

500-09-025430-158

COUR D'APPEL DU QUÉBEC

(Montréal)

REVOI RELATIF À LA CONSTITUTIONNALITÉ DE LA MISE EN PLACE D'UNE RÉGLEMENTATION PANCANADIENNE DES VALEURS MOBILIÈRES SOUS LA GOUVERNE D'UN ORGANISME UNIQUE, SELON LE MODÈLE ÉTABLI PAR LE « PROTOCOLE D'ACCORD CONCERNANT LE RÉGIME COOPÉRATIF DE RÉGLEMENTATION DES MARCHÉS DES CAPITAUX » ET AU POUVOIR DU PARLEMENT DU CANADA D'ADOPTER L'ÉBAUCHE DE LOI FÉDÉRALE INTITULÉE « LOI SUR LA STABILITÉ DES MARCHÉS DES CAPITAUX » EN VERTU DE LA COMPÉTENCE SUR LE COMMERCE (PARAGRAPHE 91(2) DE LA LOI CONSTITUTIONNELLE DE 1867)

**CAHIER DE SOURCES DE LA
PROCUREURE GÉNÉRALE DU QUÉBEC**

Volume 7, onglets 79 – 90

M^e Jean-Yves Bernard, Ad. E.

M^e Francis Demers

Bernard, Roy

8^e étage

1, rue Notre-Dame Est

Montréal (Québec) H2Y 1B6

Tél. : 514 393-2336 (51467 / 51456)

Téléc. : 514 873-7074

jean-yves.bernard@justice.gouv.qc.ca

francis.demers@justice.gouv.qc.ca

**Avocats de la
Procureure générale du Québec**

M^e Sébastien Grammond

Université d'Ottawa

Pavillon Fauteux

57, Louis-Pasteur

Ottawa (Ontario) K1N 6N5

Tél. : 613 562-5800, poste 3235

Téléc. : 613 562-5121

sébastien.grammond@uottawa.ca

**Avocat-conseil de la
Procureure générale du Québec**



LAFORTUNE

Montréal 514 374-0400 | Québec 418 641-0101 | lafortune.ca

**M^e Alexander Pless
M^e Michelle Kellam
M^e Sara Gauthier Campbell
Ministère de la Justice Canada**
Tour Est, 9^e étage
Complexe Guy-Favreau
200, boul. René-Lévesque Ouest
Montréal (Québec) H2Z 1X4

Tél. : 514 283-8767
Téléc. : 514 283-3856
apless@justice.gc.ca
michelle.kellam@justice.gc.ca
sara.gauthier@justice.gc.ca

**Avocats du Procureur général
du Canada**

**M^e Nathaniel Carnegie
Ministère de la Justice
Colombie-Britannique**
1001 Douglas Street
Victoria (Colombie-Britannique) V8W 9J7

Tél. : 250 952-7380
Téléc. : 250 356-9154
nathaniel.carnegie@gov.bc.ca

**Avocat de la Procureure générale
de la Colombie-Britannique**

**M^e Michael Conner
Ministère de la Justice Manitoba**
Bureau 1205
405 Broadway
Winnipeg (Manitoba) R3C 3L6

Tél. : 204 945-6723
Téléc. : 204 945-0053
michael.conner@gov.mb.ca

**M^e Guy Régimbald
Gowling Lafleur Henderson
S.E.N.C.R.L., s.r.l.**
Bureau 2600
160, rue Elgin
Ottawa (Ontario) K1P 1C3

Tél. : 613 786-0197
Téléc. : 613 563-9869
guy.regimbald@gowlingwlg.com

M^e Louis Fortier
Louis Fortier & Associés inc.
Bureau 1
1075, rue Rostand
Sherbrooke (Québec) J1J 4P3

Tél. : 819 829-0800
Téléc. : 819 829-0729
louis@louisfortier.com

**Avocat de l'Association canadienne
des juristes-traducteurs**

TABLE DES MATIÈRES

Cahier de sources de la Procureure générale du Québec

Onglet

Volume 1

Législation

<i>Loi d'exécution du budget de 2009</i> , L.C. 2009, c. 2, art. 295	1
<i>Loi sur les instruments dérivés</i> , RLRQ, c. I-14.01, art. 2, art. 175 <i>in fine</i> , art. 239	2
<i>Loi sur les valeurs mobilières</i> , RLRQ, c. V-1.1, art. 169 à 172, art. 186.1 à 186.6, art. 331.1, 331.2 et 335.1 à 335.3	3
<i>Règlement 25-101 sur les agences de notation désignées</i> , RLRQ, c. V-1.1, r. 8.1	4
<i>Loi sur les valeurs mobilières</i> , L.R.O., c. S.5, art. 2.2, 126 et 127	5
<i>Loi sur l'Autorité des marchés financiers</i> , RLRQ, c. A-33.2, articles 59 à 91	6
<i>Règlement 44-101 sur le placement de titres au moyen d'un prospectus simplifié</i> , RLRQ, c. V-1.1, r. 16	7
<i>Loi sur le Bureau du surintendant des institutions financières</i> , L.R.C. 1985, c. 18 (3 ^e suppl.), art. 4(2)d)	8
BSIF, Lignes directrices E-22, <i>Exigences de marges pour les dérivés non compensés centralement</i> , en ligne : http://www.osfi-bsif.gc.ca/fra/fi-if/rq-ro/gdn-ort/gl-ld/pages/e22.aspx .	9
<i>Loi sur les banques</i> , L.C. 1991, c. 46, art. 415.2, 415.2(1), 415.3 et 484.1(1)	10
<i>Loi n° 1 d'exécution du budget de 2016</i> , projet de loi C-15, 42 ^e Parlement, 1 ^{re} session, art. 156, ajoutant les art. 415.2(1) et 484.1(1) à la <i>Loi sur les banques</i>	11
<i>Lois sur la compensation et le règlement des paiements</i> , L.C. 1996, c. 6, annexe	12
<i>Loi constitutionnelle de 1982</i> , partie V	13

TABLE DES MATIÈRES

Cahier de sources de la Procureure générale du Québec

Onglet

Volume 1 (*suite*)

Législation (*suite*)

Formule Fulton-Favreau (1964), reproduite dans (1966-67) 12 R.D. McGill 579	14
--	-------	----

Volume 2

<i>Loi de 2006 sur le transfert des valeurs mobilières, L.O. 2006, c. 8</i>	.....	15
<i>Loi sur le transfert de valeurs mobilières et l'obtention de titres intermédiaires, RLRQ, c. T-11.002</i>	.....	16
<i>Code civil</i> (art. 2684.1, 2701.1 2713.1-2713.9, 2714.1- 2714.7)	.....	17
<i>Loi sur les offices des produits agricoles, L.R.C. 1985, c. F- 4, art. 22(3)</i>	.....	18
<i>Loi sur les transports routiers, L.R.C. 1985, c. 29 (3^e suppl.)</i>	.....	19
<i>Loi sur la conservation et la mise en valeur de la faune, RLRQ, c. C-61.1, art. 62 et suiv.</i>	.....	20
<i>Loi sur les pêcheries commerciales et la récolte commerciale de végétaux aquatiques, RLRQ, c. P-9.01</i>	.....	21
<i>Loi sur les loteries, les concours publicitaires et les appareils d'amusement, RLRQ, c. L-6</i>	.....	22
<i>Loi sur le parc marin du Saguenay – Saint-Laurent, L.C. 1997, c. 37</i>	.....	23
<i>Loi sur le parc marin du Saguenay – Saint-Laurent, RLRQ, c. P-8.1</i>	.....	24
<i>Loi sur les règlements, RLRQ, c. R-18.1.</i>	.....	25
<i>Loi sur le ministère du Conseil exécutif, RLRQ, c. M-30, art. 3.8</i>	.....	26

TABLE DES MATIÈRES

Cahier de sources de la Procureure générale du Québec

Onglet

Volume 2 (suite)

Législation (suite)

<i>Loi sur les renvois à la Cour d'appel</i> , RLRQ, c. R-23	.....	27
<i>Règlement 91-507 sur les référentiels centraux et la déclaration de données sur les dérivés</i> , RLRQ c. I-14.01, r. 1.1	.....	28
<i>Règlement 24-102 sur les obligations relatives aux chambres de compensation, en vigueur le 17 février 2015</i>	.....	29
<i>Règlement 94-101 sur la compensation des dérivés par contrepartie centrale, en voie d'adoption</i>	.....	30
<i>Règlement 94-102 sur la compensation des dérivés et la protection des sûretés et des positions des clients, en voie d'adoption</i>	.....	31

Jurisprudence

<i>Renvoi relatif à la Loi sur les valeurs mobilières</i> , [2011] 3 R.C.S. 837, 2011 CSC 66	32
--	-------	----

Volume 3

<i>Renvoi relatif à la Loi sur la procréation assistée</i> , [2010] 3 R.C.S. 457, 2010 CSC 61	.....	33
<i>Renvoi relatif à la sécession du Québec</i> , [1998] 2 R.C.S. 217	.....	34
<i>Ward c. Canada (Procureur général)</i> , [2002] 1 R.C.S. 569, 2002 CSC 17	.....	35
<i>Hodge c. The Queen</i> , [1883] 9 A.C. 117 (C.P.)	.....	36
<i>Liquidators of the Maritime Bank of Canada c. Receiver-General of New Brunswick</i> , [1892] A.C. 437 (C.P.)	.....	37
<i>A.-G. of Ontario c. A.-G. Canada</i> , [1896] A.C. 348 (C.P.)	.....	38

TABLE DES MATIÈRES

Cahier de sources de la Procureure générale du Québec

Onglet

Volume 3 (suite)

Jurisprudence (suite)

Québec (<i>Procureure générale</i>) c. Canada (<i>Procureure générale</i>), 2011 QCCA 591	39
---	-------	----

Volume 4

Québec (<i>Procureur général</i>) c. Canada (<i>Procureur général</i>), [2015] 1 R.C.S. 693, 2015 CSC 14	40
--	-------	----

<i>Renvoi relatif à la Loi anti-inflation</i> , [1976] 2 R.C.S. 373	41
---	-------	----

<i>Banque Canadienne de l'Ouest c. Alberta</i> , [2007] 2 R.C.S. 3, 2007 CSC 22	42
---	-------	----

<i>Goodwin c. Colombie-Britannique (Superintendent of Motor Vehicles)</i> , [2015] 3 R.C.S. 251, 2015 CSC 46	43
--	-------	----

<i>Bandé Kitkatla c. Colombie-Britannique (Ministre des Petites et moyennes entreprises, du Tourisme et de la Culture)</i> , [2002] 2 R.C.S. 146, 2002 CSC 31	44
---	-------	----

<i>R. c. Morgentaler</i> , [1993] 3 R.C.S. 463	45
--	-------	----

<i>Reference as to the validity of Section 5(a) of the Dairy Industry Act</i> , [1949] R.C.S. 1	46
---	-------	----

<i>Bell Canada c. Québec (Commission de la santé et de la sécurité du travail)</i> , [1988] 1 R.C.S. 749	47
--	-------	----

<i>R. v. Smith</i> , [1960] R.C.S. 776	48
--	-------	----

<i>Gregory & Company Inc. c. Quebec Securities Commission</i> , [1961] R.C.S. 584	49
---	-------	----

<i>Lymburn c. Mayland</i> , [1932] A.C. 318	50
---	-------	----

TABLE DES MATIÈRES

Cahier de sources de la Procureure générale du Québec

Onglet

Volume 5

Jurisprudence (suite)

<i>Multiple Access Ltd. c. McCutcheon</i> , [1982] 2 R.C.S. 161	.....	51
<i>Global Securities Corp. c. Colombie-Britannique (Securities Commission)</i> , [2000] 1 R.C.S. 494, 2000 CSC 21	.....	52
<i>Friends of the Oldman River Society c. Canada (Ministre des Transports)</i> , [1992] 1 R.C.S. 3	.....	53
<i>Saumur c. Ville de Québec</i> , [1953] 2 R.C.S. 299	.....	54
<i>A.G. Canada c. A.G. Alberta</i> , [1916] 1 A.C. 588	.....	55
<i>Pezim c. Colombie-Britannique (Superintendent of Brokers)</i> , [1994] 2 R.C.S. 557	.....	56
<i>RJR-MacDonald Inc. c. Canada (Procureur général)</i> , [1995] 3 R.C.S. 199	.....	57
<i>R. c. W. McKenzie Securities Ltd.</i> (1966), 56 D.L.R. (2d) 56 (C.A. Man.)	.....	58
<i>Bennett c. British Columbia (Securities Commission)</i> (1991), 82 D.L.R. (4th) 129 (C.S.C.-B.), confirmé par (1992), 94 D.L.R. (4th) 339 (C.A.C.-B.)	.....	59
<i>Kaynes c. BP, PLC</i> , 2014 ONCA 580	.....	60
<i>Re Legault and Law Society of Upper Canada</i> (1975), 8 O.R. (2d) 585 (C.A.)	.....	61
<i>Re Underwood McLellan & Associates and Association of Professional Engineers of Saskatchewan</i> (1979), 103 D.L.R. (3d) 268 (C.A. Sask.)	.....	62
<i>Cowen c. A.G. British Columbia</i> , [1941] R.C.S. 321	.....	63
<i>Renvoi : Résolution pour modifier la constitution</i> , [1981] 1 R.C.S. 753	.....	64

TABLE DES MATIÈRES

Cahier de sources de la Procureure générale du Québec

Onglet

Volume 5 (*suite*)

Jurisprudence (*suite*)

<i>A.G. Nova Scotia c. A.G. Canada</i> , [1951] R.C.S. 31	65
---	-------	----

<i>P.E.I. Potato Marketing Board c. Willis</i> , [1952] 2 R.C.S. 392	66
--	-------	----

Volume 6

<i>Coughlin c. Ontario Highway Transport Board</i> , [1968] R.C.S. 569	67
---	-------	----

<i>Fédération des producteurs de volaille du Québec c. Pelland</i> , [2005] 1 R.C.S. 292, 2005 CSC 20	68
---	-------	----

<i>R. c. Furtney</i> , [1991] 3 R.C.S. 89	69
---	-------	----

<i>Renvoi relativement à la Loi sur l'organisation du marché des produits agricoles</i> , [1978] 2 R.C.S. 1198	70
--	-------	----

<i>Attorney-General for Ontario c. Reciprocal Insurers</i> , [1924] A.C. 328 (C.P.)	71
--	-------	----

<i>In re The Insurance Act of Canada</i> , [1932] A.C. 41 (C.P.)	72
--	-------	----

<i>Renvoi relatif à la Upper Churchill Water Rights Reversion Act</i> , [1984] 1 R.C.S. 297	73
---	-------	----

<i>Supermarchés Dominion Itée c. La Reine</i> , [1980] 1 R.C.S. 844	74
--	-------	----

<i>A.G. British Columbia c. A.G. Canada</i> , [1937] A.C. 377	75
---	-------	----

<i>Ontario (A.G.) c. Winner</i> , [1954] A.C. 541	76
---	-------	----

<i>A.G. Canada c. A.G. Quebec</i> , [1921] 1 A.C. 413	77
---	-------	----

<i>Renvoi relatif à la réforme du Sénat</i> , [2014] 1 R.C.S. 704, 2014 CSC 32	78
---	-------	----

TABLE DES MATIÈRES

Cahier de sources de la Procureure générale du Québec

Onglet

Volume 7

Jurisprudence (suite)

<i>Renvoi relatif au Régime d'assistance publique du Canada</i> (C.-B.), [1991] 2 R.C.S. 525	.....	79
<i>Renvoi relatif à la Loi sur la Cour suprême</i> , art. 5 et 6, [2014] 1 R.C.S. 433, 2014 CSC 21	.....	80
<i>Re Initiative and Referendum Act</i> , [1919] A.C. 935 (C.P.)	.....	81
<i>SEFPO c. Ontario (Procureur général)</i> , [1987] 2 R.C.S. 2	.....	82
<i>Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto</i> , [1943] R.C.S. 1	.....	83
<i>R. c. Mercure</i> , [1988] 1 R.C.S. 234	.....	84
<i>R. c. Drybones</i> , [1970] R.C.S. 282	.....	85
<i>Bribery Commissioner c. Ranasinghe</i> , [1965] A.C. 172 (C.P.)	.....	86
<i>A.G. New South Wales c. Trethewan</i> , [1932] A.C. 526 (C.P.)	.....	87
<i>Canada (Procureur général) c. Friends of the Canadian Wheat Board</i> , 2012 CAF 183	.....	88
<i>Renvoi: Compétence du Parlement relativement à la Chambre Haute</i> , [1980] 1 R.C.S. 54	.....	89
<i>Manitoba Gov't Employees Assoc. and The Government of Manitoba</i> [1978] 1 R.C.S. 1123	.....	90

TABLE DES MATIÈRES

Cahier de sources de la Procureure générale du Québec

Onglet

Volume 8

Jurisprudence (suite)

<i>The King v. Easter Terminal Elevator Co.</i> , [1925] R.C.S. 434	91
--	-------	----

<i>Labatt c. Procureur general du Canada</i> , [1980] 1 R.C.S. 914	92
---	-------	----

<i>General Motors of Canada Ltd. c. City National Leasing</i> , [1989] 1 R.C.S. 641	93
--	-------	----

<i>Reference Re Securities Act (Canada)</i> 2011 ABCA 77	94
--	-------	----

Doctrine

Rousseau, Stéphane. <i>L'encadrement du secteur des valeurs mobilières par les provinces : coopération, harmonisation et innovation</i> , Montréal, Thémis, 2012	95
--	-------	----

Lee, Ian B. « The General Trade and Commerce Power after the <i>Securities Reference</i> », dans Anita Anand (dir.), <i>What's Next for Canada? Securities Regulation After the Reference</i> , Toronto, Irwin Law, 2012	96
--	-------	----

Pinard, Danielle. « Les énoncés de fait du législateur et le contrôle judiciaire de constitutionnalité au Canada : de l'utilisation des préambules et autres dispositions non normatives des lois », (2008-09) 24 R.N.D.C. 27	97
---	-------	----

Johnston, David et Kathleen D. Rockwell. <i>Canadian Securities Regulation</i> , 4 ^e éd., Toronto, LexisNexis Butterworths, 2006	98
---	-------	----

Johnston, David, Kathleen D. Rockwell et Cristie Ford. <i>Canadian Securities Regulation</i> , 5 ^e éd., Toronto, LexisNexis Butterworths, 2014	99
---	-------	----

TABLE DES MATIÈRES

Cahier de sources de la Procureure générale du Québec

Onglet

Volume 8 (*suite*)

Doctrine (*suite*)

Lederman, W.R. « The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada », dans Paul-André Crépeau et C.B. Macpherson (dir.), <i>L'avenir du fédéralisme canadien</i> , Toronto et Montréal, University of Toronto Press et Presses de l'Université de Montréal, 1965	.....	100
Desrosiers, Éric. « Après la crise du papier commercial, un bilan », <i>Le Devoir</i> , 23 janvier 2009, en ligne : http://www.ledevoir.com/economie/actualites-economiques/228896/apres-la-crise-du-papier-commercial-un-bilan	.....	101
Smiley, Donald V. et Ronald L. Watts. <i>Le fédéralisme intrastatique au Canada</i> , Ottawa, Commission royale sur l'union économique et les perspectives de développement du Canada, 1986	.....	102
Anderson, George. <i>Le fédéralisme : une introduction</i> , Ottawa, Presses de l'Université d'Ottawa, 2010 [<i>Federalism: An Introduction</i> , Oxford, Oxford University Press, 2009]	.....	103
Poirier, Johanne. « Souveraineté parlementaire et armes à feu : le fédéralisme coopératif dans la ligne de mire », (2015) 45 R.D.U.S. 47	.....	104
Brun, Henri, Guy Tremblay et Eugénie Brouillet. <i>Droit constitutionnel</i> , 6 ^e éd., Cowansville, Éd. Yvon Blais, 2014	.....	105
Bayefsky, Anne F. <i>Canada's Constitution Act 1982 & Amendments: A Documentary History</i> , Toronto, McGraw-Hill Ryerson, 1989	.....	106
Hogg, Peter W. <i>Constitutional Law of Canada</i> , éd. feuilles mobiles, Toronto, Carswell	.....	107

TABLE DES MATIÈRES

Cahier de sources de la Procureure générale du Québec

Onglet

Volume 8 (*suite*)

Doctrine (*suite*)

Morin, Jacques-Yvan et José Woehrling. <i>Les constitutions du Canada et du Québec du régime français à nos jours</i> , Montréal, Thémis, 1992	.....	108
Monahan, Patrick et Byron Shaw. <i>Constitutional Law</i> , 4 ^e éd., Toronto, Irwin Law, 2013	.....	109
La Forest, Gérard V. « Delegation of Legislative Power in Canada », (1975) 21 R.D. McGill 131	.....	110
Poirier, Johanne. « Une source paradoxale du droit constitutionnel canadien : les ententes intergouvernementales » (2009) 1 R.Q.D.C., en ligne : http://www.aqdc.org/volumes/pdf/poirier-une_source_paradoxale.pdf	.....	111
Han-Ru Zhou, « Revisiting the “Manner and Form” Theory of Parliamentary Sovereignty », (2013) 129 L.Q.R. 610	.....	112

Onglet 79

Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] 2 R.C.S. 525

[1991] 2 R.C.S.

RENOVI: RÉGIME D'ASSISTANCE DU CANADA (C.-B.)

525

IN THE MATTER OF a reference to the Court of Appeal of the Province of British Columbia, pursuant to the provisions of the *Constitutional Question Act*, R.S.B.C. 1979, c. 63, of the questions contained in an Order of the Lieutenant Governor in Council of British Columbia, being No. 287, dated February 27, 1990

and

IN THE MATTER OF the *Canada Assistance Plan*, R.S.C. 1970, c. C-1

and

IN THE MATTER OF a certain agreement, dated March 23, 1967, pursuant to Part I of the *Canada Assistance Plan*, between the Government of Canada, represented by the Minister of National Health and Welfare of Canada, and the Government of the Province of British Columbia, represented by the Minister of Social Welfare of British Columbia

between

The Attorney General of Canada *Appellant*

v.

The Attorney General of British Columbia *Respondent*

and

The Attorney General for Ontario, the Attorney General of Manitoba, the Attorney General for Alberta, the Attorney General for Saskatchewan, the Native Council of

DANS L'AFFAIRE du renvoi à la Cour d'appel de la province de la Colombie-Britannique, conformément aux dispositions de la *Constitutional Question Act*,

a R.S.B.C. 1979, ch. 63, des questions formulées dans le décret n° 287 en date du 27 février 1990, pris par le lieutenant-gouverneur en conseil de la Colombie-Britannique

et

c **DANS L'AFFAIRE** du *Régime d'assistance publique du Canada*, S.R.C. 1970, ch. C-1

et

d **DANS L'AFFAIRE** d'un certain accord, en date du 23 mars 1967, intervenu, conformément à la partie I du *Régime d'assistance publique du Canada*, entre le gouvernement du Canada, représenté par le ministre de la Santé nationale et du Bien-être social du Canada, et le gouvernement de la province de la Colombie-Britannique, représenté par le ministre du Bien-être social de la Colombie-Britannique

entre

Le procureur général du Canada *Appellant*

h c.

Le procureur général de la Colombie-Britannique *Intimé*

i et

Le procureur général de l'Ontario, le procureur général du Manitoba, le procureur général de l'Alberta, le procureur général de la Saskatchewan, le

Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] 2 R.C.S. 525

526

REFERENCE RE CANADA ASSISTANCE PLAN (B.C.)

[1991] 2 S.C.R.

Canada and the United Native Nations of British Columbia Intervenors

INDEXED AS: REFERENCE RE CANADA ASSISTANCE PLAN (B.C.)

File No.: 22017.

1990: December 11, 12; 1991: August 15.

Present: Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Federal-provincial agreements — Canada Assistance Plan — Federal government contributing 50 per cent of costs of provincial assistance and welfare services pursuant to Canada Assistance Plan and Agreement with province — Federal government introducing new legislation reducing its fiscal obligation under Canada Assistance Plan and Agreement — Whether federal government has authority to reduce its obligation unilaterally — Whether doctrine of legitimate expectations applies — Whether Canada Assistance Plan imposes requirements as to "manner and form" of subsequent legislation — Whether new legislation ultra vires — Canada Assistance Plan, R.S.C., 1985, c. C-1.

Constitutional law — Reference — Questions — Whether questions referred to Court of Appeal raised justiciable issues.

In 1990, the federal government, in order to reduce the federal budget deficit, decided to cut expenditures and limit the growth of payments made to financially stronger provinces under the *Canada Assistance Plan* (the "Plan"). This change was embodied in Bill C-69, now the *Government Expenditures Restraint Act*. Under the Plan, the federal government concluded agreements with the provinces to share the cost of their expenditures on social assistance and welfare. Section 5 of the Plan authorizes contributions amounting to half of the provinces' eligible expenditures. These agreements continue to be in force so long as the relevant provincial law remains in operation (s. 8(1)). They may be amended or terminated by mutual consent, or terminated on one

Conseil national des autochtones du Canada et les United Native Nations of British Columbia Intervenants

^a RÉPERTORIÉ: RENVOI RELATIF AU *RÉGIME D'ASSISTANCE PUBLIQUE DU CANADA* (C.-B.)

Nº du greffe: 22017.

^b 1990: 11, 12 décembre; 1991: 15 août.

Présents: Le juge en chef Lamer et les juges La Forest, Sopinka, Gonthier, Cory, McLachlin et Stevenson.

^c EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Accords fédéraux provinciaux — Régime d'assistance publique du Canada — Moitié du coût des services provinciaux d'assistance publique et de protection sociale payée par le gouvernement fédéral conformément au Régime d'assistance publique du Canada et à un accord conclu avec la province — Dépôt par le gouvernement fédéral d'un projet de loi prévoyant l'allègement de l'obligation financière

^d *lui incomtant aux termes du Régime d'assistance publique du Canada et de l'accord — Le gouvernement fédéral a-t-il compétence pour alléger unilatéralement son obligation? — La théorie de l'expectative légitime s'applique-t-elle? — Le Régime d'assistance publique du Canada impose-t-il des exigences quant au «mode» et à la «forme» d'une loi subséquente? — La nouvelle mesure législative est-elle inconstitutionnelle? — Régime d'assistance publique du Canada, L.R.C. (1985), ch. C-1.*

^e *Droit constitutionnel — Renvoi — Questions — Les questions soumises à la Cour d'appel soulèvent-elles des points relevant de la compétence des tribunaux?*

^f *Afin de réduire son déficit budgétaire, le gouvernement fédéral a décidé, en 1990, de couper les dépenses et de limiter l'augmentation des paiements effectués, en vertu du Régime d'assistance publique du Canada (le «Régime»), aux provinces les plus fortes financièrement. Cette modification était contenue dans le projet de loi C-69, devenu maintenant la Loi sur la compression des dépenses publiques. En vertu du Régime, le gouvernement fédéral a conclu avec les provinces des accords prévoyant le partage des frais engagés par ces dernières au titre de l'assistance publique et de la protection sociale. L'article 5 du Régime autorise le versement de contributions égales à la moitié des dépenses admissibles des provinces. Ces accords resteront en vigueur*

Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] 2 R.C.S. 525

[1991] 2 R.C.S.

RENOVI: RÉGIME D'ASSISTANCE DU CANADA (C.-B.)

527

year's notice from either party (s. 8(2)). The Plan also provides for regulations, but regulations affecting the substance of agreements are ineffective unless passed with the consent of any province affected (s. 9(2)).

The Lieutenant Governor in Council of British Columbia, in accordance with s. 1 of the *Constitutional Question Act* of that province, referred to the British Columbia Court of Appeal two constitutional questions to determine: (1) whether the Government of Canada has any authority to limit its obligation under the Plan and its Agreement with British Columbia; and (2) whether the terms of the Agreement, the subsequent conduct of the Government of Canada pursuant to the Agreement and the provisions of the Plan give rise to a legitimate expectation that the Government of Canada would introduce no bill into Parliament to limit its obligation under the Agreement or the Plan without the consent of British Columbia. The Court of Appeal answered the first question in the negative and the second question in the affirmative.

Held: The appeal should be allowed. The first constitutional question is answered in the affirmative. The second constitutional question is answered in the negative.

Justiciability

The reference questions raise matters that are justiciable and should be answered. Both questions have a sufficient legal component to warrant the intervention of the judiciary branch. The first question requires the interpretation of a statute of Canada and an agreement. The second raises the question of the applicability of the legal doctrine of legitimate expectations to the process involved in the enactment of a money bill. A decision on these questions will have the practical effect of settling the legal issues in contention and will assist in resolving the controversy. There is no other forum in which these legal questions could be determined in an authoritative manner.

Question.1

In presenting Bill C-69 to Parliament, the Government of Canada acted in accordance with the Agreement. While the language of the Plan is, in general, duplicated in the Agreement, the contribution formula,

tant que sera appliquée la législation provinciale pertinente (par. 8(1)). Ils peuvent être modifiés ou résiliés par consentement mutuel, ou résiliés à la suite d'un préavis d'un an donné par l'une ou l'autre partie (par. 8(2)).

a Le Régime prévoit aussi l'adoption de règlements d'application. Les règlements portant sur le fond d'un accord ne s'appliquent toutefois que s'ils sont pris avec l'assentiment de toute province concernée (par. 9(2)).

b Le lieutenant-gouverneur en conseil de la Colombie-Britannique, en conformité avec l'art. 1 de la *Constitutional Question Act* de cette province, a soumis à la Cour d'appel de la Colombie-Britannique deux questions constitutionnelles: (1) celle de savoir si le gouvernement du Canada a compétence pour limiter son obligation découlant du Régime et de l'accord intervenu entre lui et la Colombie-Britannique, et (2) celle de savoir si les conditions de l'accord, la conduite subséquente du gouvernement du Canada dans l'exécution de cet accord et les dispositions du Régime permettent de

c s'attendre légitimement à ce que le gouvernement du Canada ne dépose devant le Parlement aucun projet de loi tendant à limiter, sans le consentement de la Colombie-Britannique, l'obligation que lui impose l'accord ou le Régime. La Cour d'appel a répondu par la négative à *e* la première question et par l'affirmative à la seconde.

f *Arrêt:* Le pourvoi est accueilli. La première question constitutionnelle reçoit une réponse affirmativé. La seconde question constitutionnelle reçoit une réponse négative.

L'assujettissement à la compétence des tribunaux

g Les questions faisant l'objet du renvoi soulèvent des points qui relèvent de la compétence des tribunaux et méritent une réponse. Les deux questions posées présentent un aspect suffisamment juridique pour justifier l'intervention des tribunaux. La première question nécessite l'interprétation d'une loi du Canada et d'un accord. La seconde concerne l'applicabilité de la théorie juridique de l'expectative légitime au processus d'adoption d'un projet de loi de finances. La décision rendue sur ces questions aura l'effet pratique de trancher les questions de droit en litige et contribuera à résoudre la controverse. Il n'existe pas d'autre tribune devant laquelle ces questions de droit pourraient être réglées de manière

i péremptoire.

La première question

j En déposant le projet de loi C-69 devant le Parlement, le gouvernement du Canada a agi en conformité avec l'accord. Bien que l'accord reprenne généralement les termes du Régime, la formule de calcul des contribu-

which authorizes payments to the provinces, appears only in s. 5 of the Plan. Being part of the Plan, the formula is subject to amendment by virtue of the principle of parliamentary sovereignty reflected in s. 42(1) of the federal *Interpretation Act*, which states that "Every Act shall be construed as to reserve to Parliament the power of repealing or amending it . . .". Under s. 54 of the *Constitution Act, 1867*, a money bill, including an amendment to a money bill like the Plan, can only be introduced on the initiative of the government. In these circumstances, the natural meaning to be given to the Agreement is that Canada's obligation is to pay the contributions which are authorized from time to time and not the contributions that were authorized when the Agreement was signed. The insertion of the formula for payment in the Plan only was a very strong indication that the parties did not intend that the formula should remain forever frozen. To assert that the federal government could prevent Parliament from exercising its powers to legislate amendments to the Plan would be to negate the sovereignty of Parliament. As well, Parliament did not intend to fetter its sovereign legislative power in restricting, in s. 9(2) of the Plan, the federal government's regulatory powers. Finally, the Agreement could be amended otherwise than in accordance with s. 8 of the Plan. The Agreement, which is subject to the amending formula in s. 8, obliges Canada to pay the amounts which Parliament has authorized Canada to pay pursuant to s. 5 of the Plan. Hence, the payment obligations under the Agreement are subject to change when s. 5 is changed. That provision contains its own process of amendment by virtue of the principle of parliamentary sovereignty.

Question 2

The federal government did not act illegally in invoking the power of Parliament to amend the Plan without obtaining the consent of British Columbia. The doctrine of legitimate expectations does not create substantive rights — in this case, a substantive right to veto proposed federal legislation. The doctrine is part of the rules of procedural fairness which can govern administrative bodies. Where it is applicable, it can only create a right to make representations or to be consulted. Moreover, the doctrine does not apply to the legislative process. The government, which is an integral part of this process, is thus not constrained by the doctrine from introducing a bill to Parliament. A restraint on the executive in the introduction of legislation would place a fetter on the sovereignty of Parliament itself. This is particularly true when the restraint relates to the introduction

tions, qui autorise les paiements aux provinces, figure seulement à l'art. 5 du Régime. Comme elle fait partie du Régime, la formule est susceptible de modification en application du principe de la souveraineté du Parlement reflété au par. 42(1) de la *Loi d'interprétation* fédérale, qui prévoit: «Il est entendu que le Parlement peut toujours abroger ou modifier toute loi . . .» Suivant l'art. 54 de la *Loi constitutionnelle de 1867*, c'est seulement à l'initiative du gouvernement que peut être déposé un projet de loi de finances ou un projet de loi modificative d'une loi de finances comme le Régime. Dans ces circonstances, le sens naturel à donner à l'accord est que le Canada est obligé de payer les contributions qui sont autorisées à l'occasion et non celles autorisées lors de la signature de l'accord. L'inclusion de la formule de paiement dans le Régime seulement constitue une très forte indication que les parties n'ont pas voulu que la formule demeure à tout jamais figée. Affirmer que le gouvernement fédéral pourrait empêcher le Parlement d'exercer ses pouvoirs de légiférer pour modifier le Régime reviendrait à nier la souveraineté du Parlement. De même, le Parlement n'a pas voulu limiter son pouvoir législatif souverain en imposant, au par. 9(2) du Régime, une restriction aux pouvoirs de réglementation du gouvernement fédéral. Enfin, l'accord pouvait être modifié autrement qu'en conformité avec l'art. 8 du Régime. L'accord, qui est assujetti à la formule de modification prévue à l'art. 8 oblige le Canada à verser les montants que le Parlement a autorisé le Canada à payer en vertu de l'art. 5 du Régime. Les obligations prévues par l'accord en matière de paiement peuvent donc être changées par une modification de l'art. 5. Cette disposition renferme son propre processus de modification en vertu du principe de la souveraineté du Parlement.

g La seconde question

Le gouvernement fédéral n'a pas agi illégalement en invoquant le pouvoir du Parlement afin de modifier le Régime sans obtenir le consentement de la Colombie-Britannique. La théorie de l'expectative légitime n'est pas génératrice de droits fondamentaux, en l'occurrence, celui d'opposer un veto à un projet de loi fédérale. Cette théorie fait partie des règles de l'équité procédurale auxquelles peuvent être soumis les organismes administratifs. Dans les cas où elle s'applique, elle ne peut faire naître que le droit de présenter des observations ou d'être consulté. La théorie ne s'applique pas non plus au processus législatif. Elle ne vient donc pas empêcher le gouvernement, qui fait partie intégrante de ce processus, de déposer un projet de loi au Parlement. Toute restriction imposée au pouvoir de l'exécutif de déposer des projets de loi constituerait une limitation de la souveraineté du Parlement.

of a money bill. It is also fundamental to our system of government that a government is not bound by the undertakings of its predecessor. The doctrine would derogate from this essential feature of democracy.

The Plan does not purport to control the "manner and form" of subsequent legislation. Where a statute is of a constitutional nature and governs legislation generally, rather than dealing with a specific statute, it can impose requirements as to manner and form. But where, as in this case, a statute has no constitutional nature, it will be very unlikely to evidence an intention of the legislative body to bind itself in the future. Sections 8(2) and 9(2) of the Plan, read together, do not reveal, by necessary implication, a requirement that subsequent legislation cannot alter the Plan unless the consent of the affected province or provinces is obtained. They address only amendments to the Agreement and to the regulations under the Plan, and say nothing about amendments to the Plan. Moreover, any "manner and form" requirement in an ordinary statute must overcome the clear words of s. 42(1) of the *Interpretation Act*. This provision requires that federal statutes ordinarily be interpreted to accord with the doctrine of parliamentary sovereignty. This doctrine prevents a legislative body from binding itself as to the substance of its future legislation.

Section 2 of the *Government Expenditures Restraint Act* is *intra vires* Parliament. First, Parliament was not disabled from unilaterally changing the law so as to change the Agreement once it had been authorized by Parliament and executed by the parties. The Agreement was between British Columbia and the federal government. It did not bind Parliament. The applicable constitutional principle is the sovereignty of Parliament. Second, the new legislation does not amount to regulation of an area outside federal jurisdiction. Bill C-69 was not an indirect, colourable attempt to regulate in provincial areas of jurisdiction. It is simply an austerity measure. Further, the simple withholding of federal money, which had previously been granted to fund a matter within provincial jurisdiction, does not amount to the regulation of that matter. The new legislation simply limits the growth of federal contributions. While the *Government Expenditures Restraint Act* impacts upon a constitutional interest outside the jurisdiction of Parliament, such impact is not enough to find that a statute encroaches

neté du Parlement lui-même. Cela est particulièrement vrai dans le cas d'une restriction relative au dépôt d'un projet de loi de finances. Il est également essentiel à notre système de gouvernement qu'un gouvernement ne soit pas lié par les engagements de son prédecesseur. La théorie de l'expectative légitime dérogerait à ce trait essentiel de la démocratie.

Le Régime ne vise pas à déterminer le «mode et la forme» de toute législation subséquente. Une loi qui est de nature constitutionnelle et qui régit la législation en général plutôt que de porter sur une loi précise peut imposer des exigences quant au mode et à la forme. Toutefois, lorsqu'une loi ne présente aucun caractère constitutionnel, comme c'est le cas en l'espèce, il est fort peu probable qu'elle traduise une intention de la part du corps législatif de se lier pour l'avenir. Quand on rapproche les par. 8(2) et 9(2) du Régime, il ne s'en dégage pas, par voie d'interprétation nécessaire, une exigence qu'aucune modification ne soit apportée au Régime au moyen d'une loi subséquente, si ce n'est avec l'assentiment de la province ou des provinces touchées. Ces paragraphes ne concernent que la modification de l'accord et des règlements pris en vertu du Régime et sont muets relativement à la modification du Régime. De plus, toute exigence de «mode» et de «forme» posée dans une loi ordinaire doit surmonter le texte clair du par. 42(1) de la *Loi d'interprétation*. Cette disposition exige que les lois fédérales soient ordinairement interprétées de manière à s'accorder avec la théorie de la souveraineté du Parlement, laquelle vient empêcher un corps législatif de se lier les mains en ce qui concerne la teneur de sa législation future.

L'article 2 de la *Loi sur la compression des dépenses publiques* n'excède pas la compétence du Parlement. g Premièrement, le Parlement ne devenait pas inhabile à modifier unilatéralement la loi de manière à changer l'accord, du moment que celui-ci avait été autorisé par le Parlement et signé par les parties. L'accord est intervenu entre la Colombie-Britannique et le gouvernement fédéral. Il ne lie pas le Parlement. Le principe constitutionnel applicable est celui de la souveraineté du Parlement. Deuxièmement, la nouvelle loi ne revient pas à réglementer un domaine qui n'est pas de compétence fédérale. Le projet de loi C-69 ne constitue pas une tentative déguisée et indirecte de réglementer des domaines de compétence provinciale. Il s'agit simplement d'une mesure d'austérité. En outre, le simple refus de verser des fonds fédéraux jusque-là accordés pour financer une matière relevant de la compétence provinciale ne revient pas à réglementer cette matière. La nouvelle loi se borne à limiter l'accroissement des contributions fédérales. Bien que la *Loi sur la compression des dépenses*

Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] 2 R.C.S. 525

530

REFERENCE RE CANADA ASSISTANCE PLAN (B.C.)

[1991] 2 S.C.R.

upon the jurisdiction of the other level of government. The Court should not, under the "overriding principle of federalism", supervise the federal government's exercise of its spending power in order to protect the autonomy of the provinces. Supervision of the spending power is not a separate head of judicial review. If a statute is neither *ultra vires* nor contrary to the *Canadian Charter of Rights and Freedoms*, the courts have no jurisdiction to supervise the exercise of legislative power.

publiques ait des répercussions sur un droit constitutionnel qui échappe à la compétence du Parlement, ces répercussions ne sont pas suffisantes pour conclure qu'une loi empiète sur la compétence de l'autre palier de gouvernement. La Cour ne doit pas, en vertu du «principe essentiel du fédéralisme», surveiller l'exercice par le gouvernement fédéral de son pouvoir de dépenser, afin de protéger l'autonomie des provinces. La surveillance du pouvoir de dépenser ne constitue pas un sujet distinct de contrôle judiciaire. Si une loi n'est ni inconstitutionnelle ni contraire à la *Charte canadienne des droits et libertés*, les tribunaux n'ont nullement compétence pour surveiller l'exercice du pouvoir législatif.

Cases Cited

Applied: *Reference re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753; *Reference re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793; **referred to:** *Attorney General of Canada v. l'inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *Reference re Magistrate's Court of Quebec*, [1965] S.C.R. 772; *Lord's Day Alliance of Canada v. Attorney-General for Manitoba*, [1925] A.C. 384; *Attorney-General for Ontario v. Attorney-General for Canada*, [1912] A.C. 571; *Reference re Waters and Water-Powers*, [1929] S.C.R. 200; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Bates v. Lord Hailsham*, [1972] 3 All E.R. 1019; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Penikett v. Canada* (1987), 45 D.L.R. (4th) 108, leave to appeal refused, [1988] 1 S.C.R. xii; *West Lakes Ltd. v. South Australia* (1980), 25 S.A.S.R. 389; *Attorney-General for New South Wales v. Trethewan*, [1932] A.C. 526; *R. v. Mercure*, [1988] 1 S.C.R. 234; *R. v. Drybones*, [1970] S.C.R. 282; *Hogan v. The Queen*, [1975] 2 S.C.R. 574; *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297.

Statutes and Regulations Cited

Bill C-69, An Act to amend certain statutes to enable restraint of government expenditures, 2nd sess., 34th Parl. (assented to on February 1, 1991).
Canada Assistance Plan, R.S.C. 1970, c. C-1, ss. 4, 5(1), (2)(c), 6(2), (3), 8(1), (2), 9(1), (2).

Jurisprudence

Arrêts appliqués: *Renvoi: Résolution pour modifier la Constitution*, [1981] 1 R.C.S. 753; *Renvoi: Opposition du Québec à une résolution pour modifier la Constitution*, [1982] 2 R.C.S. 793; **arrêts mentionnés:** *Procureur général du Canada c. l'inuit Tapirisat of Canada*, [1980] 2 R.C.S. 735; *Canada (Vérificateur général) c. Canada (Ministre de l'Énergie, des Mines et des Ressources)*, [1989] 2 R.C.S. 49; *Borowski c. Canada (Procureur général)*, [1989] 1 R.C.S. 342; *Renvoi relatif à la Cour de Magistrat de Québec*, [1965] R.C.S. 772; *Lord's Day Alliance of Canada v. Attorney-General for Manitoba*, [1925] A.C. 384; *Attorney-General for Ontario v. Attorney-General for Canada*, [1912] A.C. 571; *Reference re Waters and Water-Powers*, [1929] R.C.S. 200; *Assoc. des résidents du Vieux St-Boniface Inc. c. Winnipeg (Ville)*, [1990] 3 R.C.S. 1170; *Bates v. Lord Hailsham*, [1972] 3 All E.R. 1019; *Martineau c. Comité de discipline de l'Institution de Matsqui*, [1980] 1 R.C.S. 602; *Penikett v. Canada* (1987), 45 D.L.R. (4th) 108, autorisation de pourvoi refusée, [1988] 1 R.C.S. xii; *West Lakes Ltd. v. South Australia* (1980), 25 S.A.S.R. 389; *Attorney-General for New South Wales v. Trethewan*, [1932] A.C. 526; *R. c. Mercure*, [1988] 1 R.C.S. 234; *R. c. Drybones*, [1970] R.C.S. 282; *Hogan c. La Reine*, [1975] 2 R.C.S. 574; *Renvoi relatif à la Upper Churchill Water Rights Reversion Act*, [1984] 1 R.C.S. 297.

Lois et règlements cités

Charte canadienne des droits et libertés.
Constitutional Question Act, R.S.B.C. 1979, ch. 63, art. 1, 6.
Loi constitutionnelle de 1867, art. 54, 92(13), (16).
Loi constitutionnelle de 1907.

- Canada Assistance Plan*, R.S.C., 1985, c. C-1, ss. 4, 5(1), (2)(c), 5.1 [ad. 1991, c. 9, s. 2], 6(2), (3), 8(1), (2), 9(1), (2).
- Canada Assistance Plan*, S.C. 1966-67, c. 45, s. 5(2)(c).
- Canadian Charter of Rights and Freedoms*.
- Constitution Act, 1867*, ss. 54, 92(13), (16).
- Constitution Act, 1907*.
- Constitution Act, 1982*, s. 36(1).
- Constitutional Question Act*, R.S.B.C. 1979, c. 63, ss. 1, 6.
- Emergencies Act*, R.S.C., 1985, c. 22 (4th Supp.), s. 40(1), (2).
- Government Expenditures Restraint Act*, S.C. 1991, c. 9, s. 2.
- Interpretation Act*, R.S.C., 1985, c. I-21, ss. 10, 42(1).
- Statute Revision Act*, R.S.C., 1985, c. S-20, s. 6(e), (f).
- Supreme Court Act*, R.S.C., 1985, c. S-26, s. 36.
- Loi constitutionnelle de 1982*, art. 36(1).
- Loi d'interprétation*, L.R.C. (1985), ch. I-21, art. 10, 42(1).
- Loi sur la compression des dépenses publiques*, L.C. 1991, ch. 9, art. 2.
- ^a *Loi sur la Cour suprême*, L.R.C. (1985), ch. S-26, art. 36.
- Loi sur la révision des lois*, L.R.C. (1985), ch. S-20, art. 6e), f).
- ^b *Loi sur les mesures d'urgence*, L.R.C. (1985), ch. 22 (4^e suppl.), art. 40(1), (2).
- Projet de loi C-69, *Loi modificative portant compression des dépenses publiques*, 2^e sess., 34^e Parl. (sanctionnée le 1^{er} février 1991).
- ^c *Régime d'assistance publique du Canada*, L.R.C. (1985), ch. C-1, art. 4, 5(1), (2)c), 5.1 [aj. 1991, ch. 9, art. 2], 6(2), (3), 8(1), (2), 9(1), (2).
- Régime d'assistance publique du Canada*, S.C. 1966-67, ch. 45, art. 5(2)c).
- ^d *Régime d'assistance publique du Canada*, S.R.C. 1970, ch. C-1, art. 4, 5(1), (2)c), 6(2), (3), 8(1), (2), 9(1), (2).

Authors Cited

- Beaudoin, Gérald-A. *La Constitution du Canada*. Montréal: Wilson & Lafleur, 1990.
- Bagehot, Walter. *The English Constitution*. New edition with an additional chapter. London: Henry S. King & Co., 1872.

APPEAL from a judgment of the British Columbia Court of Appeal (1990), 46 B.C.L.R. (2d) 273, 71 D.L.R. (4th) 99, 45 Admin. L.R. 34, in the matter of a reference concerning the federal government's authority to limit its obligation under the *Canada Assistance Plan*. Appeal allowed.

W. I. C. Binnie, Q.C., *Peter W. Hogg, Q.C.*, and *Maureen E. Baird*, for the appellant.

E. Robert A. Edwards, Q.C., and *Patrick O'Rourke*, for the respondent.

Christopher D. Bredt and *Tanya Lee*, for the intervener the Attorney General for Ontario.

Vic Toews, for the intervener the Attorney General of Manitoba.

Doctrine citée

- ^e Beaudoin, Gérald-A. *La Constitution du Canada*. Montréal: Wilson & Lafleur, 1990.
- Bagehot, Walter. *La Constitution anglaise*. Traduit de l'anglais par M. Gaulhiac. Paris: Germer Baillièvre, 1869.

^f POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1990), 46 B.C.L.R. (2d) 273, 71 D.L.R. (4th) 99, 45 Admin. L.R. 34, dans l'affaire d'un renvoi relatif à la compétence du gouvernement fédéral pour limiter son obligation découlant du *Régime d'assistance publique du Canada*. Pourvoi accueilli.

^h *W. I. C. Binnie, c.r.*, *Peter W. Hogg, c.r.*, et *Maureen E. Baird*, pour l'appellant.

ⁱ *E. Robert A. Edwards, c.r.*, et *Patrick O'Rourke*, pour l'intimé.

Christopher D. Bredt et *Tanya Lee*, pour l'intervenant le procureur général de l'Ontario.

^j *Vic Toews*, pour l'intervenant le procureur général du Manitoba.

Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] 2 R.C.S. 525

532

REFERENCE RE CANADA ASSISTANCE PLAN (B.C.) *Sopinka J.*

[1991] 2 S.C.R.

Stan Rutwind, for the intervener the Attorney General for Alberta.

Donald J. Dow, for the intervener the Attorney General for Saskatchewan.

Marvin R. V. Storrow, Q.C., and *Maria Morellato*, for the interveners the Native Council of Canada and the United Native Nations of British Columbia.

The judgment of the Court was delivered by

SOPINKA J.—This is an appeal by the Attorney General of Canada from a decision of the British Columbia Court of Appeal, answering two questions which were referred to it under the *Constitutional Question Act*, R.S.B.C. 1979, c. 63. The issues raised by the questions include whether and in what circumstances a court should answer questions referred to it that have a political connotation, the interpretation and binding effect of federal-provincial agreements, and whether the doctrine of legitimate expectations applies to prevent the Cabinet from introducing a money bill.

The Attorneys General for Ontario, Manitoba and Alberta intervened in the Court of Appeal, as did the Native Council of Canada and the United Native Nations of British Columbia. In addition, the Attorney General for Saskatchewan intervened in this Court.

1. The Background

The *Canada Assistance Plan* (the “*Plan*”) was enacted by S.C. 1966-67, c. 45; it is now R.S.C., 1985, c. C-1. By its s. 4, it authorizes the Government of Canada to enter into agreements with the provincial governments to pay them contributions toward their expenditures on social assistance and welfare. Section 5 of the *Plan* authorizes payments to the provinces pursuant to such agreements, and broadly speaking it authorizes contributions amounting to half of the provinces’ eligible expenditures. The *Plan* (s. 6(2)) specifies certain prerequisites for

Stan Rutwind, pour l’intervenant le procureur général de l’Alberta.

Donald J. Dow, pour l’intervenant le procureur général de la Saskatchewan.

Marvin R. V. Storrow, c.r., et *Maria Morellato*, pour les intervenants le Conseil national des autochtones du Canada et les United Native Nations of British Columbia.

Version française du jugement de la Cour rendu par

LE JUGE SOPINKA — Le présent pourvoi est formé par le procureur général du Canada contre un arrêt de la Cour d’appel de la Colombie-Britannique qui a répondu à deux questions qui lui avaient été soumises en vertu de la *Constitutional Question Act*, R.S.B.C. 1979, ch. 63. Il s’agit notamment de déterminer, par suite de ces questions, si et dans quelles circonstances une cour doit répondre à des questions qui lui ont été soumises et qui présentent un aspect politique, comment il convient d’interpréter des accords fédéraux-provinciaux et quelle est leur force exécutoire, et si la théorie de l’expectative légitime s’applique de manière à empêcher le cabinet de déposer un projet de loi de finances.

Les procureurs généraux de l’Ontario, du Manitoba et de l’Alberta sont intervenus en Cour d’appel, comme l’ont fait également le Conseil national des autochtones du Canada et les United Native Nations of British Columbia. De plus, le procureur général de la Saskatchewan est intervenu en notre Cour.

1. Historique

Le Régime d’assistance publique du Canada (le «*Régime*») a été adopté à S.C. 1966-67, ch. 45; il constitue maintenant le chapitre C-1 des L.R.C. (1985). Son article 4 habilite le gouvernement du Canada à conclure avec les gouvernements provinciaux des accords prévoyant le paiement de contributions aux frais encourus par ces derniers au titre de l’assistance publique et de la protection sociale. L’article 5 du *Régime* permet d’effectuer des paiements aux provinces en exécution de ces accords et, d’une manière générale, autorise le versement de contribu-

eligibility of provincial expenditures, but leaves for the provinces the determination of which programmes will be operated and how much money will be spent. By its s. 8(1), the *Plan* further provides that agreements under it shall continue in force so long as the relevant provincial law remains in operation; but, that they may be terminated by consent or on one year's notice from either party (s. 8(2)). Agreements can also be amended by consent (s. 8(2)). The *Plan* provides (s. 9(1)) for regulations under it to govern such things as how eligible costs are to be calculated; but, regulations affecting the substance of agreements are ineffective unless passed with the consent of any province affected (s. 9(2)). The *Plan* is silent as to the authority of Parliament to amend the *Plan*.

The Government of Canada entered into agreements with each of the provincial governments in 1967. It entered into an agreement with the Government of British Columbia on March 23, 1967. Amounts paid to the provinces under all agreements rose from \$151 million in 1967-68 to an estimated \$5.5 billion in 1989-90. The *Plan* itself has never been amended, although the regulations under it have been.

In 1990 the federal government decided to cut expenditures in order to reduce the federal budget deficit. The government has created an Expenditure Control Plan. One feature of this Plan is to limit the growth of payments made to financially stronger provinces under the *Canada Assistance Plan*. Such payments are to grow no more than 5 per cent per annum for fiscal 1991 and fiscal 1992. The provinces affected are those which are not entitled to receive equalization payments from the federal government; currently, this means British Columbia, Alberta and Ontario. This change, and others, were embodied in Bill C-69, *An Act to amend certain statutes to enable restraint of government expenditures*. That Bill was introduced in the House of Commons on March 15, 1990. It received royal assent on February 1, 1991,

tions égales à la moitié des dépenses admissibles des provinces. Le *Régime* énonce, au par. 6(2), certaines conditions préalables en ce qui concerne l'admissibilité des dépenses provinciales, mais il laisse aux provinces le soin de déterminer quels programmes seront offerts et quelles sommes y seront affectées. À son paragraphe 8(1), le *Régime* prévoit en outre que tout accord conclu conformément à ses dispositions restera en vigueur tant que sera appliquée la législation provinciale pertinente, mais qu'il peut être résilié par consentement ou à la suite d'un préavis d'un an donné par l'une ou l'autre partie (par. 8(2)). Un accord peut aussi être modifié par consentement (par. 8(2)). Le *Régime* prévoit au par. 9(1) l'adoption de règlements d'application établissant notamment le mode de calcul des frais admissibles. Les règlements portant sur le fond d'un accord ne s'appliquent toutefois que s'ils sont pris avec l'assentiment de toute province concernée (par. 9(2)). Le *Régime* est muet quant à la compétence du Parlement pour le modifier.

Des accords sont intervenus entre le gouvernement du Canada et chacun des gouvernements provinciaux en 1967. L'accord avec le gouvernement de la Colombie-Britannique a été conclu le 23 mars 1967. Les sommes versées aux provinces en exécution de tous les accords sont passées de 151 millions de dollars pour l'année 1967-1968 à un chiffre estimatif de 5,5 milliards de dollars pour l'année 1989-1990. Le *Régime* lui-même n'a jamais été modifié, quoique ses règlements d'application l'aient été.

En 1990, le gouvernement fédéral a décidé de couper les dépenses afin de réduire son déficit budgétaire. Le gouvernement a donc créé un plan de contrôle des dépenses qui vise notamment à limiter l'augmentation des paiements effectués, en vertu du *Régime d'assistance publique du Canada*, aux provinces les plus fortes financièrement. L'augmentation de ces paiements ne doit pas dépasser 5 pour 100 par année pour les exercices financiers 1991 et 1992. Les provinces touchées sont celles qui n'ont pas droit à des paiements de péréquation provenant du gouvernement fédéral, soit, à l'heure actuelle, la Colombie-Britannique, l'Alberta et l'Ontario. Cette modification, et d'autres encore, étaient contenues dans le projet de loi C-69, intitulé *Loi modificative portant compression des dépenses publiques*. Ce projet de loi a

Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] 2 R.C.S. 525

534

REFERENCE RE CANADA ASSISTANCE PLAN (B.C.) *Sopinka J.*

[1991] 2 S.C.R.

and is now the *Government Expenditures Restraint Act*, S.C. 1991, c. 9.

On February 27, 1990, Order in Council No. 287 was approved and ordered by the Lieutenant Governor of British Columbia. Via this Order, the Government of British Columbia referred the following questions to the British Columbia Court of Appeal:

- (1) Has the Government of Canada any statutory, prerogative or contractual authority to limit its obligation under the *Canada Assistance Plan Act* [sic], R.S.C. 1970, c. C-1 and its Agreement with the Government of British Columbia dated March 23, 1967, to contribute 50 per cent of the cost to British Columbia of assistance and welfare services?
- (2) Do the terms of the Agreement dated March 23, 1967 between the Governments of Canada and British Columbia, the subsequent conduct of the Government of Canada pursuant to the Agreement and the provisions of the *Canada Assistance Plan Act* [sic], R.S.C. 1970, c. C-1, give rise to a legitimate expectation that the Government of Canada would introduce no bill into Parliament to limit its obligation under the Agreement or the *Act* without the consent of British Columbia?

2. Relevant Provisions of Statutes and the Agreement

Canada Assistance Plan, R.S.C. 1970, c. C-1

The questions on this reference ask about the meaning of the *Plan* in the Revised Statutes of Canada 1970. The reason for this is not clear, as the Revised Statutes of Canada, 1985 came into force on December 12, 1988, and Order in Council No. 287 containing the questions was approved and ordered on February 27, 1990. The only difference between the R.S.C. 1970 version and the R.S.C. 1985 version which could be relevant to this reference is in s. 5(2)(c), and will be discussed below.

é été déposé à la Chambre des communes le 15 mars 1990. Sanctionnée le 1^{er} février 1991, la loi est maintenant connue sous le nom de *Loi sur la compression des dépenses publiques*, L.C. 1991, ch. 9.

a

Le 27 février 1990, le décret n° 287 a été approuvé et pris par le lieutenant-gouverneur de la Colombie-Britannique. Par ce décret, le gouvernement de la Colombie-Britannique renvoyait à la Cour d'appel de la Colombie-Britannique les questions suivantes:

[TRADUCTION]

- (1) Le gouvernement du Canada a-t-il, en vertu d'une loi, en raison d'une prérogative ou aux termes d'un contrat, compétence pour limiter son obligation, découlant du *Régime d'assistance publique du Canada*, S.R.C. 1970, ch. C-1, et de l'accord en date du 23 mars 1967 intervenu entre lui et le gouvernement de la Colombie-Britannique, de payer 50 pour 100 du coût des services d'assistance publique et de protection sociale en Colombie-Britannique?
- (2) Les conditions de l'accord en date du 23 mars 1967 intervenu entre les gouvernements du Canada et de la Colombie-Britannique, la conduite subséquente du gouvernement du Canada dans l'exécution de cet accord et les dispositions du *Régime d'assistance publique du Canada*, S.R.C. 1970, ch. C-1, permettent-elles de s'attendre légitimement à ce que le gouvernement du Canada ne dépose devant le Parlement aucun projet de loi tendant à limiter, sans le consentement de la Colombie-Britannique, l'obligation que lui impose l'accord ou le *Régime*?

f

2. Les dispositions législatives et contractuelles pertinentes

Régime d'assistance publique du Canada, S.R.C. 1970, ch. C-1

Les questions posées dans le présent renvoi concernent la signification du *Régime* dans les Statuts révisés du Canada 1970. La raison de cela n'est pas claire, puisque les Lois révisées du Canada (1985) sont entrées en vigueur le 12 décembre 1988 et que le décret n° 287 contenant les questions a été approuvé et pris le 27 février 1990. La seule différence entre la version S.R.C. 1970 et la version L.R.C. (1985) qui pourrait être pertinente en l'espèce se trouve à l'al. 5(2)c) et sera traitée ci-dessous.

j

4. Subject to this Act, the Minister [of National Health and Welfare] may, with the approval of the Governor in Council, enter into an agreement with any province to provide for the payment by Canada to the province of contributions in respect of the cost to the province and to municipalities in the province of

(a) assistance provided by or at the request of provincially approved agencies; and

(b) welfare services provided in the province by provincially approved agencies,

pursuant to the provincial law.

5. (1) The contributions payable to a province under an agreement shall be paid in respect of each year and shall be the aggregate of

(a) fifty per cent of the cost to the province and to municipalities in the province in that year of assistance provided by or at the request of provincially approved agencies, and

(b) fifty per cent of either

(i) the amount by which

(A) the cost to the province and to municipalities in the province in that year of welfare services provided in the province by provincially approved agencies

exceeds

(B) the total of

(I) the cost to the province, in the fiscal year of the province coinciding with or ending in the period commencing April 1, 1964 and ending March 31, 1965, of welfare services provided in the province, and

(II) the cost to municipalities in the province, in the fiscal years of such municipalities coinciding with or ending in the period commencing April 1, 1964 and ending March 31, 1965, of welfare services provided in the province,

or

(ii) the cost to the province and to municipalities in the province in that year of the employment by pro-

4. Sous réserve des dispositions de la présente loi, le Ministre [de la Santé nationale et du Bien-être social] peut, avec l'approbation du gouverneur en conseil, conclure avec toute province un accord prévoyant le paiement, par le Canada à la province, de contributions aux frais encourus par la province et des municipalités de la province, au titre

a) de l'assistance publique fournie par des organismes approuvés par la province ou à la demande de ceux-ci, et

b) des services de bien-être social fournis dans la province par des organismes approuvés par la province, en conformité de la législation provinciale.

5. (1) Les contributions payables à une province en vertu d'un accord doivent être payées pour chaque année et être le total

c) de cinquante pour cent des frais encourus par la province et des municipalités de la province au cours de l'année pour l'assistance publique fournie par des organismes approuvés par la province ou à leur demande; et

d) de cinquante pour cent, soit

e) (i) du montant par lequel

f) (A) les frais encourus par la province et des municipalités de la province au cours de l'année pour les services de bien-être social fournis dans la province par des organismes approuvés par la province

excèdent

g) (B) le total

h) (I) des frais encourus par la province, au cours de l'année financière de la province qui coïncide avec la période commençant le 1er avril 1964 et se terminant le 31 mars 1965, ou qui prend fin pendant cette période, pour les services de bien-être social fournis dans la province, et

i) (II) des frais encourus par des municipalités de la province, au cours des années financières de ces municipalités qui coïncident avec la période commençant le 1er avril 1964 et se terminant le 31 mars 1965, ou qui prennent fin pendant cette période, pour les services de bien-être social fournis dans la province,

j) soit

(ii) des frais encourus par la province et des municipalités de la province au cours de l'année pour

536

REFERENCE RE CANADA ASSISTANCE PLAN (B.C.) *Sopinka J.*

[1991] 2 S.C.R.

vincially approved agencies of persons employed by such agencies

(A) wholly or mainly in the performance of welfare services functions, and

(B) in positions filled after March 31, 1965,

at the election of the province made at such time or times and in such manner as may be prescribed.

(2) In this section, "cost" does not include,

(c) any cost that Canada has shared or is required to share in any manner with the province, or that Canada has borne or is required to bear, pursuant to any other Part or pursuant to any Act of the Parliament of Canada passed before, on or after the 15th day of July 1966;

(Section 5.1, added to the *Plan* effective February 1, 1991 by the *Government Expenditures Restraint Act*, S.C. 1991, c. 9, s. 2, is set out below in an extract from the latter Act.)

6. . .

(2) An agreement shall provide that the province . . . [there is a series of provincial obligations which must appear in an agreement].

(3) An agreement shall provide that Canada

(a) will pay to the province the contributions or advances on account thereof that Canada is authorized to pay to the province under this Act and the regulations; . . . [and certain other obligations].

8. (1) Every agreement shall continue in force so long as the provincial law remains in operation.

(2) Notwithstanding subsection (1),

(a) an agreement may, with the approval of the Governor in Council, be amended or terminated at any time by mutual consent of the Minister and the province;

(b) any schedule to an agreement may be amended at any time by mutual consent of the Minister and the province;

(c) the province may at any time give to Canada notice of intention to terminate an agreement; and

l'emploi, par des organismes approuvés par la province, de personnes au service de ces organismes,

(A) uniquement ou principalement dans des fonctions relevant des services de bien-être social, et

(B) dans des postes pourvus après le 31 mars 1965,

au choix de la province fait à l'époque ou aux époques b et de la façon qui seront prescrites.

(2) Au présent article, l'expression «frais» ne comprend pas

c) tous frais que le Canada a partagés ou est tenu de partager de quelque manière avec la province, ou que le Canada a supportés ou est tenu de supporter, en conformité de quelque autre Partie ou de quelque loi du Parlement du Canada votée avant ou après le 15 juillet 1966, ou à cette date;

(L'article 5.1, ajouté au *Régime*, depuis le 1^{er} février 1991, par la *Loi sur la compression des dépenses publiques*, L.C. 1991, ch. 9, art. 2, est reproduit plus bas dans un extrait de cette dernière loi.)

6. . .

(2) Un accord doit prévoir que la province . . . [suit une série d'obligations provinciales devant figurer dans un accord.]

(3) Un accord doit prévoir que le Canada

a) paiera à la province les contributions ou les avances sur lesdites contributions que le Canada est autorisé à payer à la province en vertu de la présente loi et des règlements; . . . [et certaines autres obligations].

8. (1) Chaque accord reste en vigueur tant que la h législation provinciale est appliquée.

(2) Nonobstant le paragraphe (1),

a) un accord peut, avec l'approbation du gouverneur en conseil, être modifié ou résilié en tout temps par consentement mutuel du Ministre et de la province;

b) toute annexe à un accord peut être modifiée en tout temps par consentement mutuel du Ministre et de la province;

c) la province peut en tout temps donner au Canada avis de son intention de résilier un accord; et

[1991] 2 R.C.S.

RENOVI: RÉGIME D'ASSISTANCE DU CANADA (C.-B.)

Le juge Sopinka

537

(d) Canada may, at any time on or after the 31st day of March 1969, give to the province notice of intention to terminate an agreement;

and, where notice of intention to terminate is given in accordance with paragraph (c) or (d), the agreement shall cease to be effective for any period after the day fixed in the notice or for any period after the expiration of one year from the day upon which the notice is given, whichever is the later.

9. . .

(2) No regulation that has the effect of altering any of the agreements or undertakings contained in an agreement entered into under this Part with a province, or that affects the method of payment or amount of payments thereunder, is effective in respect of that province unless the province has consented to the making of such regulation.

The Agreement of March 23, 1967

2. The Province agrees

[the obligations required by s. 6(2) of the *Plan* are set out].

3. (1) Canada agrees

(a) subject to this clause and to Clause 4, to pay to the province of British Columbia the contributions or advances on account thereof that Canada is authorized to pay to that province under the Act and the Regulations;

[the other obligations required by s. 6(3) of the *Plan* are set out].

6. . .

(2) Subject to subclause (3), this agreement shall continue in force so long as the provincial law remains in operation.

(3) (a) Notwithstanding subsection (1)

(i) any schedule to this Agreement may be amended at any time; and

(ii) the Agreement may, with the approval of the Governor-in-Council, be amended or terminated at any time,

by mutual consent of the Minister and The Province;

(b) The Province may at any time give to Canada notice of intention to terminate this Agreement and Canada may at any time on or after the 31st day of

d) le Canada peut, en tout temps à compter du 31 mars 1969, donner à la province avis de son intention de résilier un accord;

et, s'il est donné avis de l'intention de résilier un tel accord, en conformité de l'alinéa c) ou d), l'accord cesse d'avoir effet pour toute période postérieure à la date fixée dans l'avis ou pour toute période postérieure à la date d'expiration d'un délai d'un an à compter du jour où l'avis a été donné, en prenant de ces deux dates celle qui intervient la dernière.

9. . .

(2) Tout règlement qui a pour effet de modifier l'un des accords conclus, aux termes de la présente Partie, avec une province, ou n'importe lequel des engagements qui y sont contenus, ou qui vise la méthode de paiement ou le montant des paiements y afférents, n'entre en vigueur à l'égard de cette province que si elle y a donné son assentiment.

d) *L'accord en date du 23 mars 1967*

[TRADUCTION] 2. La province convient

[suit l'énumération des obligations prévues au par. 6(2) du *Régime*.]

3. (1) Le Canada convient

a) sous réserve de la présente clause et de la clause 4, de payer à la province de la Colombie-Britannique les contributions ou les avances sur les contributions que le Canada est autorisé à payer à cette province en vertu de la Loi et des règlements;

[suit l'énumération des autres obligations prévues au par. 6(3) du *Régime*.]

g) 6. . .

(2) Sous réserve du paragraphe (3) de la présente clause, l'accord reste en vigueur tant que la législation provinciale est appliquée.

h) (3) a) Nonobstant le paragraphe (1) de la présente clause,

i) toute annexe à l'accord peut être modifiée en tout temps; et

j) (ii) l'accord peut, avec l'approbation du gouverneur en conseil, être modifié ou résilié en tout temps,

par consentement mutuel du ministre et de la province;

b) La province peut en tout temps donner au Canada avis de son intention de résilier le présent accord et le Canada peut en tout temps, à partir du 31 mars 1969,

Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] 2 R.C.S. 525

538

REFERENCE RE CANADA ASSISTANCE PLAN (B.C.) *Sopinka J.*

[1991] 2 S.C.R.

March, 1969, give to The Province notice of intention to terminate this agreement; and where notice of intention to terminate is given in accordance with this paragraph (b), the Agreement shall cease to be effective for any period after the day fixed in the notice or for any period after the expiration of one year from the day that notice is given, whichever is the later.

Government Expenditures Restraint Act, S.C. 1991, c. 9

2. The *Canada Assistance Plan* is amended by adding thereto, immediately after section 5 thereof, the following section:

“5.1 (1) Notwithstanding sections 5 and 8 and any agreement, where no fiscal equalization payment is payable to a province pursuant to section 3 of the *Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act* for the year ending on March 31, 1991, the contributions to that province in respect of that year shall not exceed the product obtained by multiplying

(a) the amount of the contributions payable to the province for assistance and welfare services provided in the year ending on March 31, 1990 by

(b) 1.05.

(2) Notwithstanding sections 5 and 8 and any agreement, where no fiscal equalization payment is payable to a province pursuant to section 3 of the *Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act* for the year ending on March 31, 1992, the contributions to that province in respect of that year shall not exceed the product obtained by multiplying

(a) the amount of the contributions payable to the province for assistance and welfare services provided in the year ending on March 31, 1990 by

(b) 1.1025.”

Interpretation Act, R.S.C., 1985, c. I-21

42. (1) Every Act shall be so construed as to reserve to Parliament the power of repealing or amending it, and of revoking, restricting or modifying any power, privilege or advantage thereby vested in or granted to any person.

donner à la province avis de son intention de résilier le présent accord. S'il est donné avis de l'intention de résilier, en conformité avec le présent alinéa, l'accord cesse d'avoir effet pour toute période postérieure à la date fixée dans l'avis ou pour toute période postérieure à la date d'expiration d'un délai d'un an à compter du jour où l'avis a été donné, en prenant de ces deux dates celle qui intervient la dernière.

Loi sur la compression des dépenses publiques, L.C. 1991, ch. 9

2. Le *Régime d'assistance publique du Canada* est modifié par insertion, après l'article 5, de ce qui suit:

«5.1 (1) Malgré les articles 5 et 8 et tout accord, dans les cas où aucun paiement de péréquation n'est payable à une province en vertu de l'article 3 de la *Loi sur les arrangements fiscaux entre le gouvernement fédéral et les provinces et sur les contributions fédérales en matière d'enseignement postsecondaire et de santé* pour l'année se terminant le 31 mars 1991, les contributions payables à cette province pour cette année ne peuvent dépasser le produit des éléments suivants:

a) le montant des contributions payables à la province au titre des services d'assistance publique et de protection sociale fournis au cours de l'année se terminant le 31 mars 1990;

b) 1,05.

(2) Malgré les articles 5 et 8 et tout accord, dans les cas où aucun paiement de péréquation n'est payable à une province en vertu de l'article 3 de la *Loi sur les arrangements fiscaux entre le gouvernement fédéral et les provinces et sur les contributions fédérales en matière d'enseignement postsecondaire et de santé* pour l'année se terminant le 31 mars 1992, les contributions payables à cette province pour cette année ne peuvent dépasser le produit des éléments suivants:

a) le montant des contributions payables à la province au titre des services d'assistance publique et de protection sociale fournis au cours de l'année se terminant le 31 mars 1990;

b) 1,1025.”

Loi d'interprétation, L.R.C. (1985), ch. I-21

42. (1) Il est entendu que le Parlement peut toujours abroger ou modifier toute loi et annuler ou modifier tous pouvoirs, droits ou avantages attribués par cette loi.

Constitutional Question Act, R.S.B.C. 1979, c. 63

1. The Lieutenant Governor in Council may refer any matter to the Court of Appeal or to the Supreme Court for hearing and consideration, and the Court of Appeal or the Supreme Court shall then hear and consider it.

6. The opinion of the Court of Appeal or the Supreme Court is deemed a judgment of the Court of Appeal or of the Supreme Court, as the case may be, and an appeal lies from it in the manner of a judgment in an ordinary action.

Supreme Court Act, R.S.C., 1985, c. S-26

36. An appeal lies to the Court from an opinion pronounced by the highest court of final resort in a province on any matter referred to it for hearing and consideration by the lieutenant governor in council of that province whenever it has been by the statutes of that province declared that such opinion is to be deemed a judgment of the highest court of final resort and that an appeal lies therefrom as from a judgment in an action.

3. Judgment Below

The case was argued in the British Columbia Court of Appeal before Hinkson, Lambert, Toy, Southin and Legg JJA. Judgments were delivered by Lambert, Toy and Southin JJA. The case is reported at (1990), 46 B.C.L.R. (2d) 273 (*sub nom. Reference re Constitutional Question Act*), and at (1990), 71 D.L.R. (4th) 99, 45 Admin. L.R. 34 (hereinafter cited to B.C.L.R.).

Toy J.A., Hinkson and Legg JJA. concurring

On Question 1, Toy J.A. said that the Attorney General of Canada did not seriously contend that the federal government could limit its obligations under the current *Plan* and the Agreement except by legislation. The very introduction of Bill C-69 was aimed at limiting those obligations. Turning to Question 2, he began by considering the doctrine of legitimate expectations. He reviewed some of the leading cases in this area.

Toy J.A. accepted British Columbia's contention that it had a legitimate expectation that the federal government would proceed in accordance with the

Constitutional Question Act, R.S.B.C. 1979, ch. 63

[TRADUCTION] 1. Le lieutenant-gouverneur en conseil peut déferer toute question à la Cour d'appel ou à la Cour suprême, qui sont alors tenues d'entendre et d'étudier cette question.

6. L'avis de la Cour d'appel ou de la Cour suprême est réputé constituer un arrêt de l'une ou de l'autre cour, selon le cas, et cet avis est susceptible d'appel au même titre qu'un jugement rendu dans une action ordinaire.

Loi sur la Cour suprême, L.R.C. (1985), ch. S-26

36. Il peut être interjeté appel devant la Cour d'un avis prononcé par le plus haut tribunal de dernier ressort dans une province sur toute question déférée à ce tribunal par le lieutenant-gouverneur en conseil de la province quand, aux termes de la législation provinciale, l'avis en cause est assimilé à un jugement ayant autorité de chose jugée mais susceptible d'appel au même titre qu'un jugement rendu dans une action.

3. L'arrêt de la Cour d'appel

La cause a été plaidée en Cour d'appel de la Colombie-Britannique devant les juges Hinkson, Lambert, Toy, Southin et Legg. Les juges Lambert, Toy et Southin ont rédigé des motifs et l'arrêt est publié à (1990), 46 B.C.L.R. (2d) 273 (*sub nom. Reference re Constitutional Question Act*), et à (1990), 71 D.L.R. (4th) 99, 45 Admin. L.R. 34 (ci-après cité au B.C.L.R.).

Le juge Toy, à l'avis duquel ont souscrit les juges Hinkson et Legg

En ce qui concerne la première question, le juge Toy a affirmé que le procureur général du Canada n'a pas prétendu sérieusement que le gouvernement fédéral pouvait limiter les obligations lui incombant aux termes du *Régime* actuel et de l'accord, si ce n'est par l'adoption d'une loi en ce sens. Toutefois, c'est précisément la limitation de ces obligations que visait le dépôt du projet de loi C-69. Abordant ensuite la seconde question, il a commencé par étudier la théorie de l'expectative légitime et a examiné quelques-uns des arrêts de principe dans ce domaine.

Le juge Toy a retenu l'argument de la Colombie-Britannique selon lequel elle s'attendait légitimement à ce que le gouvernement fédéral agisse en confor-

Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] 2 R.C.S. 525

540

REFERENCE RE CANADA ASSISTANCE PLAN (B.C.) *Sopinka J.*

[1991] 2 S.C.R.

terms of the *Plan* and the *Agreement*. He quoted from the judgment of Estey J. in *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, at p. 758, to the effect that even the decisions of the federal cabinet are reviewable in respect of whether they are made within the parliamentary mandate which authorizes them.

Toy J.A. rejected the submission of the Attorney General of Canada that Question 2 is non-justiciable. He then turned to the submission that the principle of parliamentary sovereignty is a complete answer to Question 2. He said that this did not meet the complaint of the Attorney General of British Columbia, since that party's submission was directed, not to Parliament's powers, but to the conduct of the Government of Canada.

Toy J.A. stated his conclusion in this way (at p. 311):

In my opinion, upon the basis of the doctrine of legitimate expectations, the government of Canada was required to obtain the consent of British Columbia under the existing circumstances.

He said that precipitate action without consent might be justified in some circumstances. He did not comment on the interveners' submissions. He answered "No" to Question 1 and "Yes" to Question 2.

Lambert J.A.

Lambert J.A. noted that the court was not bound to answer the questions exactly as phrased, but rather was free to address the "matter" in question (citing *Reference re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753).

Pursuant to the concession of the Attorney General of Canada, Lambert J.A. answered the first question in the negative. Looking at the second question, he said (at p. 287):

mité avec les dispositions du *Régime* et de l'accord. Il a cité les motifs du juge Estey qui, dans l'arrêt *Procureur général du Canada c. Inuit Tapirisat of Canada*, [1980] 2 R.C.S. 735, à la p. 758, dit en substance que même les décisions du cabinet fédéral sont susceptibles d'un contrôle destiné à vérifier si elles dépassent les limites du mandat, conféré par le Parlement, en vertu duquel elles ont été prises.

Le juge Toy, ayant rejeté l'argument du procureur général du Canada voulant que la seconde question ne relève pas de la compétence des tribunaux, s'est penché ensuite sur l'allégation que le principe de la souveraineté du Parlement constitue une réponse complète à la seconde question. Selon le juge Toy, cela ne réglait pas la plainte du procureur général de la Colombie-Britannique puisque le moyen invoqué par ce dernier concernait, non pas les pouvoirs du Parlement, mais la conduite du gouvernement du Canada.

Le juge Toy formule ainsi sa conclusion (à la p. 311):

[TRADUCTION] À mon avis, conformément à la théorie de l'expectative légitime, le gouvernement du Canada était tenu, dans les circonstances, d'obtenir le consentement de la Colombie-Britannique.

Une mesure précipitée, a-t-il dit, prise sans consentement, pourrait se justifier dans certaines circonstances. Quant aux arguments des intervenants, il les a passés sous silence. Sa réponse à la première question a été négative et il a répondu par l'affirmative à la seconde.

Le juge Lambert

Le juge Lambert a fait remarquer que la cour n'était pas obligée de répondre aux questions précises qui lui avaient été soumises, mais qu'elle était libre d'aborder le «point» qu'elles soulevaient (citant le *Renvoi: Résolution pour modifier la Constitution*, [1981] 1 R.C.S. 753).

Vu la reconnaissance qu'avait faite le procureur général du Canada, le juge Lambert a répondu par la négative à la première question. En ce qui concerne la seconde question, il a dit (à la p. 287):

In my opinion, if there is an obligation, binding on Canada, to pay to British Columbia 50 per cent of the cost of providing assistance to those in need in British Columbia as determined under the Canada Assistance Plan and the Canada-British Columbia Assistance Agreement, then there would be and should be a legitimate expectation on the part of British Columbia that Canada would not break that binding obligation. In those circumstances, British Columbia could also hold a legitimate expectation that the government of Canada would not introduce a bill into Parliament which would break the binding obligation.

Lambert J.A. then turned to the matter of whether there was indeed an obligation on Canada to pay 50 per cent of the expenditures in question. He said that in this case the ordinary private law rules of interpretation should govern the determination of the scope of the obligations imposed by the Agreement.

Lambert J.A. set out clause 3(1)(a) of the Agreement, which is required by s. 6(1)(a) of the *Plan* and which provides that Canada undertakes to make the contributions authorized under the *Plan*. He then stated the issue in this way (at p. 290):

The question is whether, when the agreement was made in 1967, that clause meant that Canada must pay the contribution proportion that it was authorized to pay when the agreement was made in 1967, or whether, on the other hand, Canada was to be required to pay each year the contribution proportion that it was authorized to pay under the Act [the *Plan*] and the regulations as the Act and regulations were currently in effect and as they might be amended by Canada from time to time.

He concluded that the former is correct, and gave six reasons. These will be discussed in more detail later in this judgment.

Since he thought that the Government of Canada was obliged to pay contributions at the levels authorized in 1967, Lambert J.A. concluded that if the federal government were to pay to British Columbia less than 50 per cent of the eligible expenditures made by British Columbia, then that would be a breach of an

[TRADUCTION] À mon avis, si le Canada était lié par une obligation de payer à la Colombie-Britannique 50 pour 100 des frais engagés pour fournir de l'assistance publique aux nécessiteux dans cette province, en conformité avec le Régime d'assistance publique du Canada et avec l'accord relatif à l'assistance publique intervenu entre le Canada et la Colombie-Britannique, cette dernière s'attendrait et devrait s'attendre légitimement, alors, que le Canada ne manque pas à cette obligation. Dans ces circonstances, la Colombie-Britannique pourrait en outre s'attendre légitimement à ce que le gouvernement du Canada ne dépose pas devant le Parlement un projet de loi qui constituerait un manquement à ladite obligation.

^c Le juge Lambert a abordé ensuite la question de savoir s'il incombaît en fait au Canada de payer 50 pour 100 des dépenses en question. Il a dit qu'en l'espèce c'étaient les règles d'interprétation ordinaires en matière de droit privé qui devraient s'appliquer à la détermination de la portée des obligations imposées par l'accord.

^e Le juge Lambert a reproduit la clause 3(1)a) de l'accord, dont l'inclusion est exigée par l'al. 6(1)a) du *Régime* et qui énonce l'engagement du Canada de faire les contributions autorisées par le *Régime*. Il a poursuivi en formulant ainsi la question en litige (à la p. 290):

[TRADUCTION] La question est de savoir si, au moment de la conclusion de l'accord en 1967, cette clause signifiait que le Canada était tenu de payer la part des contributions qu'il était autorisé à payer en 1967 ou bien si le Canada devait verser annuellement la part des contributions qu'il était autorisé à payer en vertu de la Loi [le *Régime*] et des règlements, tels qu'ils étaient alors en vigueur et tels que le Canada pourrait les modifier à l'occasion.

^h Il a conclu que c'est la première hypothèse qui est à retenir et a donné six raisons à l'appui de cette conclusion, lesquelles seront traitées de façon plus détaillée plus loin dans les présents motifs.

^j Comme il a estimé que le gouvernement du Canada était obligé de verser des contributions dans les proportions autorisées en 1967, le juge Lambert a conclu que, si le gouvernement fédéral devait payer à la Colombie-Britannique moins de 50 pour 100 des dépenses admissibles effectuées par cette dernière,

542

REFERENCE RE CANADA ASSISTANCE PLAN (B.C.) *Sopinka J.* [1991] 2 S.C.R.

undertaking and a breach of an obligation. This would be so even if this action were pursuant to Bill C-69, now the *Government Expenditures Restraint Act*. Lambert J.A. said that the introduction of Bill C-69 was a form of anticipatory breach. He said that the *Government Expenditures Restraint Act* would authorize and in fact require the breach, but the non-payment would still be a breach of Canada's undertaking and of its obligations under the Agreement.

Lambert J.A. noted that if the federal government asserted that its actions were required by a state of national emergency, then the questions might be non-justiciable; but no such assertion was made.

In the result, because the proposed federal action would be a breach of an obligation, Lambert J.A. answered "Yes" to Question 2. He stated that British Columbia could have had a legitimate expectation that Canada would not breach its obligations; but he stressed that he was using the words "legitimate expectation" in a non-technical way. Lambert J.A. also summarized all of the other arguments made, although he did not accept or reject any of them.

Southin J.A.

Southin J.A. agreed that the answer to Question 1 is "No." She said that the *Constitutional Question Act* does not authorize references on questions concerning practices, usages, customs, or conventions of the Constitution, and so Question 2 must be interpreted as asking a legal question.

She looked at some old constitutional learning and said that the executive aspect of the federal government is subordinate to the legislative aspect; that is, executive action is subject to the expressed will of Parliament. She noted that there have been many decisions interpreting the Constitution, and said (at pp. 314-15):

cela constituerait un manquement à un engagement et à une obligation. Il en serait ainsi même si cette mesure était prise conformément au projet de loi C-69, maintenant la *Loi sur la compression des dépenses publiques*. D'après le juge Lambert, le dépôt du projet de loi C-69 représentait une forme de manquement anticipé. Il a dit que ce serait un manquement autorisé, voire exigé, par la *Loi sur la compression des dépenses publiques*, mais que le non-paiement n'en serait pas moins un manquement à l'engagement contracté par le Canada et à ses obligations découlant de l'accord.

c Le juge Lambert a fait remarquer que, si le gouvernement fédéral prétendait que les mesures prises s'imposaient en raison d'un état d'urgence nationale, les questions posées pourraient alors ne pas relever de la compétence des tribunaux; aucune assertion du genre n'a toutefois été faite.

En définitive, comme la mesure projetée par le fédéral constituerait un manquement à une obligation, le juge Lambert a répondu par l'affirmative à la seconde question. La Colombie-Britannique, a-t-il affirmé, aurait pu légitimement s'attendre à ce que le Canada ne manque pas à ses obligations. Il a toutefois souligné qu'il ne prêtait pas à l'expression «expectative légitime» un sens technique. Le juge Lambert a en outre résumé tous les autres arguments avancés, mais n'en a retenu ni rejeté aucun.

Le juge Southin

g Le juge Southin a été d'accord pour donner à la première question une réponse négative. Elle a dit que la *Constitutional Question Act* n'autorise pas le renvoi de questions concernant les pratiques, les usages, les coutumes ou les conventions en matière constitutionnelle, de sorte que la seconde question doit s'interpréter comme étant une question de droit.

i Elle a examiné la vieille doctrine constitutionnelle et a dit que le pouvoir exécutif du gouvernement fédéral est subordonné au pouvoir législatif, c'est-à-dire que toutes mesures prises par l'exécutif sont soumises à la volonté expresse du Parlement. Soulignant le grand nombre de décisions interprétant la Constitution, elle a dit (aux pp. 314 et 315):

Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] 2 R.C.S. 525

[1991] 2 R.C.S.

RENOVI: RÉGIME D'ASSISTANCE DU CANADA (C.-B.)

Le juge Sopinka

543

I am not aware of any decision since Confederation which suggests there is any limitation on the exercise of the Executive Power conferred on the Governor General in Council and on the Lieutenant Governor in Council by, respectively ss. 9-13 and ss. 58 and 65 of the Constitution Act, 1867, save those limitations within the [Constitution] Acts themselves.

It has generally been accepted that the Executive Power so conferred cannot go beyond the applicable Legislative Power and, of course, is subject to statutes restricting that Executive Power.

What Mr. Edwards postulates is a limitation on Executive Power.

But he cannot point to any provision in the Constitution Acts which expressly or by necessary intendment creates the limitation which he postulates.

He asks us to engraft onto the Executive Power of the Constitution Acts a doctrine of "legitimate expectation".

In my opinion, the duty of the judiciary, when confrontations take place between a province and Canada, is limited to the interpretation of the Constitution Acts.

Southin J.A. noted that s. 36(1) of the *Constitution Act, 1982* expressly says it does not alter the legislative authority of the several legislative bodies. She said that it would be wrong to engraft upon the Constitution a doctrine limiting the powers which are therein declared. This is especially so of the doctrine of legitimate expectations, which is a recent development in cases having nothing to do with our Constitution. She said (at p. 316):

There is not a word in the Constitution Acts about "legitimate expectation" and I, for one, am not prepared to put such words into the legal framework of Canada.

Southin J.A. said that this dispute is a quarrel about money, and cannot be resolved in the courts. She rejected other arguments, saying that the *Plan* does not purport to control the "manner and form" of subsequent legislation; that since the question posed was a legal one, issues of conventions did not arise for resolution; and that the provinces have no proprietary right to receive money from the federal govern-

[TRADUCTION] Je ne connais aucune décision rendue depuis la Confédération qui laisse supposer que l'exercice du pouvoir exécutif conféré au gouverneur général en conseil et au lieutenant-gouverneur en conseil par les art. 9 à 13 et par les art. 58 et 65, respectivement, de la Loi constitutionnelle de 1867, connaît des restrictions, si ce n'est celles prévues par les lois [constitutionnelles] elles-mêmes.

Il est généralement admis que le pouvoir exécutif ainsi accordé ne saurait dépasser le pouvoir législatif applicable et qu'il est, bien entendu, assujetti aux lois limitant le pouvoir exécutif.

Ce que pose comme principe M^e Edwards, c'est la limitation du pouvoir exécutif.

Il est toutefois dans l'impossibilité de relever dans les lois constitutionnelles une disposition qui crée expressément, ou par présomption nécessaire, la limitation qu'il pose comme principe.

Il nous demande en fait de greffer sur le pouvoir exécutif attribué par les lois constitutionnelles une théorie de l'«expectative légitime».

À mon avis, le rôle des tribunaux dans les différends qui opposent une province au Canada se limite à l'interprétation des lois constitutionnelles.

Le juge Southin a noté que le par. 36(1) de la *Loi constitutionnelle de 1982* dit expressément ne rien changer aux compétences législatives des différents corps législatifs. On aurait tort, selon elle, de greffer sur la Constitution une théorie qui viendrait limiter les pouvoirs y prévus. Cela vaut particulièrement pour la théorie de l'expectative légitime, qui est une innovation récente dans des affaires tout à fait étrangères à notre Constitution. Le juge Southin écrit (à la p. 316):

[TRADUCTION] L'expression «expectative légitime» ne figure nulle part dans les lois constitutionnelles et, pour ma part, je ne suis pas disposée à l'insérer dans le cadre juridique canadien.

Le juge Southin a dit qu'il s'agit en l'espèce d'un conflit portant sur des sommes d'argent qui ne peut être réglé devant les tribunaux. Elle a rejeté d'autres arguments, affirmant que le *Régime* ne vise pas à déterminer le [TRADUCTION] «mode et la forme» de toute législation subséquente, que, comme c'était une question de droit qui avait été posée, il n'y avait aucune question relative aux conventions à trancher,

ment (save under the *Constitution Act, 1907*). Hence her answer to Question 2 was "No".

In the result, all five judges answered the first question "No". Four of them answered the second question "Yes", while one would have answered it "No".

4. Issues

The issues raised are as follows:

(1) Are the matters raised in the questions justiciable? The Attorney General of Canada submits that the questions are political in nature and that therefore the Court should not answer them.

(2) If the questions raise justiciable issues which should be answered by the Court, the questions must first be interpreted and then answered.

5. Justiciability

The *Constitutional Question Act*, like similar enactments of other provincial legislatures, allows the Lieutenant Governor in Council to refer "any matter" to the court. This broad wording imposes no limit on the type of question which may be asked. Nevertheless, the court has a discretion to refuse to answer questions which are not justiciable. In *Reference re Resolution to amend the Constitution, supra*, the majority in Part I said (at p. 768):

The scope of the [reference] authority in each case is wide enough to saddle the respective courts with the determination of questions which may not be justiciable and there is no doubt that those courts, and this Court on appeal, have a discretion to refuse to answer such questions.

et que les provinces ne jouissent d'aucun droit de propriété qui leur vaut le paiement de fonds du gouvernement fédéral (si ce n'est en vertu de la *Loi constitutionnelle de 1907*). Sa réponse à la seconde question a donc été négative.

Tous les cinq juges ont donc répondu par la négative à la première question. Quatre d'entre eux ont donné une réponse affirmative à la seconde question, tandis qu'une a été d'avis d'y donner une réponse négative.

4. Les points en litige

Les points suivants sont en litige:

(1) Les points soulevés dans les questions relèvent-ils de la compétence des tribunaux? Le procureur général du Canada fait valoir que les questions revêtent un caractère politique, de sorte que la Cour ne devrait pas y répondre.

(2) À supposer qu'elles soulèvent des points relevant de la compétence des tribunaux sur lesquels devrait se prononcer la Cour, celle-ci doit d'abord interpréter les questions, puis y répondre.

f 5. L'assujettissement à la compétence des tribunaux

La *Constitutional Question Act*, comme les textes analogues adoptés par d'autres assemblées législatives provinciales, autorise le lieutenant-gouverneur en conseil à déposer «toute question» à la cour. Cette formule de large portée n'impose aucune limite quant au type de question pouvant être posée. La cour a néanmoins le pouvoir discrétionnaire de refuser de répondre aux questions qui ne relèvent pas de la compétence des tribunaux. À la partie I du *Renvoi: Réolution pour modifier la Constitution*, précité, les juges formant la majorité affirment (à la p. 768):

i Le pouvoir [de renvoi] défini dans chaque cas a une portée suffisamment large pour imposer aux différentes cours de trancher des questions qui peuvent ne pas être justiciables des tribunaux et il ne fait aucun doute que ces cours, et cette Cour dans un pourvoi, ont le pouvoir discrétionnaire de refuser de répondre à de telles questions.

Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] 2 R.C.S. 525

[1991] 2 R.C.S.

RENOVI: RÉGIME D'ASSISTANCE DU CANADA (C.-B.) *Le juge Sopinka*

545

While there may be many reasons why a question is non-justiciable, in this appeal the Attorney General of Canada submitted that to answer the questions would draw the Court into a political controversy and involve it in the legislative process. In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government. See *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, at pp. 90-91, and *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 362. In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch. In *Reference re Resolution to amend the Constitution, supra*, at p. 884, the majority in Part II of the judgment said:

We agree with what Freedman C.J.M. wrote on this subject in the Manitoba Reference [*Reference Re Amendment of the Constitution of Canada* (1981), 117 D.L.R. (3d) 1 (Man. C.A.)] at p. 13:

In my view, this submission goes too far. Its characterization of Question 2 as "purely political" overstates the case. That there is a political element embodied in the question, arising from the contents of the joint address, may well be the case. But that does not end the matter. If Question 2, even if in part political, possesses a constitutional feature, it would legitimately call for our reply.

In my view, the request for a decision by this Court on whether there is a constitutional convention, in the circumstances described, that the Dominion will not act without the agreement of the Provinces poses a question that it [sic], at least in part, constitutional in character. It therefore calls for an answer, and I propose to answer it.

This was reiterated in *Reference re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793, at p. 805. The Court reaffirmed the validity of the above passage from the judgment

Quoiqu'une question puisse ne pas relever de la compétence des tribunaux pour bien des raisons, le procureur général du Canada a fait valoir, dans le présent pourvoi qu'en répondant aux questions, la

- a* Cour se laisserait entraîner dans une controverse politique et deviendrait engagée dans le processus législatif. Dans l'exercice de son pouvoir discrétionnaire de décider s'il convient de répondre à une question qui, allègue-t-on, ne relève pas de la compétence des tribunaux, la Cour doit veiller surtout à conserver le rôle qui lui revient dans le cadre constitutionnel de notre forme démocratique de gouvernement. Voir les arrêts *Canada (Vérificateur général) c. Canada (Ministre de l'Énergie, des Mines et des Ressources)*, [1989] 2 R.C.S. 49, aux pp. 90 et 91, et *Borowski c. Canada (Procureur général)*, [1989] 1 R.C.S. 342, à la p. 362. En s'enquérant du rôle qu'elle doit jouer, la Cour doit décider si la question qu'on lui a soumise revêt un caractère purement politique et devrait, en conséquence, être tranchée dans une autre tribune ou si elle présente un aspect suffisamment juridique pour justifier l'intervention du pouvoir judiciaire. À la partie II du *Renvoi: Résolution pour modifier la Constitution*, précité, à la p. 884, les juges formant la majorité affirment:

Nous sommes d'accord avec ce que le juge en chef Freedman écrit à ce sujet à la p. 13 du renvoi du Manitoba [*Reference Re Amendment of the Constitution of Canada* (1981), 117 D.L.R. (3d) 1 (C.A. Man.)]:

- g* [TRADUCTION] À mon avis cette thèse va trop loin. Qualifier la question 2 de «purement politique» est une exagération. Il est bien possible qu'il y ait un élément politique dans la question, qui découle du contenu de l'adresse conjointe. Mais cela ne clôt pas la discussion. Si la question 2, tout en étant en partie politique, possède des traits constitutionnels, elle appelle légitimement notre réponse.

À mon sens, demander à cette Cour de décider s'il y a une convention constitutionnelle, dans les circonstances décrites, portant que le fédéral n'agira pas sans l'accord des provinces, soulève une question qui du moins en partie est de nature constitutionnelle. Elle exige donc une réponse et je me propose d'y répondre.

Ce point de vue est repris dans l'arrêt *Renvoi: Opposition du Québec à une résolution pour modifier la Constitution*, [1982] 2 R.C.S. 793, à la p. 805, où la Cour a confirmé la validité de l'extrait,

546

REFERENCE RE CANADA ASSISTANCE PLAN (B.C.) *Sopinka J.*

[1991] 2 S.C.R.

of Freedman C.J.M. While the passage speaks to a "constitutional feature", it is equally applicable to a question which possesses a sufficient legal component to warrant a decision by a court. Since only a court can authoritatively resolve a legal question, its decision will serve to resolve a controversy or it will have some other practical significance.

Applying the foregoing to this appeal, I am of the view that both of the questions posed have a significant legal component. The first question requires the interpretation of a statute of Canada and an agreement. The second raises the question of the applicability of the legal doctrine of legitimate expectations to the process involved in the enactment of a money bill. Both these matters are in contention between the so-called "have provinces" and the federal government. A decision on these questions will have the practical effect of settling the legal issues in contention and will assist in resolving the controversy. Indeed, there is no other forum in which these legal questions could be determined in an authoritative manner. In my opinion, the questions raise matters that are justiciable and should be answered.

6. The Questions

(a) *Question 1*

- (1) Has the Government of Canada any statutory, prerogative or contractual authority to limit its obligation under the *Canada Assistance Plan Act* [sic], R.S.C. 1970, c. C-1 and its Agreement with the Government of British Columbia dated March 23, 1967, to contribute 50 per cent of the cost to British Columbia of assistance and welfare services?

Before turning to the interpretation of and answers to the question, it is convenient to set out certain basic principles of our Constitution.

The Queen of Canada is our head of state, and under our Constitution she is represented in most capacities within the federal sphere by the Governor

ci-dessus, des motifs du juge en chef Freedman. Bien que ce passage parle de «traits constitutionnels», il est tout aussi applicable à une question qui présente un aspect suffisamment juridique pour justifier qu'une cour y réponde. Puisqu'une question de droit ne peut être péremptoirement tranchée que par une cour de justice, ou bien la décision de celle-ci servira à résoudre une controverse, ou bien elle aura quelque autre valeur pratique.

Appliquant au présent pourvoi les précédentes observations, j'estime que les deux questions posées présentent un aspect juridique important. La première question nécessite l'interprétation d'une loi du Canada et d'un accord. La seconde concerne l'applicabilité de la théorie juridique de l'expectative légitime au processus d'adoption d'un projet de loi de finances. Ces deux questions font l'objet de contestation entre les provinces dites «nanties» et le gouvernement fédéral. La décision rendue sur ces questions aura l'effet pratique de trancher les questions de droit en litige et contribuera à résoudre la controverse. En fait, il n'existe pas d'autre tribune devant laquelle ces questions de droit pourraient être réglées de manière péremptoire. À mon avis, les questions soulèvent des points qui relèvent de la compétence des tribunaux et méritent une réponse.

f 6. Les questions

a) *La première question*

[TRADUCTION]

- g (1) Le gouvernement du Canada a-t-il, en vertu d'une loi, en raison d'une prérogative ou aux termes d'un contrat, compétence pour limiter son obligation, découlant du *Régime d'assistance publique du Canada*, S.R.C. 1970, ch. C-1, et de l'accord en date du 23 mars 1967 intervenu entre lui et le gouvernement de la Colombie-Britannique, de payer 50 pour 100 du coût des services d'assistance publique et de protection sociale en Colombie-Britannique?

i Avant d'entreprendre l'interprétation de cette question et d'y répondre, il convient d'exposer certains principes fondamentaux de notre Constitution.

j La Reine du Canada est le chef de notre État et, aux termes de notre Constitution, elle est représentée en la plupart de ses qualités, au niveau fédéral, par le

General. The Governor General's executive powers are of course exercised in accordance with constitutional conventions. For example, after an election he asks the appropriate party leader to form a government. Once a government is in place, democratic principles dictate that the bulk of the Governor General's powers be exercised in accordance with the wishes of the leadership of that government, namely the Cabinet. So the true executive power lies in the Cabinet. And since the Cabinet controls the government, there is in practice a degree of overlap among the terms "government", "Cabinet" and "executive". In these reasons, I have used all of these terms, as one or another may be more appropriate in a given context. The government has the power to introduce legislation in Parliament. In practice, the bulk of the new legislation is initiated by the government. By virtue of s. 54 of the *Constitution Act, 1867*, a money bill, including an amendment to a money bill, can only be introduced by means of the initiative of the government.

The interpretation of the questions does not take place in a vacuum but in the context of the above constitutional facts and the events giving rise to the questions. Of particular significance is the fact that the Government of Canada introduced Bill C-69 and the allegation that this was a breach of the Agreement. The question must be given an interpretation that will make the answer of assistance in resolving the dispute.

In the Court of Appeal, this first question was interpreted as asking whether the federal government, in the absence of any new legislation amending the *Plan*, could unilaterally modify its obligations under the *Plan* and the Agreement. With respect, this interpretation has insufficient regard for the facts which gave rise to this dispute, and in particular for the introduction of Bill C-69. Moreover, this interpretation leads to an answer which is of no use in resolving the dispute with which the Court is faced. In my opinion, the first question asks the Court to determine whether the Agreement obliges the Government of Canada to pay to British Columbia the contribu-

Gouverneur général. Les pouvoirs exécutifs de ce dernier s'exercent, bien sûr, conformément à certaines conventions constitutionnelles. Par exemple, à la suite d'une élection, il demande au chef de parti approprié de former un gouvernement. Une fois le gouvernement en place, les principes démocratiques commandent que le gros des pouvoirs du Gouverneur général soient exercés en conformité avec la volonté des dirigeants de ce gouvernement, à savoir le cabinet. C'est donc le cabinet qui détient le véritable pouvoir exécutif. Et comme c'est le cabinet qui contrôle le gouvernement, il en résulte dans la pratique que les termes «gouvernement», «cabinet» et «exécutif» se chevauchent jusqu'à un certain point. Dans les présents motifs, je me sers de chacun de ces mots, employant celui qui convient le mieux dans un contexte donné. Le gouvernement a le pouvoir de déposer un projet de loi devant le Parlement. En pratique, la plupart des projets de loi sont déposés à l'initiative du gouvernement et, suivant l'art. 54 de la *Loi constitutionnelle de 1867*, c'est seulement à l'initiative du gouvernement que peut être déposé un projet de loi de finances ou un projet de loi modificative dans ce domaine.

L'interprétation des questions ne se fait pas sur une table rase, mais bien dans le contexte des faits constitutionnels ci-dessus exposés et des événements à l'origine de ces questions. Revêtent une importance particulière à cet égard le fait que le projet de loi C-69 a été déposé par le gouvernement du Canada et l'allégation que cela constituait une violation de l'accord. La question doit être interprétée de telle façon que la réponse donnée nous aide à résoudre le litige.

La Cour d'appel a interprété la première question comme demandant si, en l'absence d'une nouvelle loi modifiant le *Régime*, le gouvernement fédéral pouvait unilatéralement modifier les obligations lui incombant aux termes du *Régime* et de l'accord. En toute déférence, cette interprétation ne tient pas suffisamment compte des faits à l'origine du présent litige ni, en particulier, du dépôt du projet de loi C-69. De plus, cette interprétation amène une réponse qui ne sert aucunement à résoudre le litige dont la Cour se trouve saisie. À mon avis, dans la première question, on demande à la Cour de décider si l'accord oblige le gouvernement du Canada à verser à la Colombie-

548

REFERENCE RE CANADA ASSISTANCE PLAN (B.C.) *Sopinka J.*

[1991] 2 S.C.R.

tions that were authorized when the Agreement was signed, or rather whether the obligation is to pay those contributions which are authorized from time to time. Adopting the terminology of Lambert J.A. in the Court of Appeal, the former may be called a "static" interpretation and the latter an "ambulatory" one. If the former interpretation is correct, the Government of Canada acted contrary to the Agreement in introducing Bill C-69 in Parliament, whereas if the latter is correct the government acted in accordance with the Agreement.

In general, the language of the *Plan* is duplicated in the Agreement. But the contribution formula, which actually authorizes payments to the provinces, does not appear in the Agreement. It is only in s. 5 of the *Plan*. Clause 3(1)(a) of the Agreement provides that "Canada agrees . . . to pay to the province of British Columbia the contributions or advances . . . that Canada is authorized to pay to that province under the Act and the Regulations". That means, of course, the contributions or advances authorized by s. 5 of the *Plan*, an instrument that is to be construed as subject to amendment. This is the effect of s. 42(1) of the *Interpretation Act* which states:

42. (1) Every Act shall be so construed as to reserve to Parliament the power of repealing or amending it, and of revoking, restricting or modifying any power, privilege or advantage thereby vested in or granted to any person.

In my view this provision reflects the principle of parliamentary sovereignty. The same results would flow from that principle even in the absence or non-applicability of this enactment. But since the *Interpretation Act* governs the interpretation of the *Plan* and all federal statutes where no contrary intention appears, the matter will be resolved by reference to it.

It is conceded that the government could not bind Parliament from exercising its powers to legislate amendments to the *Plan*. To assert the contrary would be to negate the sovereignty of Parliament. This basic fact of our constitutional life was, therefore, present to the minds of the parties when the *Plan* and Agree-

Britannique les contributions autorisées lors de la signature de l'accord ou s'il s'agit plutôt d'une obligation de payer les contributions qui sont autorisées à l'occasion. Adoptant les termes employés par le juge *Lambert* en Cour d'appel, on peut qualifier de [TRADUCTION] «statique» la première interprétation et de [TRADUCTION] «dynamique» la seconde. À supposer que la première interprétation soit juste, le gouvernement du Canada a violé l'accord en déposant devant le Parlement le projet de loi C-69, tandis que, si c'est la seconde qu'il faut retenir, le gouvernement a agi en conformité avec l'accord.

c L'accord reprend généralement les termes du *Régime*. Toutefois, la formule de calcul des contributions, qui autorise en fait les paiements aux provinces, ne figure pas dans l'accord, mais seulement à l'art. 5 du *Régime*. La clause 3(1)a) de l'accord stipule que [TRADUCTION] «[l]e Canada convient[...] de payer à la province de la Colombie-Britannique les contributions ou les avances[...] que le Canada est autorisé à payer à cette province en vertu de la Loi et des règlements». Il s'agit, bien entendu, des contributions ou des avances autorisées par l'art. 5 du *Régime*, un document qui doit être considéré comme susceptible de modification. C'est ce qui découle du par. 42(1) de la *Loi d'interprétation*, qui prévoit:

f 42. (1) Il est entendu que le Parlement peut toujours abroger ou modifier toute loi et annuler ou modifier tous pouvoirs, droits ou avantages attribués par cette loi.

g À mon avis, cette disposition reflète le principe de la souveraineté du Parlement, lequel principe entraînerait des résultats identiques même dans l'hypothèse de l'inexistence ou de l'inapplicabilité de cette disposition. Mais comme la *Loi d'interprétation* régit l'interprétation du *Régime* et de toutes les lois fédérales qui ne manifestent aucune intention contraire, c'est par référence à cette loi que sera résolue la question.

i On reconnaît que le gouvernement ne pouvait prendre un engagement qui empêcherait le Parlement d'exercer ses pouvoirs de légiférer pour modifier le *Régime*. Affirmer le contraire reviendrait à nier la souveraineté du Parlement. Cet aspect fondamental de notre vie constitutionnelle était donc présent à

ment were enacted and concluded. The parties were also aware that an amendment to the *Plan* would have to be initiated by the government by reason of the provisions of s. 54 of the *Constitution Act, 1867*. If it had been the intention of the parties to arrest this process, one would have expected clear language in the Agreement that the payment formula was frozen. Instead, the payment formula was left out of the Agreement and placed in the statute where it was, by virtue of s. 42, subject to amendment. In these circumstances the natural meaning to be given to the words "authorized to pay . . . under the Act" in clause 3(1)(a) is that the obligation is to pay what is authorized from time to time. The government was, therefore, not precluded from exercising its powers to introduce legislation in Parliament amending the *Plan*.

The case for the contrary view, labelled as the "static" interpretation by Lambert J.A., was summarized by him in six points. I will examine each in turn.

First, he said that it is unlikely that the parties would have agreed to an arrangement in which Canada could change the arrangement unilaterally while British Columbia could not. There would be a "want of mutuality". It may be noted, though, that by s. 8(1) of the *Plan*, which is mirrored in clause 6(2) of the Agreement, the Agreement is terminated if the provincial welfare and assistance legislation ceases to be in force. The parties, therefore, acknowledged that both were free to terminate the Agreement by appropriate legislation.

Second, he said that agreements must be interpreted to accord with the intention of the parties. He said that the ordinary rule of interpretation is that if an agreement refers to something which could change, it will be taken to refer to the state of affairs at the time the Agreement was made and not from time to time. He cited certain cases which deal with statutory provisions making legal rules applicable by reference. None of the cases dealt with an agreement, let alone an agreement between levels of government,

l'esprit des parties lors de l'adoption du *Régime* et au moment de la conclusion de l'accord. Les parties étaient en outre conscientes que, suivant l'art. 54 de la *Loi constitutionnelle de 1867*, c'était le gouvernement qui devrait prendre l'initiative de modifier le *Régime*. Si les parties avaient voulu suspendre ce processus, on se serait attendu à ce que l'accord stipule clairement que la formule des paiements était figée. Ce qui est arrivé plutôt c'est que la formule des paiements a été exclue de l'accord pour être insérée dans une loi où, aux termes de l'art. 42, elle était susceptible de modification. Dans ces circonstances, le sens naturel à donner à l'expression [TRADUCTION] «autorisé à payer [...] en vertu de la Loi» employée à la clause 3(1)a de l'accord est qu'il s'agit d'une obligation de payer les sommes autorisées à l'occasion. Rien n'empêchait donc le gouvernement d'exercer ses pouvoirs de déposer devant le Parlement un projet de loi modifiant le *Régime*.

Les arguments en faveur du point de vue contraire, appelé l'interprétation «statique» par le juge Lambert de la Cour d'appel, ont été résumés par ce dernier en six points que j'examinerai à tour de rôle.

Premièrement, le juge Lambert a affirmé qu'il est peu probable que les parties auraient conclu un accord que le Canada pourrait modifier unilatéralement alors que la Colombie-Britannique ne le pourrait pas. Il y aurait eu dans ce cas-là [TRADUCTION] «absence de réciprocité». On peut noter toutefois que, suivant le par. 8(1) du *Régime*, qui est reflété à la clause 6(2) de l'accord, ce dernier est résilié si la législation provinciale en matière de protection sociale et d'assistance publique cesse d'être en vigueur. Les parties ont donc reconnu qu'elles étaient toutes les deux libres de résilier l'accord par l'adoption d'une loi appropriée.

Deuxièmement, le juge Lambert a dit qu'un accord doit s'interpréter d'une manière qui soit conforme à l'intention des parties. Selon la règle ordinaire applicable en matière d'interprétation, a-t-il affirmé, si un accord se rapporte à un état de choses susceptible de changer, il est considéré comme visant la situation existante au moment où il a été conclu plutôt que celle pouvant se présenter à différents moments par la suite. Le juge Lambert a cité certaines décisions portant sur des dispositions législatives qui rendent

Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] 2 R.C.S. 525

550

REFERENCE RE CANADA ASSISTANCE PLAN (B.C.) *Sopinka J.*

[1991] 2 S.C.R.

each of which can spend money only under the authority of its corresponding legislative body. If this rule of construction applies to an agreement such as this, it is subject to contrary indications in the Agreement. For the reasons stated above, insertion of the formula for payment in a statute which by law is to be construed as subject to amendment is a very strong indication that there was no intention that the formula should remain forever frozen.

applicables par renvoi les règles juridiques. Il ne s'agit dans aucune de ces affaires d'un accord, encore moins est-il question d'un accord intervenu entre différents paliers de gouvernement, dont l'un et l'autre ne peut effectuer des dépenses qu'avec l'autorisation du corps législatif qui lui correspond. Or, si cette règle d'interprétation s'applique à un accord comme celui qui est présentement en cause, elle est néanmoins soumise aux indications contraires contenues dans l'accord. Pour les raisons déjà exposées, l'inclusion de la formule de paiement dans un texte législatif qui, aux termes de la loi, doit être considéré comme susceptible de modification, constitue une très forte indication qu'on n'a pas voulu que la formule demeure à tout jamais figée.

Third, he observed that the formula governing the contribution level was placed in the *Plan* (in s. 5(1)) but not in the Agreement. Lambert J.A. said that this was not done to allow Canada to alter the contribution levels unilaterally, but rather due to the "fragile constitutionality" of the federal spending power. That fragility, he said, required that the spending authorization be embodied in an Act of Parliament. Assuming that this was the reason for placing the payment formula in the *Plan*, the parties were aware that by so doing it became subject to amendment. No attempt was made to structure the formula in a way that would have suggested that there was a fetter on the amending power. For instance, the *Plan* could have simply authorized a level of contributions calculated according to a formula in the Agreement. Moreover, the formula could have been placed in both the *Plan* and the Agreement. This was not done.

Troisièmement, le juge Lambert a observé que la formule de calcul des contributions figure dans le *Régime* (au par. 5(1)) mais non dans l'accord. D'après le juge Lambert, cela n'a pas pour but de permettre au Canada de modifier unilatéralement le montant des contributions; cela s'explique plutôt par la [TRADUCTION] «constitutionnalité fragile» du pouvoir de dépenser du gouvernement fédéral. Cette fragilité, a-t-il dit, nécessitait que l'autorisation de dépenser soit consacrée dans une loi du Parlement. À supposer que ce soit là la raison pour laquelle la formule de paiement a été insérée dans le *Régime*, les parties savaient qu'elle était dès lors susceptible de modification. On n'a aucunement tenté d'énoncer la formule d'une manière propre à indiquer que le pouvoir de modification était restreint. Par exemple, le *Régime* aurait pu simplement autoriser un niveau de contributions calculé selon une formule prévue dans l'accord. De plus, la formule aurait pu être incluse à la fois dans le *Régime* et dans l'accord. Ce n'est toutefois pas ce qui a été fait.

The fourth point made by Lambert J.A. referred to s. 9(2) of the *Plan*, which stipulates that the regulations to the *Plan* cannot be changed substantively without the consent of the province. He said this was only consistent with the conclusion that the contribution levels could not be changed unilaterally, either by the federal executive or by Parliament. He said that this inability of Parliament to amend the *Plan* was not made express in the *Plan*, as Parliament would not consider such a limitation on its powers as

Le quatrième point dont traite le juge Lambert concerne le par. 9(2) du *Régime*, qui dispose qu'aucune modification de fond ne peut être apportée aux règlements pris en vertu du *Régime*, à moins que la province n'y donne son assentiment. Selon le juge Lambert, la seule conclusion à en tirer est que les niveaux des contributions ne peuvent être changés unilatéralement, que ce soit par l'exécutif fédéral ou par le Parlement. Il dit que cette inhabilité du Parlement à modifier le *Régime* n'était pas expressément prévue

appropriate. With respect, there is some inconsistency here: Lambert J.A. is saying that Parliament has indirectly limited its own power to amend the *Plan*, via s. 9(2) which seems to deal only with regulations, while also saying that Parliament would consider any such limit to be inappropriate. Why is an indirect limit any more appropriate than a direct one?

Moreover, there are many statutes in which the power of the federal government to regulate is limited in order to ensure that certain matters are reserved to Parliament and therefore are only dealt with in the full light of the public and accountable legislative process. For example, by s. 40(1) of the *Emergencies Act*, R.S.C., 1985, c. 22 (4th Supp.), the federal cabinet is granted a very wide power to regulate when a declaration of a war emergency is in effect. But by s. 40(2), that power may not be used to conscript persons into the armed forces. As a result, conscription can only be effected via the legislative process. So it is with the *Plan*. Parliament has authorized the federal government to enter certain agreements, and has given the federal government certain regulatory powers in connection therewith. Those regulatory powers cannot be used by the federal government to alter substantively its obligations under the Agreement. But it is a far cry from that arrangement to conclude that Parliament, by a restriction on the regulatory powers of the federal government, intended to fetter its own sovereign legislative power.

Fifth, Lambert J.A. referred to s. 5(2)(c) of the *Plan*. That provision stipulates that for the purposes of s. 5, "cost" does not include any cost that Canada bears pursuant to any federal Act passed "before, on or after the 15th day of July 1966". Lambert J.A. said that this shows that where Canada intended to create an ambulatory cross-reference, as opposed to a static one, it did so specifically. Two points present themselves in this regard. The *Plan* is a statute passed by Parliament; in the Agreement, we seek the common intention of the Governments of Canada and British

dans le *Régime* étant donné que le Parlement ne jugerait guère convenable que ses pouvoirs soient ainsi limités. En toute déférence, il y a là contradiction: le juge Lambert dit, d'une part, que le Parlement, par le biais du par. 9(2), qui ne semble viser que les règlements, a indirectement limité son propre pouvoir de modifier le *Régime*, tout en affirmant, d'autre part, que le Parlement tiendrait pour non convenable une telle restriction. Pourquoi une restriction indirecte convient-elle mieux qu'une restriction directe?

De plus, bon nombre de lois viennent limiter le pouvoir de réglementation du gouvernement fédéral afin d'assurer que certaines questions soient réservées au Parlement et ne soient en conséquence abordées que dans le cadre du processus législatif avec toute la publicité et l'imputabilité qu'il comporte. Par exemple, le par. 40(1) de la *Loi sur les mesures d'urgence*, L.R.C. (1985), ch. 22 (4^e suppl.), investit le cabinet fédéral d'un très large pouvoir de réglementation pendant la durée de validité d'une déclaration d'état de guerre. Aux termes du par. 40(2), cependant, ce pouvoir ne peut être utilisé pour contraindre des personnes à servir dans les forces armées. La conscription ne peut donc être imposée que par le recours au processus législatif. Il en va de même du *Régime*. Le Parlement a autorisé le gouvernement fédéral à conclure certains accords et lui a conféré certains pouvoirs de réglementation à cet égard, pouvoirs dont le gouvernement fédéral ne saurait se servir pour apporter des modifications de fond à ses obligations découlant d'un accord. Mais de là à conclure que le Parlement, au moyen d'une restriction des pouvoirs de réglementation du gouvernement fédéral, a voulu limiter son propre pouvoir législatif souverain, il y a loin.

Cinquièmement, le juge Lambert a parlé de l'al. 5(2)c) du *Régime*. Cette disposition porte qu'aux fins de l'art. 5, le mot «frais» ne comprend pas tous frais que le Canada supporte en conformité avec quelque loi du Parlement du Canada votée «avant ou après le 15 juillet 1966, ou à cette date». Il en ressort, dit le juge Lambert, que lorsque le Canada a voulu établir un renvoi susceptible de modification et non pas statique, il l'a fait expressément. Deux points sont à retenir à ce propos. Le *Régime* est une loi adoptée par le Parlement, tandis que, dans l'accord, il

552

REFERENCE RE CANADA ASSISTANCE PLAN (B.C.) *Sopinka J.*

[1991] 2 S.C.R.

Columbia. The two documents were not created by the same entity, nor by the same process, so the use of an expression in one document is not necessarily helpful in the interpretation of the other. In any event, this suggests that the parties should have added the words "as amended from time to time" to clause 3(1)(a). This was unnecessary because by referring to the *Plan*, s. 42 of the *Interpretation Act* added it for them.

When the *Plan* was originally enacted as S.C. 1966-67, c. 45, s. 5(2)(c) ended with the words "pursuant to any Act of the Parliament of Canada passed before or after the coming into force of this Act." The *Plan* came into force on July 15, 1966, and when the Revised Statutes of Canada 1970 were compiled the wording was changed to that set out above. I have observed that the questions on this reference ask about the meaning of the *Plan* in the R.S.C. 1970. It is of some significance that in the R.S.C. 1985, s. 5(2)(c) ends simply with the words "pursuant to any Act of Parliament". Presumably the Statute Revision Commission, acting under s. 6(e) or (f) of what is now the *Statute Revision Act*, R.S.C., 1985, c. S-20, removed the words referring to July 15, 1966 on the view that such a removal effected no substantive change. I agree that those words do not have a substantive effect, as any reference in a federal statute to the Acts of the federal Parliament must be taken to mean those Acts as they exist from time to time: see s. 10 of the *Interpretation Act*.

The last point made by Lambert J.A. is rather difficult to follow. It relates to clause 1(a) of the Agreement, which reads in relevant part:

1. In this Agreement,

(a) words and phrases to which meanings have been assigned by the Act or the Regulations shall have the same meanings, respectively, as are assigned to them in the Act and Regulations; . . .

faut rechercher l'intention commune des gouvernements du Canada et de la Colombie-Britannique. Les deux documents n'émanent pas de la même entité ni ne résultent du même processus, de sorte que l'emploi d'une certaine expression dans l'un d'eux ne nous aide pas nécessairement à interpréter l'autre. Quoi qu'il en soit, ce point de vue laisse entendre que les parties auraient dû ajouter à la clause 3(1)a) de l'accord les mots «modifiés à l'occasion». Cela n'était toutefois pas nécessaire parce qu'en ce qui concerne le *Régime*, l'art. 42 de la *Loi d'interprétation* avait pour effet de l'ajouter pour elles.

g L'alinéa 5(2)c) du *Régime* adopté initialement, S.C. 1966-67, ch. 45, se terminait par les mots suivants «en conformité de quelque loi du Parlement du Canada votée avant ou après l'entrée en vigueur de la présente loi». Le *Régime* est entré en vigueur le 15 juillet 1966 et la formulation de cet alinéa a été modifiée pour devenir le texte précité dans les Statuts révisés du Canada 1970. J'ai fait observer que les questions posées dans le présent pourvoi concernent la signification des dispositions du *Régime* selon les S.R.C. 1970. Il est assez révélateur que dans les L.R.C. (1985), l'al. 5(2)c) se termine simplement par l'expression «en conformité avec quelque autre partie ou avec quelque loi fédérale». On peut supposer que la Commission de révision des lois, en vertu des al. 6e) ou 6f) de ce qui est maintenant la *Loi sur la révision des lois*, L.R.C. (1985), ch. S-20, a supprimé toute référence à la date du 15 juillet 1966, estimant que le retrait de ces mots ne constituait pas une modification du fond. Je conviens que ces mots ne changent rien au fond puisque, dans une loi fédérale, toute mention de lois du Parlement fédéral doit être interprétée comme visant les lois en vigueur: voir l'art. 10 h de la *Loi d'interprétation*.

i Le dernier point avancé par le juge Lambert se révèle quelque peu abscons. Il porte sur la clause 1a) de l'accord, qui stipule notamment:

[TRADUCTION] **1. Dans le présent accord,**

j a) les mots et les expressions définis dans la Loi ou dans les règlements ont le sens que leur donnent la Loi et les règlements; . . .

Lambert J.A. noted that by s. 9(2) of the *Plan*, the definitions in the regulations, and hence the meaning in the Agreement of the terms defined in the Regulations, cannot be changed without provincial consent. He said that it followed that Canada could have no power to change the definitions in the *Plan*, as that would mean that it could unilaterally change the meaning in the Agreement of those terms defined in the *Plan*, whereas consent is required to change the meaning in the Agreement of those terms defined in the regulations. Two points immediately present themselves. First, this again amounts to saying that there is no difference between regulation and legislation, which assertion refutes itself. Second, if I am correct that the Agreement contemplated that the authority to pay was an authority subject to amendment, the power to amend the *Plan* must have included any necessary change to definitions.

Finally, although not included as one of the six points, the respondent submitted that the Government of Canada was bound by s. 8 of the *Plan* which is set out above. That section provides that the Agreement is to continue in force so long as the provincial legislation (*Guaranteed Available Income for Need Act*, R.S.B.C. 1979, c. 158) remained in force. It could also be terminated on notice by either party and amended with the consent of the parties. The contention is that the Agreement could only be amended in accordance with s. 8. This submission fails to take into account that the Agreement which is subject to the amending formula in s. 8 obliges Canada to pay the amounts which Parliament has authorized Canada to pay pursuant to s. 5 of the *Plan*. Hence, the payment obligations under the Agreement are subject to change when s. 5 is changed. That provision contains within it its own process of amendment by virtue of the principle of parliamentary sovereignty reflected in s. 42 of the *Interpretation Act*.

If this appears to deprive the Agreement of binding effect or mutuality, which are both features of ordinary contracts, it must be remembered that this is not an ordinary contract but an agreement between gov-

Le juge Lambert a fait remarquer que, suivant le par. 9(2) du *Régime*, les définitions établies dans les règlements et, par voie de conséquence, le sens qu'ont dans l'accord les termes ainsi définis, ne peuvent être modifiés sans l'assentiment de la province. Il s'ensuit, d'après lui, que le Canada ne peut être habilité à modifier les définitions figurant dans le *Régime* parce que cela signifierait qu'il pourrait changer unilatéralement le sens qu'ont dans l'accord les termes définis dans le *Régime*, tandis qu'un assentiment est requis pour changer le sens qu'ont dans l'accord les termes définis dans les règlements. Deux points se présentent immédiatement à l'esprit. En premier lieu, cela revient à dire, encore une fois, qu'il n'y a aucune différence entre un règlement et une loi, assertion qui se réfute elle-même. En deuxième lieu, si j'ai raison d'affirmer que l'accord envisage que l'autorisation de payer est susceptible de modification, le pouvoir de modifier le *Régime* doit comprendre celui d'apporter aux définitions toute modification nécessaire.

Finalement, bien que cet argument ne figure pas parmi les six points susmentionnés, l'intimé a fait valoir que le gouvernement du Canada était lié par l'art. 8 du *Régime*, reproduit plus haut. Cet article prévoit que l'accord reste en vigueur tant que la législation provinciale (en l'occurrence la *Guaranteed Available Income for Need Act*, R.S.B.C. 1979, ch. 158) est appliquée. De plus, l'accord peut être résilié sur avis donné par l'une ou l'autre partie et modifié avec leur consentement. On soutient que l'accord ne peut être modifié qu'en conformité avec l'art. 8. Or, cet argument ne tient pas compte de ce que l'accord assujetti à la formule de modification prévue à l'art. 8 oblige le Canada à verser les montants que le Parlement a autorisé le Canada à payer en vertu de l'art. 5 du *Régime*. Donc, les obligations prévues par l'accord en matière de paiement peuvent être modifiées par une modification de l'art. 5. Cette disposition renferme son propre processus de modification en vertu du principe de la souveraineté du Parlement reflété à l'art. 42 de la *Loi d'interprétation*.

Si cela paraît enlever à l'accord son effet obligatoire ou son caractère de réciprocité, deux traits propres aux contrats ordinaires, il faut se rappeler qu'il ne s'agit pas ici d'un contrat ordinaire, mais

554

REFERENCE RE CANADA ASSISTANCE PLAN (B.C.) *Sopinka J.*

[1991] 2 S.C.R.

ements. Moreover, s. 8 itself contains an amending formula that enables either party to terminate at will. In lieu of relying on mutually binding reciprocal undertakings which promote the observance of ordinary contractual obligations, these parties were content to rely on the perceived political price to be paid for non-performance.

bien d'un accord intervenu entre des gouvernements. En outre, l'art. 8 contient lui-même une formule de modification qui permet à l'une ou à l'autre partie de résilier l'accord à son gré. Plutôt que de se lier mutuellement par des engagements réciproques propres à favoriser l'exécution d'obligations contractuelles ordinaires, les parties en l'espèce se sont contentées de se fier à ce qu'elles percevaient comme le prix politique de l'inexécution.

The result of this is that the Government of Canada, in presenting Bill C-69 to Parliament, acted in accordance with the Agreement and otherwise with the law which empowers the Government of Canada to introduce a money bill in Parliament.

c Il s'ensuit que le gouvernement du Canada, en déposant le projet de loi C-69 devant le Parlement, a agi en conformité avec l'accord et, par ailleurs, avec la loi qui l'habilité à déposer devant le Parlement un projet de loi de finances.

The answer to Question 1, therefore, is "Yes."

d La réponse à la première question est donc affirmative.

(b) *Question 2*

e b) *La seconde question*

[TRADUCTION]

f (2) Do the terms of the Agreement dated March 23, 1967 between the Governments of Canada and British Columbia, the subsequent conduct of the Government of Canada pursuant to the Agreement and the provisions of the *Canada Assistance Plan Act* [sic], R.S.C. 1970, c. C-1, give rise to a legitimate expectation that the Government of Canada would introduce no bill into Parliament to limit its obligation under the Agreement or the *Act* without the consent of British Columbia?

g (2) Les conditions de l'accord en date du 23 mars 1967 intervenu entre les gouvernements du Canada et de la Colombie-Britannique, la conduite subséquente du gouvernement du Canada dans l'exécution de cet accord et les dispositions du *Régime d'assistance publique du Canada*, S.R.C. 1970, ch. C-1, permettent-elles de s'attendre légitimement à ce que le gouvernement du Canada ne dépose devant le Parlement aucun projet de loi tendant à limiter, sans le consentement de la Colombie-Britannique, l'obligation que lui impose l'accord ou le *Régime*?

h The first step is the interpretation of the question, which will determine which arguments must be considered on the issue of whether there was a legitimate expectation. The members of the court below took differing views on the interpretation of this question. Toy J.A. interpreted the question as seeking a declaration that Canada breached a legal duty to act fairly. He considered the question to be asking about the doctrine of legitimate expectations that has developed in administrative law.

i Il faut commencer par interpréter la question, ce qui nous permettra de déterminer quels arguments doivent être pris en considération relativement à l'existence ou à l'inexistence d'une expectative légitime. Les opinions des membres de la Cour d'appel en l'espèce ont divergé sur l'interprétation de cette question. Le juge Toy l'a interprétée comme visant à faire déclarer que le Canada a manqué à une obligation juridique d'agir équitablement. Selon lui, la question concernait la théorie de l'expectative légitime élaborée en droit administratif.

j Lambert J.A. took another view. In discussing the interpretation of the questions, he said (at p. 278):

Le juge Lambert a adopté un point de vue différent. Traitant de l'interprétation des questions, il a dit (à la p. 278):

Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] 2 R.C.S. 525

[1991] 2 R.C.S.

RENOVI: RÉGIME D'ASSISTANCE DU CANADA (C.-B.)

Le juge Sopinka

555

The two questions provide a framework within which the "matter" is to be considered. We should be guided to the heart of the "matter" by the way the questions have been composed. But since they have been composed by one party only, namely, the Executive Government of British Columbia, we should not feel bound by a narrow literalism in answering the questions. Within the broad constraints of the language of the questions, we should feel free to address the "matter" which they encompass.

While I agree that the court should avoid a "narrow literalism", care must be taken that the interpretation of a question does not amount to a new question. In the language of the dissenting judges in Part II of *Reference re Resolution to amend the Constitution, supra*, the court "may not conjure up questions of its own which, in turn, would lead to uninvited answers" (p. 850). No issue was taken by the majority with this proposition which appears to be self-evident and is amply supported by authority: *Reference re Magistrate's Court of Quebec*, [1965] S.C.R. 772, at pp. 779-80; *Lord's Day Alliance of Canada v. Attorney-General for Manitoba*, [1925] A.C. 384, at pp. 388-89; *Attorney-General for Ontario v. Attorney-General for Canada*, [1912] A.C. 571; and *Reference re Waters and Water-Powers*, [1929] S.C.R. 200.

It is a misplaced concern to state that the questions were composed by one party. The Lieutenant Governor is authorized by the *Constitutional Question Act* to ask any question of the court, and this should not be held against him. No principle analogous to *contra proferentem* is applicable. If a question is clear, then the court is indeed bound to answer it on its terms, so long as it is justiciable. Even if it is not clear, like the questions in this reference, the court must do its best to determine what is being asked and to provide a response, again subject to the question's being justiciable.

Lambert J.A. said (at p. 286):

I have concluded that the answer ought to turn on whether the executive arm of the federal power, which

[TRADUCTION] Les deux questions forment un cadre dans lequel l'«affaire» doit être examinée. Le mode de formulation des questions devrait nous mener au cœur de l'«affaire». Mais comme elles ont été formulées par une seule partie, en l'occurrence l'exécutif du gouvernement de la Colombie-Britannique, nous ne devrions pas nous sentir tenus à une stricte littéralité lorsque nous répondons à ces questions. Tout en respectant les contraintes générales que nous impose la formulation des questions, nous ne devons pas hésiter à aborder l'«affaire» qu'elles englobent.

Je conviens que la cour doit éviter une «stricte littéralité», mais il faut prendre garde d'éviter que l'interprétation d'une question revienne à formuler une question nouvelle. Comme le disent les juges dissidents à la partie II du *Renvoi: Résolution pour modifier la Constitution*, précité, la cour «ne peut évoquer de son propre chef des questions qui conduiraient à des réponses non sollicitées» (p. 850). Les juges formant la majorité n'ont pas contesté cette proposition qui semble aller de soi et être largement appuyée par la jurisprudence: *Renvoi relatif à la Cour de Magistrat de Québec*, [1965] R.C.S. 772, aux pp. 779 et 780, *Lord's Day Alliance of Canada v. Attorney-General for Manitoba*, [1925] A.C. 384, aux pp. 388 et 389, *Attorney-General for Ontario v. Attorney-General for Canada*, [1912] A.C. 571, et *Reference re Waters and Water-Powers*, [1929] R.C.S. 200.

On a tort de se plaindre en l'espèce de ce que les questions ont été formulées par une seule partie. Le lieutenant-gouverneur est autorisé par la *Constitutional Question Act* à soumettre n'importe quelle question à la cour et il ne faut pas lui en tenir rigueur. Aucun principe analogue à celui du *contra proferentem* n'est applicable. Pour peu que la question soit claire et qu'elle relève de la compétence des tribunaux, la cour est effectivement tenue d'y répondre telle qu'elle a été formulée. Même à supposer qu'elle soit équivoque, comme c'est le cas des questions posées dans le présent renvoi, la cour doit faire de son mieux pour déterminer ce qui est demandé et donner une réponse, à condition toujours que la question relève de la compétence des tribunaux.

Le juge Lambert a dit (à la p. 286):

[TRADUCTION] J'ai conclu que la réponse devrait tenir à la question de savoir si la branche exécutive du pou-

556

REFERENCE RE CANADA ASSISTANCE PLAN (B.C.) *Sopinka J.*

[1991] 2 S.C.R.

could be called either the government of Canada or the federal Crown, would be in breach of a binding obligation owed by it to British Columbia if it failed to pay 50 per cent of the cost to British Columbia of providing the type and quality of assistance to those in need that is contemplated by the Canada Assistance Plan.

Thus Lambert J.A. viewed the question as asking whether Canada would be in breach of its obligations were the contemplated amendment to be effected. I have explained that in my view that was the issue under the first question. Finally, in answering "Yes" to the second question, Lambert J.A. said that he was using the words "legitimate expectation" in their ordinary meaning and not in any technical sense. Because he thought that Canada breached an obligation by introducing Bill C-69, he said that British Columbia had a legitimate expectation that Canada would not introduce the Bill. Since it was based solely on the finding that an obligation had been breached, the finding that there was a legitimate expectation did not add anything of legal significance to his conclusions. It was just a way of describing those conclusions.

Southin J.A. said that in her view the *Constitutional Question Act* only authorizes the asking of questions of law. Hence, she said that the second question could not be seen as asking about customs or conventions. She said (at p. 313):

I interpret it as asking whether there is any legal impediment to the Governor in Council, through the Minister of Finance, asking Parliament, i.e. the Senate, the House of Commons and the Sovereign, to enact Bill C-69 or any legal impediment to Parliament doing so.

When regard is had for the jurisprudence in the area of administrative law, it can be seen that Question 2 is not ambiguous. It asks about the presence of legitimate expectations. With respect to Lambert J.A., that is a term of art. It is a technical phrase, and its use in a question asked of a court of law of course implies that it is being used in its legal sense. I respectfully agree with the interpretation of the sec-

voir fédéral, que l'on pourrait appeler le gouvernement du Canada ou la Couronne fédérale, se trouverait à manquer à une obligation qu'il avait envers la Colombie-Britannique s'il ne payait pas 50 pour 100 des frais engagés par cette dernière pour fournir aux nécessiteux une assistance du genre et de la qualité envisagés dans le Régime d'assistance publique du Canada.

Donc, selon le juge Lambert, il s'agit de la question de savoir si le Canada manquerait à ses obligations si la modification envisagée était effectuée. J'ai déjà expliqué qu'à mon avis c'est précisément là le point que soulève la première question. Finalement, en donnant à la seconde question une réponse affirmative, le juge Lambert a dit qu'il prêtait à l'expression «expectative légitime» son sens ordinaire et non un sens technique. Puisqu'il a estimé que le Canada a manqué à une obligation en déposant le projet de loi C-69, il a dit que la Colombie-Britannique pouvait légitimement s'attendre à ce que le Canada ne dépose pas ce projet de loi. Vu qu'elle reposait uniquement sur la constatation qu'on avait manqué à une obligation, la conclusion à l'existence d'une expectative légitime n'apportait à ses conclusions rien d'important sur le plan juridique. Ce n'était en fait qu'une façon de décrire ces conclusions.

Le juge Southin s'est dite d'avis que la *Constitutional Question Act* n'autorise à poser que des questions de droit, d'où son assertion que la seconde question ne pouvait être considérée comme concernant des coutumes ou des conventions. Elle affirme en effet (à la p. 313):

[TRADUCTION] Selon mon interprétation, la question vise à déterminer s'il existe un empêchement juridique qui fait que le gouverneur en conseil, par l'intermédiaire du ministre des Finances, ne peut demander au Parlement, c.-à-d. au Sénat, à la Chambre des communes et au Souverain, d'adopter le projet de loi C-69, ou s'il existe un empêchement juridique qui fait que le Parlement ne peut l'adopter.

Quand on tient compte de la jurisprudence en matière de droit administratif, on constate que la seconde question ne renferme aucune ambiguïté. Elle concerne l'existence d'une expectative légitime. Sauf le respect que je dois au juge Lambert, c'est là un terme technique. Il s'agit d'une expression technique dont la présence dans une question soumise à une cour de justice implique, bien entendu, qu'elle est uti-

ond question by Southin J.A. with the addition that the legal impediment involved is that which is alleged to be imposed by the legal doctrine of legitimate expectations.

Legitimate Expectations

The doctrine of legitimate expectations was discussed in the reasons of the majority in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170. That judgment cites seven cases dealing with the doctrine, and then goes on (at p. 1204):

The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation.

It was held by the majority of the court below, and it was argued before us by the Attorney General of British Columbia, that the federal government acted illegally in invoking the power of Parliament to amend the *Plan* without obtaining the consent of British Columbia. The action was illegal because it violated a legitimate expectation of British Columbia. These submissions were adopted by the Attorney General for Alberta. This must be contrasted with a claim that there was a legitimate expectation that the federal government would not act without consulting British Columbia. If the doctrine of legitimate expectations required consent, and not merely consultation, then it would be the source of substantive rights; in this case, a substantive right to veto proposed federal legislation.

There is no support in Canadian or English cases for the position that the doctrine of legitimate expectations can create substantive rights. It is a part of the rules of procedural fairness which can govern administrative bodies. Where it is applicable, it can create a right to make representations or to be consulted. It

lisée dans son sens juridique. En toute déférence, je souscris à l'interprétation donnée à la seconde question par le juge Southin et j'ajoute seulement que l'empêchement juridique en cause est celui qui, prétend-on, résulte de la théorie juridique de l'expectative légitime.

L'expectative légitime

^b La théorie de l'expectative légitime est traitée dans les motifs des juges formant la majorité dans l'affaire *Assoc. des résidents du Vieux St-Boniface Inc. c. Winnipeg (Ville)*, [1990] 3 R.C.S. 1170. Dans ces motifs, on cite sept causes portant sur cette théorie et on ajoute ensuite (à la p. 1204):

^c Le principe élaboré dans cette jurisprudence n'est que le prolongement des règles de justice naturelle et de l'équité procédurale. Il accorde à une personne touchée par la décision d'un fonctionnaire public la possibilité de présenter des observations dans des circonstances où, autrement, elle n'aurait pas cette possibilité. La cour supplée à l'omission dans un cas où, par sa conduite, un fonctionnaire public a fait croire à quelqu'un qu'on ne toucherait pas à ses droits sans le consulter.

^d En l'espèce, la majorité en Cour d'appel a conclu, et le procureur général de la Colombie-Britannique a fait valoir devant nous, que le gouvernement fédéral a agi illégalement en invoquant le pouvoir du Parlement de modifier le *Régime* sans obtenir le consentement de la Colombie-Britannique. C'était un acte illégal en ce qu'il décevait une expectative légitime de la Colombie-Britannique. Ces arguments ont été adoptés par le procureur général de l'Alberta. Il s'agit d'un point de vue qui doit être contrasté avec celui selon lequel on pouvait légitimement s'attendre à ce que le gouvernement fédéral n'agisse pas sans consulter la Colombie-Britannique. Si, en effet, la théorie de l'expectative légitime exigeait le consentement, et non pas simplement la consultation, elle serait alors source de droits fondamentaux, en l'occurrence, celui d'opposer un veto à un projet de loi fédérale.

ⁱ Or, ni la jurisprudence canadienne ni celle d'Angleterre n'appuient la position suivant laquelle la théorie de l'expectative légitime peut créer des droits fondamentaux. Cette théorie fait partie des règles de l'équité procédurale auxquelles peuvent être soumis les organismes administratifs. Dans les cas où elle

Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] 2 R.C.S. 525

558

REFERENCE RE CANADA ASSISTANCE PLAN (B.C.) *Sopinka J.*

[1991] 2 S.C.R.

does not fetter the decision following the representations or consultation.

Moreover, the rules governing procedural fairness do not apply to a body exercising purely legislative functions. Megarry J. said so in *Bates v. Lord Hailsham*, [1972] 3 All E.R. 1019 (Ch. D.), and this was approved by Estey J. for the Court in *Attorney General of Canada v. Inuit Tapirisat of Canada, supra*, at p. 758. In *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, Dickson J., as he then was, wrote (at p. 628):

The authorities, in my view, support the following conclusions:

2. A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision.

These three cases were considered in *Penikett v. Canada* (1987), 45 D.L.R. (4th) 108 (Y.T.C.A.), leave to appeal to the Supreme Court of Canada refused, [1988] 1 S.C.R. xii, and the court concluded (at p. 120):

In these circumstances, the issues sought to be raised in paras. 12 and 12(a) [right to be consulted and duty of fairness] are not justiciable because they seek to challenge the process of legislation.

The respect by the courts for the independence of the legislative power is captured by G.-A. Beaudoin, *La Constitution du Canada* (1990), in the following passage (at p. 92):

[TRANSLATION] The courts do not intervene, however, during the legislative process in Parliament and the legislatures. They have no interest as such in parliamentary procedure. They have made this clear in certain decisions. They respect the *lex parimenti*.

s'applique, elle peut faire naître le droit de présenter des observations ou d'être consulté. Elle ne vient pas limiter la portée de la décision rendue à la suite de ces observations ou de cette consultation.

^a

De plus, les règles de l'équité procédurale ne s'appliquent pas à un organe qui exerce des fonctions purement législatives. C'est ce qu'a affirmé le juge Megarry dans l'arrêt *Bates v. Lord Hailsham*, [1972]

^b 3 All E.R. 1019 (Ch. D.), affirmation qu'a approuvée le juge Estey, au nom de notre Cour, dans l'affaire *Procureur général du Canada c. Inuit Tapirisat of Canada*, précitée, à la p. 758. Dans l'affaire *Martineau c. Comité de discipline de l'Institution de Matsqui*, [1980] 1 R.C.S. 602, le juge Dickson (plus tard Juge en chef) a écrit (à la p. 628):

^c La jurisprudence, à mon avis, appuie les conclusions suivantes:

^d 2. Une décision purement administrative, fondée sur des motifs généraux d'ordre public, n'accordera normalement aucune protection procédurale à l'individu, et une contestation de pareille décision devra se fonder sur un abus de pouvoir discrétionnaire. De même, on ne pourra soumettre à la surveillance judiciaire les organismes publics qui exercent des fonctions de nature législative.

^e Ces trois arrêts ont été examinés dans l'affaire *Penikett v. Canada* (1987), 45 D.L.R. (4th) 108 (C.A. Yuk.), autorisation de pourvoi devant la Cour suprême du Canada refusée, [1988] 1 R.C.S. xii, et la cour a conclu (à la p. 120):

^f ^g [TRADUCTION] Dans ces circonstances, les questions que l'on cherche à soulever aux al. 12 et 12a) [celles du droit d'être consulté et de l'obligation d'agir équitablement] ne relèvent pas de la compétence des tribunaux parce qu'elles visent à contester le processus législatif.

ⁱ G.-A. Beaudoin fait état du respect que manifestent les tribunaux judiciaires à l'égard de l'indépendance du pouvoir législatif, dans l'extrait suivant de *La Constitution du Canada* (1990), à la p. 92:

^j Cependant, les cours n'interviennent pas au cours du processus législatif au Parlement et dans les législatures. Elles n'ont pas d'intérêt comme tel pour la procédure parlementaire. Elles s'en sont d'ailleurs expliquées dans certains arrêts. Elles respectent la *lex parimenti*.

The formulation and introduction of a bill are part of the legislative process with which the courts will not meddle. So too is the purely procedural requirement in s. 54 of the *Constitution Act, 1867*. That is not to say that this requirement is unnecessary; it must be complied with to create fiscal legislation. But it is not the place of the courts to interpose further procedural requirements in the legislative process. I leave aside the issue of review under the *Canadian Charter of Rights and Freedoms* where a guaranteed right may be affected.

The respondent seeks to avoid this proposition by pointing to the dichotomy of the executive on the one hand and Parliament on the other. He concedes that there is no legal impediment preventing Parliament from legislating but contends that the government is constrained by the doctrine of legitimate expectations from introducing the Bill to Parliament.

This submission ignores the essential role of the executive in the legislative process of which it is an integral part. The relationship was aptly described by W. Bagehot, *The English Constitution* (1872), at p. 14:

A cabinet is a combining committee—a *hyphen* which joins, a *buckle* which fastens, the legislative part of the state to the executive part of the state. [Emphasis in original.]

Parliamentary government would be paralyzed if the doctrine of legitimate expectations could be applied to prevent the government from introducing legislation in Parliament. Such expectations might be created by statements during an election campaign. The business of government would be stalled while the application of the doctrine and its effect was argued out in the courts. Furthermore, it is fundamental to our system of government that a government is not bound by the undertakings of its predecessor. The doctrine of legitimate expectations would place a fetter on this essential feature of democracy. I adopt the words of King C.J. of the Supreme Court of South Australia, *in banco*, in *West Lakes Ltd. v. South Aus-*

La rédaction et le dépôt d'un projet de loi font partie du processus législatif dans lequel les tribunaux ne s'immiscent pas. C'est le cas également de l'exigence purement procédurale que l'on trouve à l'art. 54 de la ^a *Loi constitutionnelle de 1867*. Cela ne veut toutefois pas dire que cette exigence est inutile; il faut la respecter en légiférant en matière fiscale. Mais il n'appartient pas aux tribunaux judiciaires d'intercaler dans le processus législatif d'autres exigences procédurales. Je ne traiterai pas de la question de l'examen en vertu de la *Charte canadienne des droits et libertés* dans le cas d'atteinte possible à un droit garanti.

^c L'intimé tente de contourner ce principe en invoquant la dichotomie existante entre l'exécutif, d'une part, et le Parlement, d'autre part. Il reconnaît que, sur le plan juridique, rien ne s'oppose à ce que le Parlement légifère, mais il soutient que la théorie de l'expectative légitime vient empêcher le gouvernement de déposer le projet de loi devant le Parlement.

^e Voilà un argument qui fait abstraction du rôle essentiel que joue l'exécutif dans le processus législatif dont il fait partie intégrante. Le rapport est décrit avec justesse par W. Bagehot dans *La Constitution anglaise* (1869), à la p. 19:

^f Un Cabinet est un comité combiné de telle sorte qu'il sert, comme un trait d'union ou une boucle, à rattacher la partie législative à la partie exécutive du gouvernement.

^g ⁱ Le gouvernement parlementaire serait paralysé si la théorie de l'expectative légitime pouvait s'appliquer de manière à empêcher le gouvernement de déposer un projet de loi au Parlement. Des expectatives pourraient naître de déclarations faites au cours d'une campagne électorale. L'activité gouvernementale serait au point mort pendant que la question de l'application et de l'effet de la théorie serait débattue devant les tribunaux. En outre, il est essentiel à notre système de gouvernement qu'un gouvernement ne soit pas lié par les engagements de son prédécesseur. La théorie de l'expectative légitime aurait pour effet d'imposer une restriction à ce trait essentiel de la démocratie. Je fais miens les propos tenus par le juge en chef King de la Cour suprême de l'Australie-Méridionale, *in banco*, dans l'affaire *West Lakes Ltd. v.*

Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] 2 R.C.S. 525

560

REFERENCE RE CANADA ASSISTANCE PLAN (B.C.) *Sopinka J.*

[1991] 2 S.C.R.

tralia (1980), 25 S.A.S.R. 389, at p. 390, a case strikingly similar to this one:

Ministers of State cannot, however, by means of contractual obligations entered into on behalf of the State fetter their own freedom, or the freedom of their successors or the freedom of other members of parliament, to propose, consider and, if they think fit, vote for laws, even laws which are inconsistent with the contractual obligations.

While the statement deals with contractual obligations, it would apply, *a fortiori* to restraint imposed by other conduct which raises a legitimate expectation.

A restraint on the executive in the introduction of legislation is a fetter on the sovereignty of Parliament itself. This is particularly true when the restraint relates to the introduction of a money bill. By virtue of s. 54 of the *Constitution Act, 1867*, such a bill can only be introduced on the recommendation of the Governor General who by convention acts on the advice of the Cabinet. If the Cabinet is restrained, then so is Parliament. The legal effect of what the respondent is attempting to impugn is of no consequence to the obligations between Canada and British Columbia. The recommendation and introduction of Bill C-69 has no effect *per se*, rather it is its impact on the legislative process that will affect those obligations. It is therefore the legislative process that is, in fact, impugned.

A variety of other submissions were made in respect of Question 2. I observe first of all that none of these matters was properly raised by the question. It asks about the doctrine of legitimate expectations. I do not interpret it as asking whether there is any factor which has created a legitimate expectation, in a non-technical sense, that the federal cabinet would not introduce legislation such as Bill C-69. While this is the general response to these submissions, in the alternative, I have the following observations.

South Australia (1980), 25 S.A.S.R. 389, à la p. 390, qui ressemble étonnamment à la présente instance:

a [TRADUCTION] Les ministres d'État ne sauraient toutefois, au moyen d'obligations contractées pour le compte de l'État, imposer des restrictions à leur propre liberté, à celle de leurs successeurs ou à celle d'autres députés, de proposer, d'étudier et, s'ils le jugent opportun, de voter des lois, fussent-elles incompatibles avec les obligations contractuelles.

b Bien que cet énoncé traite d'obligations contractuelles, il s'appliquerait à plus forte raison aux restrictions découlant de toute autre conduite qui fait naître une expectative légitime.

d Toute restriction imposée au pouvoir de l'exécutif de déposer des projets de loi constitue une limitation de la souveraineté du Parlement lui-même. Cela est particulièrement vrai dans le cas d'une restriction relative au dépôt d'un projet de loi de finances. En effet, aux termes de l'art. 54 de la *Loi constitutionnelle de 1867*, un tel projet de loi ne peut être déposé qu'à la recommandation du Gouverneur général qui, par convention, agit sur avis du cabinet. Or, si le cabinet est soumis à des restrictions, le Parlement l'est également. L'effet juridique de la mesure que tente de contester l'intimé est sans conséquence pour les obligations existant entre le Canada et la Colombie-Britannique. La recommandation et le dépôt du projet de loi C-69 n'ont en soi aucun effet; c'est plutôt par leurs répercussions sur le processus législatif qu'ils touchent ces obligations. C'est donc en réalité le processus législatif qui est attaqué.

h Divers autres arguments ont été avancés au sujet de la seconde question. Je fais remarquer tout d'abord qu'aucun de ces points n'est légitimement soulevé par la question. Celle-ci concerne la théorie de l'expectative légitime. D'après mon interprétation, on ne demande pas s'il existe un facteur quelconque qui a fait naître une expectative légitime, au sens non technique, que le cabinet fédéral ne déposerait pas de mesure législative comme le projet de loi C-69. Bien que ce soit là la réponse générale à ces arguments, j'y ajoute subsidiairement les observations qui suivent.

(i) *Constitutional Convention*

The Attorney General for Ontario argued, in the words of his factum, that “with respect to federal-provincial cost-sharing agreements a constitutional convention exists that neither Parliament nor the legislatures will use their legislative authority unilaterally to alter their obligations.” Presumably the last two words mean “the obligations of the governments which are responsible to them”. These submissions were adopted by the Attorneys General for Alberta and Saskatchewan. Additionally, the Attorney General for Alberta argued that there is a convention that the federal government will not introduce legislation to alter unilaterally Canada’s obligations under the *Plan*.

The question, as I have interpreted it, does not ask about conventions. The existence of a convention can only relate to the question as an aspect of legitimate expectations. I have concluded that that doctrine does not apply to the legislative process and therefore does not apply here. The existence of a convention, therefore, is irrelevant and need not be considered further in answering this question.

(ii) *Manner and Form*

Again, this is not properly raised by either question. This argument was presented by the Native Council of Canada and the United Native Nations of British Columbia. I refer to them together hereinafter as N.C.C.

This submission differs from all of those heretofore discussed in that it is an argument that the addition of s. 5.1 to the *Plan* by s. 2 of the *Government Expenditures Restraint Act* is *ultra vires* Parliament. The argument is based on the idea that even a sovereign body can restrict itself in respect of the “manner and form” of subsequent legislation. N.C.C. cited *Attorney-General for New South Wales v. Trethewan*, [1932] A.C. 526, in which the Privy Council found that the legislature of New South Wales had so

(i) *La convention constitutionnelle*

Le procureur général de l’Ontario fait valoir, dans son mémoire, qu’ [TRADUCTION] «en ce qui concerne les ententes fédérales-provinciales de partage des coûts, il existe une convention constitutionnelle qui veut que ni le Parlement ni les assemblées législatives ne se serviront unilatéralement de leur pouvoir législatif pour changer leurs obligations». Les deux derniers mots signifient vraisemblablement «les obligations du gouvernement qui est comptable au corps législatif en question». Ces arguments ont été adoptés par les procureurs généraux de l’Alberta et de la Saskatchewan. En outre, le procureur général de l’Alberta a soutenu qu’il existe une convention selon laquelle le gouvernement fédéral ne légiférera pas pour modifier unilatéralement les obligations imposées au Canada par le *Régime*.

La question, telle que je l’interprète, ne concerne pas les conventions. Ce n’est qu’en tant qu’aspect de l’expectative légitime que l’existence d’une convention peut se rapporter à la question. J’ai conclu que la théorie de l’expectative légitime ne s’applique pas au processus législatif et qu’elle n’est donc pas applicable en l’espèce. L’existence d’une convention n’a donc aucune pertinence et il n’est pas nécessaire d’en tenir compte davantage pour répondre à cette question.

(ii) *Le mode et la forme*

Encore une fois, il s’agit d’un point qui n’est pas légitimement soulevé par l’une ou l’autre question. L’argument à ce sujet a été présenté par le Conseil national des autochtones du Canada et par les United Native Nations of British Columbia, que je désignerai ci-après par le sigle C.N.A.C.

Cet argument diffère de tous ceux traités jusqu’ici en ce sens qu’on allègue que l’adjonction de l’art. 5.1 au *Régime* opérée par l’art. 2 de la *Loi sur la compression des dépenses publiques* excède la compétence du Parlement. L’argument repose sur l’idée que même un corps législatif souverain peut s’imposer des restrictions quant au «mode» et à la «forme» de toute loi subséquente. Le C.N.A.C. a cité à cet égard l’affaire *Attorney-General for New South Wales v. Trethewan*, [1932] A.C. 526, dans laquelle le Conseil

562

REFERENCE RE CANADA ASSISTANCE PLAN (B.C.) *Sopinka J.*

[1991] 2 S.C.R.

restrained itself. Also, it referred to *R. v. Mercure*, [1988] 1 S.C.R. 234, in which it was held that the legislature of Saskatchewan was bound to enact statutes in both English and French.

N.C.C. said that when one reads ss. 8(2) and 9(2) of the *Plan* together, there is revealed, by necessary implication, a requirement that subsequent legislation cannot alter the *Plan* unless the consent of the affected province or provinces is obtained. By these sections Parliament prevented the federal government from unilaterally terminating its obligations under the *Plan* or an agreement; hence, by implication, Parliament imposed upon itself a requirement that provincial consent be obtained before the legislation could be amended. Further, N.C.C. submitted that if the *Plan* does not reveal an intention that Parliament has bound itself to obtain provincial consent before amending the *Plan*, then at least an intention is revealed that the government is bound to do so before introducing amending legislation.

I reject this argument. Neither intention is revealed in the *Plan*. Any "manner and form" requirement in an ordinary statute must overcome the clear words of s. 42(1) of the *Interpretation Act*, which I set out again for ease of reference:

42. (1) Every Act shall be so construed as to reserve to Parliament the power of repealing or amending it, and of revoking, restricting or modifying any power, privilege or advantage thereby vested in or granted to any person.

This provision requires that federal statutes ordinarily be interpreted to accord with the doctrine of parliamentary sovereignty.

In order for this argument to succeed, it would first have to be shown that Parliament intended, in the face of s. 42(1), to bind itself or to restrict the legislative powers of those of its members who are also members of the executive. The sections of the *Plan* which are supposed to reveal this intention are ss. 8(2) and 9(2). They say absolutely nothing about

privé a conclu que la législature de la Nouvelle-Galles du Sud s'était mise sous le coup d'une telle restriction. Le C.N.A.C. s'est référé en outre à l'arrêt *R. c. Mercure*, [1988] 1 R.C.S. 234, où il a été statué

^a que l'assemblée législative de la Saskatchewan était tenue d'adopter ses lois en français et en anglais.

Selon le C.N.A.C., quand on rapproche les par. 8(2) et 9(2) du *Régime*, il s'en dégage, par voie d'interprétation nécessaire, une exigence qu'aucune modification ne soit apportée au *Régime* au moyen d'une loi subséquente, si ce n'est avec l'assentiment de la province ou des provinces touchées. Au moyen de ces paragraphes, le Parlement empêche le gouvernement fédéral de mettre fin unilatéralement à ses obligations découlant du *Régime* ou d'un accord. Le Parlement s'est donc implicitement imposé l'exigence d'obtenir l'assentiment de la province pour pouvoir modifier la mesure législative. De plus, le C.N.A.C. a fait valoir que, si le *Régime* ne manifeste aucune intention de la part du Parlement de s'imposer l'obligation d'obtenir l'assentiment de la province avant de modifier le *Régime*, il traduit à tout le moins l'intention d'obliger le gouvernement à le faire avant de déposer un projet de loi modificative.

Je rejette cet argument. Le *Régime* n'exprime ni l'une ni l'autre intention. Toute exigence de «mode» et de «forme» posée dans une loi ordinaire doit surmonter le texte clair du par. 42(1) de la *Loi d'interprétation*, que, par souci de commodité, je reproduis de nouveau:

42. (1) Il est entendu que le Parlement peut toujours abroger ou modifier toute loi et annuler ou modifier tous pouvoirs, droits ou avantages attribués par cette loi.

Cette disposition exige que les lois fédérales soient ordinairement interprétées de manière à s'accorder avec la théorie de la souveraineté du Parlement.

Pour que cet argument soit retenu, il faudrait d'abord démontrer que, nonobstant le par. 42(1), le Parlement a eu l'intention de se lier les mains ou de restreindre les pouvoirs législatifs des députés qui composent également l'exécutif. Cette intention est censée se dégager des par. 8(2) et 9(2) du *Régime*. Or, ceux-ci ne disent absolument rien concernant la

the amendment of the *Plan*, and so reveal no parliamentary intention of the sort argued for by N.C.C.

It is no coincidence that when this Court has found "manner and form" restrictions, the instrument creating the restrictions has not been an ordinary statute. Regard may be had for *R. v. Drybones*, [1970] S.C.R. 282, in which a provision of the *Indian Act* was held to be inoperative pursuant to the *Canadian Bill of Rights*, S.C. 1960, c. 44 (reprinted in R.S.C., 1985, App. III). The latter statute was described as "a quasi-constitutional instrument" by Laskin J. (as he then was) in *Hogan v. The Queen*, [1975] 2 S.C.R. 574, at p. 597. Similarly, in *R. v. Mercure*, *supra*, s. 110 of *The North-West Territories Act*, R.S.C. 1886, c. 50, as re-enacted by S.C. 1891, c. 22, s. 18, was held to impose "manner and form" limitations on the legislature of Saskatchewan. But s. 110 was explicitly directed at the legislature, and the Court observed that the section was continued in force by the constituent statute of the province. Both the *Canadian Bill of Rights* and s. 110 of *The North-West Territories Act* have a constitutional nature. It may be that where a statute is of a constitutional nature and governs legislation generally, rather than dealing with a specific statute, it can impose requirements as to manner and form. But where a statute has no constitutional nature, it will be very unlikely to evidence an intention of the legislative body to bind itself in the future.

That is the case here. The sections of the *Plan* relied upon address amendments to the Agreement and amendments to the regulations under the *Plan*. They say nothing about amendments to the *Plan*. The *Plan* has no constitutional nature. It does not purport to impose any "manner and form" requirement.

There is a further problem with this argument. It is clear that parliamentary sovereignty prevents a legislative body from binding itself as to the substance of its future legislation. The claim that is made in a "manner and form" argument is that the body has

modification du *Régime* et, par conséquent, ils ne révèlent chez le législateur fédéral aucune intention du genre évoqué par le C.N.A.C.

- a* Ce n'est pas une coïncidence que, dans les cas où notre Cour a conclu à l'existence de restrictions quant au «mode» et à la «forme», ce n'était pas par une loi ordinaire que les restrictions étaient édictées. Mentionnons, à cet égard, l'arrêt *R. c. Drybones*, [1970] R.C.S. 282, dans lequel une disposition de la *Loi sur les Indiens* a été jugée inopérante en application de la *Déclaration canadienne des droits*, S.C. 1960, ch. 44 (réimprimée à L.R.C. (1985), app. III). Cette dernière loi a été qualifiée de «document quasi constitutionnel» par le juge Laskin (plus tard Juge en chef) dans l'arrêt *Hogan c. La Reine*, [1975] 2 R.C.S. 574, à la p. 597. De même, dans l'arrêt *R. c. Mercure*, précité, il a été jugé que l'art. 110 de l'*Acte des territoires du Nord-Ouest*, S.R.C. 1886, ch. 50, adopté de nouveau à S.C. 1891, ch. 22, art. 18, imposait à l'assemblée législative de la Saskatchewan des restrictions en matière de «mode» et de «forme». Mais l'article 110 visait expressément l'assemblée législative et la Cour a observé qu'il continuait à s'appliquer aux termes de la loi constitutive de la province. La *Déclaration canadienne des droits* et l'art. 110 de l'*Acte des territoires du Nord-Ouest* sont tous deux de nature constitutionnelle. Il se peut qu'une loi qui est de nature constitutionnelle et qui régit la législation en général plutôt que de porter sur une loi précise puisse imposer des exigences quant au mode et à la forme. Toutefois, lorsqu'une loi ne présente aucun caractère constitutionnel, il est fort peu probable qu'elle traduise une intention de la part du corps législatif de se lier pour l'avenir.
- b*
- c*
- d*
- e*
- f*
- g*
- i*

Tel est le cas en l'espèce. Les articles du *Régime* qu'on a invoqués concernent la modification de l'accord et des règlements pris en vertu du *Régime*. Ils sont muets relativement à la modification du *Régime*. Celui-ci n'a aucun caractère constitutionnel. Il n'a pas pour objet d'imposer une exigence quant au «mode» et à la «forme».

Cet argument présente une autre difficulté. Il est évident en effet que la souveraineté du Parlement vient empêcher un corps législatif de se lier les mains en ce qui concerne la teneur de sa législation future. Or, l'argument relatif au «mode» et à la «forme» veut

564

REFERENCE RE CANADA ASSISTANCE PLAN (B.C.) *Sopinka J.*

[1991] 2 S.C.R.

restrained itself, not in respect of substance, but in respect of the procedure which must be followed to enact future legislation of some sort, or the form which such legislation must take. In *West Lakes Ltd. v. South Australia*, *supra*, a "manner and form" argument was rejected. King C.J. said (at pp. 397-98):

Even if I could construe the statute according to the plaintiff's argument, I could not regard the provision as prescribing the manner or form of future legislation. A provision requiring the consent to legislation of a certain kind, of an entity not forming part of the legislative structure . . . does not, to my mind, prescribe a manner or form of lawmaking, but rather amounts to a renunciation *pro tanto* of the lawmaking power.

Those words are fully applicable here.

(iii) *Jurisdiction*

The Attorney General of Manitoba argued that Parliament lacked legislative jurisdiction to make the proposed change to the *Plan*. Again, this is not raised by the questions, but I will consider these submissions briefly.

Like the N.C.C., the Attorney General of Manitoba argued that s. 2 of the *Government Expenditures Restraint Act* is *ultra vires* Parliament. The argument begins with the observation that the federal spending power is wider than the field of federal legislative competence. So, as with the *Plan*, Parliament can authorize the disbursement of federal funds to the provinces for use in areas within provincial jurisdiction. Manitoba said that once Parliament authorized the federal government to enter into an agreement with British Columbia and such an agreement was executed, Parliament became disabled from unilaterally changing the law so as to change the Agreement. There are two reasons for this.

précisément que le corps législatif en question se soit imposé des restrictions, non pas à l'égard de la teneur, mais quant à la procédure à suivre dans l'adoption d'une loi future quelconque ou bien quant

^a à la forme que doit revêtir pareille loi. Dans l'arrêt *West Lakes Ltd. v. South Australia*, précité, un argument relatif au «mode» et à la «forme» a été rejeté. Le juge en chef King a dit (aux pp. 397 et 398):

^b [TRADUCTION] Même s'il n'était possible d'interpréter la loi conformément à l'argument de la demanderesse, je ne pourrais considérer la disposition en cause comme prescrivant le mode ou la forme d'une mesure législative future. Une disposition exigeant qu'une entité qui

^c ne fait pas partie de l'appareil législatif donne son consentement à un certain type de législation [...] ne prescrit pas, à mon sens, un mode ou une forme d'adoption de lois, mais équivaut plutôt à une renonciation dans cette mesure au pouvoir législatif.

^d Ces propos s'appliquent pleinement en l'espèce.

(iii) *La compétence*

^e Le procureur général du Manitoba a soutenu que le Parlement n'avait pas la compétence législative voulue pour apporter au *Régime* la modification projetée. Bien qu'il s'agisse encore une fois d'un point qui n'est pas soulevé par les questions, je me propose tout de même d'examiner brièvement les arguments avancés à ce propos.

^f ^g Comme le C.N.A.C., le procureur général du Manitoba a fait valoir que l'art. 2 de la *Loi sur la compression des dépenses publiques* excède la compétence du Parlement. L'argument commence par l'observation que le pouvoir de dépenser du fédéral est plus large que le champ de la compétence législative fédérale. Ainsi, comme il l'a fait dans le cas du *Régime*, le Parlement peut autoriser le paiement de fonds fédéraux aux provinces pour qu'elles s'en servent dans des domaines de compétence provinciale. D'après le Manitoba, du moment que le Parlement autorisait le gouvernement fédéral à conclure un accord avec la Colombie-Britannique et dès que cet accord était signé, le Parlement devenait inhabile à modifier unilatéralement la loi de manière à changer l'accord. Il y a deux raisons à cela.

First, the Agreement is enforceable as a private law agreement. This would admittedly be subject to applicable constitutional principles; but it was argued that there are no such principles in this case. This argument was not pressed in the oral submissions on behalf of the Attorney General of Manitoba. I find no merit in it. The Agreement was between the Government of British Columbia and the federal government. It does not bind Parliament. Apart from that, the "applicable constitutional principle" is the sovereignty of Parliament which I have discussed above.

Second, the Attorney General of Manitoba said that once the Agreement authorized by Parliament was executed, the province acquired vested rights to monetary contributions for a matter within provincial competence; hence, a unilateral termination of the Agreement by Parliament would be *ultra vires* Parliament. Alternatively, even if it were within Parliament's authority in respect of the division of powers, it would be unconstitutional for another reason: the "overriding principle of federalism" requires that Parliament be unable to interfere in areas of provincial jurisdiction. It was said that, in order to protect the autonomy of the provinces, the Court should supervise the federal government's exercise of its spending power.

The first branch of this submission is based on the judgment of this Court in *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297. A company was granted a lease of land and water rights by the Government of Newfoundland to permit the development of the hydro-electric resources of Churchill Falls. The lease was embodied in a statute of the provincial legislature. Later, the company contracted with Hydro-Quebec to deliver most of the generated hydro-electric power to the latter. The development of Churchill Falls could not have proceeded in the absence of this contract. Later again, the Government of Newfoundland decided that it needed more power. The legislature of Newfoundland purported to enact a statute which repealed the statutory lease and expropriated all of the generating equipment which previously belonged to the com-

Premièrement, l'accord est exécutoire à titre d'accord de droit privé. Cela serait, certes, assujetti aux principes constitutionnels applicables, mais on soutient qu'il n'existe pas de tels principes en l'espèce.

^a C'est là un argument sur lequel on n'a pas insisté dans les plaidoiries effectuées pour le compte du procureur général du Manitoba et je le juge non fondé. L'accord est intervenu entre le gouvernement de la Colombie-Britannique et le gouvernement fédéral. Il ne lie pas le Parlement. En outre, le «principe constitutionnel applicable» est celui de la souveraineté du Parlement, dont j'ai déjà traité.

^c Deuxièmement, le procureur général du Manitoba a dit qu'une fois signé l'accord autorisé par le Parlement, la province se trouvait investie du droit à des contributions financières dans un domaine de compétence provinciale; cela étant, le Parlement excéderait sa propre compétence en résiliant unilatéralement l'accord. Subsidiairement, même si le partage des compétences permettait au Parlement d'agir ainsi, une telle mesure serait pour une autre raison frappée

^d d'inconstitutionnalité: le «principe essentiel du fédéralisme» commande qu'il ne soit pas loisible au Parlement de s'immiscer dans des domaines de compétence provinciale. Afin de protéger l'autonomie des provinces, a-t-on affirmé, la Cour devrait surveiller l'exercice par le gouvernement fédéral de son pouvoir de dépenser.

^g Le premier volet de cet argument repose sur notre arrêt *Renvoi relatif à la Upper Churchill Water Rights Reversion Act*, [1984] 1 R.C.S. 297. Dans cette affaire, le gouvernement de Terre-Neuve avait cédé à bail à une compagnie des terres et des droits relatifs à l'eau afin de permettre la mise en valeur des ressources hydro-électriques des chutes Churchill. Le bail était compris dans une loi de la législature provinciale. Plus tard, la compagnie a conclu avec la société Hydro-Québec un contrat aux termes duquel elle convenait de livrer à cette dernière la majeure partie de l'énergie hydro-électrique produite. L'aménagement des chutes Churchill n'aurait pas pu avoir lieu en l'absence de ce contrat. Plus tard encore, le gouvernement de Terre-Neuve a décidé qu'il lui fallait davantage d'énergie. L'assemblée législative de Terre-Neuve a donc adopté une loi résiliant le bail

^h ⁱ ^j

566

REFERENCE RE CANADA ASSISTANCE PLAN (B.C.) *Sopinka J.*

[1991] 2 S.C.R.

pany. On a reference, this Court was of the opinion that the second statute was *ultra vires*.

It was argued for the Attorney General of Newfoundland that the legislature was merely repealing existing legislation. McIntyre J., for the Court, rejected this argument, adopting the words of Morgan J.A. in the Newfoundland Court of Appeal to the effect that the new legislation also had the effect of expropriating rights. McIntyre J. said that the new legislation was a colourable attempt to interfere with the contract and to derogate from the contractual rights of Hydro-Quebec, which rights were held to be situate in Quebec. The only heads of power under which the second statute could have been enacted were ss. 92(13) and (16) of the *Constitution Act, 1867*; namely, property and civil rights in the province, and matters of a purely local or private nature in the province. Because of the territorial restrictions on provincial legislatures, and the extraterritorial effect of the new legislation, the legislation was beyond the competence of the Newfoundland legislature.

The Attorney General of Manitoba argues by analogy that in this case, the *Plan* has an impact on areas of provincial jurisdiction. Hence, it was submitted, the alteration of the *Plan* would amount to regulation of an area outside the federal jurisdiction. I reject this argument. The legislation in the *Churchill Falls* case was a colourable attempt to do indirectly something which could not be done directly because of the territorial restrictions on the Newfoundland legislature. For an analogy to exist, a similar state of affairs would have to obtain here. There was no allegation, nor could there have been, that Bill C-69 was an indirect, colourable attempt to regulate in provincial areas of jurisdiction. It is simply an austerity measure. So the question of colourability can be disregarded, and the question directly considered: is the *Government Expenditures Restraint Act* *ultra vires* Parliament as being, in pith and substance, legislation

législatif et expropriant tout le matériel servant à la production d'énergie hydro-électrique qui avait jusque-là appartenue à la compagnie. À la suite d'un renvoi, notre Cour a estimé que la seconde loi était ^a inconstitutionnelle.

On avait soutenu pour le compte du procureur général de Terre-Neuve que la législature ne faisait qu'abroger une loi existante. Le juge McIntyre, s'exprimant au nom de la Cour, a rejeté cet argument en faisant siens les propos tenus par le juge Morgan, en Cour d'appel de Terre-Neuve, qui avait dit que la nouvelle loi avait en outre pour effet d'exproprier des droits. Selon le juge McIntyre, cette nouvelle loi constituait une tentative déguisée de modifier le contrat et de déroger aux droits contractuels d'Hydro-Québec, lesquels ont été jugés situés au Québec. Les seuls chefs de compétence en vertu desquels la seconde loi aurait pu être adoptée sont énoncés aux par. 92(13) et (16) de la *Loi constitutionnelle de 1867*, savoir la propriété et les droits civils dans la province et les matières d'une nature purement locale ou privée dans la province. En raison des restrictions territoriales imposées aux législatures provinciales et à cause de l'effet extraterritorial de la nouvelle loi, celle-ci excédait la compétence de l'assemblée législative de Terre-Neuve.

Le procureur général du Manitoba fait valoir, par analogie, qu'en l'espèce le *Régime* a des répercussions dans des domaines de compétence provinciale. Il s'ensuit, a-t-on soutenu, que la modification du *Régime* reviendrait à réglementer un domaine qui n'est pas de compétence fédérale. Je rejette cet argument. La loi en cause dans l'affaire *Churchill Falls* représentait une tentative déguisée d'accomplir indirectement ce qu'on ne pouvait faire directement en raison des restrictions territoriales auxquelles était assujettie l'assemblée législative de Terre-Neuve. Pour qu'il y ait analogie, il faudrait qu'il existe en l'espèce un état de choses semblable. On n'a pas allégué, ce qui aurait été impossible d'ailleurs, que le projet de loi C-69 constituait une tentative déguisée et indirecte de réglementer des domaines de compétence provinciale. Il s'agit simplement d'une mesure d'austérité. On peut donc passer outre à la question du caractère déguisé pour se pencher immédiatement sur celle de savoir si la *Loi sur la compression des*

in relation to areas of exclusive provincial competence?

The written argument of the Attorney General of Manitoba was that the legislation "amounts to" regulation of a matter outside federal authority. I disagree. The Agreement under the *Plan* set up an open-ended cost-sharing scheme, which left it to British Columbia to decide which programmes it would establish and fund. The simple withholding of federal money which had previously been granted to fund a matter within provincial jurisdiction does not amount to the regulation of that matter. Still less is this so where, as in this case, the new legislation simply limits the growth of federal contributions. In oral argument, counsel said that the *Government Expenditures Restraint Act* "impacts upon [a] constitutional interest" outside the jurisdiction of Parliament. That is no doubt true, but it does not make the Act *ultra vires*. "Impact" with nothing more is clearly not enough to find that a statute encroaches upon the jurisdiction of the other level of government.

Finally, I turn to the second branch of this argument of the Attorney General of Manitoba. This was the argument that the "overriding principle of federalism" requires that Parliament be unable to interfere in areas of provincial jurisdiction. It was said that, in order to protect the autonomy of the provinces, the Court should supervise the federal government's exercise of its spending power. But supervision of the spending power is not a separate head of judicial review. If a statute is neither *ultra vires* nor contrary to the *Canadian Charter of Rights and Freedoms*, the courts have no jurisdiction to supervise the exercise of legislative power.

The answer to the second question is "No".

dépenses publiques excède la compétence du Parlement du fait qu'elle est, de par son caractère véritable, une loi portant sur des domaines de compétence provinciale exclusive.

a

Suivant l'argument écrit avancé par le procureur général du Manitoba, la loi en cause [TRADUCTION] «revient à» réglementer un domaine qui ne relève pas de la compétence fédérale. Je ne partage pas cet avis. L'accord conclu en vertu du *Régime* établissait un système flexible de partage des coûts qui laissait à la Colombie-Britannique le soin de décider quels programmes elle mettrait sur pied et financerait. Le simple refus de verser des fonds fédéraux jusqu'à accordés pour financer une matière relevant de la compétence provinciale ne revient pas à réglementer cette matière. À plus forte raison, ce n'est pas le cas lorsque, comme en l'espèce, la nouvelle loi se borne à limiter l'accroissement des contributions fédérales. Au cours des plaidoiries, l'avocat a dit que la *Loi sur la compression des dépenses publiques* [TRADUCTION] «a des répercussions sur un droit constitutionnel» qui échappe à la compétence du Parlement. C'est sans doute vrai, mais la Loi n'est pas inconstitutionnelle pour autant. De simples «répercussions», prises isolément, ne sont manifestement pas suffisantes pour conclure qu'une loi empiète sur la compétence de l'autre palier de gouvernement.

Je passe, enfin, au second volet de cet argument du procureur général du Manitoba. Il s'agit de l'argument selon lequel le «principe essentiel du fédéralisme» exige qu'il ne soit pas loisible au Parlement de s'immiscer dans des domaines de compétence provinciale. On a dit que, pour protéger l'autonomie des provinces, la Cour devrait surveiller l'exercice par le gouvernement fédéral de son pouvoir de dépenser. La surveillance du pouvoir de dépenser ne constitue cependant pas un sujet distinct de contrôle judiciaire. Si une loi n'est ni inconstitutionnelle ni contraire à la *Charter canadienne des droits et libertés*, les tribunaux n'ont nullement compétence pour surveiller l'exercice du pouvoir législatif.

La seconde question reçoit donc une réponse négative.

568

REFERENCE RE CANADA ASSISTANCE PLAN (B.C.) *Sopinka J.*

[1991] 2 S.C.R.

7. Disposition

The appeal is allowed and the answers to the questions are as follows:

- (1) Has the Government of Canada any statutory, prerogative or contractual authority to limit its obligation under the *Canada Assistance Plan Act* [sic], R.S.C. 1970, c. C-1 and its Agreement with the Government of British Columbia dated March 23, 1967, to contribute 50 per cent of the cost to British Columbia of assistance and welfare services?

Answer: Yes.

- (2) Do the terms of the Agreement dated March 23, 1967 between the Governments of Canada and British Columbia, the subsequent conduct of the Government of Canada pursuant to the Agreement and the provisions of the *Canada Assistance Plan Act* [sic], R.S.C. 1970, c. C-1, give rise to a legitimate expectation that the Government of Canada would introduce no bill into Parliament to limit its obligation under the Agreement or the *Act* without the consent of British Columbia?

Answer: No.

Appeal allowed.

Solicitor for the appellant: John C. Tait, Ottawa.

Solicitor for the respondent: The Ministry of the Attorney General, Victoria.

Solicitor for the intervenor the Attorney General for Ontario: The Attorney General for Ontario, Toronto.

Solicitor for the intervenor the Attorney General of Manitoba: The Department of Justice, Winnipeg.

Solicitor for the intervenor the Attorney General for Alberta: The Attorney General's Department, Edmonton.

7. Dispositif

Le pourvoi est accueilli et les questions reçoivent les réponses suivantes:

^a [TRADUCTION]

- (1) Le gouvernement du Canada a-t-il, en vertu d'une loi, en raison d'une prérogative ou aux termes d'un contrat, compétence pour limiter son obligation, découlant du *Régime d'assistance publique du Canada*, S.R.C. 1970, ch. C-1, et de l'accord en date du 23 mars 1967 intervenu entre lui et le gouvernement de la Colombie-Britannique, de payer 50 pour 100 du coût des services d'assistance publique et de protection sociale en Colombie-Britannique?

Réponse: Oui.

[TRADUCTION]

^b [TRADUCTION]

- (2) Les conditions de l'accord en date du 23 mars 1967 intervenu entre les gouvernements du Canada et de la Colombie-Britannique, la conduite subséquente du gouvernement du Canada dans l'exécution de cet accord et les dispositions du *Régime d'assistance publique du Canada*, S.R.C. 1970, ch. C-1, permettent-elles de s'attendre légitimement à ce que le gouvernement du Canada ne dépose devant le Parlement aucun projet de loi tendant à limiter, sans le consentement de la Colombie-Britannique, l'obligation que lui impose l'accord ou le *Régime*?

Réponse: Non.

Pourvoi accueilli.

Procureur de l'appelant: John C. Tait, Ottawa.

Procureur de l'intimé: Le ministère du Procureur général, Victoria.

Procureur de l'intervenant le procureur général de l'Ontario: Le procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Manitoba: Le ministère de la Justice, Winnipeg.

Procureur de l'intervenant le procureur général de l'Alberta: Le ministère du Procureur général, Edmonton.

[1991] 2 R.C.S.

RENOVI: RÉGIME D'ASSISTANCE DU CANADA (C.-B.)

569

Solicitor for the intervenor the Attorney General for Saskatchewan: Brian Barrington-Foote, Regina.

Procureur de l'intervenant le procureur général de la Saskatchewan: Brian Barrington-Foote, Regina.

Solicitors for the intervenors the Native Council of Canada and the United Native Nations of British Columbia: Blake, Cassels & Graydon, Vancouver; Robin M. Elliot, Vancouver.

Procureurs des intervenants le Conseil national des autochtones du Canada et les United Native Nations of British Columbia: Blake, Cassels & Graydon, Vancouver; Robin M. Elliot, Vancouver.

Onglet 80

Renvoi relatif à la Loi sur la Cour suprême, art. 5 et 6, [2014] 1 R.C.S. 433, 2014 CSC 21

[2014] 1 R.C.S.

RENOVI RELATIF À LA LOI SUR LA COUR SUPRÈME

433

IN THE MATTER OF a Reference by the Governor in Council concerning sections 5 and 6 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, as set out in Order in Council P.C. 2013-1105 dated October 22, 2013

INDEXED AS: *REFERENCE RE SUPREME COURT ACT, SS. 5 AND 6*

2014 SCC 21

File No.: 35586.

2014: January 15; 2014: March 21.

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

REFERENCE BY GOVERNOR IN COUNCIL

Courts — Supreme Court of Canada — Judges — Eligibility requirements for appointment to Supreme Court of Canada — Requirement that three judges be appointed to Court from among judges of Court of Appeal or of Superior Court of Quebec or from among advocates of at least 10 years standing at Barreau du Québec — Whether Federal Court of Appeal judge formerly member of Barreau du Québec for more than 10 years eligible for appointment to Supreme Court of Canada — Supreme Court Act, R.S.C. 1985, c. S-26, ss. 5, 6.

Constitutional law — Constitutional amendment — Composition of Supreme Court of Canada — Whether Parliament acting alone can enact legislation permitting appointment of former member of Quebec bar to Quebec position on Court — Constitution Act, 1982, s. 41(d) — Supreme Court Act, R.S.C. 1985, c. S-26, ss. 5.1, 6.1.

The Honourable Marc Nadon, a supernumerary judge of the Federal Court of Appeal and formerly a member of the Quebec bar for more than 10 years, was named a judge of the Supreme Court of Canada for the province of Quebec, pursuant to s. 6 of the *Supreme Court Act* (“Act”). Section 6 specifies that at least three of the nine judges appointed to the Court “shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province”.

After the appointment of Justice Nadon was challenged before the Federal Court of Canada, the Governor General in Council referred the following questions to this Court under s. 53 of the Act:

DANS L'AFFAIRE DU renvoi par le Gouverneur en conseil concernant les articles 5 et 6 de la *Loi sur la Cour suprême*, L.R.C. 1985, ch. S-26, institué aux termes du décret C.P. 2013-1105 en date du 22 octobre 2013

RÉPERTORIÉ : RENVOI RELATIF À LA LOI SUR LA COUR SUPRÈME, ART. 5 ET 6

2014 CSC 21

Nº du greffe : 35586.

2014 : 15 janvier; 2014 : 21 mars.

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

RENOVI PAR LE GOUVERNEUR EN CONSEIL

Tribunaux — Cour suprême du Canada — Juges — Conditions d'admissibilité à une nomination à la Cour suprême du Canada — Exigence que trois juges soient nommés parmi les juges de la Cour d'appel ou de la Cour supérieure de la province de Québec ou parmi les avocats inscrits pendant au moins 10 ans au Barreau du Québec — Un juge de la Cour d'appel fédérale qui a été autrefois inscrit au Barreau du Québec pendant plus de 10 ans est-il admissible à une nomination à la Cour suprême du Canada? — Loi sur la Cour suprême, L.R.C. 1985, ch. S-26, art. 5, 6.

Droit constitutionnel — Modification de la Constitution — Composition de la Cour suprême du Canada — Le Parlement agissant seul peut-il légiférer pour permettre la nomination d'un ancien membre du Barreau du Québec à un poste de juge de la Cour réservé au Québec? — Loi constitutionnelle de 1982, art. 41d) — Loi sur la Cour suprême, L.R.C. 1985, ch. S-26, art. 5.1, 6.1.

L'honorable Marc Nadon, juge surnuméraire de la Cour d'appel fédérale et ancien membre du Barreau du Québec pendant plus de 10 ans, a été nommé juge de la Cour suprême du Canada pour la province de Québec en vertu de l'art. 6 de la *Loi sur la Cour suprême* (« Loi »). L'article 6 précise qu'au moins trois des neuf juges nommés à la Cour « sont choisis parmi les juges de la Cour d'appel ou de la Cour supérieure de la province de Québec ou parmi les avocats de celle-ci ».

Après la contestation de la nomination du juge Nadon devant la Cour fédérale du Canada, le gouverneur général en conseil a soumis les questions suivantes au jugement de la Cour en vertu de l'art. 53 de la Loi :

1. Can a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec be appointed to the Supreme Court of Canada as a member of the Supreme Court from Quebec pursuant to sections 5 and 6 of the *Supreme Court Act*?

2. Can Parliament enact legislation that requires that a person be or has previously been a barrister or advocate of at least 10 years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada or enact the annexed declaratory provisions as set out in clauses 471 and 472 of the Bill entitled *Economic Action Plan 2013 Act, No. 2*?

Clauses 471 and 472 of the bill entitled *Economic Action Plan 2013 Act, No. 2*, received Royal Assent and became ss. 5.1 and 6.1 of the Act. Sections 5.1 and 6.1 seek to make it clear that a former member of the bar may be appointed to the Court under s. 5 and that a former member of the Quebec bar is eligible for appointment under s. 6.

Held (Moldaver J. dissenting): Question 1 is answered in the negative. Question 2 is answered in the negative with respect to the three seats reserved for Quebec and the declaratory provision set out in cl. 472. It is answered in the affirmative with respect to cl. 471.

Question 1

Per McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ.:

A judge of the Federal Court or Federal Court of Appeal is ineligible for appointment to the Supreme Court of Canada under s. 6 of the Act. Section 5 of the Act sets out the general eligibility requirements for appointment to the Supreme Court by creating four groups of people who are eligible for appointment: (1) current judges of a superior court of a province, including courts of appeal; (2) former judges of such a court; (3) current barristers or advocates of at least 10 years standing at the bar of a province; and (4) former barristers or advocates of at least 10 years standing. However, s. 6 narrows the pool of eligible candidates from the four groups of people who are eligible under s. 5 to two groups who are eligible under s. 6. In addition to meeting the general requirements of s. 5, persons appointed to the three Quebec seats under s. 6 must be current members of the Barreau du Québec, the Quebec Court of Appeal or the Superior Court of Quebec.

1. Une personne qui a autrefois été inscrite comme avocat pendant au moins dix ans au Barreau du Québec peut-elle être nommée à la Cour suprême du Canada à titre de juge de la Cour suprême pour le Québec conformément aux articles 5 et 6 de la *Loi sur la Cour suprême*?

2. Le Parlement peut-il légiférer pour exiger, à titre de condition de sa nomination au poste de juge de la Cour suprême du Canada, qu'une personne soit ou ait été inscrite comme avocat au barreau d'une province pendant au moins dix ans ou adopter des dispositions déclaratoires telles que celles prévues aux articles 471 et 472 du projet de loi intitulé *Loi n° 2 sur le plan d'action économique de 2013*, ci-annexé?

Les articles 471 et 472 du projet de loi intitulé *Loi n° 2 sur le plan d'action économique de 2013* ont reçu la sanction royale et sont devenus les art. 5.1 et 6.1 de la Loi. Les articles 5.1 et 6.1 précisent qu'un ancien membre du barreau peut être nommé à la Cour en vertu de l'art. 5 et qu'un ancien membre du Barreau du Québec est admissible à une nomination en vertu de l'art. 6.

Arrêt (le juge Moldaver est dissident) : La question 1 reçoit une réponse négative. La question 2 reçoit une réponse négative pour ce qui est des trois postes réservés au Québec et de la disposition déclaratoire énoncée dans l'art. 472. Elle reçoit une réponse affirmative concernant l'art. 471.

Question 1

La juge en chef McLachlin et les juges LeBel, Abella, Cromwell, Karakatsanis et Wagner :

Un juge de la Cour fédérale ou de la Cour d'appel fédérale ne peut être nommé à la Cour suprême du Canada en vertu de l'art. 6 de la Loi. L'article 5 de la Loi fixe les conditions générales de nomination à la Cour suprême en créant quatre groupes de personnes admissibles à une nomination : (1) les juges actuels d'une cour supérieure, et notamment d'une cour d'appel, d'une province; (2) les anciens juges d'une telle cour; (3) les avocats actuels inscrits pendant au moins 10 ans au barreau d'une province; (4) les anciens avocats inscrits au barreau d'une province pendant au moins 10 ans. Toutefois, l'art. 6 réduit à deux groupes le bassin des personnes admissibles, qui comprend quatre groupes en vertu de l'art. 5. Les personnes nommées aux trois postes réservés pour le Québec en vertu de l'art. 6 doivent être soit membres du Barreau du Québec soit juges de la Cour d'appel ou de la Cour supérieure du Québec au moment de leur nomination, en plus de répondre aux conditions générales fixées à l'art. 5.

The plain meaning of s. 6 has remained consistent since the original version of that provision was enacted in 1875, and it has always excluded former advocates. By specifying that three judges shall be appointed “from among” the judges and advocates (i.e. members) of the identified institutions, s. 6 impliedly excludes former members of those institutions and imposes a requirement of current membership. Reading ss. 5 and 6 together, the requirement of at least 10 years standing at the bar applies to appointments from Quebec.

This textual analysis is consistent with the underlying purpose of s. 6 and reflects the historical compromise that led to the creation of the Supreme Court as a general court of appeal for Canada and as a federal and bijural institution. Section 6 seeks (i) to ensure civil law expertise and the representation of Quebec’s legal traditions and social values on the Court, and (ii) to enhance the confidence of Quebec in the Court. This interpretation is also consistent with the broader scheme of the Act for the appointment of *ad hoc* judges, which excludes judges of the federal courts as *ad hoc* judges for Quebec cases.

Per Moldaver J. (dissenting):

The eligibility criteria in s. 5 apply to all appointees, including those chosen from Quebec institutions to fill a Quebec seat. It follows that both current and former members of the Quebec bar of at least 10 years standing, and current and former judges of the Quebec superior courts, are eligible for appointment to a Quebec seat on this Court. Therefore, I answer Question 1 in the affirmative.

Sections 5 and 6 are inextricably linked. Section 5 sets out the threshold eligibility requirements to be appointed a judge of this Court. Under s. 5, both current and former members of a provincial bar of at least 10 years standing, and current and former judges of a superior court of a province, are eligible. Section 6 builds on s. 5 by requiring that for three of the seats on this Court, the candidates who meet the criteria of s. 5 must be chosen from three Quebec institutions (the Barreau du Québec, the Quebec Court of Appeal, and the Superior Court of Quebec). Section 6 does not impose any additional requirements.

To suggest that Quebec wanted to render ineligible former advocates of at least 10 years standing at the Quebec bar is to rewrite history. The object of s. 6 is, and always has been, to ensure that a specified number of

Le sens ordinaire de l’art. 6 est demeuré constant depuis la version originale de cette disposition édictée en 1875 et il a toujours exclu les anciens avocats. En précisant que trois juges sont nommés « parmi » les juges et les avocats (c’est-à-dire les membres) des institutions énumérées, l’art. 6 exclut implicitement les anciens membres de ces institutions et impose une condition de contemporanéité de l’appartenance à celles-ci. Selon les art. 5 et 6, interprétés en corrélation, le minimum de 10 années d’inscription au barreau s’applique à la nomination des juges pour le Québec.

Cette analyse textuelle respecte l’objectif sous-jacent de l’art. 6 et reflète le compromis historique qui a mené à la création de la Cour suprême en tant que cour générale d’appel pour le Canada et en tant qu’institution fédérale et bijuridique. L’article 6 vise (i) à garantir une expertise en droit civil et la représentation des traditions juridiques et des valeurs sociales du Québec à la Cour, et (ii) à renforcer la confiance du Québec envers la Cour. Cette interprétation respecte en outre l’économie générale de la Loi au sujet de la nomination des juges suppléants, qui exclut les juges des cours fédérales des postes de juge suppléant pour les causes du Québec.

Le juge Moldaver (dissident) :

Les conditions de nomination énoncées à l’art. 5 s’appliquent à tous les candidats, y compris ceux qui sont choisis parmi les institutions québécoises pour occuper un siège réservé au Québec. En conséquence, les avocats actuels et les anciens avocats inscrits pendant au moins 10 ans au Barreau du Québec ainsi que les juges actuels et les anciens juges des cours supérieures du Québec sont tous admissibles à une nomination à un poste de la Cour réservé au Québec. Je réponds donc à la question 1 par l’affirmative.

Les articles 5 et 6 sont inextricablement liés. L’article 5 énonce les conditions de base auxquelles une personne doit satisfaire pour être nommée juge de la Cour. Pour l’application de l’art. 5, tous les avocats, actuels et anciens, inscrits au barreau d’une province pendant au moins 10 ans et tous les juges, actuels et anciens, d’une cour supérieure d’une province sont admissibles. L’article 6 précise l’art. 5 en exigeant que, pour trois postes de juge de notre Cour, les candidats qui satisfont aux critères de l’art. 5 soient choisis parmi trois institutions québécoises (le Barreau du Québec, la Cour d’appel du Québec et la Cour supérieure du Québec). L’article 6 n’impose aucune condition additionnelle.

Suggérer que le Québec souhaitait soustraire du bassin de candidats potentiels les anciens avocats inscrits pendant au moins 10 ans au Barreau du Québec revient à réécrire l’histoire. L’article 6 a, et a toujours eu, pour

this Court's judges are trained in civil law and represent Quebec. By virtue of the fact that these seats must be filled by persons appointed from the three Quebec institutions named in s. 6, appointees will necessarily have received formal training in the civil law. The combination of this training and affiliation with one of the named Quebec institutions serves to protect Quebec's civil law tradition and inspire Quebec's confidence in this Court. Imposing the additional requirement of current membership at the Quebec bar does nothing to promote the underlying object of s. 6 and leads to absurd results.

The currency requirement is not supported by the text of s. 6, its context, or its legislative history. The words "from among" found in s. 6 convey no temporal meaning. They take their meaning from the surrounding context and cannot, on their own, support the contention that a person must be a *current* member of the bar or bench to be eligible for a Quebec seat. The words "from among" do not alter the group to which s. 6 refers — the group described in s. 5. Indeed, having regard to their historical context, the words "from among" *support* the view that ss. 5 and 6 are inextricably linked.

An absurdity results if s. 6 is not read in conjunction with s. 5, such that a newly-minted member of one day's standing at the Quebec bar would be eligible for a Quebec seat on this Court. Manifestly, s. 6 must be linked to the 10-year eligibility requirement for members of the bar specified in s. 5. Choosing from s. 5 only those aspects of it that are convenient (i.e. the 10 year requirement) — and jettisoning those that are not (i.e. the fact that both *current* and *former* advocates of 10 years standing qualify under s. 5) — is a principle of statutory interpretation heretofore unknown.

The currency requirement finds no support in the scheme of the Act. Section 30 of the Act, which deals with the appointment of *ad hoc* judges, is a historic anomaly and does not assist in the interpretation of the eligibility requirements set out in ss. 5 and 6.

Any interpretation of s. 6 that requires a *former* advocate of at least 10 years standing at the Quebec bar, or a *former* judge of the Quebec Court of Appeal or Superior Court, to rejoin the Quebec bar for a day in order to be eligible for appointment to this Court makes no practical sense. It is difficult to believe that the people of Quebec would somehow have more confidence in this candidate on Friday than they had on Thursday.

objet de garantir qu'un nombre déterminé de juges de la Cour soient formés en droit civil et représentent le Québec. Puisque ces postes de juge doivent être pourvus par des candidats provenant d'une des trois institutions québécoises énumérées à l'art. 6, ces candidats auront forcément reçu une formation en droit civil. La combinaison de cette formation et de leur lien avec l'une des institutions québécoises nommées sert à protéger la tradition civiliste du Québec et suscite la confiance du Québec envers la Cour. Imposer une exigence additionnelle de contemporanéité de l'appartenance au Barreau du Québec ne favorise en rien la réalisation de l'objet sous-jacent de l'art. 6 et mène à des résultats absurdes.

L'exigence de contemporanéité ne trouve un appui ni dans le texte de l'art. 6, ni dans son contexte ou son historique législatif. Le mot « *parmi* », à l'art. 6, n'a aucune signification temporelle. Il tire son sens du contexte et ne peut, en soi, appuyer la prétention qu'une personne doive être un membre *actuel* du barreau ou de la magistrature pour être nommée juge pour le Québec. Le mot « *parmi* » ne modifie pas le groupe de personnes visé à l'art. 6 — celui qui est décrit à l'art. 5. En fait, compte tenu de son contexte historique, le mot « *parmi* » renforce l'idée d'un lien inextricable entre les art. 5 et 6.

Si on ne le lit pas en conjonction avec l'art. 5, l'art. 6 mène à un résultat absurde, car un avocat néophyte admis au barreau la veille serait admissible à occuper l'un des sièges de la Cour réservés au Québec. Manifestement, l'art 6 doit être lié à la condition d'inscription au barreau pendant 10 ans que pose l'art. 5. Il n'existe pas à ce jour de principe d'interprétation des lois qui permette de puiser seulement les aspects qui nous agréent dans l'art. 5 (soit l'inscription au barreau pendant 10 ans) et de rejeter les autres (soit l'admissibilité, en vertu de l'art. 5, des avocats actuels *et des anciens* avocats inscrits au barreau pendant 10 ans).

L'exigence de contemporanéité ne trouve pas d'appui dans l'économie de la Loi. L'article 30 de la Loi qui traite de la nomination de juges suppléants constitue une anomalie historique et n'est d'aucune utilité pour l'interprétation des art. 5 et 6.

Toute interprétation de l'art. 6 exigeant qu'un *ancien* avocat qui a été membre du Barreau du Québec pendant 10 ans, ou qu'un *ancien* juge de la Cour d'appel du Québec ou de la Cour supérieure, redeienne membre de ce barreau pendant un jour pour être admissible à une nomination à la Cour n'aurait aucun sens d'un point de vue pratique. Il est difficile de croire que la population du Québec aurait, pour une raison ou pour une autre, davantage confiance en pareil candidat le vendredi que le jeudi.

Question 2

Per McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ.:

The unilateral power of Parliament to “provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada”, found in s. 101 of the *Constitution Act, 1867*, has been overtaken by the Supreme Court’s evolution in the structure of the Constitution, as recognized in Part V of the *Constitution Act, 1982*. The Court’s constitutional status initially arose from the Court’s historical evolution into an institution whose continued existence and functioning engaged the interests of both Parliament and the provinces. The Court’s protection was then confirmed by the *Constitution Act, 1982*, which reflected the understanding that the Court’s essential features formed part of the Constitution of Canada. As a result, Parliament is now required to maintain the essence of what enables the Supreme Court to perform its current role. While Parliament has the authority to enact amendments necessary for the continued maintenance of the Court, it cannot unilaterally modify the composition or other essential features of the Court.

Part V of the *Constitution Act, 1982* expressly makes changes to the Supreme Court and to its composition subject to constitutional amending procedures. Changes to the composition of the Court, including its abolition, can only be made under the procedure provided for in s. 41(d) and therefore require the unanimous consent of Parliament and the provincial legislatures. The notion of “composition” refers to ss. 4(1), 5 and 6 of the Act, which codify the composition of and eligibility requirements for appointment to the Supreme Court as they existed in 1982. Any substantive change in relation to those eligibility requirements is an amendment to the Constitution in relation to the composition of the Supreme Court and triggers the application of Part V. Changes to the other essential features of the Court can only be made under the procedure provided for in s. 42(1) (d), which requires the consent of at least seven provinces representing, in the aggregate, at least half of the population of all the provinces. The essential features of the Court protected under s. 42(1)(d) include, at the very least, the Court’s jurisdiction as the final general court of appeal for Canada, including in matters of constitutional interpretation, and its independence.

Question 2

La juge en chef McLachlin et les juges LeBel, Abella, Cromwell, Karakatsanis et Wagner :

Le pouvoir unilatéral de « créer, maintenir et organiser une cour générale d’appel pour le Canada », conféré au Parlement par l’art. 101 de la *Loi constitutionnelle de 1867*, a été modifié par l’évolution de la Cour suprême dans la structure constitutionnelle, comme le reconnaît la partie V de la *Loi constitutionnelle de 1982*. Initialement, la Cour suprême a acquis son statut constitutionnel en raison de l’évolution historique qui en a fait une institution dont la pérennité et le fonctionnement affectaient les intérêts à la fois du Parlement et des provinces. La protection de la Cour a ensuite été confirmée dans la *Loi constitutionnelle de 1982*, dont le contenu reflète la perception que les caractéristiques essentielles de la Cour faisaient partie de la Constitution canadienne. En conséquence, le Parlement doit maintenant préserver les éléments essentiels qui permettent à la Cour de s’acquitter de sa mission actuelle. Bien que le Parlement puisse adopter les modifications d’ordre administratif nécessaires au maintien de la Cour, il ne peut modifier unilatéralement ni la composition ni d’autres caractéristiques essentielles de la Cour.

La partie V de la *Loi constitutionnelle de 1982* assujettit expressément les changements touchant la Cour suprême et sa composition au respect des procédures de modification de la Constitution. Les modifications de la composition de la Cour, y compris son abolition, ne peuvent se faire que conformément à la procédure établie à l’al. 41d) et requièrent donc le consentement unanime du Parlement et de l’assemblée législative de chaque province. La notion de « composition » renvoie au par. 4(1) et aux art. 5 et 6 de la Loi, qui codifient la composition de la Cour suprême et les conditions de nomination de ses juges telles qu’elles existaient en 1982. Toute modification importante portant sur ces conditions de nomination constitue une modification de la Constitution portant sur la composition de la Cour suprême et entraîne l’application de la partie V. Les autres caractéristiques essentielles de la Cour ne peuvent être modifiées que conformément à l’al. 42(1)d), qui exige le consentement d’au moins sept provinces représentant, au total, au moins la moitié de la population de toutes les provinces. Les caractéristiques essentielles de la Cour qui sont protégées par l’al. 42(1)d) incluent, à tout le moins, la juridiction de la Cour en tant que cour générale d’appel pour le Canada, notamment en matière d’interprétation de la Constitution, et son indépendance.

Section 6.1 of the Act (cl. 472 of *Economic Action Plan 2013 Act, No. 2*) is *ultra vires* of Parliament acting alone, since it substantively changes the eligibility requirements for appointments to the Quebec seats on the Court under s. 6. The assertion that it is a declaratory provision does not alter its import. However, s. 5.1 (cl. 471) does not alter the law as it existed in 1982 and is therefore validly enacted under s. 101 of the *Constitution Act, 1867*, although it is redundant.

Per Moldaver J. (dissenting):

As both current and past advocates of at least 10 years standing at the Quebec bar are eligible for appointment to the Quebec seats on this Court, the legislation that Question 2 refers to does nothing more than restate the law as it exists. Accordingly, it is unnecessary to answer Question 2.

Cases Cited

By McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ.

Referred to: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Sarvanis v. Canada*, 2002 SCC 28, [2002] 1 S.C.R. 921; *R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Re References by the Governor-General in Council* (1910), 43 S.C.R. 536, aff'd [1912] A.C. 571; *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Bank of Montreal v. Metropolitan Investigation & Security (Canada) Ltd.*, [1975] 2 S.C.R. 546; *R. v. Gardiner*, [1982] 2 S.C.R. 368; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609.

By Moldaver J. (dissenting)

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27; *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616.

Statutes and Regulations Cited

Act respecting the Revised Statutes of Canada, R.S.C. 1886, c. 4, s. 8.
Act to amend the Criminal Code, S.C. 1932-33, c. 53, s. 17.
Act to amend the Exchequer Court Act, S.C. 1912, c. 21, s. 1.
Act to amend the Exchequer Court Act, S.C. 1920, c. 26, s. 1.

L'article 6.1 de la Loi (art. 472 du projet de loi intitulé *Loi n° 2 sur le plan d'action économique de 2013*) excède le pouvoir du Parlement agissant seul, car il modifie sur le fond les conditions de nomination d'un juge pour le Québec fixées à l'art. 6. L'affirmation que l'art. 6.1 est une disposition déclaratoire ne change en rien son effet. Toutefois, l'art. 5.1 (art. 471) ne modifie pas le droit existant en 1982; il a donc été valablement adopté en vertu de l'art. 101 de la *Loi constitutionnelle de 1867*, bien qu'il soit redondant.

Le juge Moldaver (dissident) :

Comme tout avocat, actuel ou ancien, inscrit pendant 10 ans au Barreau du Québec est admissible à une nomination à un poste de juge de la Cour réservé au Québec, le texte législatif mentionné dans la question 2 n'a aucun autre effet que de répéter ce que la loi dit déjà. Il n'est donc pas nécessaire de répondre à la question 2.

Jurisprudence

Citée par la juge en chef McLachlin et les juges LeBel, Abella, Cromwell, Karakatsanis et Wagner

Arrêts mentionnés : *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *Edwards c. Attorney-General for Canada*, [1930] A.C. 124; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *Sarvanis c. Canada*, 2002 CSC 28, [2002] 1 R.C.S. 921; *R. c. Daoust*, 2004 CSC 6, [2004] 1 R.C.S. 217; *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217; *Re References by the Governor-General in Council* (1910), 43 R.C.S. 536, conf. par [1912] A.C. 571; *Reference re The Farm Products Marketing Act*, [1957] R.C.S. 198; *Renvoi relatif à la Loi sur les valeurs mobilières*, 2011 CSC 66, [2011] 3 R.C.S. 837; *Hunt c. T&N plc*, [1993] 4 R.C.S. 289; *Banque de Montréal c. Metropolitan Investigation & Security (Canada) Ltd.*, [1975] 2 R.C.S. 546; *R. c. Gardiner*, [1982] 2 R.C.S. 368; *R. c. Henry*, 2005 CSC 76, [2005] 3 R.C.S. 609.

Citée par le juge Moldaver (dissident)

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 R.C.S. 27; *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616.

Lois et règlements cités

Acte concernant les statuts revisés du Canada, S.R.C. 1886, ch. 4, art. 8.
Acte de la Cour Suprême et de l'Échiquier, S.C. 1875, ch. 11, art. 4.
Acte des cours Suprême et de l'Échiquier, S.R.C. 1886, ch. 135, art. 4(2), (3).
Charte canadienne des droits et libertés.
Loi constitutionnelle de 1867, art. 101.

- Act to amend the Supreme Court Act, S.C. 1918, c. 7, s. 1.*
- Act to amend the Supreme Court Act, S.C. 1926-27, c. 38, s. 1.*
- Act to amend the Supreme Court Act, S.C. 1949 (2nd Sess.), c. 37, ss. 1, 3.*
- Act to amend the Supreme Court Act and to make related amendments to the Federal Court Act, S.C. 1974-75-76, c. 18.*
- Canadian Charter of Rights and Freedoms. Constitution Act, 1867, s. 101.*
- Constitution Act, 1982, Part V, ss. 41(d), 42(1)(d), 52(1).*
- Courts Administration Service Act, S.C. 2002, c. 8, s. 175.*
- Economic Action Plan 2013 Act, No. 2 (Bill C-4), S.C. 2013, c. 40, ss. 471, 472.*
- Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), s. 64.*
- Federal Courts Act, R.S.C. 1985, c. F-7, s. 5.4.*
- Legislation Revision and Consolidation Act, R.S.C. 1985, c. S-20, s. 6.*
- Règlement sur la formation continue obligatoire des avocats, R.R.Q., c. B-1, r. 12, s. 2.*
- Statute of Westminster, 1931 (reprinted in R.S.C. 1985, App. II, No. 27).*
- Supreme and Exchequer Court Act, S.C. 1875, c. 11, s. 4.*
- Supreme and Exchequer Courts Act, R.S.C. 1886, c. 135, s. 4(2), (3).*
- Supreme Court Act, R.S.C. 1906, c. 139, ss. 5, 6.*
- Supreme Court Act, R.S.C. 1927, c. 35, ss. 4, 5, 6.*
- Supreme Court Act, R.S.C. 1985, c. S-26, ss. 4(1), 5, 5.1 [ad. 2013, c. 40, s. 471], 6, 6.1 [idem, s. 472], 25, 29, 30 [am. 2002, c. 8, s. 175], 53.*
- Loi constitutionnelle de 1982, partie V, art. 41d), 42(1)d), 52(1).*
- Loi de la cour Suprême, S.R.C. 1906, ch. 139, art. 5, 6.*
- Loi de la Cour suprême, S.R.C. 1927, ch. 35, art. 4, 5, 6.*
- Loi modifiant la loi de la Cour de l'Échiquier, S.C. 1912, ch. 21, art. 1.*
- Loi modifiant la Loi de la cour de l'Échiquier, S.C. 1920, ch. 26, art. 1.*
- Loi modifiant la Loi de la cour Suprême, S.C. 1918, ch. 7, art. 1.*
- Loi modifiant la Loi de la Cour suprême, S.C. 1926-27, ch. 38, art. 1.*
- Loi modifiant la Loi de la Cour suprême, S.C. 1949 (2^e sess.), ch. 37, art. 1, 3.*
- Loi modifiant la Loi sur la Cour suprême et modifiant en conséquence la Loi sur la Cour fédérale, S.C. 1974-75-76, ch. 18.*
- Loi modifiant le Code criminel, S.C. 1932-33, ch. 53, art. 17.*
- Loi n° 2 sur le plan d'action économique de 2013 (projet de loi C-4), L.C. 2013, ch. 40, art. 471, 472.*
- Loi sur la Cour fédérale, S.R.C. 1970, ch. 10 (2^e suppl.), art. 64.*
- Loi sur la Cour suprême, L.R.C. 1985, ch. S-26, art. 4(1), 5, 5.1 [aj. 2013, ch. 40, art. 471], 6, 6.1 [idem, art. 472], 25, 29, 30 [mod. 2002, ch. 8, art. 175], 53.*
- Loi sur la révision et la codification des textes législatifs, L.R.C. 1985, ch. S-20, art. 6.*
- Loi sur le Service administratif des tribunaux judiciaires, L.C. 2002, ch. 8, art. 175.*
- Loi sur les Cours fédérales, L.R.C. 1985, ch. F-7, art. 5.4.*
- Règlement sur la formation continue obligatoire des avocats, R.R.Q., ch. B-1, r. 12, art. 2.*
- Statut de Westminster de 1931 (reproduit dans L.R.C. 1985, app. II, n° 27).*

Authors Cited

- Brun, Henri, Guy Tremblay et Eugénie Brouillet. *Droit constitutionnel*, 5^e éd. Cowansville, Qué.: Yvon Blais, 2008.
- Bushnell, Ian. *The Captive Court: A Study of the Supreme Court of Canada*. Montréal and Kingston: McGill-Queen's University Press, 1992.
- Bushnell, Ian. *The Federal Court of Canada: A History, 1875-1992*. Toronto: University of Toronto Press, 1997.
- Canada. *Consensus Report on the Constitution: Charlottetown*. Ottawa: Minister of Supply and Services, 1992.
- Canada. *Constitutional Accord: Canadian Patriation Plan*. Ottawa, 1981.

Doctrine et autres documents cités

- Brun, Henri, Guy Tremblay et Eugénie Brouillet. *Droit constitutionnel*, 5^e éd. Cowansville, Qué. : Yvon Blais, 2008.
- Bushnell, Ian. *The Captive Court : A Study of the Supreme Court of Canada*. Montréal and Kingston : McGill-Queen's University Press, 1992.
- Bushnell, Ian. *The Federal Court of Canada : A History, 1875-1992*. Toronto : University of Toronto Press, 1997.
- Canada. *Accord constitutionnel : Projet canadien de rapatriement de la Constitution*. Ottawa, 1981.
- Canada. Assemblée législative. *Débats parlementaires sur la question de la Confédération des provinces de l'Amérique britannique du Nord*, 3^e sess., 8^e lég. Québec : Hunter, Rose et Lemieux, 1865, p. 581-582.

- Canada. House of Commons. *Debates of the House of Commons of the Dominion of Canada*, 2nd Sess., 3rd Parl., 1875, pp. 284, 285, 738, 739, 754, 938, 940, 972.
- Canada. Legislative Assembly. *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, 3rd Sess., 8th Parl. Quebec: Hunter, Rose & Co., 1865, p. 576.
- Canada. Senate. *Debates of the Senate of Canada*, 2nd Sess., 3rd Parl., 1875, p. 713.
- Côté, Pierre-André, in collaboration with Stéphane Beaulac and Mathieu Devinat. *The Interpretation of Legislation in Canada*, 4th ed. Toronto: Carswell, 2011.
- Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. Supp., vol. 1. Toronto: Carswell, 2007 (updated 2013, release 1).
- Lederman, W. R. "Constitutional Procedure and the Reform of the Supreme Court of Canada" (1985), 26 *C. de D.* 195.
- Monahan, Patrick J., and Byron Shaw. *Constitutional Law*, 4th ed. Toronto: Irwin Law, 2013.
- Newman, Warren J. "The Constitutional Status of the Supreme Court of Canada" (2009), 47 *S.C.L.R.* (2d) 429.
- Oliver, Peter. "Canada, Quebec, and Constitutional Amendment" (1999), 49 *U.T.L.J.* 519.
- Plaxton, Michael, and Carissima Mathen. "Purposive Interpretation, Quebec, and the *Supreme Court Act*" (2013), 22 *Const. Forum* 15.
- Russell, Peter H. *The Supreme Court of Canada as a Bilingual and Bicultural Institution*. Ottawa: Information Canada, 1969.
- Saywell, John T. *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism*. Toronto: University of Toronto Press, 2002.
- Scott, Stephen A. "Pussycat, Pussycat or Patriation and the New Constitutional Amendment Processes" (1982), 20 *U.W.O. L. Rev.* 247.
- Scott, Stephen A. "The Canadian Constitutional Amendment Process" (1982), 45 *Law & Contemp. Probs.* 249.
- Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.
- Canada. Chambre des communes. *Débats de la Chambre des communes du Canada*, 2^e sess., 3^e lég., 1875, p. 299, 782-783, 799, 993, 995, 1030.
- Canada. *Rapport du consensus sur la Constitution : Charlottetown*. Ottawa : Ministre des Approvisionnements et Services, 1992.
- Canada. Sénat. *Debates of the Senate of Canada*, 2nd Sess., 3rd Parl., 1875, p. 713.
- Côté, Pierre-André, avec la collaboration de Stéphane Beaulac et Mathieu Devinat. *Interprétation des lois*, 4^e éd. Montréal : Thémis, 2009.
- Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. Supp., vol. 1. Toronto : Carswell, 2007 (updated 2013, release 1).
- Lederman, W. R. « Constitutional Procedure and the Reform of the Supreme Court of Canada » (1985), 26 *C. de D.* 195.
- Monahan, Patrick J., and Byron Shaw. *Constitutional Law*, 4th ed. Toronto : Irwin Law, 2013.
- Newman, Warren J. « The Constitutional Status of the Supreme Court of Canada » (2009), 47 *S.C.L.R.* (2d) 429.
- Oliver, Peter. « Canada, Quebec, and Constitutional Amendment » (1999), 49 *U.T.L.J.* 519.
- Plaxton, Michael, and Carissima Mathen. « Purposive Interpretation, Quebec, and the *Supreme Court Act* » (2013), 22 *Const. Forum* 15.
- Russell, Peter H. *The Supreme Court of Canada as a Bilingual and Bicultural Institution*. Ottawa : Information Canada, 1969.
- Saywell, John T. *The Lawmakers : Judicial Power and the Shaping of Canadian Federalism*. Toronto : University of Toronto Press, 2002.
- Scott, Stephen A. « Pussycat, Pussycat or Patriation and the New Constitutional Amendment Processes » (1982), 20 *U.W.O. L. Rev.* 247.
- Scott, Stephen A. « The Canadian Constitutional Amendment Process » (1982), 45 *Law & Contemp. Probs.* 249.
- Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont. : LexisNexis, 2008.

REFERENCE by the Governor in Council concerning ss. 5 and 6 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, as set out in Order in Council P.C. 2013-1105 dated October 22, 2013. Question 1 is answered in the negative, Moldaver J. dissenting. Question 2 is answered in the negative with respect to the three seats reserved for Quebec and the declaratory provision set out in cl. 472.

RENOVIS par le gouverneur en conseil concernant les art. 5 et 6 de la *Loi sur la Cour suprême*, L.R.C. 1985, ch. S-26, institué aux termes du décret C.P. 2013-1105 en date du 22 octobre 2013. La question 1 reçoit une réponse négative. Le juge Moldaver est dissident. La question 2 reçoit une réponse négative pour ce qui est des trois postes réservés au Québec et de la disposition déclaratoire

It is answered in the affirmative with respect to cl. 471.

René LeBlanc and *Christine Mohr*, for the Attorney General of Canada.

Patrick J. Monahan and *Josh Hunter*, for the intervener the Attorney General of Ontario.

André Fauteux and *Jean-François Beaupré*, for the intervener the Attorney General of Quebec.

Sébastien Grammond, *Jeffrey Haylock* and *Nicolas M. Rouleau*, for the interveners Robert Décaray, Alice Desjardins and Gilles Létourneau.

Rocco Galati, on his own behalf.

Sébastien Grammond, for the intervener the Canadian Association of Provincial Court Judges.

Paul Slansky, for the intervener the Constitutional Rights Centre Inc.

The following is the opinion of

THE CHIEF JUSTICE AND LEBEL, ABELLA,
CROMWELL, KARAKATSANIS AND WAGNER JJ. —

I. Introduction

[1] The *Supreme Court Act* provides that three of the nine judges of the Supreme Court of Canada must be appointed “from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province”: R.S.C. 1985, c. S-26, s. 6. This reference seeks our opinion on two aspects of the eligibility requirements for appointment to these three Quebec seats.

[2] The first is whether a person who was at any time an advocate of at least 10 years standing at the Barreau du Québec qualifies for appointment under s. 6 as being “from among the advocates of that Province”. If the answer to the first question is no, the second question arises. It is whether Parliament

énoncée dans l’article 472. Elle reçoit une réponse affirmative concernant l’article 471.

René LeBlanc et *Christine Mohr*, pour le procureur général du Canada.

Patrick J. Monahan et *Josh Hunter*, pour l’intervenant le procureur général de l’Ontario.

André Fauteux et *Jean-François Beaupré*, pour l’intervenant le procureur général du Québec.

Sébastien Grammond, *Jeffrey Haylock* et *Nicolas M. Rouleau*, pour les intervenants Robert Décaray, Alice Desjardins et Gilles Létourneau.

Rocco Galati, en personne.

Sébastien Grammond, pour l’intervenant l’Association canadienne des juges de cours provinciales.

Paul Slansky, pour l’intervenant Constitutional Rights Centre Inc.

Version française de l’avis rendu par

LA JUGE EN CHEF ET LES JUGES LEBEL, ABELLA,
CROMWELL, KARAKATSANIS ET WAGNER —

I. Introduction

[1] La *Loi sur la Cour suprême* prévoit que trois des neuf juges de la Cour suprême du Canada sont choisis « parmi les juges de la Cour d’appel ou de la Cour supérieure de la province de Québec ou parmi les avocats de celle-ci » : L.R.C. 1985, ch. S-26, art. 6. Le renvoi porte sur deux aspects des conditions de nomination à ces trois postes de juge réservés pour le Québec.

[2] Dans la première question, on nous demande si une personne qui a autrefois été inscrite pendant au moins 10 ans au Barreau du Québec répond aux conditions de nomination pour être choisie « parmi les avocats de » cette province au sens de l’art. 6. La deuxième question se posera si la première reçoit

can enact legislation to make such a person eligible for appointment to one of the three Quebec seats on the Court. The answer to these questions — which on their face raise issues of statutory interpretation — engage more fundamental issues about the composition of the Court and its place in Canada's legal and constitutional order.

[3] These questions arise in the context of the appointment under s. 6 of the Honourable Marc Nadon, a supernumerary judge of the Federal Court of Appeal and formerly, but not at the time of this appointment, a member of the Quebec bar of more than 10 years standing. Justice Nadon was not a judge of the Court of Appeal or the Superior Court of the Province of Quebec and therefore was not eligible for appointment on that basis. The narrow question is thus whether he was eligible for appointment because he had previously been a member of the Quebec bar.

[4] In our view, the answer to this question is no: a current judge of the Federal Court of Appeal is not eligible for appointment under s. 6 as a person who may be appointed “from among the advocates of that Province”. This language requires that, at the time of appointment, the appointee be a current member of the Quebec bar with at least 10 years standing.

[5] On the question of whether Parliament can enact legislation purporting to declare a binding interpretation of s. 6 and thereby permit the appointment of a former member of the bar to one of the Quebec positions on the Court, our view is that the answer is also no. The eligibility requirements set out in s. 6 relate to the composition of the Court and are, therefore, constitutionally protected. Under s. 41(d) of the *Constitution Act, 1982*, any amendment in relation to the composition of the Supreme Court of Canada may only be made by proclamation issued by the Governor General under the Great Seal of Canada authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province.

une réponse négative. Nous devrons alors déterminer si le Parlement peut légiférer pour permettre la nomination d'une telle personne à l'un des trois postes de juge de la Cour réservés pour le Québec. La réponse à ces questions — qui soulèvent à première vue des questions d'interprétation législative — implique des problèmes plus fondamentaux sur la composition de la Cour et la place qu'elle occupe dans les ordres juridique et constitutionnel du Canada.

[3] Ces questions se présentent dans le contexte de la nomination, en vertu de l'art. 6, de l'honorable Marc Nadon, juge surnuméraire de la Cour d'appel fédérale. Le juge Nadon a déjà été inscrit au Barreau du Québec pendant plus de 10 ans, mais ne l'était plus au moment de sa nomination. Comme il n'était un juge ni de la Cour d'appel ni de la Cour supérieure de la province de Québec, il ne pouvait pas être nommé à ce titre. Il s'agit donc de déterminer plus précisément s'il était admissible à une nomination à titre de personne qui a été autrefois membre du Barreau du Québec.

[4] À notre avis, il faut répondre à cette question par la négative : une personne actuellement juge à la Cour d'appel fédérale n'est pas admissible à être nommée en vertu de l'art. 6 « parmi les avocats de » la province de Québec. Ces termes exigent que la personne nommée soit un avocat inscrit au Barreau du Québec pendant au moins 10 ans au moment de sa nomination.

[5] Quant à la question du pouvoir du Parlement de légiférer pour imposer une interprétation de l'art. 6 et permettre ainsi la nomination d'un ancien membre du Barreau du Québec à l'un des postes de juge de la Cour réservés pour le Québec, nous sommes d'avis qu'il faut aussi y répondre par la négative. Les conditions de nomination fixées à l'art. 6 portent sur la composition de la Cour et bénéficient à ce titre d'une protection constitutionnelle. Selon l'al. 41d) de la *Loi constitutionnelle de 1982*, toute modification portant sur la composition de la Cour suprême du Canada doit se faire par proclamation du gouverneur général sous le grand sceau du Canada, autorisée par des résolutions du Sénat, de la Chambre des communes et de l'assemblée législative de chaque province.

[6] The practical effect is that the appointment of Justice Nadon and his swearing-in as a judge of the Court were void *ab initio*. He remains a supernumerary judge of the Federal Court of Appeal.

II. The Reference Questions

[7] On October 22, 2013, the Governor General in Council issued Order in Council P.C. 2013-1105 under s. 53 of the *Supreme Court Act*, which referred to this Court the following questions:

1. Can a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec be appointed to the Supreme Court of Canada as a member of the Supreme Court from Quebec pursuant to sections 5 and 6 of the *Supreme Court Act*?
2. Can Parliament enact legislation that requires that a person be or has previously been a barrister or advocate of at least 10 years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada or enact the annexed declaratory provisions as set out in clauses 471 and 472 of the Bill entitled *Economic Action Plan 2013 Act, No. 2*?

[8] These questions concern the proper interpretation of ss. 5 and 6 of the *Supreme Court Act* and Parliament's authority to amend them. Our opinion, issued pursuant to s. 53(4) of the Act, limits itself to the legal and jurisdictional issues necessary to answer the questions. We are not asked about nor opine on the advantages or disadvantages of the eligibility requirements codified in ss. 5 and 6 of the Act and possible changes to them.

III. Background

[9] On September 30, 2013, the Prime Minister of Canada announced the nomination of Justice Marc Nadon, a supernumerary judge of the Federal Court of Appeal, to the Supreme Court of Canada. On October 3, 2013, by Order in Council P.C. 2013-1050, Justice Nadon was named a judge of the Supreme

[6] Ces conclusions signifient, concrètement, que la nomination du juge Nadon et son assermentation comme juge de la Cour sont nulles *ab initio*. Le juge Nadon demeure juge surnuméraire de la Cour d'appel fédérale.

II. Les questions soumises par renvoi

[7] Le 22 octobre 2013, le gouverneur général en conseil a pris le décret C.P. 2013-1105 en vertu de l'art. 53 de la *Loi sur la Cour suprême* afin de soumettre les questions suivantes au jugement de la Cour :

1. Une personne qui a autrefois été inscrite comme avocat pendant au moins dix ans au Barreau du Québec peut-elle être nommée à la Cour suprême du Canada à titre de juge de la Cour suprême pour le Québec conformément aux articles 5 et 6 de la *Loi sur la Cour suprême*?
2. Le Parlement peut-il légiférer pour exiger, à titre de condition de sa nomination au poste de juge de la Cour suprême du Canada, qu'une personne soit ou ait été inscrite comme avocat au barreau d'une province pendant au moins dix ans ou adopter des dispositions déclaratoires telles que celles prévues aux articles 471 et 472 du projet de loi intitulé *Loi n° 2 sur le plan d'action économique de 2013*, ci-annexé?

[8] Ces questions portent sur l'interprétation juste des art. 5 et 6 de la *Loi sur la Cour suprême* et sur le pouvoir du Parlement de les modifier. Notre avis, donné en vertu du par. 53(4) de la Loi, se limite aux questions de droit et de compétence qu'il faut nécessairement trancher pour y répondre. On ne nous demande pas notre avis et nous ne nous prononçons pas sur les avantages ou les inconvénients des conditions de nomination codifiées aux art. 5 et 6 de la Loi ni sur les modifications qui pourraient y être apportées.

III. Contexte

[9] Le 30 septembre 2013, le premier ministre du Canada a annoncé la nomination à la Cour suprême du Canada du juge Marc Nadon, juge surnuméraire de la Cour d'appel fédérale. Le 3 octobre 2013, le juge Nadon a été nommé juge à la Cour suprême du Canada par le décret C.P. 2013-1050, afin de

Court of Canada, replacing Justice Morris Fish as one of the three judges appointed from Quebec pursuant to s. 6 of the *Supreme Court Act*. He was sworn in as a member of the Court on the morning of October 7, 2013.

[10] The same day, the appointment was challenged by an application before the Federal Court of Canada: Federal Court File No. T-1657-13. Justice Nadon decided not to participate in any matters before the Court.

[11] On October 22, 2013, the Governor General in Council referred the two questions set out earlier to this Court for hearing and consideration pursuant to s. 53 of the *Supreme Court Act*. On the same day, Bill C-4, *Economic Action Plan 2013 Act, No. 2*, was introduced in the House of Commons. Clauses 471 and 472 of Bill C-4 proposed to amend the *Supreme Court Act* by adding ss. 5.1 and 6.1. These provisions were subsequently passed and received Royal Assent on December 12, 2013: S.C. 2013, c. 40. The new s. 6.1 seeks to make it clear that a former member of the Quebec bar is eligible for appointment under s. 6.

[12] Sections 5, 5.1, 6 and 6.1 of the Act now read as follows:

5. Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.

5.1 For greater certainty, for the purpose of section 5, a person may be appointed a judge if, at any time, they were a barrister or advocate of at least 10 years standing at the bar of a province.

6. At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.

6.1 For greater certainty, for the purpose of section 6, a judge is from among the advocates of the Province of Quebec if, at any time, they were an advocate of at least 10 years standing at the bar of that Province.

remplacer le juge Morris Fish à titre de l'un des trois juges provenant du Québec nommés conformément à l'art. 6 de la *Loi sur la Cour suprême*. Le juge Nadon a prêté serment comme juge de la Cour le 7 octobre 2013, en avant-midi.

[10] Le même jour, cette nomination a été contestée par une requête présentée devant la Cour fédérale du Canada : dossier de la Cour fédérale n° T-1657-13. Le juge Nadon a alors décidé de ne pas participer aux dossiers examinés par la Cour.

[11] Le 22 octobre 2013, le gouverneur général en conseil a soumis les deux questions énoncées précédemment au jugement de la Cour en vertu de l'art. 53 de la *Loi sur la Cour suprême*. Le même jour, le projet de loi C-4, intitulé *Loi n° 2 sur le plan d'action économique de 2013*, a été déposé à la Chambre des communes. Les articles 471 et 472 du projet de loi C-4 modifiaient la *Loi sur la Cour suprême* par l'adjonction des art. 5.1 et 6.1. Ces dispositions ont par la suite été adoptées et ont reçu la sanction royale le 12 décembre 2013 : L.C. 2013, ch. 40. Le nouvel art. 6.1 précise qu'un ancien membre du Barreau du Québec peut être nommé à la Cour en vertu de l'art. 6.

[12] Les articles 5, 5.1, 6 et 6.1 de la Loi sont actuellement libellés comme suit :

5. Les juges sont choisis parmi les juges, actuels ou anciens, d'une cour supérieure provinciale et parmi les avocats inscrits pendant au moins dix ans au barreau d'une province.

5.1 Pour l'application de l'article 5, il demeure entendu que les juges peuvent être choisis parmi les personnes qui ont autrefois été inscrites comme avocat pendant au moins dix ans au barreau d'une province.

6. Au moins trois des juges sont choisis parmi les juges de la Cour d'appel ou de la Cour supérieure de la province de Québec ou parmi les avocats de celle-ci.

6.1 Pour l'application de l'article 6, il demeure entendu que les juges peuvent être choisis parmi les personnes qui ont autrefois été inscrites comme avocat pendant au moins dix ans au barreau de la province de Québec.

IV. Question 1**A. The Issue**

1. Can a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec be appointed to the Supreme Court of Canada as a member of the Supreme Court from Quebec pursuant to sections 5 and 6 of the *Supreme Court Act*?

[13] Section 5 of the *Supreme Court Act* sets out the general eligibility requirements for appointment to the Supreme Court of Canada by creating four groups of people who are eligible for appointment: (1) current judges of a superior court of a province, including courts of appeal, (2) former judges of such a court, (3) current barristers or advocates of at least 10 years standing at the bar of a province, and (4) former barristers or advocates of at least 10 years standing.

[14] Section 6 of the Act sets out the specific eligibility requirements for appointment to the Supreme Court as a judge for the province of Quebec. The provision expressly identifies two categories of people who are eligible for appointment: (1) judges of the Court of Appeal and Superior Court of Quebec, and (2) members of the Quebec bar.

[15] The question in this reference is whether the second category in s. 6 of the Act encompasses both current *and* former members of the Quebec bar, or whether it limits eligibility to current members of the bar. Justice Nadon does not belong to the first category — he was not a judge of the Court of Appeal or of the Superior Court of Quebec — and was not a current member of the Quebec bar at the time of his appointment. He is, however, a former member of the Quebec bar of more than 10 years standing. His eligibility for appointment thus turns on the scope of the second category — i.e. on whether a person is eligible for appointment to the Supreme Court of Canada under s. 6 of the Act on the basis of former membership of the Quebec bar.

IV. Question 1**A. La question**

1. Une personne qui a autrefois été inscrite comme avocat pendant au moins dix ans au Barreau du Québec peut-elle être nommée à la Cour suprême du Canada à titre de juge de la Cour suprême pour le Québec conformément aux articles 5 et 6 de la *Loi sur la Cour suprême*?

[13] L'article 5 de la *Loi sur la Cour suprême* fixe les conditions générales de nomination à la Cour suprême du Canada en créant quatre groupes de personnes admissibles à une nomination : (1) les juges actuels d'une cour supérieure, et notamment d'une cour d'appel, d'une province, (2) les anciens juges d'une telle cour, (3) les avocats actuels inscrits pendant au moins 10 ans au barreau d'une province, (4) les anciens avocats inscrits au barreau d'une province pendant au moins 10 ans.

[14] L'article 6 de la Loi fixe les conditions particulières auxquelles une personne doit répondre pour être nommée juge de la Cour suprême pour la province de Québec. Il définit expressément deux catégories de personnes admissibles à une nomination : (1) les juges de la Cour d'appel ou de la Cour supérieure de la province de Québec, et (2) les membres du Barreau du Québec.

[15] Dans le présent renvoi, on nous demande de décider si la deuxième catégorie définie à l'art. 6 englobe *à la fois* les avocats actuellement inscrits au Barreau du Québec *et* ceux qui y ont autrefois été inscrits, ou si l'admissibilité à une nomination se limite aux membres actuels du barreau. Le juge Nadon n'appartient pas à la première catégorie — il n'était juge ni de la Cour d'appel ni de la Cour supérieure du Québec — et n'était pas membre du Barreau du Québec au moment de sa nomination. Il a toutefois été autrefois un avocat inscrit au Barreau du Québec pendant plus de 10 ans. Son admissibilité à une nomination dépend donc des limites de la deuxième catégorie — c'est-à-dire si une personne peut être nommée à la Cour suprême en vertu de l'art. 6 en sa qualité d'ancien membre du Barreau du Québec.

[16] The Attorney General of Canada submits that s. 5 sets out the general eligibility criteria and allows both former and current members of the bar to be appointed to the Supreme Court. In his view, s. 6 does not restrict or otherwise substantively modify these criteria; rather, it functions to ensure that judges appointed for Quebec fulfil the general eligibility requirements in the province of Quebec.

[17] In our view, s. 6 narrows the pool from the four groups of people who are eligible under s. 5 to two groups who are eligible under s. 6. By specifying that three judges shall be selected from among the members of a specific list of institutions, s. 6 requires that persons appointed to the three Quebec seats must, in addition to meeting the general requirements of s. 5, be current members of these institutions.

[18] We come to this conclusion for four main reasons. First, the plain meaning of s. 6 has remained consistent since the original version of that provision was enacted in 1875, and it has always excluded former advocates. Second, this interpretation gives effect to important differences in the wording of ss. 5 and 6. Third, this interpretation of s. 6 advances its dual purpose of ensuring that the Court has civil law expertise and that Quebec's legal traditions and social values are represented on the Court *and* that Quebec's confidence in the Court be maintained. Finally, this interpretation is consistent with the broader scheme of the *Supreme Court Act* for the appointment of *ad hoc* judges.

B. General Principles of Interpretation

[19] The *Supreme Court Act* was enacted in 1875 as an ordinary statute under the authority of s. 101 of the *Constitution Act, 1867* (S.C. 1875, c. 11). However, as we explain below, Parliament's authority to amend the Act is now limited by the Constitution. Sections 5 and 6 of the *Supreme Court Act* reflect an essential feature of the Supreme Court of Canada — its composition — which is constitutionally protected under Part V of the

[16] Le procureur général du Canada soutient que l'art. 5 fixe les critères d'admissibilité généraux et permet de nommer les avocats, actuels et anciens, à la Cour suprême. Selon lui, l'art. 6 ne restreint pas ces critères ni ne les modifie autrement sur le fond : il a plutôt pour objectif de garantir que les juges nommés pour le Québec remplissent les conditions de nomination générales dans la province de Québec.

[17] À notre avis, l'art. 6 réduit à deux groupes le bassin des personnes admissibles, qui comprend quatre groupes en vertu de l'art. 5. En précisant que trois juges doivent être choisis parmi les membres d'institutions expressément énumérées, l'art. 6 exige que les personnes nommées aux trois postes de juge réservés pour le Québec soient choisies parmi les membres actuels de ces institutions, en plus de répondre aux conditions générales fixées à l'art. 5.

[18] Notre conclusion s'appuie sur quatre motifs principaux. Premièrement, le sens ordinaire de l'art. 6 est demeuré constant depuis la version originale de cette disposition édictée en 1875 et il a toujours exclu les anciens avocats. Deuxièmement, cette interprétation reflète des différences importantes dans la formulation des art. 5 et 6. Troisièmement, cette interprétation de l'art. 6 favorise son double objet qui consiste à garantir que la Cour possède une expertise en droit civil et que les traditions juridiques et les valeurs sociales du Québec y soient représentées *et à préserver la confiance du Québec envers la Cour*. Enfin, cette interprétation respecte l'économie générale de la *Loi sur la Cour suprême* au sujet de la nomination de juges suppléants.

B. Principes généraux d'interprétation

[19] La *Loi sur la Cour suprême* a été édictée en 1875 à titre de loi ordinaire relevant du pouvoir de légiférer conféré par l'art. 101 de la *Loi constitutionnelle de 1867* (S.C. 1875, ch. 11). Toutefois, comme nous l'expliquons plus loin, la Constitution limite maintenant le pouvoir du Parlement de modifier la Loi. En effet, les art. 5 et 6 de la *Loi sur la Cour suprême* contiennent une caractéristique essentielle de la Cour suprême du Canada

Constitution Act, 1982. As such, they must be interpreted in a broad and purposive manner and understood in their proper linguistic, philosophic and historical context: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-56; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344.

C. Legislative History of Sections 5 and 6

[20] The eligibility requirements for appointments from Quebec are the result of the historic bargain that gave birth to the Court in 1875. Sections 5 and 6 in the current Act descend from the original eligibility provision found in s. 4 of the 1875 Act. It is therefore useful to review the legislative history of the eligibility provisions. As we shall discuss, only the 1886 amendment to the Act substantively changed the general eligibility requirements for appointment to the Court under what is now s. 5. There have been no substantive changes to the criteria for appointments from Quebec since the Act was introduced in 1875.

[21] The 1875 Act set out in a single provision the appointment process, the number of judges (one chief justice and five puisne judges), the general eligibility requirements, and the specification that two judges shall come from the bench or bar of Quebec: s. 4. The portion of s. 4 that evolved into ss. 4, 5 and 6 of the current Act stated:

4. [Qualification of Chief Justice and Judges, respectively.] Her Majesty may appoint, by letters patent, under the Great Seal of Canada, one person, who is, or has been, a Judge of one of the Superior Courts in any of the Provinces forming part of the Dominion of Canada, or who is a Barrister or Advocate of at least ten years' standing at the Bar of any one of the said Provinces, to be Chief Justice of the said Court, and five persons who are, or have been, respectively, Judges of one of the said Superior Courts, or who are Barristers or Advocates of at least ten years' standing at the Bar of one of the said Provinces, to be Puisne Judges of the said Court, two of whom at least shall be taken from among the Judges of

— sa composition — que protège la partie V de la *Loi constitutionnelle de 1982*. À ce titre, ils doivent être interprétés généreusement en fonction de leur objet et examinés dans leurs contextes linguistique, philosophique et historique : *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, p. 155-156; *Edwards c. Attorney-General for Canada*, [1930] A.C. 124 (C.P.), p. 136; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 344.

C. Historique législatif des art. 5 et 6

[20] Les conditions de nomination des juges pour le Québec résultent de l'entente historique qui a permis la création de la Cour en 1875. Les articles 5 et 6 de la Loi actuelle tirent leur origine de la disposition initiale fixant les conditions de nomination à l'art. 4 de la Loi de 1875. Il est donc utile d'examiner l'historique législatif des dispositions fixant ces conditions. Nous verrons que seule la modification de 1886 a apporté un changement de fond aux conditions générales de nomination à la Cour aujourd'hui énoncées à l'art. 5. Par ailleurs, aucune modification de fond n'a été apportée aux critères de nomination des juges pour le Québec depuis l'entrée en vigueur de la Loi en 1875.

[21] La Loi de 1875 établissait dans une seule disposition le processus de nomination, le nombre de juges (un juge en chef et cinq juges puînés), les conditions de nomination générales et l'exigence que deux juges proviennent de la magistrature ou du barreau de la province de Québec : art. 4. Le volet de l'art. 4 à l'origine des art. 4, 5 et 6 de la Loi actuelle était ainsi libellé :

4. [Qualités exigées du juge en chef et des juges.] Sa Majesté pourra nommer, par lettres patentes sous le grand sceau du Canada, — comme juge en chef de cette cour, — une personne étant ou ayant été juge de l'une des cours supérieures dans quelqu'une des provinces formant la Puissance du Canada, ou un avocat ayant pratiqué pendant au moins dix ans au barreau de quelqu'une de ces provinces et, — comme juges puînés de cette cour, — cinq personnes étant ou ayant été respectivement juges de l'une de ces cours supérieures, ou étant avocats de pas moins de dix ans de pratique au barreau de quelqu'une de ces provinces, dont deux au moins seront pris parmi les juges de la Cour Supérieure ou de la Cour du Banc de la

the Superior Court or Court of Queen's Bench, or the Barristers or Advocates of the Province of Quebec;

4. [Qualités exigées du juge en chef et des juges.] Sa Majesté pourra nommer, par lettres patentes sous le grand sceau du Canada, — comme juge en chef de cette cour, — une personne étant ou ayant été juge de l'une des cours supérieures dans quelqu'une des provinces formant la Puissance du Canada, ou un avocat ayant pratiqué pendant au moins dix ans au barreau de quelqu'une de ces provinces, et, — comme juges puînés de cette cour, — cinq personnes étant ou ayant été respectivement juges de l'une de ces cours supérieures, ou étant avocats de pas moins de dix ans de pratique au barreau de quelqu'une de ces provinces, dont deux au moins seront pris parmi les juges de la Cour Supérieure ou de la Cour du Banc de la Reine, ou parmi les procureurs ou avocats de la province de Québec;

This provision contemplated the appointment of only current lawyers to the Court, both for Quebec and for the rest of the country.

[22] The only substantive change to the eligibility requirements took place in 1886 as part of statutory revisions (R.S.C. 1886, c. 135). Section 4 was divided into several subsections, including ss. 4(2) and 4(3) setting out the general requirements for appointment and, more specifically, the requirements for Quebec appointments. Notably, the language in s. 4(2) (now s. 5) was broadened to encompass any person who "is or has been" ("sera ou aura été") a barrister or advocate. Sections 4(2) and 4(3) read:

2. [Who may be appointed judge.] Any person may be appointed a judge of the court who is or has been a judge of a superior court of any of the Provinces of Canada, or a barrister or advocate of at least ten years' standing at the bar of any of the said Provinces:

3. [Judges from bar of Quebec.] Two at least of the judges of the court shall be appointed from among the judges of the Court of Queen's Bench, or of the Superior Court, or the barristers or advocates of the Province of Quebec:

2. [Qui pourra être nommé juge.] Pourra être nommé juge de la cour quiconque sera ou aura été juge d'une cour supérieure dans quelqu'une des provinces du

Reine, ou parmi les procureurs ou avocats de la province de Québec;

4. [Qualification of Chief Justice and Judges, respectively.] Her Majesty may appoint, by letters patent, under the Great Seal of Canada, one person, who is, or has been, a Judge of one of the Superior Courts in any of the Provinces forming part of the Dominion of Canada, or who is a Barrister or Advocate of at least ten years' standing at the Bar of any one of the said Provinces, to be Chief Justice of the said Court, and five persons who are, or have been, respectively, Judges of one of the said Superior Courts, or who are Barristers or Advocates of at least ten years' standing at the Bar of one of the said Provinces, to be Puisne Judges of the said Court, two of whom at least shall be taken from among the judges of the Superior Court or Court of Queen's Bench or the Barristers or Advocates of the Province of Quebec;

Selon cette disposition, seules les personnes étant avocats au moment de leur nomination pouvaient être nommées à la Cour, tant pour le Québec que pour le reste du pays.

[22] Le seul changement de fond aux conditions de nomination a été apporté en 1886 lors de la révision des lois (S.R.C. 1886, ch. 135). L'article 4 a alors été divisé en plusieurs paragraphes, dont les par. 4(2) et 4(3) qui énonçaient les conditions de nomination générales et, plus particulièrement, les conditions de nomination des juges pour le Québec. En particulier, la formulation du par. 4(2) (maintenant l'art. 5) a été élargie pour inclure qui-conque « sera ou aura été » ("is or has been") un avocat. Voici les par. 4(2) et 4(3) :

2. [Qui pourra être nommé juge.] Pourra être nommé juge de la cour quiconque sera ou aura été juge d'une cour supérieure dans quelqu'une des provinces du Canada, ou un avocat ayant pratiqué pendant au moins dix ans au barreau de quelqu'une de ces provinces.

3. [Judges tirés du barreau de Québec.] Au moins deux des juges de la cour seront pris parmi les juges de la cour du Banc de la Reine ou de la cour Supérieure, ou parmi les avocats de la province de Québec.

2. [Who may be appointed judge.] Any person may be appointed a judge of the court who is or has been a judge of a superior court of any of the Provinces of Canada, or

Canada, ou un avocat ayant pratiqué pendant au moins dix ans au barreau de quelqu'une de ces provinces.

3. [Juges tirés du barreau de Québec.] Au moins deux des juges de la cour seront pris parmi les juges de la cour du Banc de la Reine ou de la cour Supérieure, ou parmi les avocats de la province de Québec.

[23] We have underlined key aspects of the wording in each official language of the revisions of 1886, which we will discuss below. The 1886 Act contemplated the appointment of current or former lawyers to the Court generally, but it did not change the more restrictive language for the Quebec appointments. The revisions of 1886 stipulated that where the effect of the revised statutes is different from that of the repealed laws, "the provisions contained in [the Revised Statutes] shall prevail": *An Act respecting the Revised Statutes of Canada*, R.S.C. 1886, c. 4, s. 8.

[24] In 1906, ss. 4(2) and 4(3) became ss. 5 and 6, but no substantive changes were made: R.S.C. 1906, c. 139.

[25] In 1927, one judge was added for a total of seven judges on the Court, but the number of Quebec judges remained two: S.C. 1926-27, c. 38, s. 1; R.S.C. 1927, c. 35, ss. 4 and 6. The Court was enlarged again in 1949, when the number of judges of the Court increased to nine and the ratio of Quebec judges was preserved by increasing their number to three: *An Act to amend the Supreme Court Act*, S.C. 1949 (2nd Sess.), c. 37, s. 1.

[26] The current text of ss. 5 and 6 dates to the statutory revisions of 1985. These revisions changed the French wording of ss. 5 and 6, creating an ambiguity that will be discussed below, but did not change the English wording. Parliament did not intend any substantive changes at this time: *Legislation Revision and Consolidation Act*, R.S.C. 1985, c. S-20, s. 6. The 1985 text provides:

5. [Who may be appointed judges.] Any person may be appointed a judge who is or has been a judge of a

a barrister or advocate of at least ten years' standing at the bar of any of the said Provinces :

3. [Judges from bar of Quebec.] Two at least of the judges of the court shall be appointed from among the judges of the Court of Queen's Bench, or of the Superior Court, or the barristers or advocates of the Province of Quebec :

[23] Nous avons souligné, dans chacune des deux langues officielles, les termes clés des dispositions révisées de 1886 que nous allons maintenant examiner. La Loi de 1886 prévoyait la nomination des avocats, actuels et anciens, à la Cour en général, mais elle n'a pas modifié le langage plus restrictif employé à propos de la nomination des juges pour le Québec. De plus, dans la réfonte de 1886, il était précisé que, dans le cas où l'effet des statuts révisés serait différent de celui des lois abrogées, les « dispositions [des statuts révisés] prévaudront » : *Acte concernant les statuts revisés du Canada*, S.R.C. 1886, ch. 4, art. 8.

[24] En 1906, les par. 4(2) et 4(3) sont devenus les art. 5 et 6, mais sans qu'aucun changement de fond ne soit apporté : S.R.C. 1906, ch. 139.

[25] En 1927, on a ajouté un juge à la composition de la Cour pour porter le nombre de juges à sept au total, mais on a maintenu à deux le nombre de juges pour le Québec : S.C. 1926-27, ch. 38, art. 1; S.R.C. 1927, ch. 35, art. 4 et 6. Le nombre de juges de la Cour a été augmenté à nouveau en 1949, pour être porté à neuf. On a préservé la proportion de juges pour le Québec, en faisant passer leur nombre à trois : *Loi modifiant la Loi de la Cour suprême*, S.C. 1949 (2^e sess.), ch. 37, art. 1.

[26] Le libellé actuel des art. 5 et 6 remonte à la révision des textes législatifs de 1985. Le libellé de la version française des art. 5 et 6 a alors subi un changement qui a créé une ambiguïté dont nous traiterons plus loin, tandis que la version anglaise est demeurée identique. À ce moment, le Parlement n'avait pas l'intention d'apporter de changements de fond à la Loi : la *Loi sur la révision et la codification des textes législatifs*, L.R.C. 1985, ch. S-20, art. 6. Voici le texte de la Loi de 1985 :

5. [Conditions de nomination.] Les juges sont choisis parmi les juges, actuels ou anciens, d'une cour supérieure

superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.

6. [Three judges from Quebec.] At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.

5. [Conditions de nomination.] Les juges sont choisis parmi les juges, actuels ou anciens, d'une cour supérieure provinciale et parmi les avocats inscrits pendant au moins dix ans au barreau d'une province.

6. [Représentation du Québec.] Au moins trois des juges sont choisis parmi les juges de la Cour d'appel ou de la Cour supérieure de la province de Québec ou parmi les avocats de celle-ci.

[27] In summary, other than the increase from two Quebec judges to three in s. 6, there have been no substantive amendments to ss. 5 and 6 between the 1886 revisions, which explicitly took precedence over the previous version, and the version currently in force.

D. Section 5

[28] To repeat, s. 5 of the Act sets out the eligibility requirements that apply generally to appointments to the Court. The section creates four groups of people who are eligible for appointment: (1) current judges of a superior court of a province, including courts of appeal; (2) former judges of such a court; (3) current barristers or advocates of at least 10 years standing at the bar of a province; and (4) former barristers or advocates of at least 10 years standing. Thus, the section authorizes the appointment to the Court of current *or* former barristers or advocates of at least 10 years standing at the bar of a province.

[29] The English version of s. 5 is unambiguous. The specification “is or has been” clearly applies to both judges of a superior court of a province *and* barristers or advocates of at least 10 years standing at the bar of a province. This is confirmed by the provision’s legislative history. Under the 1875 Act, appointments were limited to persons “who are, or have been, respectively, Judges of one of the said Superior Courts, or who are Barristers or Advocates”:

provinciale et parmi les avocats inscrits pendant au moins dix ans au barreau d'une province.

6. [Représentation du Québec.] Au moins trois des juges sont choisis parmi les juges de la Cour d'appel ou de la Cour supérieure de la province de Québec ou parmi les avocats de celle-ci.

5. [Who may be appointed judges.] Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.

6. [Three judges from Quebec.] At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.

[27] En résumé, hormis l’augmentation du nombre de juges pour le Québec, qui est passé de deux à trois dans l’art. 6, aucun changement de fond n’a été apporté aux art. 5 et 6 entre la révision de 1886, qui prévalait expressément sur la version antérieure, et la version de la Loi actuellement en vigueur.

D. L’article 5

[28] Rappelons que l’art. 5 de la Loi fixe les conditions de nomination générales à la Cour. Cet article crée quatre groupes de personnes qui peuvent être nommées : (1) les juges actuels d'une cour supérieure, et notamment d'une cour d'appel, d'une province; (2) les anciens juges d'une telle cour; (3) les avocats actuels inscrits pendant au moins 10 ans au barreau d'une province; (4) les anciens avocats inscrits au barreau d'une province pendant au moins 10 ans. En conséquence, cette disposition permet généralement la nomination à la Cour des avocats, actuels *ou* anciens, inscrits pendant au moins 10 ans au barreau d'une province.

[29] La version anglaise de l’art. 5 ne soulève aucune ambiguïté. Les termes « *is or has been* » s’appliquent manifestement à *la fois* aux juges d'une cour supérieure provinciale *et* aux avocats inscrits pendant au moins 10 ans au barreau d'une province. L’historique législatif de cette disposition le confirme. La Loi de 1875 limitait les nominations aux personnes « étant ou ayant été respectivement juges de l’une de ces cours supérieures, ou étant

s. 4. The 1875 Act excluded former advocates from appointment. It permitted the appointment of current or former judges and current, but not former, advocates. As part of statutory revisions of 1886, however, the specification “is or has been” was extended to both judges and advocates, thereby including former advocates as a fourth category of eligible candidates. As we have observed, the changes made under the 1886 statutory revision were intended to have substantive effect.

[30] To the extent that there are ambiguities in the French version of s. 5, they were created by the 1985 revision. Prior to 1985, the wording of the French text (“*est ou a été*”) closely mirrored that of the English text (“*is or has been*”). Between 1886 and 1985, both versions plainly encompassed current as well as former advocates. The English version continues to do so. The French version now requires the selection of judges “*parmi les juges, actuels ou anciens*” or “*parmi les avocats inscrits pendant au moins dix ans*”. It might be suggested that the current wording excludes advocates who are not current members of the bar, because the specification “*actuels ou anciens*” is not applied to them. We reject this argument.

[31] The 1985 change to the French version of s. 5 did not change its meaning. This amendment was part of statutory revisions which were not intended to effect substantive change: s. 6 of the *Legislation Revision and Consolidation Act*; *Sarvanis v. Canada*, 2002 SCC 28, [2002] 1 S.C.R. 921, at para. 13. In short, the meaning of the text of the English and French versions remains the same as before the 1985 revision.

[32] We reach the same conclusion by applying the shared meaning rule of bilingual interpretation, which requires that where the words of one version may raise an ambiguity, one should look to the other official language version to determine whether its meaning is plain and unequivocal: Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 99-116; Pierre-André Côté, in collaboration with Stéphane Beaulac and Mathieu

avocats » : art. 4. La Loi de 1875 excluait les anciens avocats. Elle permettait la nomination des juges, actuels et anciens, ainsi que des avocats actuels, à l’exclusion des anciens avocats. Toutefois, dans la formulation adoptée lors de la révision de 1886, les termes « quiconque sera ou aura été » s’appliquent tant aux juges qu’aux avocats, de sorte que les anciens avocats forment une quatrième catégorie de personnes admissibles. Comme nous l’avons déjà précisé, les modifications législatives apportées lors de la révision de 1886 étaient conçues pour avoir un effet substantiel sur les textes.

[30] Si la version française de l’art. 5 soulève maintenant des ambiguïtés, celles-ci ont été créées par la révision de 1985. Auparavant, le texte français (« *est ou a été* ») suivait le texte anglais de près (« *is or has been* »). De 1886 à 1985, les deux versions incluaient nettement les avocats, actuels ou anciens. La version anglaise les comprend toujours. Toutefois, la version française exige maintenant que les juges soient choisis « *parmi les juges, actuels ou anciens* » ou « *parmi les avocats inscrits pendant au moins dix ans* ». Certains pourraient prétendre que la formulation actuelle exclut les avocats qui ne sont pas inscrits au barreau au moment de leur nomination, puisque les termes « *actuels ou anciens* » ne s’appliquent pas aux avocats. Nous rejetons cet argument.

[31] La modification apportée à la version française de l’art. 5 en 1985 n’en a pas changé la portée. Cette modification faisait partie de la révision des textes législatifs qui n’était pas censée en modifier le fond : art. 6 de la *Loi sur la révision et la codification des textes législatifs*; *Sarvanis c. Canada*, 2002 CSC 28, [2002] 1 R.C.S. 921, par. 13. Bref, les versions française et anglaise ont la même portée, comme c’était le cas avant la révision de 1985.

[32] Nous concluons de la même manière si nous appliquons la règle selon laquelle l’interprétation d’une loi bilingue exige la recherche du sens commun aux deux versions. En cas d’ambiguïté d’une version, il faut examiner la version rédigée dans l’autre langue officielle pour déterminer si elle est claire et non équivoque : Ruth Sullivan, *Sullivan on the Construction of Statutes* (5^e éd. 2008), p. 99-116; Pierre-André Côté, avec la collaboration de

Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at pp. 347-49; *R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217, at para. 28. The English version of the text is unambiguous in its inclusion of former advocates for appointment, while the French version is reasonably capable of two interpretations: one which excludes former advocates from appointment, and one which includes them. The meaning common to both versions is only found in the unambiguous English version, which is therefore the meaning we should adopt.

[33] Finally, the inclusion of former advocates of at least 10 years standing at the bar is consistent with the purpose of s. 5, which is to ensure that appointees to the Court have adequate legal experience.

[34] In the result, judges of the Federal Court or Federal Court of Appeal will generally qualify for appointment under s. 5 on the basis that they were formerly barristers or advocates of at least 10 years standing.

E. Section 6

[35] Section 6 specifies that at least three of the nine judges appointed to the Court “shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province” (“*sont choisis parmi les juges de la Cour d’appel ou de la Cour supérieure de la province de Québec ou parmi les avocats de celle-ci*”).

[36] The Attorney General of Canada argues that ss. 5 and 6 must be read together as complementary provisions, so that the requirement of at least 10 years standing at the bar applies to appointments from Quebec. Since s. 6 makes no reference to how many years an appointee must have been at the bar, reading it without s. 5 would lead to the absurd result that a highly inexperienced lawyer would be eligible for appointment to the Court, the Attorney General says.

[37] We agree that ss. 5 and 6 must be read together. We also agree that the requirement of at

Stéphane Beaulac et Mathieu Devinat, *Interprétation des lois* (4^e éd. 2009), p. 375-377; *R. c. Daoust*, 2004 CSC 6, [2004] 1 R.C.S. 217, par. 28. La version anglaise de la loi permet sans équivoque la nomination d’anciens avocats, alors que la version française peut raisonnablement recevoir deux interprétations : une qui exclut les anciens avocats comme personnes admissibles à une nomination et une qui les inclut. Le sens commun aux deux versions se trouve uniquement dans la version anglaise non équivoque, dont nous devons dès lors retenir le sens.

[33] Enfin, l’inclusion des anciens avocats inscrits pendant au moins 10 ans au barreau est compatible avec l’objet de l’art. 5, qui consiste à garantir que les personnes nommées à la Cour possèdent une expérience suffisante de la pratique du droit.

[34] En conséquence, les juges de la Cour fédérale et de la Cour d’appel fédérale satisfont généralement aux conditions de nomination fixées à l’art. 5, puisqu’ils ont été autrefois des avocats inscrits au barreau pendant au moins 10 ans.

E. L’article 6

[35] L’article 6 précise qu’au moins trois des neuf juges nommés à la Cour « sont choisis parmi les juges de la Cour d’appel ou de la Cour supérieure de la province de Québec ou parmi les avocats de celle-ci » (« *shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province* »).

[36] Le procureur général du Canada plaide que les art. 5 et 6 doivent être lus en corrélation comme des dispositions complémentaires, de sorte que l’inscription pendant au moins 10 ans au barreau s’applique aux nominations des juges pour le Québec. De l’avis du procureur général, comme l’art. 6 ne précise pas le nombre d’années pendant lesquelles la personne nommée doit avoir été inscrite au barreau, interpréter l’art. 6 isolément de l’art. 5 mènerait à la conclusion absurde qu’un avocat de peu d’expérience pourrait être nommé à la Cour.

[37] Nous sommes d’accord pour affirmer que les art. 5 et 6 doivent être interprétés en corrélation.

least 10 years standing at the bar applies to appointments from Quebec. We disagree, however, with the Attorney General's ultimate conclusion that reading these provisions together in a complementary way permits the appointment of *former* advocates of at least 10 years standing to the Quebec seats on the Court. Section 6 does not displace the general requirements under s. 5 that apply to all appointments to the Supreme Court. Rather, it makes additional specifications in respect of the three judges from Quebec. One of these is that they must currently be a member of the Quebec bar.

[38] We reach this conclusion based on the plain meaning and purpose of s. 6, and the surrounding statutory context.

(1) The Plain Meaning of Section 6

[39] The language of s. 5 is general (“[a]ny person may be appointed a judge”), whereas the language of s. 6 is restrictive (“[a]t least three of the judges shall be appointed from among”). As such, s. 6 limits the pool of candidates. It is undisputed that s. 6 does so geographically by requiring that the appointments be made from one of the listed institutions in Quebec. The issue is whether s. 6 also imposes a requirement of current membership in one of the listed institutions.

[40] The Attorney General of Canada argues that the plain meaning of s. 6 does not require current membership in the bar of Quebec. He submits that the phrase “from among” (“*parmi*” in French) does not contain a temporal element and, as a result, s. 6 imports s. 5’s temporal specifications (“is or has been”).

[41] We do not agree. There is an important change in language between s. 5 and s. 6. Section 5 refers to both present and former membership in the listed institutions by using the words “is or has been” in the English version and “*actuels ou*

Nous sommes aussi d’avis que le minimum de 10 années d’inscription au barreau s’applique à la nomination des juges pour le Québec. Nous rejetons toutefois la conclusion ultime du procureur général du Canada selon laquelle l’interprétation de ces dispositions de manière complémentaire permet que d’*anciens* avocats inscrits au barreau pendant au moins 10 ans soient nommés aux postes de juge réservés pour le Québec. L’article 6 n’écarte pas les conditions de nomination générales fixées à l’art. 5, qui s’appliquent à toutes les nominations à la Cour suprême. Il y ajoute plutôt des conditions de nomination additionnelles applicables aux trois juges nommés pour le Québec. L’une d’elles exige que les personnes nommées soient inscrites au Barreau du Québec au moment de leur nomination.

[38] Cette conclusion s’appuie sur le sens ordinaire et l’objectif de l’art. 6, ainsi que sur le contexte législatif.

(1) Le sens ordinaire de l’art. 6

[39] L’article 5 est libellé en termes généraux (« [I]ls juges sont choisis parmi »), tandis que l’art. 6 est libellé en termes restrictifs (« [a]u moins trois des juges sont choisis parmi »). Ainsi, l’art. 6 limite le bassin de candidats. Il n’est pas contesté que les limites fixées à l’art. 6 sont d’ordre géographique, car il exige que les personnes nommées appartiennent à l’une des institutions du Québec qui y sont énumérées. Il s’agit de savoir si l’art. 6 exige aussi qu’elles appartiennent à l’une des institutions du Québec qu’il énumère au moment de leur nomination.

[40] Le procureur général du Canada plaide que le sens ordinaire de l’art. 6 n’exige pas qu’une personne soit inscrite au Barreau du Québec au moment de sa nomination. Selon lui, le terme « *parmi* » (« *from among* » en anglais) ne comporte pas de sens temporel et, en conséquence, les termes « *actuels ou anciens* » (« *is or has been* » en anglais) qui ont un sens temporel dans l’art. 5 s’appliquent à l’art. 6.

[41] Nous ne sommes pas de cet avis. Les termes utilisés aux art. 5 et 6 sont très différents. L’article 5 renvoie à la fois aux membres actuels et aux anciens membres des institutions énumérées par l’utilisation des mots « *actuels ou anciens* » dans

anciens" in the French version. By contrast, s. 6 refers only to the pool of individuals who are presently members of the bar ("shall be appointed from among" and "*sont choisis parmi*"). The significance of this change is made clear by the plain meaning of the words used: the words "from among the judges" and "*parmi les juges*" do not mean "from among the former judges" and "*parmi les anciens juges*", and the words "from among the advocates" and "*parmi les avocats*" do not mean "from among the former advocates" and "*parmi les anciens avocats*".

[42] It is a principle of interpretation that the mention of one or more things of a particular class excludes, by implication, all other members of the class: Sullivan, at pp. 243-44. By enumerating the particular institutions in Quebec from which appointments shall be made, s. 6 excludes all other institutions. Similarly, by specifying that three judges shall be appointed "from among" the judges and advocates (i.e. members) of the identified institutions, s. 6 impliedly excludes former members of those institutions and imposes a requirement of current membership.

[43] The fact that ss. 5 and 6 originated in a single provision — s. 4 of the 1875 Act — does not undermine our interpretation, because the same textual observations could be made with respect to the original provision. Then, as now, the general requirements for appointment were phrased generally whereas the specification for Quebec judges was expressed more restrictively: "... two of whom at least shall be taken from among the Judges of the Superior Court or Court of Queen's Bench, or the Barristers or Advocates of the Province of Quebec . . ."

[44] Indeed, s. 4 of the 1875 Act adds weight to our conclusion that former advocates are excluded from appointment as Quebec judges. From 1875 until the revisions of 1886, eligibility extended to persons "who are, or have been, respectively, Judges . . . or who are Barristers or Advocates". The Quebec requirement was first enacted alongside this general language, which clearly excluded

la version française et des mots « *is or has been* » dans la version anglaise. En revanche, l'art. 6 renvoie uniquement aux personnes qui sont membres du barreau au moment de leur nomination (« *sont choisis parmi* » et « *shall be appointed from among* »). Le sens ordinaire des termes utilisés indique clairement la signification de cette différence. Les mots « *parmi les juges* » et « *from among the judges* » ne signifient pas « *parmi les anciens juges* » et « *from among the former judges* ». De même, les mots « *parmi les avocats* » et « *from among the advocates* » ne signifient pas « *parmi les anciens avocats* » ou « *from among the former advocates* ».

[42] Un principe d'interprétation reconnaît que la mention d'un ou de plusieurs éléments d'une catégorie donnée exclut implicitement tous les autres éléments de cette catégorie : Sullivan, p. 243-44. En énumérant expressément les institutions du Québec parmi les membres desquelles les juges doivent être nommés, l'art. 6 exclut toutes les autres institutions. De même, en précisant que trois juges sont nommés « *parmi* » les juges et les avocats (c'est-à-dire les membres) des institutions énumérées, l'art. 6 exclut implicitement les anciens membres de ces institutions et impose une condition de contemporanéité de l'appartenance à celles-ci.

[43] Le fait que les art. 5 et 6 formaient à l'origine une seule disposition —l'art. 4 de la Loi de 1875 — n'ébranle pas notre interprétation, parce que les mêmes conclusions pourraient être tirées du texte de la disposition initiale. À l'époque, comme maintenant, les conditions de nomination générales étaient libellées en termes généraux, tandis que les précisions au sujet des juges pour le Québec étaient exprimées en termes restrictifs : « . . . dont deux au moins seront pris parmi les juges de la Cour Supérieure ou de la Cour du Banc de la Reine, ou parmi les procureurs ou avocats de la province de Québec . . . »

[44] En fait, l'art. 4 de la Loi de 1875 renforce notre conclusion selon laquelle les anciens avocats ne peuvent pas être nommés aux postes de juge pour le Québec. Entre 1875 et la révision de 1886, étaient admissibles les personnes « étant ou ayant été respectivement juges [. . .] ou étant avocats ». Les conditions de nomination des juges pour le Québec ont été édictées à l'origine parallèlement

former advocates from appointment. When the general requirements were broadened in 1886, rendering former advocates eligible, the wording of the Quebec requirement did not substantively change. With the exception of the increase from two judges to three in 1949, the wording of the Quebec requirement has remained substantively unchanged since 1875. Absent any express intention to amend the Quebec requirement since its enactment in 1875, we find that s. 6 retains its original meaning and excludes the appointment of former Quebec advocates to the designated Quebec seats. The requirement of current membership in the Quebec bar has been in place — unambiguous and unchanged — since 1875.

[45] In summary, on a plain reading, s. 5 creates four groups of people eligible for appointment: current and former judges of a superior court and current and former barristers or advocates of at least 10 years standing at the bar. But s. 6 imposes a requirement that persons appointed to the three Quebec seats must, in addition to meeting the general requirements of s. 5, be current members of the listed Quebec institutions. Thus, s. 6 narrows eligibility to only two groups for Quebec appointments: current judges of the Court of Appeal or Superior Court of Quebec and current advocates of at least 10 years standing at the bar of Quebec.

(2) The Purpose of Section 6

[46] This textual analysis is consistent with the underlying purpose of s. 6. The Attorney General of Canada submits that the purpose of s. 6 is simply to ensure that three members of this Court are trained and experienced in Quebec civil law and that this purpose is satisfied by appointing either current or former Quebec advocates, both of whom would have civil law training and experience.

à ces termes généraux, qui excluaient manifestement les anciens avocats. Lorsque les conditions de nomination générales ont été assouplies en 1886 pour permettre la nomination d'anciens avocats, les conditions de nomination aux postes de juge pour le Québec n'ont pas été modifiées sur le fond. Hormis l'augmentation du nombre de juges qui est passé de deux à trois en 1949, les conditions de nomination aux postes de juge pour le Québec sont demeurées inchangées sur le fond depuis 1875. En l'absence d'intention expresse de modifier les conditions de nomination des juges pour le Québec depuis qu'elles ont été édictées en 1875, nous concluons que l'art. 6 a conservé le même sens qu'à l'origine et qu'il exclut la nomination d'anciens avocats aux postes de juge réservés pour le Québec. La condition de contemporanéité existe sans équivoque depuis 1875 et n'a jamais été modifiée.

[45] En résumé, selon le sens ordinaire des termes utilisés, l'art. 5 crée quatre groupes de personnes admissibles à une nomination : les juges, actuels et anciens, d'une cour supérieure et les avocats, actuels et anciens, inscrits au barreau d'une province pendant au moins 10 ans. Toutefois, l'art. 6 impose une condition additionnelle en exigeant que les personnes nommées aux trois postes de juge réservés pour le Québec soient membres des institutions énumérées de la province de Québec au moment de leur nomination, en plus de satisfaire aux conditions générales fixées à l'art. 5. Ainsi, l'art. 6 restreint à seulement deux groupes le bassin de candidats à une nomination pour le Québec : les juges actuels de la Cour d'appel ou de la Cour supérieure de la province de Québec et les avocats actuels inscrits pendant au moins 10 ans au Barreau du Québec.

(2) L'objet de l'art. 6

[46] Cette analyse textuelle respecte l'objectif sous-jacent de l'art. 6. Le procureur général du Canada plaide que l'art. 6 vise seulement à garantir que trois membres de notre Cour possèdent une formation et de l'expérience en droit civil québécois. Il soutient que la nomination d'avocats du Québec, actuels ou anciens, qui posséderaient de toute façon une formation et de l'expérience en droit civil, permet de réaliser cet objectif.

[47] While the Attorney General of Canada's submissions capture an important purpose of the provision, a review of the legislative history reveals an additional and broader purpose.

[48] Section 6 reflects the historical compromise that led to the creation of the Supreme Court. Just as the protection of minority language, religion and education rights were central considerations in the negotiations leading up to Confederation (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ("Secession Reference"), at paras. 79-82), the protection of Quebec through a minimum number of Quebec judges was central to the creation of this Court. A purposive interpretation of s. 6 must be informed by and not undermine that compromise.

[49] The purpose of s. 6 is to ensure not only civil law training and experience on the Court, but also to ensure that Quebec's distinct legal traditions and social values are represented on the Court, thereby enhancing the confidence of the people of Quebec in the Supreme Court as the final arbiter of their rights. Put differently, s. 6 protects both the *functioning* and the *legitimacy* of the Supreme Court as a general court of appeal for Canada. This broader purpose was succinctly described by Professor Russell in terms that are well supported by the historical record:

. . . the antipathy to having the Civil Code of Lower Canada interpreted by judges from an alien legal tradition was not based merely on a concern for legal purity or accuracy. It stemmed more often from the more fundamental premise that Quebec's civil-law system was an essential ingredient of its distinctive culture and therefore it required, as a matter of *right*, judicial custodians imbued with the methods of jurisprudence and social values integral to that culture. [Emphasis in original.]

(Peter H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (1969), at p. 8)

[47] Bien que les arguments du procureur général du Canada fassent ressortir un objectif important de l'art. 6, un examen de l'historique législatif révèle que cette disposition possède un objectif additionnel de caractère plus général.

[48] En effet, l'art. 6 exprime le compromis historique qui a mené à la création de la Cour suprême. Tout comme la protection des droits linguistiques, religieux et scolaires de minorités constituait une considération majeure dans les négociations qui ont mené à la Confédération (*Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217 (« *Renvoi sur la sécession* »), par. 79-82), la protection du Québec par un nombre minimum de juges du Québec constituait un enjeu majeur de la création de la Cour. Une interprétation téléologique de l'art. 6 doit refléter la conclusion de ce compromis et non saper celui-ci.

[49] L'objectif de l'art. 6 est de garantir que non seulement des juristes civilistes expérimentés siègent à la Cour, mais également que les traditions juridiques et les valeurs sociales distinctes du Québec y soient représentées, pour renforcer la confiance des Québécois envers la Cour en tant qu'arbitre ultime de leurs droits. Autrement dit, l'art. 6 protège à la fois le *fonctionnement* et la *légitimité* de la Cour suprême dans sa fonction de cour générale d'appel pour le Canada. Le professeur Russell a décrit succinctement cet objectif plus général en des termes que l'histoire justifie :

[TRADUCTION] . . . l'antipathie pour l'idée que des juges d'une tradition juridique étrangère interprètent le Code civil du Bas-Canada ne reposait pas simplement sur une préoccupation à l'égard de la pureté ou de la justesse du droit. Elle découlait plus souvent de la prémissse plus fondamentale que le système de droit civil du Québec constituait un ingrédient essentiel de sa culture distinctive et devait par conséquent, de *droit*, être protégé par des juges empreints des pratiques judiciaires et des valeurs sociales inhérentes à cette culture. [En italique dans l'original.]

(Peter H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (1969), p. 8)

[50] At the time of Confederation, Quebec was reluctant to accede to the creation of a Supreme Court because of its concern that the Court would be incapable of adequately dealing with questions of the Quebec civil law (Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (1992), at pp. 4-5; Russell, at pp. 8-9). Various Members of Parliament for Quebec expressed concerns about a “Supreme Tribunal of Appeal” that would be

composed of Judges, the great majority of whom would be unfamiliar with the civil laws of Quebec, which tribunal would be called upon to revise and would have the power to reverse the decisions of all their Quebec Courts . . .

(*Debates of the House of Commons*, 2nd Sess., 3rd Parl. (“1875 Debates”), March 16, 1875, at p. 739, Henri-Thomas Taschereau, M.P. for Montmagny, Quebec)

[51] The bill creating the Supreme Court was passed only after amendments were made responding specifically to Quebec’s concerns. Most significantly, the amended bill that became the *Supreme Court Act* provided that two of the six judges “shall be taken from among the Judges of the Superior Court or Court of Queen’s Bench, or the Barristers or Advocates of the Province of Quebec”: s. 4 of the 1875 Act.

[52] In debating the proposed establishment of the Supreme Court in 1875, members of Parliament on both sides of the House of Commons were conscious of the particular situation of Quebec and the need to ensure civil law expertise on the Court. At second reading, Mr. Taschereau of the governing Liberal Party described Quebec’s special interest in the bill:

This interest arises out of the civil appellate jurisdiction proposed to be given to the Supreme Court, and of the peculiar position of that Province with regard to her institutions and her laws compared with those of the other Provinces. Situated as she is, no Province in the Dominion is so greatly interested as our own in

[50] À l’époque de la Confédération, le Québec hésitait à accepter la création d’une Cour suprême parce qu’il craignait qu’elle soit incapable de traiter adéquatement les questions de droit civil québécois (Ian Bushnell, *The Captive Court : A Study of the Supreme Court of Canada* (1992), p. 4-5; Russell, p. 8-9). Des députés fédéraux du Québec déclarèrent redouter qu’un « tribunal suprême d’appel » soit

composé de juges, dont la grande majorité ignoreraient les lois civiles de Québec, lequel tribunal serait appelé à reviser et aurait le pouvoir de renverser les décisions de toutes leurs cours de Québec . . .

(*Débats de la Chambre des communes*, 2^e sess., 3^e lég. (« *Débats de 1875* »), 16 mars 1875, p. 782-783, Henri-Thomas Taschereau, député de Montmagny, Québec)

[51] Le projet de loi créant la Cour suprême a été adopté seulement après que des amendements y furent apportés pour répondre spécifiquement aux préoccupations du Québec. Plus important encore, le projet de loi amendé qui est devenu la *Loi sur la Cour suprême* prévoyait que deux des six juges « seront pris parmi les juges de la Cour Supérieure ou de la Cour du Banc de la Reine, ou parmi les procureurs ou avocats de la province de Québec » : art. 4 de la Loi de 1875.

[52] Lors des débats entourant l’adoption du projet d’établissement de la Cour suprême en 1875, des députés des deux côtés de la Chambre étaient conscients de la situation particulière du Québec et de la nécessité d’assurer une expertise en droit civil à la Cour. Ainsi, en deuxième lecture, M. Taschereau, député du parti libéral alors au pouvoir, a décrit l’intérêt spécial du Québec à l’égard du projet de loi :

Cet intérêt provient du droit de juridiction en appel en matière civile que l’on se propose d’accorder à la Cour Suprême, et de la position particulière de cette province relativement à ses institutions et à ses lois comparées avec celles des autres provinces. Située comme elle l’est, il n’y a pas de province dans la Puissance aussi intéressée

458

REFERENCE RE SUPREME COURT ACT *The Chief Justice et al.*

[2014] 1 S.C.R.

the passage of the Act now under discussion, and which before many days are over, will form a most important chapter in the statute books of the Dominion.

(*1875 Debates*, March 16, 1875, at p. 738)

[53] Toussaint Antoine Rodolphe Laflamme introduced the provision for a minimum number of Quebec judges. He described the requirement as a matter of right for Quebec: “He understood if this Supreme Court was to regulate and definitely settle all the questions which involved the interests of Lower Canada, that Province was entitled to two of the six Judges” (*1875 Debates*, March 27, 1875, at p. 938). Mr. Laflamme reasoned that with two judges (one third) on the Supreme Court, Quebec “would have more and better safeguards than under the present system”, namely appeals to the Privy Council (*ibid.*). Télesphore Fournier, Minister of Justice and principal spokesman for the bill, argued that the two judges would contribute to the civil law knowledge of the bench as a whole: “. . . there will be among the Judges on the bench, men perfectly versed in the knowledge of the laws of that section of the Confederation, will be able to give the benefits of their lights to the other Judges sitting with them” (*1875 Debates*, March 16, 1875, at p. 754). David Mills, a supporter of the bill, defended the Quebec minimum against critics who attacked it as “sectionalist”. In his view, in light of the “entirely different system of jurisprudence” in Quebec, “it was only reasonable that she should have *security* that a portion of the Court would understand the system of law which it would be called upon to administer” (*1875 Debates*, March 30, 1875, at p. 972 (emphasis added)).

[54] Quebec’s confidence in the Court was dependent on the requirement of two (one third) Quebec judges. Jacques-Olivier Bureau, a Senator from Quebec, saw fit to “trust the rights of his compatriots . . . to this Supreme Court, as he considered their rights would be quite safe in a court of which two of the judges would have to be taken from the Bench

que la nôtre dans la passation de l’acte maintenant sous discussion, et qui avant que quelques jours ne se soient écoulés, formera un des chapitres les plus importants dans le livre des statuts de la Puissance.

(*Débats de 1875*, 16 mars 1875, p. 782)

[53] De même, Toussaint Antoine Rodolphe Laflamme, qui a présenté devant le Parlement la disposition prévoyant un nombre minimum de juges du Québec, a qualifié cette exigence de question de droit pour le Québec : « Il comprenait que si cette Cour Suprême devait régler et établir définitivement toutes les questions qui embrassaient les intérêts du Bas-Canada, cette province avait droit à deux juges sur les six » (*Débats de 1875*, 27 mars 1875, p. 993). Monsieur Laflamme estimait qu’avec deux juges (un tiers) à la Cour suprême, pour le Québec, « la clause serait une sauvegarde plus considérable et meilleure que sous le présent système », soit celui des appels au Conseil privé (*ibid.*). De son côté, Télesphore Fournier, le ministre de la Justice, principal porte-parole pour le projet de loi, a fait valoir que la connaissance du droit civil de ces deux juges bénéficierait à l’ensemble de la Cour : « . . . il y aura, parmi les juges sur le banc, des personnes parfaitement entendues dans la connaissance des lois de cette section de la Confédération, et ces personnes pourront donner le bénéfice de leurs lumières aux autres juges siégeant avec elles » (*Débats de 1875*, 16 mars 1875, p. 799). David Mills, qui appuyait le projet de loi, s’est fait le défenseur de la disposition réservant un nombre minimum de juges pour le Québec face aux critiques qui la taxaien d’« esprit de section ». Selon lui, compte tenu du « système de jurisprudence entièrement différent » au Québec, « il n’était que raisonnable qu’il eût une garantie qu’une portion de la cour comprît le système de lois qu’elle était appelée à administrer » (*Débats de 1875*, 30 mars 1875, p. 1030 (nous soulignons)).

[54] La confiance du Québec envers la Cour dépendait de la présence de deux juges (un tiers) originaires du Québec. Jacques-Olivier Bureau, un sénateur du Québec, a estimé justifié de [TRADUCTION] « confier les droits de ses concitoyens . . . à cette Cour suprême, puisqu’il considérait que leurs droits seraient en sécurité dans une cour dont

of that Province" (*Debates of the Senate*, 2nd Sess., 3rd Parl., April 5, 1875, at p. 713). The comments of Joseph-Aldéric Ouimet, Liberal-Conservative Member for Laval, also underline that it was a matter of confidence in the Court:

In Quebec an advocate must have ten years' practice before he can be a Judge. The Judges from the other Provinces might have the finest intelligence and the best talent possible and yet not give such satisfaction to the people of Quebec as their own judiciary.

(*1875 Debates*, March 27, 1875, at p. 940)

[55] Government and opposition members alike saw the two seats (one third) for Quebec judges as a means of ensuring not only the functioning, but also the legitimacy of the Supreme Court as a federal and bijural institution.

[56] Viewed in this light, the purpose of s. 6 is clearly different from the purpose of s. 5. Section 5 establishes a broad pool of eligible candidates; s. 6 is more restrictive. Its exclusion of candidates otherwise eligible under s. 5 was intended by Parliament as a means of attaining the twofold purpose of (i) ensuring civil law expertise and the representation of Quebec's legal traditions and social values on the Court, and (ii) enhancing the confidence of Quebec in the Court. Requiring the appointment of current members of civil law institutions was intended to ensure not only that those judges were qualified to represent Quebec on the Court, but that they were perceived by Quebecers as being so qualified.

[57] It might be argued that excluding former advocates of at least 10 years standing at the Quebec bar does not perfectly advance this twofold purpose because it might exclude from appointment candidates who have civil law expertise and who would in fact bring Quebec's legal traditions and social values to the Court. In other words, it could be argued that our reading of s. 6 is under-inclusive when measured against the provision's objectives.

deux des juges proviendraient de la magistrature de cette province » (*Debates of the Senate*, 2^e sess., 3^e lég., 5 avril 1875, p. 713). Les commentaires de Joseph-Aldéric Ouimet, député libéral-conservateur de Laval, soulignent également qu'il s'agissait d'une question de confiance envers la Cour :

Dans Québec un avocat doit avoir dix ans de pratique avant de pouvoir être nommé juge. Les juges des autres provinces pourraient avoir la plus belle intelligence et le plus beau talent possible et cependant ne pas donner autant de satisfaction au peuple de Québec que leur propre Banc Judiciaire.

(*Débats de 1875*, 27 mars 1875, p. 995)

[55] Les députés du gouvernement comme ceux de l'opposition ont considéré que l'attribution de deux postes de juge (un tiers) au Québec était un moyen d'assurer non seulement le bon fonctionnement, mais aussi la légitimité de la Cour suprême en tant qu'institution fédérale et bijuridique.

[56] Envisagé sous cet angle, l'objectif de l'art. 6 diffère manifestement de celui de l'art. 5. L'article 5 établit un vaste bassin de candidats admissibles; l'art. 6 est plus restrictif. Le Parlement considérait l'exclusion de candidats par ailleurs admissibles aux termes de l'art. 5 comme un moyen d'atteindre le double objectif de (i) garantir une expertise en droit civil et la représentation des traditions juridiques et des valeurs sociales du Québec à la Cour, et de (ii) renforcer la confiance du Québec envers la Cour. Exiger que des membres actuels des institutions de droit civil soient nommés garantissait non seulement que ces juges soient qualifiés pour représenter le Québec, mais que les Québécois les perçoivent ainsi.

[57] On pourrait prétendre que l'exclusion des anciens avocats inscrits pendant au moins 10 ans au Barreau du Québec ne permet pas de réaliser parfaitement ce double objectif parce qu'elle risque d'exclure des candidats qui possèdent une expertise en droit civil et qui feraient effectivement bénéficier la Cour de leur connaissance des traditions juridiques et des valeurs sociales du Québec. En d'autres mots, on pourrait prétendre que notre interprétation de l'art. 6 est trop limitative au regard des objets de cette disposition.

[58] This argument is not convincing. Parliament could have adopted different criteria to achieve the twofold objectives of s. 6 — for instance by requiring a qualitative assessment of a candidate's expertise in Quebec's civil law and legal traditions — but instead it chose to advance the provision's objectives by specifying objective criteria for appointment to one of the Quebec seats on the Court. In the final analysis, lawmakers must draw lines. The criteria chosen by Parliament might not achieve perfection, but they do serve to advance the provision's purpose: see Michael Plaxton and Carissima Mathen, "Purposive Interpretation, Quebec, and the *Supreme Court Act*" (2013), 22 *Const. Forum* 15, at pp. 20-22.

[59] We earlier concluded that a textual interpretation of s. 6 excludes former advocates from appointment to the Court. We come to the same conclusion on purposive grounds. The underlying purpose of the general eligibility provision, s. 5, is to articulate minimum general requirements for the appointment of all Supreme Court judges. In contrast, the underlying purpose of s. 6 is to enshrine the historical compromise that led to the creation of the Court by narrowing the eligibility for the Quebec seats. Its function is to limit the Governor in Council's otherwise broad discretion to appoint judges, in order to ensure expertise in civil law and that Quebec's legal traditions and social values are reflected in the judges on the Supreme Court, and to enhance the confidence of the people of Quebec in the Court.

[60] In reaching this conclusion, we do not overlook or in any way minimize the civil law expertise of judges of the Federal Court and Federal Court of Appeal. For instance, s. 5.4 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, in many ways reflects s. 6 of the *Supreme Court Act* by requiring that a minimum number of judges on each court be drawn from Quebec institutions. The role of Quebec judges on the federal courts is a vital one. Nevertheless, s. 6 makes clear that judges of the federal courts are not, by virtue of being judges of those courts, eligible

[58] Cet argument n'est pas convaincant. Le législateur aurait pu retenir des critères différents pour réaliser le double objectif de l'art. 6 — en exigeant par exemple une évaluation qualitative de l'expertise des candidats en matière de droit civil et de traditions juridiques du Québec — mais il a plutôt choisi de favoriser la réalisation des objectifs de cette disposition en précisant des critères objectifs de nomination à un poste de la Cour réservé pour Québec. En dernière analyse, le législateur doit tracer la ligne. Les critères choisis par le législateur ne sont peut-être pas parfaits, mais ils favorisent la réalisation de l'objectif de cette disposition : voir Michael Plaxton et Carissima Mathen, « Purposive Interpretation, Quebec, and the *Supreme Court Act* » (2013), 22 *Const. Forum* 15, p. 20-22.

[59] Nous avons déjà conclu qu'une interprétation textuelle de l'art. 6 exclut la nomination d'anciens avocats. L'interprétation téléologique de cet article nous amène à la même conclusion. La disposition générale relative à l'admissibilité, l'art. 5, a pour objectif sous-jacent l'énonciation des conditions générales minimales applicables à la nomination de tous les juges de la Cour suprême. Par contre, l'objectif sous-jacent de l'art. 6 consiste à consacrer le compromis historique qui a permis la création de la Cour, en restreignant les conditions d'admissibilité aux postes de juge réservés pour le Québec. Il sert à limiter le pouvoir discrétionnaire par ailleurs large du gouverneur en conseil de nommer des juges, afin de garantir que la Cour suprême possède une expertise en droit civil et que les traditions juridiques et les valeurs sociales du Québec y soient représentées, ainsi qu'afin de renforcer la confiance des Québécois envers la Cour.

[60] Nous atteignons cette conclusion sans pour autant ignorer ou minimiser de quelque façon que ce soit l'expertise en droit civil des juges de la Cour fédérale et de la Cour d'appel fédérale. À titre d'exemple, l'art. 5.4 de la *Loi sur les Cours fédérales*, L.R.C. 1985, ch. F-7, fait écho à bien des égards à l'art. 6 de la *Loi sur la Cour suprême* en exigeant qu'un nombre minimum de juges de chacune de ces cours proviennent des institutions québécoises. Les juges originaires du Québec jouent un rôle vital au sein des cours fédérales.

for appointment to the Quebec seats on this Court. The question is not whether civilist members of the federal courts would make excellent judges of the Supreme Court of Canada, but whether they are eligible for appointment under s. 6 on the basis of being former rather than current advocates of the Province of Quebec. We conclude that they are not.

[61] Some of the submissions before us relied heavily on the context provided by constitutional negotiations following the patriation of the Constitution in 1982, particularly on Quebec's agreement to proposed constitutional reforms that would have explicitly rendered Federal Court and Federal Court of Appeal judges eligible for appointment to one of the Quebec seats on the Court. The Charlottetown Accord went furthest by stipulating that it was entrenching the current *Supreme Court Act* requirement of "nine members, of whom three must have been admitted to the bar of Quebec (civil law bar)" (*Consensus Report on the Constitution: Charlottetown* (1992), at p. 8). This showed, it was argued, that these eligibility requirements were acceptable to Quebec.

[62] We do not find this argument compelling. The Meech Lake and Charlottetown negotiations over the eligibility requirements for the Court took place in the context of wider negotiations over federal-provincial issues, including greater provincial involvement in Supreme Court appointments. In the case of Quebec, the proposed changes would have diminished the significance of s. 6 as the sole safeguard of Quebec's interests on the Supreme Court by requiring the Governor General in Council to make an appointment from a list of names submitted by Quebec. In this context, we should be wary of drawing any inference that there was a consensus interpretation of s. 6 different from the one that we adopt.

Cependant, l'art. 6 précise que les juges des cours fédérales ne sont pas, à ce titre, admissibles à l'un des postes de juge de notre Cour réservés pour le Québec. La question n'est pas de savoir si les membres civilistes des cours fédérales feraient d'excellents juges de la Cour suprême du Canada, mais de déterminer s'ils sont admissibles à une nomination en vertu de l'art. 6 à titre d'anciens avocats, plutôt que d'avocats actuels, de la province de Québec. Nous concluons qu'ils ne le sont pas.

[61] Certains arguments qui nous ont été présentés s'appuient fortement sur le contexte découlant des négociations constitutionnelles qui ont suivi le rapatriement de la Constitution en 1982, en particulier sur le consentement du Québec aux réformes constitutionnelles proposées, qui auraient explicitement rendu les juges de la Cour fédérale et de la Cour d'appel fédérale admissibles à l'un des postes de juge de la Cour réservés pour le Québec. L'Accord de Charlottetown allait plus loin en stipulant qu'il inscrivait dans la Constitution les dispositions actuelles de la *Loi sur la Cour suprême* prévoyant « neuf juges, dont trois doivent avoir été reçus au barreau du Québec (barreau de droit civil) » (*Rapport du consensus sur la Constitution : Charlottetown* (1992), p. 8). Le consentement du Québec démontrait, plaide-t-on, que ce dernier acceptait ces conditions de nomination.

[62] Cet argument n'est pas convaincant. Les négociations en vue des accords du Lac Meech et de Charlottetown au sujet des conditions de nomination à la Cour ont été entreprises dans le contexte de discussions plus vastes sur des questions intéressant le fédéral et les provinces, qui comprenaient une participation plus importante des provinces au processus de nomination des juges de la Cour suprême. Dans le cas du Québec, les modifications proposées auraient diminué l'importance de l'art. 6 en tant que seule mesure de sauvegarde des intérêts du Québec à la Cour suprême. En effet, ces propositions auraient exigé que le gouverneur général en conseil nomme une personne dont le nom figurerait sur une liste fournie par le Québec. Dans ce contexte, il faut nous garder de toute inférence selon laquelle tous s'entendaient pour donner de l'art. 6 une interprétation différente de celle que nous adoptons.

(3) Surrounding Statutory Context

[63] The broader scheme of the *Supreme Court Act* reinforces the conclusion reached through a textual and purposive analysis. In addition to addressing who is eligible to be appointed a judge of the Supreme Court of Canada, the Act addresses which judges of other courts are eligible to sit as *ad hoc* judges of the Court. Judges of the federal courts and the Tax Court of Canada, while eligible to sit as *ad hoc* judges generally, are not eligible to sit in Quebec appeals when the quorum of the Court does not include at least two judges appointed under s. 6. In other words, the provisions governing eligibility to sit as an *ad hoc* judge of the Court reflect the same distinction between general eligibility and eligibility for one of the Quebec seats. The point is not that these judges are excluded under s. 6 simply because they are excluded under s. 30(2) of the Act. Rather, the point is that the exclusion under s. 30(2) is part of the overall context that must be taken into account in interpreting ss. 5 and 6 of the Act.

[64] In principle, a quorum of the Court consists of five judges: ss. 25 and 29 of the Act. When there is no quorum, s. 30(1) stipulates that an *ad hoc* judge may be drawn from (a) the Federal Court of Appeal, the Federal Court, or the Tax Court of Canada, or, in their absence, from (b) provincial superior courts. However, under s. 30(2), unless two of the judges available to constitute a quorum fulfil the requirements for appointment under s. 6 — that is, were appointed from the bench or bar of Quebec — an *ad hoc* judge for a Quebec appeal must be drawn from the Court of Appeal or Superior Court of Quebec.

[65] Thus, while judges of the Federal Court, the Federal Court of Appeal and the Tax Court of Canada meet the general eligibility requirements for appointment as an *ad hoc* judge of this Court under s. 30(1), they do not meet the more restrictive

(3) Contexte législatif

[63] L'économie générale de la *Loi sur la Cour suprême* renforce la conclusion à laquelle nous a amenés une interprétation textuelle et téléologique. En plus d'indiquer quelles personnes peuvent être nommées juges de la Cour suprême du Canada, la Loi indique quels juges des autres cours peuvent agir à titre de juges suppléants de la Cour. Les juges des cours fédérales et de la Cour canadienne de l'impôt, qui sont admissibles à siéger à titre de juges suppléants en général, ne peuvent siéger pour l'audition de l'appel d'un jugement rendu au Québec lorsque le quorum de la Cour n'inclut pas au moins deux des juges nommés aux termes de l'art. 6. Autrement dit, les dispositions régissant l'admissibilité à siéger à titre de juge suppléant de la Cour comportent la même distinction entre l'admissibilité générale et l'admissibilité à un poste de juge réservé pour le Québec. Il ne s'agit pas d'affirmer que ces juges sont exclus pour l'application de l'art. 6 simplement parce qu'ils sont exclus pour l'application du par. 30(2) de la Loi. Le fait est plutôt que l'exclusion prévue au par. 30(2) s'inscrit dans le contexte général qui doit être pris en compte pour l'interprétation des art. 5 et 6 de la Loi.

[64] En principe, cinq juges constituent le quorum de la Cour : art. 25 et 29 de la Loi. Lorsque le quorum n'est pas atteint, le par. 30(1) prévoit qu'un juge suppléant peut provenir a) de la Cour d'appel fédérale, de la Cour fédérale ou de la Cour canadienne de l'impôt, ou, en leur absence, b) des cours supérieures des provinces. Toutefois, aux termes du par. 30(2), lorsque les juges capables de siéger ne comprennent pas au moins deux juges qui remplissent les conditions fixées à l'art. 6, — c'est-à-dire deux juges issus de la magistrature ou du barreau de la province de Québec — le juge suppléant choisi pour l'audition d'un appel d'un jugement rendu au Québec doit provenir de la Cour d'appel ou de la Cour supérieure du Québec.

[65] Ainsi, les juges de la Cour fédérale, de la Cour d'appel fédérale et de la Cour canadienne de l'impôt satisfont aux conditions de nomination générales pour siéger à titre de juge suppléant de la Cour aux termes du par. 30(1), mais ils ne

eligibility requirements for an *ad hoc* judge replacing a Quebec judge under s. 30(2). Section 30(2) expressly refers to judges who “fulfil the requirements of section 6” and so the two sections are explicitly linked. Moreover, ss. 5 and 6 and ss. 30(1) and 30(2) reflect the same distinction between the general eligibility requirements (s. 5 and s. 30(1)) and the more restrictive eligibility requirements for the Quebec seats on the Court (s. 6 and s. 30(2)).

[66] This exclusion of Federal Court and Federal Court of Appeal judges from appointment as *ad hoc* judges for Quebec lends support to the conclusion that those judges are similarly excluded from appointment to the Court under s. 6.

[67] It was argued that we should give no weight to the wording of s. 30 because it is an obsolete provision that has not been used since the second decade of the 20th century. We do not agree. The statutory history suggests that the exclusion of judges of the federal courts as *ad hoc* judges for Quebec cases was not a mere oversight. In the 1970s after the establishment of the Federal Court, s. 30(1) of the *Supreme Court Act* was revised to refer to the Federal Court (*Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), s. 64). Despite the fact that the very purpose of the revision was to incorporate references to the Federal Court into the Act, as was done in s. 30(1), Parliament did not amend the immediately adjacent provision, s. 30(2). There was similarly no amendment to s. 30(2) when, in 2002, s. 30(1) was amended to refer to the newly separate Federal Court of Appeal and the Tax Court of Canada (S.C. 2002, c. 8, s. 175). While certainly not conclusive, the repeated failure to include the Quebec appointees to the Federal Court and Federal Court of Appeal among the judges who may serve as *ad hoc* judges of this Court in place of s. 6 judges suggests that the exclusion was deliberate. This in turn is consistent with members of those same courts not being eligible for appointment under s. 6.

satisfont pas aux conditions plus restrictives fixées au par. 30(2) pour remplacer, à titre de juge suppléant, un juge provenant du Québec. En effet, le par. 30(2) mentionne expressément les juges qui remplissent les « conditions fixées à l'article 6 », de sorte que les deux articles sont explicitement liés. De plus, les art. 5 et 6 et les par. 30(1) et 30(2) comportent la même distinction entre les conditions de nomination générales (art. 5 et par. 30(1)) et les conditions plus restrictives pour les postes de juge de la Cour réservés pour le Québec (art. 6 et par. 30(2)).

[66] Le fait que les juges de la Cour fédérale et de la Cour d'appel fédérale ne peuvent pas être nommés juges suppléants pour le Québec appuie la conclusion suivant laquelle ces juges sont, de la même manière, exclus d'une nomination à la Cour en vertu de l'art. 6.

[67] On a suggéré qu'il ne faudrait pas accorder d'importance aux termes de l'art. 30 parce qu'il s'agirait d'une disposition désuète à laquelle on n'a pas eu recours depuis la seconde décennie du 20^e siècle. Nous ne sommes pas d'accord. L'historique de la Loi donne à penser que l'exclusion des juges des cours fédérales des postes de juge suppléant pour le Québec ne résulte pas d'un simple oubli. Après la création de la Cour fédérale dans les années 70, on a révisé le par. 30(1) de la *Loi sur la Cour suprême* pour y faire mention de la Cour fédérale (*Loi sur la Cour fédérale*, S.R.C. 1970, ch. 10 (2^e suppl.), art. 64). Même si l'objectif de la révision était expressément de mentionner la Cour fédérale dans la Loi, comme au par. 30(1), le législateur n'a pas modifié la disposition qui la suit immédiatement, le par. 30(2). De même, il n'a pas modifié le par. 30(2) en 2002, lorsqu'il a modifié le par. 30(1) pour mentionner les deux nouvelles cours distinctes, la Cour d'appel fédérale et la Cour canadienne de l'impôt (L.C. 2002, ch. 8, art. 175). Même si elle n'est pas concluante, l'omission répétée d'inclure les juges de la Cour fédérale et de la Cour d'appel fédérale provenant du Québec parmi les juges suppléants qui peuvent siéger à notre Cour en remplacement de juges nommés aux termes de l'art. 6 laisse croire que leur exclusion était délibérée. Cette exclusion est compatible avec le fait que les juges de ces mêmes cours ne peuvent être nommés aux termes de l'art. 6.

464

REFERENCE RE SUPREME COURT ACT *The Chief Justice et al.*

[2014] 1 S.C.R.

[68] When s. 30 was first enacted in 1918 (S.C. 1918, c. 7, s. 1), the assistant judge of the Exchequer Court was a judge from Quebec. Appointing him as an *ad hoc* judge to hear an appeal from one of the common law provinces would have meant that a majority of the quorum hearing the appeal would be jurists trained in the civil law. Parliament deemed this undesirable. This legislative history explains why the assistant judge of the Exchequer Court was excluded from serving as an *ad hoc* judge on appeals from common law provinces. But it does not explain why that judge was also excluded from serving as an *ad hoc* judge on appeals from Quebec even though that would have maintained Quebec's representation on appeals from that province. Parliament has, since it first provided for *ad hoc* judges, consistently precluded judges of the federal courts or their predecessor, the Exchequer Court, from sitting on Quebec appeals as *ad hoc* judges of the Supreme Court. If this is an anomaly, it is one that Parliament deliberately created and has consistently maintained.

(4) Conclusion

[69] We therefore conclude that s. 5 establishes general eligibility requirements for a broad pool of persons eligible for appointment to the Supreme Court of Canada. In respect of the three Quebec seats, s. 6 leads to a more restrictive interpretation of the eligibility requirements in order to give effect to the historical compromise aimed at protecting Quebec's legal traditions and social values.

[70] We conclude that a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec, may be appointed to the Supreme Court pursuant to s. 5 of the *Supreme Court Act*, but not s. 6. The three appointments under s. 6 require, in addition to the criteria set out in s. 5, current membership of the Barreau du Québec or of the Court of Appeal or Superior Court of Quebec. Therefore, a judge of the Federal Court or

[68] Lorsque l'art. 30 a été édicté à l'origine en 1918 (S.C. 1918, ch. 7, art. 1), le juge adjoint de la Cour de l'Échiquier provenait du Québec. S'il avait été nommé juge suppléant pour entendre une affaire provenant d'une province de common law, une majorité du quorum qui aurait tranché le litige aurait été composée de juristes de formation civiliste. Le Parlement a jugé que cette conséquence n'était pas souhaitable. L'historique législatif explique pourquoi le juge adjoint de la Cour de l'Échiquier ne pouvait agir comme juge suppléant pour entendre les appels de décisions rendues dans une province de common law. Il n'explique toutefois pas pourquoi ce juge ne pouvait pas non plus agir comme juge suppléant pour entendre les appels d'une décision rendue au Québec, alors que la représentation du Québec aurait ainsi été préservée pour l'audition des appels provenant de cette province. Depuis qu'il a prévu pour la première fois la nomination de juges suppléants, le Parlement a toujours refusé que les juges des cours fédérales, ou de la Cour de l'Échiquier qu'elles ont remplacée, siègent en qualité de juges suppléants à la Cour suprême dans les appels des décisions rendues au Québec. S'il s'agit d'une anomalie, le Parlement l'a créée délibérément et l'a toujours maintenue.

(4) Conclusion

[69] Nous concluons donc que l'art. 5 établit les conditions générales de nomination d'un vaste bassin de personnes admissibles à un poste de juge à la Cour suprême du Canada. Cependant, dans le cas des trois postes de juge réservés pour le Québec, l'art. 6 commande une interprétation plus restrictive des conditions d'admissibilité pour qu'il reflète le compromis historique destiné à protéger les traditions juridiques et les valeurs sociales du Québec.

[70] Nous concluons qu'une personne qui a été autrefois inscrite pendant au moins 10 ans au Barreau du Québec peut être nommée juge de la Cour en vertu de l'art. 5 de la *Loi sur la Cour suprême*, mais ne peut pas être nommée en vertu de l'art. 6. Pour être admissible à l'un des trois postes de juge visés à l'art. 6 il faut, en plus de satisfaire aux conditions fixées à l'art. 5, être soit membre du Barreau du Québec soit juge de la Cour d'appel ou

Federal Court of Appeal is ineligible for appointment under s. 6 of the Act.

[71] We note in passing that the reference questions do not ask whether a judge of the Federal Court or Federal Court of Appeal who was a former advocate of at least 10 years standing at the Quebec bar could rejoin the Quebec bar for a day in order to be eligible for appointment to this Court under s. 6. We therefore do not decide this issue.

V. Question 2

A. *The Issue*

2. Can Parliament enact legislation that requires that a person be or has previously been a barrister or advocate of at least 10 years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada or enact the annexed declaratory provisions as set out in clauses 471 and 472 of the Bill entitled *Economic Action Plan 2013 Act, No. 2?*

[72] In light of our conclusion that appointments to the Court under s. 6 require current membership of the Barreau du Québec or of the Court of Appeal or Superior Court of Quebec, in addition to the criteria set out in s. 5, it is necessary to consider the second question, which is whether Parliament can enact declaratory legislation that would alter the composition of the Supreme Court of Canada.

[73] The Attorney General of Canada argues that the eligibility requirements for appointments under s. 6 have not been entrenched in the Constitution, and that Parliament retains the plenary power under s. 101 of the *Constitution Act, 1867* to unilaterally amend the eligibility criteria under ss. 5 and 6.

[74] We disagree. Parliament cannot unilaterally change the composition of the Supreme Court of

de la Cour supérieure du Québec au moment de la nomination. En conséquence, un juge de la Cour fédérale ou de la Cour d'appel fédérale ne peut être nommé à la Cour en vertu de l'art. 6 de la Loi.

[71] Nous soulignons en passant que le renvoi ne soulève pas la question de savoir si un juge de la Cour fédérale ou de la Cour d'appel fédérale qui a été autrefois inscrit au Barreau du Québec pendant au moins 10 ans pourrait s'y réinscrire pendant un jour pour être admissible à une nomination à la Cour en vertu de l'art. 6. Nous ne nous prononçons donc pas sur cette question.

V. Question 2

A. *La question*

2. Le Parlement peut-il légiférer pour exiger, à titre de condition de sa nomination au poste de juge de la Cour suprême du Canada, qu'une personne soit ou ait été inscrite comme avocat au barreau d'une province pendant au moins dix ans ou adopter des dispositions déclaratoires telles que celles prévues aux articles 471 et 472 du projet de loi intitulé *Loi n° 2 sur le plan d'action économique de 2013*, ci-annexé?

[72] Comme nous avons conclu que, pour être admissible à l'un des postes de juge visés à l'art. 6 il faut, en plus de satisfaire aux conditions fixées à l'art. 5, être soit membre du Barreau du Québec soit juge de la Cour d'appel ou de la Cour supérieure du Québec au moment de la nomination, nous devons examiner la seconde question et déterminer si le Parlement peut adopter des dispositions déclaratoires qui modifieraient la composition de la Cour suprême du Canada.

[73] Le procureur général du Canada plaide que les conditions de nomination prévues à l'art. 6 ne sont pas inscrites dans la Constitution. Selon ses prétentions, le Parlement conserve le plein pouvoir de modifier unilatéralement les conditions de nomination fixées aux art. 5 et 6 en vertu de l'art. 101 de la *Loi constitutionnelle de 1867*.

[74] Nous ne sommes pas d'accord. Le Parlement ne peut pas modifier unilatéralement la composition

Canada. Essential features of the Court are constitutionally protected under Part V of the *Constitution Act, 1982*. Changes to the composition of the Court can only be made under the procedure provided for in s. 41¹ of the *Constitution Act, 1982* and therefore require the unanimous consent of Parliament and the provincial legislatures. Changes to the other essential features of the Court can only be made under the procedure provided for in s. 42² of the *Constitution Act, 1982*, which requires the consent of at least seven provinces representing, in the aggregate, at least half of the population of all the provinces.

[75] We will first discuss the history of how the Court became constitutionally protected, and then answer the Attorney General of Canada's arguments on this issue. Finally, we will discuss the effect of the declaratory provisions enacted by Parliament.

B. *Evolution of the Constitutional Status of the Supreme Court*

[76] The Supreme Court's constitutional status initially arose from the Court's historical evolution into an institution whose continued existence and functioning engaged the interests of both Parliament and the provinces. The Court's status was then confirmed by the *Constitution Act, 1982*, which reflected the understanding that the Court's essential features formed part of the Constitution of Canada.

de la Cour suprême du Canada. Les caractéristiques essentielles de la Cour sont protégées par la partie V de la *Loi constitutionnelle de 1982*. La composition de la Cour ne peut être modifiée que conformément à l'art. 41¹ de la *Loi constitutionnelle de 1982* et, partant, pareille modification requiert le consentement unanime du Parlement et de l'assemblée législative de chaque province. Les autres caractéristiques essentielles de la Cour ne peuvent être modifiées que conformément à l'art. 42² de la *Loi constitutionnelle de 1982*, qui exige le consentement d'au moins sept provinces représentant, au total, au moins la moitié de la population de toutes les provinces.

[75] Nous examinerons comment la Cour a acquis une protection constitutionnelle au cours de l'histoire, puis nous répondrons aux arguments du procureur général du Canada sur cette question. Enfin, nous traiterons de l'effet des dispositions déclaratoires adoptées par le Parlement.

B. *Évolution du statut constitutionnel de la Cour suprême*

[76] Initialement, la Cour suprême a acquis son statut constitutionnel en raison de l'évolution historique qui en a fait une institution dont la pérennité et le fonctionnement affectaient les intérêts à la fois du Parlement et des provinces. Ce statut a ensuite été confirmé dans la *Loi constitutionnelle de 1982*, dont le contenu reflète la perception que les caractéristiques essentielles de la Cour faisaient partie de la Constitution canadienne.

1 The text of s. 41(d) states:

41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

(d) the composition of the Supreme Court of Canada;

2 The text of s. 42(1)(d) states:

42. (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

(d) subject to paragraph 41(d), the Supreme Court of Canada;

1 L'alinéa 41(d) prévoit ce qui suit :

41. Toute modification de la Constitution du Canada portant sur les questions suivantes se fait par proclamation du gouverneur général sous le grand sceau du Canada, autorisée par des résolutions du Sénat, de la Chambre des communes et de l'assemblée législative de chaque province :

(d) la composition de la Cour suprême du Canada;

2 L'alinéa 42(1)d) prévoit ce qui suit :

42. (1) Toute modification de la Constitution du Canada portant sur les questions suivantes se fait conformément au paragraphe 38(1) :

(d) sous réserve de l'alinéa 41(d), la Cour suprême du Canada;

(1) The Supreme Court's Evolution Prior to Partition

[77] At Confederation, there was no Supreme Court of Canada. Nor were the details of what would eventually become the Supreme Court expounded in the *Constitution Act, 1867*. It was assumed that the ultimate judicial authority for Canada would continue to be the Judicial Committee of the Privy Council in London. For example, George-Étienne Cartier, then the Attorney General for Canada East, expressed the view that “we shall always have our court of final appeal in Her Majesty’s Privy Council”, even if a general court of appeal for Canada were to be established domestically: Province of Canada, Legislative Assembly, *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, 3rd Sess., 8th Parl., March 2, 1865, at p. 576.

[78] The *Constitution Act, 1867*, however, gave Parliament the authority to establish a general court of appeal for Canada:

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

[79] The Parliamentary debates between 1868 and 1875 over whether to create a Supreme Court were instigated by Sir John A. Macdonald, who was Canada’s Prime Minister and Minister of Justice from 1867 to 1873. He introduced bills for the establishment of the Supreme Court in 1869 and again in 1870 in the House of Commons. Both bills, which did not reserve any seats on the Court for Quebec jurists, faced staunch opposition from Quebec in Parliament. The first bill died on the Order Paper and the second was withdrawn.

[80] In addition to Quebec’s opposition, the nature of the court’s jurisdiction was contested, and many

(1) L'évolution de la Cour suprême avant le rapatriement

[77] Au moment de la Confédération, la Cour suprême du Canada n’existait pas. De plus, la *Loi constitutionnelle de 1867* ne contenait aucune précision à propos de l’institution qui deviendrait la Cour suprême du Canada. On supposait que le Comité judiciaire du Conseil privé de Londres demeurerait l’autorité judiciaire suprême pour le Canada. À titre d’exemple, George-Étienne Cartier, qui était alors procureur général pour le Bas-Canada, a exprimé l’opinion que « nous trouverons toujours un tribunal d’appel en dernier ressort dans le conseil privé de Sa Majesté », même si une cour générale d’appel pour le Canada devait être créée au pays : Province du Canada, Assemblée législative, *Débats parlementaires sur la question de la Confédération des provinces de l’Amérique britannique du Nord*, 3^e sess., 8^e lég., 2 mars 1865, p. 581-582.

[78] Toutefois, une disposition de la *Loi constitutionnelle de 1867* accordait au Parlement le pouvoir d’établir une cour générale d’appel pour le Canada :

101. Le parlement du Canada pourra, nonobstant toute disposition contraire énoncée dans la présente loi, lorsque l’occasion le requerra, adopter des mesures à l’effet de créer, maintenir et organiser une cour générale d’appel pour le Canada, et établir des tribunaux additionnels pour la meilleure administration des lois du Canada.

[79] Sir John A. Macdonald, le premier ministre et ministre de la Justice de 1867 à 1873, fut l’instigateur des débats parlementaires tenus sur l’opportunité d’établir une Cour suprême entre 1868 et 1875. En 1869, puis de nouveau en 1870, il a déposé à la Chambre des communes des projets de loi pour créer la Cour suprême. Aucun de ces projets ne réservait de postes à la Cour pour des juristes québécois. Le Québec s’est opposé ardemment à ces projets de loi au Parlement. Le premier projet de loi est mort au Feuilleton et le deuxième a été retiré.

[80] Au-delà de l’opposition du Québec, on a contesté la nature de la juridiction de la cour et

468

REFERENCE RE SUPREME COURT ACT *The Chief Justice et al.*

[2014] 1 S.C.R.

questioned whether a general court of appeal was even needed. Since an appeal to the Privy Council was available and Ontario and Quebec already had provincial courts of appeal, a Supreme Court would only be an intermediate step on the way to London.

[81] The bill that finally became the *Supreme Court Act* was introduced in 1875 by the federal Minister of Justice, Télesphore Fournier, and was adopted after several amendments (*1875 Debates*, February 23, 1875, at p. 284). The new Supreme Court had general appellate jurisdiction over civil, criminal, and constitutional cases. In addition, the Court was given an exceptional original jurisdiction not incompatible with its appellate jurisdiction, for instance to consider references from the Governor in Council: *Re References by the Governor-General in Council* (1910), 43 S.C.R. 536, affirmed on appeal to the Privy Council, [1912] A.C. 571 (*sub nom. Attorney-General for Ontario v. Attorney-General for Canada*); *Secession Reference*, at para. 9.

[82] Under the authority newly granted by the *Statute of Westminster, 1931*, Parliament abolished criminal appeals to the Privy Council in 1933 (*An Act to amend the Criminal Code*, S.C. 1932-33, c. 53, s. 17). Of even more historic significance, in 1949, it abolished *all* appeals to the Privy Council (*An Act to amend the Supreme Court Act*, s. 3). This had a profound effect on the constitutional architecture of Canada. The Privy Council had exercised ultimate judicial authority over all legal disputes in Canada, including those arising from Canada's Constitution. It played a central role in this country's constitutional structure, by, among other things, delineating the contours of federal and provincial jurisdiction through a number of landmark cases that continue to inform our understanding of the division of powers to this day (John T. Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (2002); Warren J. Newman, "The Constitutional Status of the Supreme Court of Canada" (2009), 47 *S.C.L.R.* (2d) 429, at p. 439). As Warren Newman explains:

bon nombre d'objections remettaient en question la nécessité même d'une cour générale d'appel. Puisque l'on pouvait faire appel au Conseil privé et que l'Ontario et le Québec possédaient déjà des cours d'appel, une Cour suprême ne constituerait qu'une étape judiciaire intermédiaire sur la voie menant à Londres.

[81] Le projet de loi qui est finalement devenu la *Loi sur la Cour suprême* a été déposé par le ministre fédéral de la Justice, Télesphore Fournier, et a été adopté après plusieurs amendements (*Débats de 1875*, 23 février 1875, p. 299). La nouvelle Cour suprême était investie d'une compétence générale d'appel en matière civile, criminelle et constitutionnelle. De plus, la Cour s'était vu conférer une compétence exceptionnelle de première instance, qui n'était pas incompatible avec sa compétence en appel, notamment pour examiner les renvois du gouverneur en conseil : *Re References by the Governor-General in Council* (1910), 43 R.C.S. 536, conf. par le Conseil privé, [1912] A.C. 571 (*sub nom. Attorney-General for Ontario c. Attorney-General for Canada*); *Renvoi sur la sécession*, par. 9.

[82] En vertu des pouvoirs que lui accordait depuis peu le *Statut de Westminster, 1931*, le Parlement a aboli les appels au Conseil privé en matière criminelle en 1933 (*Loi modifiant le Code criminel*, S.C. 1932-33, ch. 53, art. 17). Fait historique encore plus important, il a aboli *tous* les appels au Conseil privé en 1949 (*Loi modifiant la Loi de la Cour suprême*, art. 3), ce qui a entraîné de profondes répercussions sur l'architecture constitutionnelle du Canada. En effet, le Conseil privé avait exercé la compétence judiciaire de dernier ressort sur tous les litiges au Canada, y compris ceux relatifs à la Constitution canadienne. Il avait joué un rôle central dans la structure constitutionnelle de notre pays, notamment en traçant les contours de la compétence fédérale et provinciale dans un bon nombre d'arrêts de principe qui nous éclairent encore aujourd'hui quant au partage des compétences (John T. Saywell, *The Lawmakers : Judicial Power and the Shaping of Canadian Federalism* (2002); Warren J. Newman, « The Constitutional Status of the Supreme Court of Canada » (2009), 47 *S.C.L.R.* (2d) 429, p. 439). Comme l'a expliqué Warren Newman :

... the supreme appellate function of the Judicial Committee of the Privy Council was an integral part of the Canadian judicial system until it was ultimately displaced by the Parliament of Canada in favour of the Supreme Court. Canadians could do without a general court of appeal for Canada as long as the Judicial Committee continued to play that role. With the abolition of appeals to the Privy Council, the appellate jurisdiction of the Supreme Court of Canada became essential. [p. 439]

[83] The abolition of appeals to the Privy Council meant that the Supreme Court of Canada inherited the role of the Council under the Canadian Constitution. As a result, the Court assumed the powers and jurisdiction “no less in scope than those formerly exercised in relation to Canada by the Judicial Committee” (*Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198, at p. 212), including adjudicating disputes over federalism. The need for a final, independent judicial arbiter of disputes over federal-provincial jurisdiction is implicit in a federal system:

Inherent in a federal system is the need for an impartial arbiter of jurisdictional disputes over the boundaries of federal and provincial powers (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 124). That impartial arbiter is the judiciary, charged with “control[ling] the limits of the respective sovereignties” (*Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733, at p. 741).

(*Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at para. 55; see also *Secession Reference*, at para. 53.)

[84] In addition, the elevation in the Court’s status empowered it to exercise a ““unifying jurisdiction’ over the provincial courts”: *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, at p. 318; *Bank of Montreal v. Metropolitan Investigation & Security (Canada) Ltd.*, [1975] 2 S.C.R. 546, at p. 556. The Supreme Court became the keystone to Canada’s unified court system. It “acts as the exclusive ultimate

[TRADUCTION] ... la fonction d’appel de dernier ressort du Comité judiciaire du Conseil privé faisait partie intégrante du système judiciaire canadien jusqu’à ce qu’il soit finalement écarté par le Parlement canadien en faveur de la Cour suprême. Tant que le Comité judiciaire continuait d’exercer cette fonction, les Canadiens pouvaient se passer d’une cour générale d’appel pour le Canada. Avec l’abolition des appels au Conseil privé, la juridiction d’appel de la Cour suprême du Canada est devenue essentielle. [p. 439]

[83] L’abolition des appels au Conseil privé signifiait que la Cour suprême du Canada héritait du rôle du Conseil en vertu de la Constitution canadienne. En conséquence, les pouvoirs et la compétence dont a été investie la Cour n’avaient [TRADUCTION] « pas une portée moindre que ceux exercés autrefois par le Comité judiciaire à l’égard du Canada » (*Reference re The Farm Products Marketing Act*, [1957] R.C.S. 198, p. 212), ce qui l’amenait notamment à trancher les litiges relatifs au fédéralisme. Un système fédéral doit nécessairement compter sur un arbitre indépendant qui tranche en dernier ressort les litiges relatifs au partage des compétences :

Un système fédéral repose forcément sur la nécessité qu’existe un arbitre impartial pour régler les conflits de compétence quant aux frontières entre les pouvoirs du Parlement et ceux des législatures provinciales (*Renvoi relatif à la rémunération des juges de la Cour provinciale de l’Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3, par. 124). Les juges, qui sont chargés de « contrôl[e]r] les bornes de la souveraineté propre » des deux paliers de gouvernement, sont cet arbitre impartial (*Northern Telecom Canada Ltée c. Syndicat des travailleurs en communication du Canada*, [1983] 1 R.C.S. 733, p. 741).

(*Renvoi relatif à la Loi sur les valeurs mobilières*, 2011 CSC 66, [2011] 3 R.C.S. 837, par. 55; voir aussi *Renvoi sur la sécession*, par. 53.)

[84] En outre, le statut de tribunal de dernier ressort désormais reconnu à la Cour l’autorisait à exercer une « “juridiction unificatrice” sur les tribunaux des provinces » : *Hunt c. T&N plc*, [1993] 4 R.C.S. 289, p. 318; *Banque de Montréal c. Metropolitan Investigation & Security (Canada) Ltd.*, [1975] 2 R.C.S. 546, p. 556. La Cour suprême du Canada est devenue la clé de voûte du système

appellate court in the country” (*Secession Reference*, at para. 9). In fulfilling this role, the Court is not restricted to the powers of the lower courts from which an appeal is made. Rather, the Court may exercise the powers necessary to enable it “to discharge its role at the apex of the Canadian judicial system, as the court of last resort for all Canadians”: *R. v. Gardiner*, [1982] 2 S.C.R. 368, at p. 404, *per* Dickson J.; *Hunt*, at p. 319.

[85] With the abolition of appeals to the Judicial Committee of the Privy Council, the continued existence and functioning of the Supreme Court of Canada became a key matter of interest to both Parliament and the provinces. The Court assumed a vital role as an institution forming part of the federal system. It became the final arbiter of division of powers disputes, and became the final word on matters of public law and provincial civil law. Drawing on the expertise of its judges from Canada’s two legal traditions, the Court ensured that the common law and the civil law would evolve side by side, while each maintained its distinctive character. The Court thus became central to the functioning of legal systems within each province and, more broadly, to the development of a unified and coherent Canadian legal system.

[86] The role of the Supreme Court of Canada was further enhanced as the 20th century unfolded. In 1975, Parliament amended the *Supreme Court Act* to end appeals as of right to the Court in civil cases (S.C. 1974-75-76, c. 18). This gave the Court control over its civil docket, and allowed it to focus on questions of public legal importance. As a result, the Court’s “mandate became oriented less to error correction and more to development of the jurisprudence”: *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 53.

[87] As a result of these developments, the Supreme Court emerged as a constitutionally essential institution engaging both federal and provincial interests. Increasingly, those concerned with

judiciaire unifié du Canada. Elle «exerce le rôle de juridiction d’appel suprême et exclusive au pays» (*Renvoi sur la sécession*, par. 9). Dans ce rôle, les pouvoirs de la Cour ne se limitent pas à ceux des tribunaux inférieurs dont elle révise les décisions en appel. Elle possède tous les pouvoirs nécessaires pour lui permettre «de remplir son rôle au sommet du système judiciaire canadien en tant que cour de dernier ressort pour tous les Canadiens» : *R. c. Gardiner*, [1982] 2 R.C.S. 368, p. 404, le juge Dickson; *Hunt*, p. 319.

[85] À la suite de l’abolition des appels au Comité judiciaire du Conseil privé, la pérennité et le fonctionnement de la Cour suprême sont devenus des questions d’intérêt primordiales pour le Parlement et pour les provinces. La Cour a assumé un rôle vital en tant qu’institution faisant partie du système fédéral. Elle est devenue l’arbitre ultime des litiges sur le partage des compétences et devait désormais juger en dernier ressort les questions de droit public et de droit provincial en matière civile. Grâce à l’expertise de ses juges issus des deux traditions juridiques du Canada, la Cour a veillé à ce que la common law et le droit civil évoluent côté à côté, tout en conservant leur caractère distinctif. La Cour est ainsi devenue essentielle au fonctionnement des systèmes juridiques dans chaque province et, plus généralement, au développement d’un système juridique canadien cohérent et unifié.

[86] Dans la dernière partie du 20^e siècle, le rôle de la Cour a encore évolué. En 1975, le Parlement a modifié la *Loi sur la Cour suprême* pour abolir les appels de plein droit à la Cour en matière civile (S.C. 1974-75-76, ch. 18). La Cour a ainsi pu commencer à choisir les affaires qu’elle entend en matière civile, ce qui lui a permis de centrer son attention sur les questions juridiques qui revêtent une importance pour le public. En conséquence, la mission de la Cour «consiste désormais moins à corriger les erreurs et davantage à développer la jurisprudence» : *R. c. Henry*, 2005 CSC 76, [2005] 3 R.C.S. 609, par. 53.

[87] Cette évolution historique a fait de la Cour suprême une institution constitutionnellement essentielle qui affecte les intérêts à la fois du fédéral et des provinces. De plus en plus, les personnes

constitutional reform accepted that future reforms would have to recognize the Supreme Court's position within the architecture of the Constitution.

(2) The Supreme Court and Patriation

[88] We have seen that the Supreme Court was already essential under the Constitution's architecture as the final arbiter of division of powers disputes and as the final general court of appeal for Canada. The *Constitution Act, 1982* enhanced the Court's role under the Constitution and confirmed its status as a constitutionally protected institution.

[89] Patriation of the Constitution was accompanied by the adoption of the *Canadian Charter of Rights and Freedoms*, which gave the courts the responsibility for interpreting and remedying breaches of the *Charter*. Patriation also brought an explicit acknowledgement that the Constitution is the “supreme law of Canada”:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The existence of an impartial and authoritative judicial arbiter is a necessary corollary of the enactment of the supremacy clause. The judiciary became the “guardian of the constitution” (*Hunter*, at p. 155, *per* Dickson J.). As such, the Supreme Court of Canada is a foundational premise of the Constitution. With the adoption of the *Constitution Act, 1982*, “the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy”: *Secession Reference*, at para. 72.

[90] Accordingly, the *Constitution Act, 1982* confirmed the constitutional protection of the essential features of the Supreme Court. Indeed, Part V of the *Constitution Act, 1982* expressly makes changes to the Supreme Court and to its composition subject to constitutional amending procedures.

que préoccupaient les réformes constitutionnelles ont accepté que les réformes à venir devraient reconnaître le rôle de la Cour suprême dans l'architecture de la Constitution.

(2) La Cour suprême et le rapatriement

[88] Nous avons vu que la Cour suprême jouait déjà un rôle primordial dans la structure constitutionnelle en tant qu'arbitre ultime des litiges sur le partage des compétences et en tant que cour générale d'appel pour le Canada. La *Loi constitutionnelle de 1982* a accentué l'importance du rôle attribué à la Cour par la Constitution et a confirmé son statut d'institution protégée par la Constitution.

[89] La *Charte canadienne des droits et libertés* a été adoptée lors du rapatriement de la Constitution. Les tribunaux ont alors dû assumer la responsabilité d'interpréter la *Charte* et d'accorder des réparations en cas de violation de ses dispositions. Le rapatriement a permis également de reconnaître expressément que la Constitution est la « loi suprême du Canada » :

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

La nécessité de l'existence d'un arbitre judiciaire impartial et dont les décisions font autorité est le corollaire de cette disposition. Les tribunaux sont devenus les « gardiens de la constitution » (*Hunter*, p. 155, le juge Dickson). À ce titre, la Cour suprême du Canada constitue une pierre d'assise de la Constitution. L'adoption de la *Loi constitutionnelle de 1982* a « fait passer le système canadien de gouvernement de la suprématie parlementaire à la suprématie constitutionnelle » : *Renvoi sur la sécession*, par. 72.

[90] En conséquence, la *Loi constitutionnelle de 1982* a confirmé que les caractéristiques essentielles de la Cour suprême sont protégées par la Constitution. En effet, la partie V de la *Loi constitutionnelle de 1982* assujettit expressément les changements touchant la Cour suprême et sa composition au respect des procédures de modification de la Constitution.

472

REFERENCE RE SUPREME COURT ACT *The Chief Justice et al.*

[2014] 1 S.C.R.

[91] Under s. 41(d), the unanimous consent of Parliament and all provincial legislatures is required for amendments to the Constitution relating to the “composition of the Supreme Court”. The notion of “composition” refers to ss. 4(1), 5 and 6 of the *Supreme Court Act*, which codify the composition of and eligibility requirements for appointment to the Supreme Court of Canada as they existed in 1982. By implication, s. 41(d) also protects the continued existence of the Court, since abolition would altogether remove the Court’s composition.

[92] The textual origin of Part V was the “April Accord” of 1981 (*Constitutional Accord: Canadian Patriation Plan* (1981)), to which eight provinces, including Quebec, were parties. The explanatory notes to this Accord confirm that the intention was to limit Parliament’s unilateral authority to reform the Supreme Court. That sentiment finds particular expression in the explanatory note for what became s. 41, which requires unanimity for amendments relating to five matters, including the composition of the Supreme Court: “This section recognizes that some matters are of such fundamental importance that amendments in relation to them should require the consent of all the provincial Legislatures and Parliament” (p. 9 (note 9)). Pointedly, the explanatory note to s. 41(d) states: “This clause would ensure that the Supreme Court of Canada is comprised of judges a proportion of whom are drawn from the Bar or Bench of Quebec and are, therefore, trained in the civil law” (p. 9 (note 9(d))). The intention of the provision was demonstrably to make it difficult to change the composition of the Court, and to ensure that Quebec’s representation was given special constitutional protection.

[93] The fact that the composition of the Supreme Court of Canada was singled out for special protection in s. 41(d) is unsurprising, since the Court’s composition has been long recognized as crucial to its ability to function effectively and with sufficient institutional legitimacy as the final court of appeal for Canada. As explained above, the central bargain that led to the creation of the Supreme Court

[91] Aux termes de l’al. 41d), les modifications de la Constitution relatives à la « composition de la Cour suprême » requièrent le consentement unanime du Parlement et de l’assemblée législative de chaque province. La notion de « composition » renvoie au par. 4(1) et aux art. 5 et 6 de la *Loi sur la Cour suprême*, qui codifient la composition de la Cour suprême du Canada et les conditions de nomination de ses juges telles qu’elles existaient en 1982. L’alinéa 41d) protège aussi la pérennité de la Cour, puisque son abolition en éliminerait la composition.

[92] Le texte de la partie V apparaissait à l’origine dans l’« Accord d’avril » de 1981 (*Accord constitutionnel : Projet canadien de rapatriement de la Constitution* (1981)), signé par huit provinces, dont le Québec. Les notes explicatives de cet Accord confirment que les signataires avaient l’intention de limiter le pouvoir unilatéral du Parlement de réformer la Cour suprême. Cette intention est exprimée en particulier dans la note explicative du texte maintenant devenu l’art. 41, qui requiert un consentement unanime pour les modifications portant sur cinq sujets, dont la composition de la Cour suprême : « Cet article reconnaît que quelques sujets sont d’une importance tellement fondamentale que des modifications les affectant devraient recevoir l’approbation de toutes les Assemblées provinciales et du Parlement » (p. 9 (note 9)). La note explicative de l’al. 41d) précise justement que « [c]e paragraphe assurerait que la Cour suprême du Canada soit composée de juges dont une partie proviendraient du Barreau ou d’une Cour du Québec et auraient, par conséquent, une formation en droit civil » (p. 9 (note 9(d))). Les auteurs de cette disposition voulaient manifestement qu’il devienne difficile de modifier la composition de la Cour. Ils entendaient ainsi assurer une protection constitutionnelle spéciale à la représentation du Québec à la Cour.

[93] Il ne faut pas s’étonner que l’al. 41d) ait accordé une protection spéciale à la composition de la Cour suprême du Canada. En effet, on reconnaît depuis longtemps son importance cruciale pour le fonctionnement efficace de la Cour et sa légitimité institutionnelle en tant que cour d’appel de dernier ressort au Canada. Comme nous l’avons expliqué, l’entente essentielle qui a permis la création de la

in the first place was the guarantee that a significant proportion of the judges would be drawn from institutions linked to Quebec civil law and culture. The objective of ensuring representation from Quebec's distinct juridical tradition remains no less compelling today, and implicates the competence, legitimacy, and integrity of the Court. Requiring unanimity for changes to the composition of the Court gave Quebec constitutional assurance that changes to its representation on the Court would not be effected without its consent. Protecting the composition of the Court under s. 41(d) was necessary because leaving its protection to s. 42(1)(d) would have left open the possibility that Quebec's seats on the Court could have been reduced or altogether removed without Quebec's agreement.

[94] Section 42(1)(d) applies the 7/50 amending procedure to the essential features of the Court, rather than to all of the provisions of the *Supreme Court Act*.³ The express mention of the Supreme Court of Canada in s. 42(1)(d) is intended to ensure the proper functioning of the Supreme Court. This requires the constitutional protection of the essential features of the Court, understood in light of the role that it had come to play in the Canadian constitutional structure by the time of patriation. These essential features include, at the very least, the Court's jurisdiction as the final general court of appeal for Canada, including in matters of constitutional interpretation, and its independence.

[95] In summary, the Supreme Court gained constitutional status as a result of its evolution into the *final* general court of appeal for Canada, with jurisdiction to hear appeals concerning all the laws of Canada and the provinces, including the Constitution. This status was confirmed in the *Constitution*

Cour suprême portait sur la garantie qu'un nombre relativement important des juges proviendraient d'institutions liées au droit civil et à la culture du Québec. L'objectif de garantir que la tradition juridique distincte du Québec soit représentée à la Cour demeure tout aussi important de nos jours et touche la compétence, la légitimité et l'intégrité de la Cour. Le consentement unanime exigé pour changer la composition de la Cour a donné au Québec la garantie constitutionnelle que sa représentation à la Cour ne sera pas modifiée sans son consentement. Il était nécessaire de protéger la composition de la Cour à l'al. 41d) parce que la protection prévue à l'al. 42(1)d) n'aurait pas empêché que le nombre de postes de juge réservés pour le Québec puisse être réduit, peut-être même totalement supprimé, sans le consentement du Québec.

[94] L'alinéa 42(1)d) applique la procédure de modification 7/50 aux caractéristiques essentielles de la Cour, plutôt qu'à toutes les dispositions de la *Loi sur la Cour suprême*³. La mention expresse de la Cour suprême du Canada à l'al. 42(1)d) garantit le bon fonctionnement de la Cour suprême. Celui-ci exige qu'une protection constitutionnelle soit accordée aux caractéristiques essentielles de la Cour, identifiées à la lumière de son rôle dans la structure constitutionnelle tel qu'il avait évolué jusqu'au rapatriement. Ces caractéristiques essentielles incluent, à tout le moins, la juridiction de la Cour en tant que cour générale d'appel de dernier ressort pour le Canada, notamment en matière d'interprétation de la Constitution, et son indépendance.

[95] En résumé, la Cour suprême a acquis son statut constitutionnel parce qu'elle a évolué de manière à devenir une cour générale d'appel *de dernier ressort* pour le Canada, avec compétence sur les appels relatifs à toutes les lois fédérales et provinciales, y compris la Constitution. Ce statut a

³ This view is supported by, among others, Patrick J. Monahan and Byron Shaw, *Constitutional Law* (4th ed. 2013), at p. 205; Peter Oliver, "Canada, Quebec, and Constitutional Amendment" (1999), 49 *U.T.L.J.* 519, at p. 579; W.R. Lederman, "Constitutional Procedure and the Reform of the Supreme Court of Canada" (1985), 26 *C. de D.* 195, at p. 196; Stephen A. Scott, "Pussycat, Pussycat or Patriation and the New Constitutional Amendment Processes" (1982), 20 *U.W.O. L. Rev.* 247, at p. 273.

³ Cette opinion est partagée notamment par Patrick J. Monahan et Byron Shaw, *Constitutional Law* (4^e éd. 2013), p. 205; Peter Oliver, « Canada, Quebec, and Constitutional Amendment » (1999), 49 *U.T.L.J.* 519, p. 579; W. R. Lederman, « Constitutional Procedure and the Reform of the Supreme Court of Canada » (1985), 26 *C. de D.* 195, p. 196; Stephen A. Scott, « Pussycat, Pussycat or Patriation and the New Constitutional Amendment Processes » (1982), 20 *U.W.O. L. Rev.* 247, p. 273.

Act, 1982, which made modifications of the Court's composition and other essential features subject to stringent amending procedures.

C. *The Arguments of the Attorney General of Canada*

[96] The Attorney General of Canada argues (i) that the mention of the Supreme Court in the *Constitution Act, 1982* has no legal force, and (ii) that the failed attempts to entrench the eligibility requirements in the Meech Lake Accord of 1987 and the Charlottetown Accord of 1992 demonstrate that Parliament and the provinces understood those requirements not to have been entrenched in 1982.

(1) The “Empty Vessels” Theory

[97] The Attorney General of Canada contends that the Supreme Court is not protected by Part V, because the *Supreme Court Act* is not enumerated in s. 52 of the *Constitution Act, 1982* as forming part of the Constitution of Canada. He essentially argues that the references to the “Supreme Court” in ss. 41(d) and 42(1)(d) are “empty vessels” to be filled only when the Court becomes *expressly* entrenched in the text of the Constitution: see for example Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 4-21. It follows from this, he argues, that Parliament retains the power to unilaterally make changes to the Court under s. 101 of the *Constitution Act, 1867* until such time as the Court is expressly entrenched.

[98] This contention is unsustainable. It would mean that the framers would have entrenched the Court's *exclusion* from constitutional protection: Stephen A. Scott, “Pussycat, Pussycat or Patriation and the New Constitutional Amendment Processes” (1982), 20 *U.W.O. L. Rev.* 247, at p. 272; Stephen A. Scott, “The Canadian Constitutional Amendment Process” (1982), 45 *Law & Contemp. Probs.* 249, at p. 261; see also Patrick J. Monahan and Byron

éété confirmé dans la *Loi constitutionnelle de 1982*, qui a assujetti toute modification portant sur la composition de la Cour et ses autres caractéristiques essentielles à des procédures de modification strictes.

C. *Les arguments du procureur général du Canada*

[96] Cependant, le procureur général du Canada plaide (i) que la mention de la Cour suprême dans la *Loi constitutionnelle de 1982* n'a pas d'effet juridique, et (ii) que les vaines tentatives d'intégrer les conditions de nomination dans l'Accord du lac Meech en 1987 et dans l'Accord de Charlottetown en 1992 démontrent que le Parlement et les provinces estimaient que ces conditions n'avaient pas été constitutionnalisées en 1982.

(1) La thèse des « contenants vides »

[97] Le procureur général du Canada prétend que la Cour suprême du Canada n'est pas protégée par la partie V, parce que la *Loi sur la Cour suprême* n'est pas mentionnée à l'art. 52 de la *Loi constitutionnelle de 1982* parmi les textes législatifs compris dans la Constitution du Canada. Il soutient essentiellement que les mentions de la « Cour suprême » aux al. 41d) et 42(1)d) sont des « contenants vides » dont le contenu ne sera déterminé que lorsque la Cour sera *expressément* inscrite dans le texte de la Constitution : voir par exemple Peter W. Hogg, *Constitutional Law of Canada* (5^e éd. suppl.), p. 4-21. Il s'ensuit, selon lui, que le Parlement conserve le pouvoir d'apporter unilatéralement des changements à la Cour en vertu de l'art. 101 de la *Loi constitutionnelle de 1867*, jusqu'à ce que la Cour soit expressément constitutionnalisée.

[98] Cet argument est dépourvu de fondement. Il signifierait que les auteurs du texte constitutionnel ont constitutionnalisé l'*exclusion* de la Cour suprême de toute protection constitutionnelle : Stephen A. Scott, « Pussycat, Pussycat or Patriation and the New Constitutional Amendment Processes » (1982), 20 *U.W.O. L. Rev.* 247, p. 272; Stephen A. Scott, « The Canadian Constitutional Amendment Process » (1982), 45 *Law & Contemp. Probs.* 249,

Shaw, *Constitutional Law* (4th ed. 2013), at p. 204. It would also mean that the provinces agreed to insulate this unilateral federal power from amendment except through the exacting procedures in Part V.

[99] Accepting this argument would have two practical consequences that the provinces could not have intended. First, it would mean that Parliament could unilaterally and fundamentally change the Court, including Quebec's historically guaranteed representation, through ordinary legislation. Quebec, a signatory to the April Accord, would not have agreed to this, nor would have the other provinces. Second, it would mean that the Court would have less protection than at any other point in its history since the abolition of appeals to the Privy Council. This outcome illustrates the absurdity of denying Part V its plain meaning. The framers cannot have intended to diminish the constitutional protection accorded to the Court, while at the same time enhancing its constitutional role under the *Constitution Act, 1982*.

[100] Our constitutional history shows that ss. 41(d) and 42(1)(d) of the *Constitution Act, 1982* were enacted in the context of ongoing constitutional negotiations that anticipated future amendments relating to the Supreme Court. The amending procedures in Part V were meant to guide that process. By setting out in Part V how changes were to be made to the Supreme Court and its composition, the clear intention was to freeze the *status quo* in relation to the Court's constitutional role, pending future changes: Monahan and Shaw, at pp. 204-5; W. R. Lederman, "Constitutional Procedure and the Reform of the Supreme Court of Canada" (1985), 26 *C. de D.* 195, at p. 200; Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel* (5th ed. 2008), at pp. 233-34. This reflects the political and social consensus at the time that the Supreme Court was an essential part of Canada's constitutional architecture.

p. 261; voir aussi Patrick J. Monahan et Byron Shaw, *Constitutional Law* (4^e éd. 2013), p. 204. Cet argument signifierait aussi que les provinces ont accepté de mettre ce pouvoir unilatéral du Parlement à l'abri de toute modification, à moins que ne soient respectées les procédures astreignantes établies dans la partie V.

[99] Retenir cet argument entraînerait deux conséquences pratiques incompatibles avec l'intention des provinces. Premièrement, cela signifierait que le Parlement pourrait, par une loi ordinaire, modifier unilatéralement et fondamentalement la Cour suprême, y compris la représentation du Québec à la Cour, qui a toujours été garantie. Or, le Québec, qui a signé l'Accord d'avril, n'aurait certainement pas consenti à cela, et les autres provinces non plus. Deuxièmement, cela voudrait dire que la Cour serait moins bien protégée que jamais depuis l'abolition des appels au Conseil privé. Ce résultat illustre l'absurdité du rejet du sens ordinaire de la partie V. Les auteurs de celle-ci ne peuvent pas avoir eu l'intention de réduire la protection constitutionnelle accordée à la Cour, tout en accentuant le rôle constitutionnel que lui attribue la *Loi constitutionnelle de 1982*.

[100] Notre histoire constitutionnelle révèle que les al. 41(d) et 42(1)d) de la *Loi constitutionnelle de 1982* ont été adoptés dans le contexte de négociations constitutionnelles en prévision de modifications futures touchant la Cour suprême. Les procédures de modification établies dans la partie V visaient à orienter ce processus. Lorsque les auteurs du texte législatif ont précisé comment doivent être faites les modifications portant sur la Cour suprême et sa composition, ils avaient manifestement l'intention de préserver le statu quo quant au rôle constitutionnel de la Cour, jusqu'à ce que des modifications soient faites : Monahan et Shaw, p. 204-205; W. R. Lederman, « Constitutional Procedure and the Reform of the Supreme Court of Canada » (1985), 26 *C. de D.* 195, p. 200; Henri Brun, Guy Tremblay et Eugénie Brouillet, *Droit constitutionnel* (5^e éd. 2008), p. 233-234. Cette intention concorde avec le consensus politique et social de l'époque selon lequel la Cour suprême constitue un élément essentiel de l'architecture constitutionnelle du Canada.

[101] It is true that at Confederation, Parliament was given the authority through s. 101 of the *Constitution Act, 1867* to “provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada”. Parliament undoubtedly has the authority under s. 101 to enact routine amendments necessary for the continued maintenance of the Supreme Court, but only if those amendments do not change the constitutionally protected features of the Court. The unilateral power found in s. 101 of the *Constitution Act, 1867* has been overtaken by the Court’s evolution in the structure of the Constitution, as recognized in Part V of the *Constitution Act, 1982*. As a result, what s. 101 now requires is that Parliament maintain — and protect — the essence of what enables the Supreme Court to perform its current role.

(2) The Meech Lake Accord and the Charlottetown Accord

[102] The Attorney General of Canada argues that the Meech Lake Accord and the Charlottetown Accord would have expressly entrenched the qualifications for appointment to the Court in the Constitution, and that the failure to adopt these constitutional amendments means that the qualifications for appointment to the Court are not entrenched.

[103] We cannot accept this argument. As discussed above, the enactment of the *Constitution Act, 1982* protected the *status quo* regarding the Supreme Court. That expressly included the Court’s composition, of which Quebec’s representation on the Court is an integral part. The Meech Lake Accord and the Charlottetown Accord would have reformed the appointment process for the Court, and would have required that the Quebec judges on the Court be appointed from a list of candidates submitted by Quebec. These failed attempts at reform are evidence only of attempts at a broader reform of the selection process, but they shed no light on the issue of the Court’s existing constitutional protection. The failure of the Meech

[101] Il est vrai qu’au moment de la Confédération, l’art. 101 de la *Loi constitutionnelle de 1867* a conféré au Parlement le pouvoir d’« adopter des mesures à l’effet de créer, maintenir et organiser une cour générale d’appel pour le Canada ». Le Parlement peut certainement, aux termes de l’art. 101, adopter les modifications d’ordre administratif nécessaires au maintien de la Cour suprême, mais uniquement à condition que ces modifications ne changent rien aux caractéristiques de la Cour qui bénéficient d’une protection constitutionnelle. La nature du pouvoir unilatéral conféré à l’art. 101 de la *Loi constitutionnelle de 1867* a été modifiée par l’évolution de la Cour dans la structure constitutionnelle, comme le reconnaît la partie V de la *Loi constitutionnelle de 1982*. Par conséquent, l’art. 101 exige maintenant que le Parlement préserve — et protège — les éléments essentiels qui permettent à la Cour suprême de s’acquitter de sa mission actuelle.

(2) L’Accord du lac Meech et l’Accord de Charlottetown

[102] Le procureur général du Canada plaide que l’Accord du lac Meech et l’Accord de Charlottetown auraient expressément constitutionnalisé les conditions de nomination à la Cour et que, comme ces modifications constitutionnelles n’ont pas été adoptées, les conditions de nomination à la Cour ne sont pas inscrites dans la Constitution.

[103] Nous ne pouvons pas retenir cet argument. Comme nous l’avons rappelé, l’adoption de la *Loi constitutionnelle de 1982* a protégé le *status quo* en ce qui concerne la Cour suprême. Ce *status quo* incluait expressément la composition de la Cour, dont la représentation du Québec à la Cour fait partie intégrante. L’Accord du lac Meech et l’Accord de Charlottetown auraient réformé le processus de nomination des juges de la Cour et exigé que les juges pour le Québec soient nommés parmi les candidats figurant sur une liste soumise par le Québec. Ces vaines tentatives de réforme prouvent uniquement qu’on a tenté de réformer plus généralement le processus de sélection, mais ne nous apprennent rien sur la protection constitutionnelle

Lake Accord and Charlottetown Accord simply means that the *status quo* regarding the Court's constitutional role remains intact.

D. *The Effects of the Declaratory Provisions Enacted by Parliament*

[104] Changes to the composition of the Supreme Court must comply with s. 41(d) of the *Constitution Act, 1982*. Sections 4(1), 5 and 6 of the *Supreme Court Act* codify the composition of and eligibility requirements for appointment to the Supreme Court of Canada as they existed in 1982. Of particular relevance is s. 6, which reflects the Court's bijural character and represents the key to the historic bargain that created the Court in the first place. As we discussed above, the guarantee that one third of the Court's judges would be chosen from Quebec ensured that civil law expertise and that Quebec's legal traditions would be represented on the Court and that the confidence of Quebec in the Court would be enhanced.

[105] Both the general eligibility requirements for appointment and the specific eligibility requirements for appointment from Quebec are aspects of the composition of the Court. It follows that any substantive change in relation to those eligibility requirements is an amendment to the Constitution in relation to the composition of the Supreme Court of Canada and triggers the application of Part V of the *Constitution Act, 1982*. Any change to the eligibility requirements for appointment to the three Quebec positions on the Court codified in s. 6 therefore requires the unanimous consent of Parliament and the 10 provinces.

[106] Since s. 6.1 of the *Supreme Court Act* (cl. 472 of *Economic Action Plan 2013 Act, No. 2*) substantively changes the eligibility requirements for appointments to the Quebec seats on the Court under s. 6, it seeks to bring about an amendment to the Constitution of Canada on a matter requiring unanimity of Parliament and the provincial legislatures. The assertion that s. 6.1 is a declaratory provision does not alter its import. Section 6.1 is

actuelle de la Cour. L'échec de l'Accord du lac Meech et de l'Accord de Charlottetown signifie simplement que le statu quo quant au rôle constitutionnel de la Cour est demeuré intact.

D. *Les effets des dispositions déclaratoires édictées par le Parlement*

[104] Tout changement dans la composition de la Cour doit être fait conformément à l'al. 41d) de la *Loi constitutionnelle de 1982*. Le paragraphe 4(1) et les art. 5 et 6 de la *Loi sur la Cour suprême* codifient la composition de la Cour suprême du Canada et les conditions de nomination de ses juges telles qu'elles existaient en 1982. L'article 6 est particulièrement pertinent, car il reflète le caractère bijuridique de la Cour et représente l'élément clé de l'entente historique qui a permis la création de la Cour suprême. Rappelons que la garantie qu'un tiers des juges de la Cour proviendrait du Québec assurait que la Cour posséderait une expertise en droit civil et que les traditions juridiques, et valeurs sociales du Québec y seraient représentées et renforçait la confiance du Québec envers la Cour.

[105] Les conditions de nomination générales et les conditions de nomination particulières pour le Québec sont des aspects de la composition de la Cour. En conséquence, toute modification importante portant sur ces conditions de nomination constitue une modification de la Constitution portant sur la composition de la Cour suprême du Canada et entraîne l'application de la partie V de la *Loi constitutionnelle de 1982*. Toute modification des conditions de nomination aux trois postes de juge de la Cour réservés pour le Québec codifiées à l'art. 6 exige donc le consentement unanime du Parlement et des 10 provinces.

[106] Comme l'art. 6.1 de la *Loi sur la Cour suprême* (l'art. 472 du projet de loi intitulé *Loi n° 2 sur le plan d'action économique de 2013*) modifie substantiellement les conditions de nomination d'un juge pour le Québec fixées à l'art. 6, il apporte une modification à la Constitution du Canada portant sur un sujet qui requiert le consentement unanime du Parlement et de l'assemblée législative de chaque province. L'affirmation que l'art. 6.1 est

therefore *ultra vires* of Parliament acting alone. However, s. 5.1 (cl. 471) does not alter the law as it existed in 1982 and is therefore validly enacted under s. 101 of the *Constitution Act, 1867*, although it is redundant.

VI. Responses to the Reference Questions

[107] We answer the reference questions as follows:

1. Can a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec be appointed to the Supreme Court of Canada as a member of the Supreme Court from Quebec pursuant to sections 5 and 6 of the *Supreme Court Act*?

Answer: No.

2. Can Parliament enact legislation that requires that a person be or has previously been a barrister or advocate of at least 10 years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada or enact the annexed declaratory provisions as set out in clauses 471 and 472 of the Bill entitled *Economic Action Plan 2013 Act, No. 2*?

Answer: With respect to the three seats reserved for Quebec on the Court, the answer is no. With respect to the declaratory provision set out in cl. 472, the answer is no. With respect to cl. 471, the answer is yes.

The following is the opinion of

MOLDAVER J. (dissenting)—

I. Introduction

[108] On October 22, 2013, the Governor General in Council referred the following two questions to this Court for determination pursuant to s. 53 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 (“Act”):

1. Can a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec be

une disposition déclaratoire ne change en rien son effet. Par conséquent, l’art. 6.1 excède le pouvoir du Parlement agissant seul. Toutefois, l’art. 5.1 (art. 471) ne modifie pas le droit existant en 1982; il a donc été valablement adopté en vertu de l’art. 101 de la *Loi constitutionnelle de 1867*, bien qu’il soit redondant.

VI. Réponses aux questions du renvoi

[107] Nous répondons comme suit aux questions du renvoi :

1. Une personne qui a autrefois été inscrite comme avocat pendant au moins dix ans au Barreau du Québec peut-elle être nommée à la Cour suprême du Canada à titre de juge de la Cour suprême pour le Québec conformément aux articles 5 et 6 de la *Loi sur la Cour suprême*?

Réponse : Non

2. Le Parlement peut-il légiférer pour exiger, à titre de condition de sa nomination au poste de juge de la Cour suprême du Canada, qu'une personne soit ou ait été inscrite comme avocat au barreau d'une province pendant au moins dix ans ou adopter des dispositions déclaratoires telles que celles prévues aux articles 471 et 472 du projet de loi intitulé *Loi n° 2 sur le plan d'action économique de 2013*, ci-annexé?

Réponse : Pour ce qui est des trois postes de juge de la Cour réservés pour le Québec, la réponse est non. Pour ce qui est de la disposition déclaratoire énoncée dans l’art. 472, la réponse est non. Concernant l’art. 471, la réponse est oui.

Version française de l’avis rendu par

LE JUGE MOLDAVER (dissident)—

I. Introduction

[108] Le 22 octobre 2013, le gouverneur général en conseil a soumis les questions suivantes au jugement de la Cour conformément à l’art. 53 de la *Loi sur la Cour suprême*, L.R.C. 1985, ch. S-26 (« Loi ») :

1. Une personne qui a autrefois été inscrite comme avocat pendant au moins dix ans au Barreau du Québec peut-elle

appointed to the Supreme Court of Canada as a member of the Supreme Court from Quebec pursuant to sections 5 and 6 of the *Supreme Court Act*?

2. Can Parliament enact legislation that requires that a person be or has previously been a barrister or advocate of at least 10 years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada or enact the annexed declaratory provisions as set out in clauses 471 and 472 of the Bill entitled *Economic Action Plan 2013 Act, No. 2*?

[109] This reference stems from the appointment of the Honourable Justice Marc Nadon to fill one of the three seats on this Court allocated to the Province of Quebec. Justice Nadon is a former member of the Quebec bar of almost 20 years standing. At the time of his appointment to this Court, he was a judge of the Federal Court of Appeal.⁴

[110] The issue raised in Question 1 is whether former advocates of the Quebec bar of at least 10 years standing meet the eligibility requirements in the *Supreme Court Act* for appointment to the Quebec seats on this Court. That is a legal issue, not a political one. It is not the function of this Court to comment on the merits of an appointment or the selection process that led to it. Those are political matters that belong to the executive branch of government. They form no part of our mandate.

[111] The answer to Question 1 lies in the correct interpretation of ss. 5 and 6 of the Act. For reasons that follow, I would answer Question 1 in the affirmative. Under ss. 5 and 6 of the Act, both current and past advocates of at least 10 years standing at the Quebec bar are eligible for appointment to this Court. In view of my answer to Question 1, the legislation to which Question 2 refers is redundant. It does nothing more than restate the

être nommée à la Cour suprême du Canada à titre de juge de la Cour suprême pour le Québec conformément aux articles 5 et 6 de la *Loi sur la Cour suprême*?

2. Le Parlement peut-il légiférer pour exiger, à titre de condition de sa nomination au poste de juge de la Cour suprême du Canada, qu'une personne soit ou ait été inscrite comme avocat au barreau d'une province pendant au moins dix ans ou adopter des dispositions déclaratoires telles que celles prévues aux articles 471 et 472 du projet de loi intitulé *Loi n° 2 sur le plan d'action économique de 2013*, ci-annexé?

[109] Ce renvoi découle de la nomination de l'honorable juge Marc Nadon à l'un des trois postes de juge de la Cour réservés à la province de Québec. Le juge Nadon a autrefois été membre du Barreau du Québec pendant près de 20 ans. Au moment de sa nomination à la Cour, il était juge à la Cour d'appel fédérale⁴.

[110] Pour répondre à la question 1, il faut décider si les anciens avocats inscrits au Barreau du Québec pendant au moins 10 ans répondent aux conditions de nomination fixées dans la *Loi sur la Cour suprême* relativement aux postes de juge réservés au Québec. Il s'agit d'une question d'ordre juridique, et non politique. Ce n'est pas le rôle de la Cour de faire des commentaires sur l'opportunité d'une nomination ou sur le processus de sélection qui l'a précédée. Ce sont là des questions d'ordre politique qui relèvent du pouvoir exécutif. Elles n'entrent pas dans notre mandat.

[111] La réponse à la question 1 réside dans l'interprétation juste des art. 5 et 6 de la Loi. Pour les motifs qui suivent, je répondrais à la question 1 par l'affirmative. Les articles 5 et 6 permettent de nommer à la Cour tout avocat, actuel ou ancien, inscrit pendant au moins 10 ans au Barreau du Québec. Compte tenu de ma réponse à la question 1, le texte législatif mentionné dans la question 2 est redondant. Il n'a aucun autre effet que de répéter

⁴ Justice Nadon was appointed to the Federal Court Trial Division in 1993. He was appointed to fill one of the 10 seats on that court reserved for the Province of Quebec. He was later elevated to the Federal Court Appeal Division in 2001 where he occupied a seat on that court reserved for the Province of Quebec.

⁴ Le juge Nadon a été nommé à la Division de première instance de la Cour fédérale en 1993. Il a alors été nommé pour combler l'un des 10 postes de cette cour réservés à la province de Québec. Il a ensuite accédé à la Division d'appel de la Cour fédérale en 2001, où il occupait un siège de cette cour réservé à la province de Québec.

law as it exists. Accordingly, I find it unnecessary to answer Question 2.

[112] That said, as the majority reasons make clear, a different response to Question 1 brings Question 2 to the forefront and makes it far from redundant. It gives rise to constitutional issues that are profoundly important to this Court and its place in our constitutional democracy.

[113] With that in mind, although I need not address the constitutional issues in view of my response to Question 1, I choose to do so to this extent. The coexistence of two distinct legal systems in Canada — the civil law system in Quebec and the common law system elsewhere — is a unique and defining characteristic of our country. It is critical to both Quebec and Canada as a whole that persons with training in civil law form an integral part of this country's highest court. Indeed, a guarantee to that effect was central to the bargain struck between Parliament and Quebec when the Supreme Court was first created in 1875.⁵

[114] Section 6 of the Act protects Quebec's right to have three seats on this Court. Like the majority, I agree that this guarantee has been constitutionally entrenched, and that the three seats allotted to Quebec are an integral part of this Court's composition. As such, any change in this regard would require the unanimous consent of the Senate, the House of Commons, and the legislative assembly of each province under s. 41(d) in Part V of the *Constitution Act, 1982*.

[115] I stop there, however. I do so because I have difficulty with the notion that an amendment

ce que la loi dit déjà. Par conséquent, il n'est pas nécessaire de répondre à la question 2.

[112] Cela dit, comme les motifs des juges majoritaires le montrent clairement, une réponse différente à la question 1 place la question 2 à l'avant-plan, à mille lieues de la redondance. Elle soulève des questions constitutionnelles de grande importance pour la Cour et pour son rôle dans notre démocratie constitutionnelle.

[113] Bien que ma réponse à la question 1 me dispense d'examiner ces questions constitutionnelles, j'ai décidé de le faire dans la mesure de ce qui suit. La coexistence de deux systèmes juridiques distincts au Canada — le système de droit civil au Québec et le système de common law ailleurs — constitue une caractéristique unique et fondamentale de notre pays. Il est crucial pour le Québec et pour l'ensemble du Canada que des personnes formées en droit civil fassent partie intégrante du plus haut tribunal du pays. En fait, une garantie à cet égard était un élément capital du compromis auquel en sont arrivés le Parlement et le Québec au moment de la création de la Cour suprême en 1875⁵.

[114] L'article 6 de la Loi protège le droit du Québec aux trois sièges qui lui sont réservés à la Cour. À l'instar des juges majoritaires, je reconnais que cette garantie a été intégrée à la Constitution et que les trois postes réservés au Québec constituent un élément essentiel de la composition de la Cour. De ce fait, tout changement à cet égard exigerait le consentement unanime du Sénat, de la Chambre des communes et de l'assemblée législative de chaque province conformément à l'al. 41d) figurant dans la partie V de la *Loi constitutionnelle de 1982*.

[115] Je n'en dirai pas plus. Et ce, parce que j'ai du mal à concevoir qu'une modification de l'art. 6

⁵ At that time, the Act required two of the Court's six judges to be appointed from Quebec (*The Supreme and Exchequer Court Act*, S.C. 1875, c. 11, s. 4). In 1949, when the size of the Court was increased to nine judges, the number of Quebec appointees was increased to three (*An Act to amend the Supreme Court Act*, S.C. 1949 (2nd Sess.), c. 37, s. 1).

⁵ À l'époque, la Loi exigeait que deux des six juges de la Cour proviennent du Québec (*Acte de la Cour Suprême et de l'Échiquier*, S.C. 1875, ch. 11, art. 4). En 1949, lorsque le nombre de juges à la Cour a augmenté pour passer à neuf, le nombre de nominations pour le Québec a été haussé à trois (*Loi modifiant la Loi de la Cour suprême*, S.C. 1949 (2^e sess.), ch. 37, art. 1).

to s. 6 making former Quebec advocates of at least 10 years standing eligible for appointment to the Court would require unanimity, whereas an amendment that affected other features of the Court, including its role as a general court of appeal for Canada and its independence, could be achieved under s. 42(1)(d) of the *Constitution Act, 1982* using the 7-50 formula. Put simply, I am not convinced that any and all changes to the eligibility requirements will necessarily come within “the composition of the Supreme Court of Canada” in s. 41(d).

[116] Be that as it may, the first question before us today raises a much narrower issue. Specifically, we are asked to decide whether Quebec appointees are subject to more stringent eligibility requirements than their common law counterparts.

[117] All members of this Court agree that under s. 5 of the Act, both *current and former* members of a provincial bar of at least 10 years standing, and both *current and former* judges of a provincial superior court, are eligible for appointment to this Court. We part company, however, on whether s. 6 restricts the eligibility criteria, in the case of the three Quebec seats, to only *current* members of the Quebec bar and *current* judges of Quebec’s superior courts. My colleagues conclude that it does; I reach the opposite conclusion. In my respectful view, the same eligibility criteria in s. 5 apply to all appointees, including those chosen from Quebec institutions to fill a Quebec seat. The currency requirement is not supported by the text of s. 6, its context, its legislative history, or its underlying object. Nor is such a requirement supported by the scheme of the *Supreme Court Act*. In short, currency has never been a requirement under s. 6 and, in my view, any attempt to impose it must be rejected.

visant à permettre que les anciens avocats inscrits au Barreau du Québec pendant au moins 10 ans soient admissibles à une nomination à la Cour exigerait l’unanimité, alors qu’il serait possible de modifier d’autres caractéristiques de la Cour — par exemple son rôle de cour générale d’appel pour le Canada et son indépendance — en appliquant la formule 7-50, en vertu de l’al. 42(1)d) de la *Loi constitutionnelle de 1982*. En clair, je ne suis pas convaincu que tout changement des conditions de nomination porte sur « la composition de la Cour suprême du Canada » au sens de l’al. 41d).

[116] Quoi qu'il en soit, la première question qui nous est soumise est beaucoup plus restreinte. On nous demande spécifiquement de déterminer si les conditions de nomination sont plus strictes pour les personnes provenant du Québec que pour celles provenant des provinces de common law.

[117] Les juges majoritaires et moi sommes tous d’avis que, suivant l’art. 5 de la Loi, les avocats, *actuels et anciens*, inscrits à un barreau provincial pendant au moins 10 ans, ainsi que les juges, *actuels et anciens*, d’une cour supérieure provinciale, peuvent être nommés juges de notre Cour. Nous différons toutefois d’avis quant à savoir si, dans le cas des trois sièges réservés au Québec, l’art. 6 restreint les conditions de nomination aux seuls membres *actuels* du Barreau du Québec et aux juges *actuels* des cours supérieures de cette province. Contrairement à mes collègues, j’estime que ce n’est pas le cas. À mon humble avis, les mêmes conditions de nomination, énoncées à l’art. 5, s’appliquent à tous les candidats, y compris ceux qui sont choisis parmi les institutions québécoises pour occuper un siège réservé au Québec. L’exigence voulant qu’une personne soit inscrite au barreau au moment de sa nomination ne trouve un appui ni dans le texte de l’art. 6, ni dans son contexte, son historique législatif ou l’objet qui le sous-tend. Cette exigence de contemporanéité ne trouve pas non plus d’appui dans l’économie de la *Loi sur la Cour suprême*. En bref, la contemporanéité n’a jamais été exigée à l’art. 6 et j’estime que toute tentative en vue de l’imposer doit être repoussée.

II. Analysis

A. *The Text, Context and History of Sections 5 and 6*

[118] Sections 5 and 6 of the Act are central to the current debate:

5. [Who may be appointed judges.] Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.

6. [Three judges from Quebec.] At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.

5. [Conditions de nomination.] Les juges sont choisis parmi les juges, actuels ou anciens, d'une cour supérieure provinciale et parmi les avocats inscrits pendant au moins dix ans au barreau d'une province.

6. [Représentation du Québec.] Au moins trois des juges sont choisis parmi les juges de la Cour d'appel ou de la Cour supérieure de la province de Québec ou parmi les avocats de celle-ci.

[119] Section 5 sets out the threshold eligibility requirements to be appointed a judge of this Court. Section 6 guarantees three Quebec seats on the Court by specifying that, for at least three of the judges, the bar mentioned in s. 5 is the Barreau du Québec and the superior courts mentioned in s. 5 are the Superior Court of Quebec and the Quebec Court of Appeal. Put another way, s. 6 builds on s. 5 by requiring that for three of the seats on this Court, the candidates who meet the criteria of s. 5 must be chosen from three Quebec institutions (the Barreau du Québec, the Quebec Court of Appeal, and the Superior Court of Quebec). Section 6 does not impose any additional requirements.

[120] Although the current French version of s. 5 may be cloudy, the current English version is clear. My colleagues point out, and I agree, that the English version therefore governs the interpretation of s. 5 according to the shared meaning rule of bilingual interpretation. As the words "is or has been" indicate, individuals are eligible for appointment if they are current *or* former members of

II. Analyse

A. *Le texte, le contexte et l'historique des art. 5 et 6*

[118] Les articles 5 et 6 de la Loi sont au cœur du débat qui nous occupe :

5. [Conditions de nomination.] Les juges sont choisis parmi les juges, actuels ou anciens, d'une cour supérieure provinciale et parmi les avocats inscrits pendant au moins dix ans au barreau d'une province.

6. [Représentation du Québec.] Au moins trois des juges sont choisis parmi les juges de la Cour d'appel ou de la Cour supérieure de la province de Québec ou parmi les avocats de celle-ci.

5. [Who may be appointed judges.] Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.

6. [Three judges from Quebec.] At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.

[119] L'article 5 énonce les conditions de base auxquelles une personne doit satisfaire pour être nommée juge de la Cour. L'article 6 garantit au Québec trois sièges à la Cour en précisant que, pour au moins trois des juges, le barreau mentionné à l'art. 5 est celui du Québec, et les cours supérieures mentionnées à l'art. 5 sont la Cour supérieure du Québec et la Cour d'appel du Québec. Autrement dit, l'art. 6 précise l'art. 5 en exigeant que, pour trois postes de juge de notre Cour, les candidats qui satisfont aux critères de l'art. 5 soient choisis parmi trois institutions québécoises (le Barreau du Québec, la Cour d'appel du Québec et la Cour supérieure du Québec). L'article 6 n'impose aucune autre condition.

[120] Même si la version française actuelle de l'art. 5 peut être nébuleuse, la version anglaise actuelle est claire. Mes collègues soulignent donc, avec raison selon moi, que, conformément à la règle d'interprétation des lois bilingues selon laquelle il faut retenir le sens commun aux deux versions, il faut se fonder sur la version anglaise de l'art. 5 pour l'interpréter. Comme l'indiquent les mots « *is or*

a provincial bar of at least 10 years standing, or if they are current or former judges of a superior court. My colleagues accept this to be the case. However, for the Quebec seats, they say that s. 6 imposes the additional requirement that candidates must be *current* members of the Quebec bar or *current* judges of a superior court.

[121] With respect, I disagree. Sections 5 and 6 are inextricably linked — and that is the key to appreciating that the minimum eligibility requirements of s. 5 apply equally to the Quebec appointees referred to in s. 6. Nowhere is this link more evident than in the wording of ss. 5 and 6 themselves, which I repeat here for ease of reference with key words emphasized:

5. [Who may be appointed judges.] Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.

6. [Three judges from Quebec.] At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.

5. [Conditions de nomination.] Les juges sont choisis parmi les juges, actuels ou anciens, d'une cour supérieure provinciale et parmi les avocats inscrits pendant au moins dix ans au barreau d'une province.

6. [Représentation du Québec.] Au moins trois des juges sont choisis parmi les juges de la Cour d'appel ou de la Cour supérieure de la province de Québec ou parmi les avocats de celle-ci.

[122] First, the words “[a]ny person” in s. 5 are a clear indication that the eligibility requirements set out in that section apply to *all* appointees. Second, the words “*the* judges” in s. 6 refer explicitly to the description of *the* judges provided in s. 5. Manifestly, one must read s. 5 in order to understand *which* judges s. 6 is referring to and what their eligibility requirements are.

has been », une personne peut être nommée si elle est un avocat, actuel ou ancien, inscrit pendant au moins 10 ans au barreau d'une province, ou si elle est un juge, actuel ou ancien, d'une cour supérieure. Mes collègues acceptent cette conclusion. Toutefois, relativement aux sièges réservés pour le Québec, ils affirment que l'art. 6 impose comme exigence supplémentaire que les candidats soient des membres *actuels* du Barreau du Québec ou qu'ils soient des juges *actuels* d'une cour supérieure du Québec.

[121] En toute déférence, je ne partage pas leur avis. Les articles 5 et 6 sont inextricablement liés — et c'est là la clé pour comprendre que les conditions de nomination minimales de l'art. 5 s'appliquent également à la nomination des juges pour le Québec dont il est question à l'art. 6. Ce lien n'est nulle part plus évident que dans la formulation des art. 5 et 6 eux-mêmes, que je répète ici par souci de commodité, en soulignant les termes clés :

5. [Conditions de nomination.] Les juges sont choisis parmi les juges, actuels ou anciens, d'une cour supérieure provinciale et parmi les avocats inscrits pendant au moins dix ans au barreau d'une province.

6. [Représentation du Québec.] Au moins trois des juges sont choisis parmi les juges de la Cour d'appel ou de la Cour supérieure de la province de Québec ou parmi les avocats de celle-ci.

5. [Who may be appointed judges.] Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.

6. [Three judges from Quebec.] At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.

[122] Tout d'abord, les mots « [*les* juges » à l'art. 5 indiquent clairement que les conditions de nomination qu'énonce cet article s'appliquent à *toutes* les personnes nommées juges. Ensuite, les mots « *des* juges » à l'art. 6 renvoient explicitement à la description *des* juges de l'art. 5. Manifestement, il faut lire l'art. 5 afin de comprendre *quels* juges sont mentionnés à l'art. 6 et quelles sont les conditions de leur nomination.

[123] Apart from these textual cues, an absurdity results if s. 6 is *not* read in conjunction with s. 5. Section 6 says nothing about the length of Quebec bar membership required before an individual will be eligible for one of the Quebec seats on this Court. Hence, for the purposes of s. 6, if it is not read in conjunction with s. 5, *any* member of the Quebec bar, including a newly minted member of one day's standing, would be eligible for a Quebec seat on this Court. Faced with this manifest absurdity, the majority acknowledges that the phrase "advocates of that Province" in s. 6 *must* be linked to the 10-year eligibility requirement for members of the bar specified in s. 5.

[124] But that, they say, is where the link ends. It does not extend to the fact that under s. 5, both current and past members of the bar of at least 10 years standing are eligible. With respect, this amounts to cherry-picking. Choosing from s. 5 only those aspects of it that are convenient — and jettisoning those that are not — is a principle of statutory interpretation heretofore unknown.

[125] Given that s. 6 contains an explicit reference to the eligibility criteria set out in s. 5 and that an absurdity would result if s. 6 did not take its meaning from s. 5, the next logical question to ask is: What is it in s. 6 that imposes a currency requirement on Quebec appointees? The answer, in my view, is nothing.

[126] Contrary to the view of the majority, the words "from among" found in s. 6 do not, with respect, impose a currency requirement on Quebec appointees. The words convey no temporal meaning. They take their meaning from the surrounding context and cannot, on their own, support the contention that a person must be a *current* member of the bar or bench to be eligible for a Quebec seat. In short, they do not alter the group to which s. 6 refers — the group described in s. 5.

[123] Mises à part ces indications textuelles, l'art. 6 mène à un résultat absurde si on ne le lit pas en conjonction avec l'art. 5. L'article 6 n'indique aucunement pendant combien de temps une personne doit être inscrite au barreau pour devenir admissible à occuper l'un des sièges de la Cour réservés au Québec. Par conséquent, si on ne lit pas l'art. 6 en conjonction avec l'art. 5, *tout* membre du Barreau du Québec, y compris un avocat néophyte admis au barreau la veille, serait admissible à occuper l'un des sièges de la Cour réservés au Québec. Devant ce résultat manifestement absurde, les juges de la majorité reconnaissent que l'expression « avocats de [la province] » à l'art. 6 *doit* être liée à la condition d'inscription au barreau pendant 10 ans que pose l'art. 5.

[124] Mais, disent-ils, le lien s'arrête là. Il ne s'étend pas au fait que, pour l'application de l'art. 5, tous les avocats, actuels et anciens, inscrits au barreau pendant au moins 10 ans peuvent être nommés juges de la Cour. J'estime, en toute déférence, qu'il s'agit d'une interprétation sélective. Il n'existe pas à ce jour de principe d'interprétation des lois qui permette de puiser seulement les aspects qui nous agréent dans l'art. 5 — et de rejeter les autres.

[125] Étant donné que l'art. 6 renvoie explicitement aux critères d'admissibilité énoncés à l'art. 5 et qu'il serait absurde que l'art. 6 ne tire pas son sens de l'art. 5, il faut logiquement se poser la question suivante : qu'est-ce qui, à l'art. 6, impose une exigence de contemporanéité aux personnes nommées pour le Québec? À mon avis, la réponse est rien du tout.

[126] Contrairement aux juges majoritaires, j'estime, avec égards, que le mot « *parmi* », à l'art. 6, n'impose pas une exigence de contemporanéité aux juges nommés pour le Québec. Ce terme n'a aucune signification temporelle. Il tire son sens du contexte et ne peut, en soi, appuyer la prétention qu'une personne doive être un membre *actuel* du barreau ou de la magistrature pour être nommée juge de notre Cour pour le Québec. En bref, il ne modifie pas le groupe de personnes visé à l'art. 6 — celui qui est décrit à l'art. 5.

[127] If Parliament *had* intended to distinguish Quebec appointees from other appointees by requiring that Quebec judges be current judges or current advocates, surely it would have said so in clear terms. It would not have masked this crucial distinction between Quebec candidates and non-Quebec candidates by using words as ambiguous and inconclusive as “from among”. The addition of the word “current” before the words “judges” and “advocates” in s. 6 would have been a simple — and obvious — solution.

[128] Not only do the words “from among” not convey any temporal meaning, they support the view that ss. 5 and 6 are inextricably linked. This is apparent when one considers the words of the original 1875 Act (S.C. 1875, c. 11). At the time, ss. 5 and 6 were part of the same sentence — s. 4 of the 1875 Act. That provision set out the eligibility criteria for appointment to the newly created Supreme Court:

4. Her Majesty may appoint, by letters patent, under the Great Seal of Canada, one person, who is, or has been, a Judge of one of the Superior Courts in any of the Provinces forming part of the Dominion of Canada, or who is a Barrister or Advocate of at least ten years' standing at the Bar of any one of the said Provinces, to be Chief Justice of the said Court, and five persons who are, or have been, respectively, Judges of one of the said Superior Courts, or who are Barristers or Advocates of at least ten years' standing at the Bar of one of the said Provinces, to be Puisne Judges of the said Court, two of whom at least shall be taken from among the Judges of the Superior Court or Court of Queen's Bench, or the Barristers or Advocates of the Province of Quebec; and vacancies in any of the said offices shall, from time to time, be filled in like manner. The Chief Justice and Judges of the Supreme Court shall be respectively the Chief Justice and Judges of the Exchequer Court: they shall reside at the City of Ottawa, or within five miles thereof.

4. Sa Majesté pourra nommer, par lettres patentes sous le grand sceau du Canada, — comme juge en chef de cette cour, — une personne étant ou ayant été juge de l'une des cours supérieures dans quelqu'une des provinces formant la Puissance du Canada, ou un avocat ayant pratiqué pendant au moins dix ans au barreau de quelqu'une de ces provinces, et, — comme juges puînés de cette cour, — cinq personnes étant ou ayant été respectivement juges de l'une de ces cours supérieures, ou étant avocats de pas moins de dix ans de pratique au barreau de quelqu'une de ces provinces, dont deux au moins seront pris *parmi les juges de la Cour Supérieure ou de la Cour du Banc de la Reine*, ou parmi les procureurs ou avocats de la province de Québec; et les vacances survenant dans ces charges seront, au besoin, remplies de la même manière. Le juge en chef et les juges de la Cour Suprême seront respectivement le juge en chef et les juges de la Cour de l'Échiquier. Ils résideront en la cité d'Ottawa, ou dans un rayon de cinq milles de cette cité.

[127] Si le législateur *avait eu* l'intention de faire une distinction entre les personnes nommées pour le Québec et les autres personnes, en exigeant des juges du Québec qu'ils soient des juges actuels ou des membres actuels du barreau, il l'aurait certainement indiqué en termes clairs. Il n'aurait pas masqué cette distinction cruciale entre les candidats du Québec et les autres candidats au moyen d'un terme aussi ambigu et non concluant que le mot « *parmi* ». L'ajout du mot « *actuels* » après les mots « *juges* » et « *avocats* » à l'art. 6 se serait avéré une solution simple et évidente.

[128] En plus de n'avoir aucune signification temporelle, le mot « *parmi* » renforce l'idée d'un lien inextricable entre les art. 5 et 6. C'est ce qui ressort à l'examen des termes employés à l'origine dans la Loi de 1875 (S.C. 1875, ch. 11). À l'époque, le texte des art. 5 et 6 actuels se retrouvait dans une même phrase — à l'art. 4 de la Loi de 1875. Cette disposition énonçait les conditions de nomination des juges de la nouvelle Cour suprême :

4. Sa Majesté pourra nommer, par lettres patentes sous le grand sceau du Canada, — comme juge en chef de cette cour, — une personne étant ou ayant été juge de l'une des cours supérieures dans quelqu'une des provinces formant la Puissance du Canada, ou un avocat ayant pratiqué pendant au moins dix ans au barreau de quelqu'une de ces provinces, dont deux au moins seront pris *parmi les juges de la Cour Supérieure ou de la Cour du Banc de la Reine*, ou parmi les procureurs ou avocats de la province de Québec; et les vacances survenant dans ces charges seront, au besoin, remplies de la même manière. Le juge en chef et les juges de la Cour Suprême seront respectivement le juge en chef et les juges de la Cour de l'Échiquier. Ils résideront en la cité d'Ottawa, ou dans un rayon de cinq milles de cette cité.

4. Her Majesty may appoint, by letters patent, under the Great Seal of Canada, one person, who is, or has been, a Judge of one of the Superior Courts in any of the Provinces forming part of the Dominion of Canada, or who is a Barrister or Advocate of at least ten years' standing at the Bar of any one of the said Provinces, to

ces provinces, et, — comme juges puînés de cette cour, — cinq personnes étant ou ayant été respectivement juges de l'une de ces cours supérieures, ou étant avocats de pas moins de dix ans de pratique au barreau de quelqu'une de ces provinces, dont deux au moins seront pris parmi les juges de la Cour Supérieure ou de la Cour du Banc de la Reine, ou parmi les procureurs ou avocats de la province de Québec; et les vacances survenant dans ces charges seront, au besoin, remplies de la même manière. Le juge en chef et les juges de la Cour Suprême seront respectivement le juge en chef et les juges de la Cour de l'Échiquier. Ils résideront en la cité d'Ottawa, ou dans un rayon de cinq milles de cette cité.

[129] This provision uses the words “from among” in relation to Quebec superior court judges. And yet, the surrounding context, namely, the earlier use of the words “who are, or have been, respectively, Judges”, makes it abundantly clear that eligibility for the Quebec seats extended to both current *and* former judges — and nothing has ever changed in that regard. Nowhere in Hansard has it ever been suggested — nor in any subsequent revisions has it ever been proclaimed — that former judges of the Quebec superior courts are not eligible for appointment to this Court. What did change was that in 1886, *former* barristers and advocates of at least 10 years standing became eligible for appointment to this Court, along with current barristers and advocates (R.S.C. 1886, c. 135, s. 4(2)).

[130] And once it is understood that current and former judges of the Quebec superior courts have always been included in the eligibility pool, it is a short step to realize that the 1886 amendments did not reduce the eligible groups for Quebec judges to two — rather, they increased the number of eligible groups in Quebec (and elsewhere in Canada) from three to four.⁶ One can scour the Hansard debates of 1875 — or at any point in time since then — and find no mention that Parliament intended to narrow

be Chief Justice of the said Court, and five persons who are, or have been, respectively, Judges of one of the said Superior Courts, or who are Barristers or Advocates of at least ten years' standing at the Bar of one of the said Provinces, to be Puisne Judges of the said Court, two of whom at least shall be taken from among the Judges of the Superior Court or Court of Queen's Bench, or the Barristers or Advocates of the Province of Quebec; and vacancies in any of the said offices shall, from time to time, be filled in like manner. The Chief Justice and Judges of the Supreme Court shall be respectively the Chief Justice and Judges of the Exchequer Court : they shall reside at the City of Ottawa, or within five miles thereof.

[129] Cette disposition utilise le mot « *parmi* » en rapport avec les juges des cours supérieures du Québec. Et pourtant, le contexte, soit les mots « *étant ou ayant été respectivement juges* » utilisés précédemment dans la disposition, indique très clairement que les juges actuels *et* anciens étaient admissibles à un siège de la Cour réservé pour le Québec — et rien n'a jamais changé à cet égard. Il n'a jamais été suggéré dans le Hansard — et aucune révision subséquente des lois n'a jamais proclamé — que les anciens juges des cours supérieures du Québec ne peuvent pas être nommés juges de notre Cour. Ce qui a changé, c'est qu'en 1886, les *anciens* avocats inscrits au barreau pendant 10 ans sont devenus admissibles à siéger à la Cour, tout comme les avocats actuels (S.R.C. 1886, ch. 135, par. 4(2)).

[130] Lorsqu'on comprend que les juges actuels et anciens des cours supérieures du Québec ont toujours été inclus dans le bassin des personnes admissibles, il n'y a qu'un pas à faire pour constater que les modifications de 1886 n'ont pas réduit à deux le nombre des groupes de personnes admissibles pour le Québec — ce nombre, au Québec (et ailleurs au Canada), a plutôt été porté de trois à quatre⁶. On peut passer au peigne fin le Hansard des débats de 1875 — ou de toute année ultérieure —

⁶ The present tense words “who is” and “who are”, used in s. 4 of the 1875 Act in reference to barristers and advocates, were removed, making it clear that both current and former barristers and advocates were eligible. As a result of the 1886 revision, s. 4(2) read: “Any person may be appointed a judge of the court who is or has been a judge of a superior court of any of the Provinces of Canada, or a barrister or advocate of at least ten years' standing at the bar of any of the said provinces”.

⁶ Le mot « *étant* » employé à l'art. 4 de la Loi de 1875 en rapport avec les avocats a été remplacé par les mots « *sera ou aura été* », ce qui indique clairement que les avocats anciens et actuels étaient admissibles. Dans la révision de 1886, le par. 4(2) était rédigé comme suit : « Pourra être nommé juge de la cour quiconque sera ou aura été juge d'une cour supérieure dans quelqu'une des provinces du Canada, ou un avocat ayant pratiqué pendant au moins dix ans au barreau de quelqu'une de ces provinces. »

the four groups of eligible candidates under s. 5 to only two groups in the case of Quebec. In short, the four group/two group distinction has no foundation in fact or law.

[131] To summarize, the plain wording and legislative history of ss. 5 and 6 support the conclusion that the same eligibility requirements set out in s. 5 apply to Quebec appointees. Furthermore, a consideration of the broader scheme of the *Supreme Court Act* — and specifically, s. 30 — does not assist in the interpretation of ss. 5 and 6. I include the following discussion of that section only to explain why it does not favour either interpretation of ss. 5 and 6.

B. Section 30 of the Supreme Court Act

[132] Section 30 of the Act is by and large a historical anomaly. It concerns the appointment of *ad hoc* judges to this Court:

30. (1) [Appointment of *ad hoc* judge.] Where at any time there is not a quorum of the judges available to hold or continue any session of the Court, owing to a vacancy or vacancies, or to the absence through illness or on leave or in the discharge of other duties assigned by statute or order in council, or to the disqualification of a judge or judges, the Chief Justice of Canada, or in the absence of the Chief Justice, the senior puisne judge, may in writing request the attendance at the sittings of the Court, as an *ad hoc* judge, for such period as may be necessary,

(a) of a judge of the Federal Court of Appeal, the Federal Court or the Tax Court of Canada; or

(b) if the judges of the Federal Court of Appeal, the Federal Court or the Tax Court of Canada are absent from Ottawa or for any reason are unable to sit, of a judge of a provincial superior court to be designated in writing by the chief justice, or in the absence of the chief justice, by any acting chief justice or the senior puisne judge of that provincial court on that request being made to that acting chief justice or that senior puisne judge in writing.

on n'y trouvera rien qui indique que le législateur aurait eu l'intention de ramener les quatre groupes de candidats admissibles énumérés à l'art. 5 à deux groupes seulement dans le cas du Québec. En bref, la distinction entre quatre groupes d'une part et deux groupes d'autre part n'est fondée ni en fait ni en droit.

[131] En résumé, le libellé clair et l'historique législatif des art. 5 et 6 appuient la conclusion que les conditions de nomination énoncées à l'art. 5 s'appliquent également aux juges nommés pour le Québec. En outre, l'examen de l'économie générale de la *Loi sur la Cour suprême* — et en particulier de l'art. 30 — n'est d'aucune utilité pour l'interprétation des art. 5 et 6. Je passe à l'examen de cet article uniquement pour expliquer qu'il ne favorise aucune des interprétations des art. 5 et 6 proposées.

B. L'article 30 de la Loi sur la Cour suprême

[132] L'article 30 de la Loi constitue dans l'ensemble une anomalie historique. Il traite de la nomination de juges suppléants pour notre Cour :

30. (1) [Nomination d'un juge suppléant.] Dans les cas où, par suite de vacance, d'absence ou d'empêchement attribuable à la maladie, aux congés ou à l'exercice d'autres fonctions assignées par loi ou décret, ou encore de l'inabilité à siéger d'un ou plusieurs juges, le quorum n'est pas atteint pour tenir ou poursuivre les travaux de la Cour, le juge en chef ou, en son absence, le doyen des juges puînés peut demander par écrit que soit détaché, pour assister aux séances de la Cour à titre de juge suppléant et pendant le temps nécessaire :

a) soit un juge de la Cour d'appel fédérale, de la Cour fédérale ou de la Cour canadienne de l'impôt;

b) soit, si les juges de la Cour d'appel fédérale, de la Cour fédérale ou de la Cour canadienne de l'impôt sont absents d'Ottawa ou dans l'incapacité de siéger, un juge d'une cour supérieure provinciale désigné par écrit, sur demande formelle à lui adressée, par le juge en chef ou, en son absence, le juge en chef suppléant ou le doyen des juges puînés de ce tribunal provincial.

(2) [Quebec appeals.] Unless two of the judges available fulfil the requirements of section 6, the ad hoc judge for the hearing of an appeal from a judgment rendered in the Province of Quebec shall be a judge of the Court of Appeal or a judge of the Superior Court of that Province designated in accordance with subsection (1).

30. (1) [Nomination d'un juge suppléant.] Dans les cas où, par suite de vacance, d'absence ou d'empêchement attribuable à la maladie, aux congés ou à l'exercice d'autres fonctions assignées par loi ou décret, ou encore de l'inabilité à siéger d'un ou plusieurs juges, le quorum n'est pas atteint pour tenir ou poursuivre les travaux de la Cour, le juge en chef ou, en son absence, le doyen des juges puînés peut demander par écrit que soit détaché, pour assister aux séances de la Cour à titre de juge suppléant et pendant le temps nécessaire :

- a) soit un juge de la Cour d'appel fédérale, de la Cour fédérale ou de la Cour canadienne de l'impôt;
- b) soit, si les juges de la Cour d'appel fédérale, de la Cour fédérale ou de la Cour canadienne de l'impôt sont absents d'Ottawa ou dans l'incapacité de siéger, un juge d'une cour supérieure provinciale désigné par écrit, sur demande formelle à lui adressée, par le juge en chef ou, en son absence, le juge en chef suppléant ou le doyen des juges puînés de ce tribunal provincial.

(2) [Appels du Québec.] Lorsque au moins deux des juges pouvant siéger ne remplissent pas les conditions fixées à l'article 6, le juge suppléant choisi pour l'audition d'un appel d'un jugement rendu dans la province de Québec doit être un juge de la Cour d'appel ou un juge de la Cour supérieure de cette province, désigné conformément au paragraphe (1).

[133] Because federal court judges from Quebec are not listed in s. 30(2), and thus cannot act as *ad hoc* judges on Quebec appeals when the statutory quorum is not met and two or more Quebec judges on this Court are unavailable,⁷ the interveners Rocco Galati and the Constitutional Rights Centre Inc. submit that they should not be eligible for

⁷ It should be noted that *ad hoc* judges from the federal courts, whether from Quebec or otherwise, *can* replace an absent Quebec judge on this Court. Section 30(2) only prevents this where two or more Quebec judges are missing in a Quebec appeal.

(2) [Appels du Québec.] Lorsque au moins deux des juges pouvant siéger ne remplissent pas les conditions fixées à l'article 6, le juge suppléant choisi pour l'audition d'un appel d'un jugement rendu dans la province de Québec doit être un juge de la Cour d'appel ou un juge de la Cour supérieure de cette province, désigné conformément au paragraphe (1).

30. (1) [Appointment of *ad hoc* judge.] Where at any time there is not a quorum of the judges available to hold or continue any session of the Court, owing to a vacancy or vacancies, or to the absence through illness or on leave or in the discharge of other duties assigned by statute or order in council, or to the disqualification of a judge or judges, the Chief Justice of Canada, or in the absence of the Chief Justice, the senior puisne judge, may in writing request the attendance at the sittings of the Court, as an *ad hoc* judge, for such period as may be necessary,

(a) of a judge of the Federal Court of Appeal, the Federal Court or the Tax Court of Canada; or

(b) if the judges of the Federal Court of Appeal, the Federal Court or the Tax Court of Canada are absent from Ottawa or for any reason are unable to sit, of a judge of a provincial superior court to be designated in writing by the chief justice, or in the absence of the chief justice, by any acting chief justice or the senior puisne judge of that provincial court on that request being made to that acting chief justice or that senior puisne judge in writing.

(2) [Quebec appeals.] Unless two of the judges available fulfil the requirements of section 6, the ad hoc judge for the hearing of an appeal from a judgment rendered in the Province of Quebec shall be a judge of the Court of Appeal or a judge of the Superior Court of that Province designated in accordance with subsection (1).

[133] Parce que le par. 30(2) ne mentionne pas les juges des cours fédérales provenant du Québec et que ces derniers ne peuvent agir à titre de juges suppléants pour l'audition de l'appel d'un jugement rendu au Québec lorsque le quorum n'est pas atteint et qu'au moins deux juges de la Cour provenant du Québec ne sont pas disponibles⁷, les

⁷ Il convient de noter que des juges suppléants provenant des cours fédérales, qu'ils soient du Québec ou d'ailleurs, peuvent remplacer un juge de la Cour provenant du Québec qui est absent. Le paragraphe 30(2) s'applique uniquement lorsqu'au moins deux juges du Québec sont absents pour l'audition d'un appel d'une décision rendue au Québec.

appointment to the *permanent* Quebec seats on this Court. My colleagues rely on this as support of the currency requirement, which has the effect of excluding judges of the federal courts from appointment to the permanent Quebec seats.

[134] For the reasons that follow, I do not accept these submissions. Section 30 does not assist in the interpretation of the eligibility requirements set out in ss. 5 and 6 of the Act. In this regard, I am in essential agreement with the submissions of Dean Sébastien Grammond⁸ on behalf of the intervenors Robert Décaray, Alice Desjardins and Gilles Létourneau.

[135] As indicated, s. 30 is a historical anomaly. In order to explain why Quebec judges on the federal courts are not mentioned in s. 30(2), it is necessary to trace the legislative history of this provision. The provision was first enacted in 1918 (S.C. 1918, c. 7, s. 1). At the time, there were only six judges on the Court, and the statutory quorum was set at five. As a result, if two or more judges were unavailable for whatever reason, the quorum was not met and cases could not be heard. In 1918, the Court faced a crisis resulting from the absence of several judges. Parliament responded by introducing the concept of *ad hoc* judges into the Act. These *ad hoc* judges would temporarily fulfill the functions of a Supreme Court judge so that the quorum would be met and cases could be heard.

[136] For practical reasons, Parliament wanted an *ad hoc* judge to first be appointed from the Exchequer Court (the predecessor to the federal courts), as that court was also located in Ottawa. At the time, there were only two judges on the Exchequer Court — the “judge” and the “assistant judge” (*An Act to amend the Exchequer Court Act*, S.C. 1912, c. 21, s. 1).

⁸ Dean, University of Ottawa, Faculty of Law, Civil Law Section.

intervenants Rocco Galati et Constitutional Rights Centre Inc. plaident que les juges des cours fédérales ne devraient pas être admissibles à un siège *permanent* de la Cour réservé pour le Québec. Mes collègues s'appuient sur cet argument pour conclure à l'exigence de contemporanéité, qui a pour effet d'exclure la nomination de juges des cours fédérales pour occuper à notre Cour un siège permanent réservé au Québec.

[134] Pour les motifs qui suivent, je n'accepte pas ces prétentions. L'article 30 n'est d'aucun secours pour l'interprétation des conditions de nomination qu'énoncent les art. 5 et 6 de la Loi. À cet égard, je fais miens, pour l'essentiel, les arguments qu'avance le doyen Sébastien Grammond⁸ au nom des intervenants Robert Décaray, Alice Desjardins et Gilles Létourneau.

[135] J'ai déjà indiqué que l'art. 30 constitue une anomalie historique. Afin d'expliquer pourquoi le par. 30(2) ne mentionne pas les juges des cours fédérales provenant du Québec, il faut tracer l'historique législatif de cette disposition. Cet article a été adopté en 1918 (S.C. 1918, ch. 7, art. 1). À l'époque, la Cour ne comptait que six juges et la Loi fixait le quorum à cinq juges. Par conséquent, si, pour une raison ou une autre, deux juges ou plus n'étaient pas disponibles, la Cour ne pouvait entendre des appels faute de quorum. En 1918, l'absence de plusieurs juges a placé la Cour dans une situation critique. Le Parlement a réagi en introduisant dans la Loi la notion de juges suppléants. Ces derniers devaient remplir temporairement les fonctions de juge de la Cour suprême de sorte que le quorum soit atteint et que les appels soient entendus.

[136] Pour des raisons d'ordre pratique, le Parlement voulait qu'un juge suppléant provienne d'abord de la Cour de l'Échiquier (aujourd'hui remplacée par les cours fédérales) puisque cette cour siégeait elle aussi à Ottawa. À l'époque, la Cour de l'Échiquier ne comptait que deux juges — le « juge » et le « juge adjoint » (*Loi modifiant la loi de la Cour de l'Échiquier*, S.C. 1912, ch. 21, art. 1).

⁸ Doyen de la Section de droit civil de la Faculté de droit de l'Université d'Ottawa.

[137] Importantly, the assistant judge at the time was a judge from Quebec. Appointing any judge of the Exchequer Court to sit as an *ad hoc* judge could thus have resulted in the assistant judge — a Quebec judge — being appointed. This created the possibility that, if the loss of quorum on this Court was due to the absence of two common law judges, a majority of civil law judges might hear a common law case.

[138] Parliament sought to avoid this result by specifying that only “the judge” of the Exchequer Court could be appointed an *ad hoc* judge — a term that necessarily excluded the assistant judge. In response to Quebec’s displeasure, Parliament accepted that if the loss of quorum was caused by the absence of two or more Quebec judges, and if it was a Quebec case, the *ad hoc* judge would be chosen from that province’s superior courts.⁹

[139] In sum, Parliament had in mind two specific goals when it created s. 30 — the primary goal of ensuring this Court could continue to exercise its functions, and the secondary goal of ensuring that civil law judges could not form a majority on common law cases. The substance of s. 30 was last considered by Parliament in 1920, when an amendment to the *Exchequer Court Act* allowed any member of the Exchequer Court to be appointed as *ad hoc* judge (S.C. 1920, c. 26, s. 1; R.S.C. 1927, c. 35, s. 5). At that time, it was impossible to include Quebec federal court judges in s. 30(2), as the federal courts did not exist and the Exchequer Court that *did* exist had no reserved Quebec seats.

[140] The majority states that “the repeated failure to include the Quebec appointees to the Federal Court and Federal Court of Appeal among the judges who may serve as *ad hoc* judges of this

[137] Il importe de signaler qu’à l’époque, le juge adjoint provenait du Québec. Le fait de nommer l’un ou l’autre des juges de la Cour de l’Échiquier pour siéger à titre de juge suppléant pouvait alors faire en sorte que le juge adjoint — un Québécois — soit nommé. Ce qui engendrait la possibilité qu’une majorité de juges civilistes entendent une affaire de common law, si la perte du quorum de la Cour résultait de l’absence de deux juges de common law.

[138] Le Parlement a cherché à éviter un tel résultat en précisant que seul pouvait être nommé juge suppléant « le juge » de la Cour de l’Échiquier, un terme qui excluait nécessairement le juge adjoint. Devant le mécontentement du Québec, le Parlement a accepté que, pour entendre l’appel d’un jugement rendu au Québec, si la perte du quorum résultait de l’absence d’au moins deux juges du Québec, le juge suppléant serait choisi parmi les juges des cours supérieures de cette province⁹.

[139] En résumé, lorsqu’il a adopté l’art. 30, le législateur visait deux objectifs précis — tout d’abord, s’assurer que notre Cour continue d’exercer ses fonctions et, ensuite, s’assurer que des juges civilistes ne puissent former une majorité lors de l’audition d’un appel sur une matière relevant de la common law. Le législateur a examiné la teneur de l’art. 30 pour la dernière fois en 1920, lorsqu’il a modifié la *Loi de la cour de l’Échiquier* pour permettre la nomination de tout juge de la Cour de l’Échiquier à titre de juge suppléant (S.C. 1920, ch. 26, art. 1; S.R.C. 1927, ch. 35, art. 5). À l’époque, il n’était pas possible d’inclure des juges de la Cour fédérale provenant du Québec au par. 30(2), puisque les cours fédérales n’existaient pas et que la Cour de l’Échiquier, qui *existait* alors, n’avait pas de sièges réservés pour le Québec.

[140] Les juges majoritaires affirment que « l’omission répétée d’inclure les juges de la Cour fédérale et de la Cour d’appel fédérale provenant du Québec parmi les juges suppléants qui peuvent

⁹ See I. Bushnell, *The Federal Court of Canada: A History, 1875-1992* (1997), at pp. 95-96.

⁹ Voir I. Bushnell, *The Federal Court of Canada : A History, 1875-1992* (1997), p. 95-96.

Court in place of s. 6 judges suggests that the exclusion was deliberate” (para. 67). In fact, the evidence suggests the opposite. Updating the names of the courts mentioned in the provision was done by means of statutory revisions that were organizational in nature and necessarily related only to s. 30(1), as s. 30(2) contained no reference to the Exchequer Court and did not require updating.¹⁰ Given that s. 30 has, for all intents and purposes, become obsolete since the number of judges on this Court was increased to nine,¹¹ it is hardly surprising that the substance of s. 30 has not been foremost on Parliament’s mind.

[141] My colleagues note that s. 30(2) refers to s. 6 — “[u]nless two of the judges available fulfil the requirements of section 6” — and from this, they state that the sections are “explicitly linked” (para. 65). That the opening line of s. 30(2) refers to s. 6 does not aid in the interpretation of *what s. 6 means*. Indeed, s. 30 clearly contemplates that only current judges of the named courts can be appointed *ad hoc* judges of this Court for *all* appeals, not just Quebec appeals. This is so notwithstanding that s. 5 allows *both* current and former judges to qualify for the permanent seats. Just as the s. 30(1) requirements for *ad hoc* judges have no effect on the s. 5 eligibility requirements for *permanent* judges (a point on which all members of this Court agree), s. 30(2) cannot be used in support of a currency requirement in s. 6 for *permanent* judges.

siéger à notre Cour en remplacement de juges nommés aux termes de l’art. 6 laisse croire que leur exclusion était délibérée » (par. 67). En fait, la preuve suggère l’inverse. Les modifications législatives faites pour mettre à jour le nom des cours mentionnées dans cet article étaient de nature organisationnelle et touchaient exclusivement le par. 30(1), puisque le par. 30(2) ne mentionnait pas la Cour de l’Échiquier et ne nécessitait pas d’actualisation¹⁰. Dans la mesure où, à toutes fins utiles, l’art. 30 est devenu obsolète depuis que le nombre de juges siégeant à la Cour est passé à neuf¹¹, il n’est guère surprenant que le législateur ne se soit pas préoccupé de la teneur de cette disposition.

[141] Mes collègues signalent que le par. 30(2) renvoie à l’art. 6 — « [...]orsque au moins deux des juges pouvant siéger ne remplissent pas les conditions fixées à l’article 6 » — et ils en déduisent que les deux articles sont « explicitement liés » (par. 65). Or, que le premier segment du par. 30(2) renvoie à l’art. 6 n’aide pas à interpréter *ce que signifie l’art. 6*. En effet, l’art. 30 prévoit manifestement que seuls les juges actuels des cours mentionnées peuvent être nommés juges suppléants de la Cour pour *tous* les appels, et non uniquement pour les appels provenant du Québec. Et ce, même si selon l’art. 5, *tant* les juges actuels que les anciens juges peuvent être nommés à titre permanent. Tout comme les conditions de nomination des juges suppléants énoncées au par. 30(1) n’ont pas d’incidence sur les conditions de nomination des juges *permanents* prévues à l’art. 5 (ce dont conviennent tous les membres de la Cour), le par. 30(2) ne peut servir de fondement à une exigence de contemporanéité à l’art. 6 relativement à la nomination de juges *permanents*.

¹⁰ For example, replacing the reference to the “Exchequer Court” in s. 30(1) with “Federal Court” when that court was created in 1971 (*Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), s. 64), and later adding the “Federal Court of Appeal” in 2002 (S.C. 2002, c. 8, s. 175).

¹¹ The number of judges on this Court was increased to nine in 1949. However, the statutory quorum has remained at five. Thus, resort to s. 30 would only be necessary if five of this Court’s nine judges were unavailable.

¹⁰ Par exemple, en remplaçant la mention de la « Cour de l’Échiquier » au par. 30(1) par « Cour fédérale » lorsque cette dernière a été créée en 1971 (*Loi sur la Cour fédérale*, S.R.C. 1970, ch. 10 (2^e suppl.), art. 64), puis, en y ajoutant « Cour d’appel fédérale » en 2002 (L.C. 2002, ch. 8, art. 175).

¹¹ Le nombre de juges de la Cour est passé à neuf en 1949. Toutefois, le quorum légal est demeuré à cinq. Il ne serait donc nécessaire de recourir à l’art. 30 que si cinq des neuf juges de la Cour n’étaient pas disponibles.

492

REFERENCE RE SUPREME COURT ACT *Moldaver J.*

[2014] 1 S.C.R.

[142] For these reasons, I am of the view that s. 30 is of no assistance in the interpretation of ss. 5 and 6.

[143] No statutory interpretation exercise is complete without considering the legislative objectives underlying the provisions at issue. It is to these objectives that I now turn.

C. The Legislative Objectives

(1) The Purpose of Sections 5 and 6

[144] Section 5, as I have explained, sets out *minimum eligibility criteria* for the pool of potential candidates. The very broad eligibility requirements in s. 5 ensure that the executive branch can choose from among the largest possible pool of candidates who meet the basic eligibility requirements.

[145] The legislative objective underlying s. 6 is different. The objective of s. 6 is, and always has been, to ensure that a specified number of this Court's judges are trained in civil law and represent Quebec. By virtue of the fact that these seats must be filled by candidates appointed from the three Quebec institutions named in s. 6 (the Barreau du Québec, the Quebec Court of Appeal, or the Superior Court of Quebec), the candidates will necessarily have received formal training in the civil law. The combination of this training and affiliation with one of the named Quebec institutions serves to protect Quebec's civil law tradition and inspire Quebec's confidence in this Court. To that extent, I agree with the majority. Respectfully, however, I do not agree that s. 6 was intended to ensure that "Quebec's . . . social values are represented on the Court" (para. 18). Parliament made a deliberate choice to include only objective criteria in ss. 5 and 6. Importing social values — 140 years later — is unsupported by the text and history of the Act.

[142] Pour ces motifs, je suis d'avis que l'art. 30 n'est d'aucun secours pour interpréter les art. 5 et 6.

[143] Aucun exercice d'interprétation législative n'est complet si les objectifs législatifs qui sous-tendent les dispositions en cause ne sont pas examinés. Je parlerai donc maintenant de ces objectifs.

C. Les objectifs législatifs

(1) L'objet des art. 5 et 6

[144] Comme je l'ai expliqué, l'art. 5 énonce les *conditions de nomination minimales* pour le bassin de candidats potentiels. Les conditions très larges prévues par cette disposition garantissent que l'exécutif puisse choisir parmi le bassin le plus large possible de candidats qui satisfont aux conditions de nomination de base.

[145] L'objectif législatif qui sous-tend l'art. 6 est différent. En effet, cette disposition a, et a toujours eu, pour objet de garantir qu'un nombre déterminé de juges de la Cour soient formés en droit civil et représentent le Québec. Puisque les postes de juge en question doivent être pourvus par des candidats provenant d'une des trois institutions québécoises énumérées à l'art. 6 (le Barreau du Québec, la Cour d'appel du Québec et la Cour supérieure du Québec), ces candidats auront forcément reçu une formation en droit civil. La combinaison de cette formation et de leur lien avec l'une des institutions québécoises nommées sert à protéger la tradition civiliste du Québec et suscite la confiance du Québec envers la Cour. Dans cette mesure, je suis d'accord avec les juges majoritaires. Cependant, ceci dit avec égards, je ne suis pas d'accord pour dire que l'art. 6 vise à garantir que « les valeurs sociales du Québec [. . .] soient représentées [à la Cour] » (par. 18). Le législateur a délibérément choisi d'inclure uniquement des conditions de nomination objectives dans les art. 5 et 6, et rien dans le libellé de la Loi ou dans son historique n'autorise à y importer les valeurs sociales — 140 ans plus tard.

[146] As noted, the objective of s. 6 is to protect Quebec's civil law tradition and inspire Quebec's confidence in this Court. Section 6 recognizes the uniqueness of Quebec and its important place in our country, and was key to gaining Quebec's support for the formation of the Supreme Court of Canada. Crucially, however, there is no evidence that this support would have been withheld if the issue of both current and past advocates of the Quebec bar qualifying for appointment, as well as current and past judges of the Quebec superior courts, had been debated at the time. Indeed, as I interpret s. 4 of the 1875 Act, both *current and former* judges *have always been* eligible. To the extent there may have been a question mark about former members of the bar, the 1886 statutory revision made it clear that they too were eligible.

[146] Je le répète, l'art. 6 vise à protéger la tradition civiliste du Québec et à susciter la confiance des Québécois envers la Cour. L'article 6 reconnaît le caractère unique du Québec et la place importante qu'il occupe dans notre pays, et il a joué un rôle clé pour obtenir l'adhésion du Québec à la création de la Cour suprême du Canada. Ce qui est toutefois crucial, c'est qu'aucune preuve n'établit que le Québec n'aurait pas donné son adhésion si, à l'époque, le débat avait aussi porté sur la question de savoir si les avocats, actuels ou anciens, inscrits au Barreau du Québec devaient être admissibles, comme les juges, actuels ou anciens, des cours supérieures du Québec. En effet, selon mon interprétation de l'art. 4 de la Loi de 1875, les juges actuels et anciens ont toujours été admissibles à une nomination. Dans la mesure où il a pu y avoir un doute quant aux anciens membres du barreau, la révision législative de 1886 a clairement indiqué qu'ils satisfont eux aussi aux conditions de nomination.

[147] To suggest that Quebec wanted to render ineligible former advocates of at least 10 years standing at the Quebec bar is to rewrite history. There is nothing in the historical debates that suggests any such thing. Indeed, it defies logic and common sense to think that Quebec would have had some reason to oppose the appointment to this Court of Court of Québec judges who had been members of the Quebec bar for at least 10 years on the day of their appointment to that court.¹² Court of Québec judges apply the civil law *on a daily basis*. Why such persons, otherwise eligible for appointment to this Court by virtue of their 10 years standing at the bar, would suddenly become unacceptable to the people of Quebec on the day of their elevation to the bench escapes me. Likewise, though the federal courts did not exist at the time, to suggest that Quebec would have resisted the appointment to this Court of a federal court judge occupying a

[147] Suggérer que le Québec souhaitait soustraire du bassin de candidats potentiels les anciens avocats inscrits pendant au moins 10 ans au Barreau du Québec revient à réécrire l'histoire. Rien dans le débat historique ne laisse croire que c'était le cas. Penser que le Québec aurait eu une raison quelconque de s'opposer à la nomination à la Cour suprême de juges de la Cour du Québec qui avaient été membres du Barreau du Québec pendant au moins 10 ans au moment de leur nomination à cette cour défie la logique et le bon sens¹². Les juges de la Cour du Québec appliquent le droit civil *quotidiennement*. Je ne sais pas vraiment pourquoi ces personnes, par ailleurs admissibles à une nomination à la Cour du fait de leur inscription au Barreau pendant 10 ans, cesseraient soudainement d'être acceptables aux yeux de la population du Québec le jour où elles accèdent à la magistrature. De même, malgré l'inexistence des cours fédérales à l'époque, la

¹² "The Court of Québec is a court of first instance that has jurisdiction in civil, criminal and penal matters as well as in matters relating to young persons. It also has jurisdiction over administrative matters and appeals where provided for by law. The Court of Québec is made up of a maximum of 270 judges, appointed by the Government of Québec for life" (Justice Québec (online: <http://www.justice.gouv.qc.ca/english/publications/generale/systeme-a.htm>) March 21, 2014).

¹² « La Cour du Québec est un tribunal de première instance qui a compétence en matière civile, criminelle et pénale ainsi que dans les matières relatives à la jeunesse. Elle siège également en matière administrative ou en appel, dans les cas prévus par la loi. La Cour du Québec se compose d'au plus 270 juges, nommés à vie par le gouvernement du Québec » (Site Web de Justice Québec (en ligne : <http://www.justice.gouv.qc.ca/français/publications/generale/systeme.htm>) 21 mars 2014).

seat on that court reserved for Quebec¹³ is, in my view, equally untenable. These judges have been trained in the civil law and continue to hear federal law cases involving Quebec that require a working knowledge of the civil law.

[148] My colleagues maintain it is Parliament's choice to "draw lines" that may be "under-inclusive when measured against the [objectives of s. 6]" and thus "might not achieve perfection" (paras. 57-58). Parliament, they say, chose certain objective criteria and it is not for this Court to question the wisdom of those criteria. I agree. But, when interpreting a statute to determine what the relevant criteria *are* — i.e. what Parliament intended them to be — absurd results are to be avoided. (See, for example, *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 27, and *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at p. 676.) In my respectful view, that principle should be applied in interpreting s. 6 — and when it is, it necessarily leads to a rejection of the currency requirement.

(2) The Currency Requirement Does Not Further the Legislative Objective of Section 6

[149] In addition to rendering ineligible candidates who might otherwise be worthy appointments to this Court, the currency requirement does nothing to promote the confidence of Quebec in this Court. In Quebec, there are approximately 16,000 *current* members of the Quebec bar with at least 10 years standing.¹⁴ Surely it cannot be suggested that the appointment of any one of these 16,000 advocates would promote the confidence of Quebec in this Court.

¹³ Of the 37 seats on the Federal Court, 10 are reserved for Quebec judges (*Federal Courts Act*, R.S.C. 1985, c. F-7, s. 5.4). Of the 13 seats on the Federal Court of Appeal, 5 are reserved for Quebec judges (*ibid.*).

¹⁴ Canadian Association of Provincial Court Judges factum, at para 26.

prévention que le Québec se serait opposé à la nomination à la Cour d'un juge de la Cour fédérale qui y occupe un des sièges réservés au Québec¹³ est, à mon avis, tout aussi dénuée de fondement. Ces juges ont été formés en droit civil et ils continuent d'entendre des causes de droit fédéral impliquant le Québec qui exigent une connaissance pratique du droit civil.

[148] Mes collègues soutiennent que le législateur est libre de « tracer la ligne » en choisissant une solution peut-être « trop limitative au regard des objets de [l'art. 6] », et en fixant ainsi des critères qui « ne sont peut-être pas parfaits » (par. 57-58). Selon eux, le législateur a choisi certains critères objectifs et il n'appartient pas à la Cour de s'interroger sur la sagesse de sa décision. Je suis d'accord. Cela dit, lorsqu'il s'agit d'interpréter une loi pour déterminer ce que *sont* les critères pertinents — c'est-à-dire ce que le législateur voulait qu'ils soient — il faut éviter d'en arriver à des résultats absurdes. (Voir, p. ex., *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 27, et *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616, p. 676.) En toute déférence, j'estime qu'il faudrait appliquer ce principe pour interpréter l'art. 6 — et son application mène nécessairement au rejet de l'exigence de la contemporanéité.

(2) L'exigence de la contemporanéité ne favorise pas la réalisation de l'objectif législatif de l'art. 6

[149] En plus de rendre inadmissibles des candidats qui pourraient autrement être dignes d'une nomination à la Cour, l'exigence de la contemporanéité ne favorise en rien la confiance du Québec envers la Cour. Il y a quelque 16 000 membres *actuellement* inscrits au Barreau du Québec depuis au moins 10 ans¹⁴. On ne peut certainement pas prétendre que la nomination de n'importe lequel de ces 16 000 avocats favoriserait la confiance du Québec envers la Cour.

¹³ Parmi les 37 sièges de la Cour fédérale, 10 sont réservés à des juges du Québec (*Loi sur les Cours fédérales*, L.R.C. 1985, ch. F-7, art. 5.4). Parmi les 13 sièges de la Cour d'appel fédérale, 5 sont réservés à des juges du Québec (*ibid.*).

¹⁴ Mémoire de l'Association canadienne des juges de cours provinciales, par. 26.

[150] This becomes all the more apparent when one realizes that a person can maintain his or her Quebec bar membership by simply paying annual fees and completing a set number of hours of continuing legal education — currently, 30 hours over a two-year period.¹⁵ Notably, there is *no* requirement that this continuing legal education have anything to do with the civil law, nor does it actually have to be completed *in Quebec*. Indeed, a person does not have to live in Quebec, *or actually practice law in Quebec*, in order to maintain his or her bar membership. In sum, a person could have only the most tenuous link to the practice of civil law in Quebec, and yet be a current member of that bar of 10 years standing.

[151] This is the reality — and it illustrates how implausible it is that anyone would view *current* membership at the Quebec bar as the *sine qua non* that assures Quebec's confidence in appointments to this Court. Likewise, it is equally implausible that being a *past* member of the Quebec bar could singlehandedly undermine this confidence.

[152] My colleagues have chosen not to address the scope of the currency requirement under s. 6, i.e. whether one day's renewed membership at the Quebec bar is sufficient to qualify as an advocate or whether something more is needed — six months, two years, five years, or perhaps even a continuous 10-year period immediately preceding the appointment.

[153] In my view, *currency means exactly that*. A former Quebec superior court judge or advocate of 10 years standing at the Quebec bar could rejoin that bar for a day and thereby regain his or her eligibility for appointment to this Court. In my view, this exposes the hollowness of the currency requirement. Surely nothing is accomplished by

[150] Cela devient encore plus évident lorsqu'on comprend qu'une personne peut rester membre du Barreau du Québec en se contentant de payer sa cotisation annuelle et de consacrer un nombre donné d'heures à la formation juridique continue — actuellement, 30 heures par période de deux ans¹⁵. Fait à noter, il n'existe *aucune* exigence voulant que cette formation continue ait un lien quelconque avec le droit civil, ni qu'elle soit en fait reçue *au Québec*. D'ailleurs, une personne n'est pas tenue de vivre au Québec, *ni d'exercer réellement le droit au Québec*, pour rester membre du Barreau du Québec. Bref, une personne pourrait avoir le lien le plus tenu avec l'exercice du droit civil au Québec et rester, malgré tout, un avocat inscrit au Barreau du Québec depuis au moins 10 ans.

[151] Telle est la réalité — et elle illustre à quel point il n'est pas plausible que quelqu'un puisse considérer l'inscription *actuelle* au Barreau du Québec comme une condition essentielle qui garantit la confiance du Québec envers les nominations à la Cour. De même, il est tout aussi peu vraisemblable que le fait d'être un *ancien* membre du Barreau du Québec puisse, à lui seul, miner cette confiance.

[152] Mes collègues ont choisi de ne pas traiter de la portée de l'exigence de contemporanéité de l'art. 6, c'est-à-dire de ne pas décider si la réinscription au Barreau du Québec pour une journée suffit pour qu'une personne puisse être nommée juge de la Cour en tant qu'avocat, ou s'il faut une période plus longue — six mois, deux ans, cinq ans, ou peut-être même une période ininterrompue de 10 ans précédent immédiatement la nomination.

[153] Pour moi, *la contemporanéité c'est la contemporanéité*. Un ancien juge d'une cour supérieure du Québec ou un ancien avocat qui a été inscrit au Barreau du Québec pendant 10 ans pourrait se réinscrire au barreau pour une journée et répondre ainsi aux conditions de nomination à notre Cour. Selon moi, ce raisonnement met en évidence la

¹⁵ *Règlement sur la formation continue obligatoire des avocats*, R.R.Q., c. B-1, r. 12, s. 2; see also Barreau du Québec (online: <https://www.barreau.qc.ca/en/avocats/formation-continue/obligatoire/index.html>).

¹⁵ *Règlement sur la formation continue obligatoire des avocats*, R.R.Q., ch. B-1, r. 12, art. 2; voir aussi Site Web du Barreau du Québec (en ligne : <https://www.barreau.qc.ca/fr/avocats/formation-continue/obligatoire/index.html>).

what is essentially an administrative act. Any interpretation of s. 6 that requires a *former* advocate of at least 10 years standing at the Quebec bar, or a *former* judge of the Quebec Court of Appeal or Superior Court, to rejoin the Quebec bar for a day in order to be eligible for appointment to this Court makes no practical sense. Respectfully, I find it difficult to believe that the people of Quebec would somehow have more confidence in this candidate on Friday than they had on Thursday.

vacuité de l'exigence de la contemporanéité. Assurément, ce qui est essentiellement un geste de nature administrative ne change rien. Toute interprétation de l'art. 6 exigeant qu'un *ancien* avocat qui a été membre du Barreau du Québec pendant au moins 10 ans, ou qu'un *ancien* juge de la Cour d'appel du Québec ou de la Cour supérieure, redevienne membre de ce Barreau pendant un jour pour être admissible à une nomination à la Cour n'aurait aucun sens d'un point de vue pratique. En toute déférence, j'ai du mal à croire que la population du Québec aurait, pour une raison ou pour une autre, davantage confiance en un tel candidat le vendredi que le jeudi.

III. Conclusion

[154] For these reasons, I would answer Question 1 in the affirmative. Both current and former members of the Quebec bar of at least 10 years standing, and current and former judges of the Quebec superior courts, are eligible for appointment to a Quebec seat on this Court. In view of my response to Question 1, I find it unnecessary to answer Question 2.

Judgment accordingly, MOLDAVER J. dissenting.

*Solicitor for the Attorney General of Canada:
Attorney General of Canada, Ottawa.*

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Attorney General of Quebec: Bernard, Roy & Associés, Montréal; Attorney General of Quebec, Montréal.

*Solicitor for the interveners Robert Décaray,
Alice Desjardins and Gilles Létourneau: Sébastien
Grammond, Ottawa.*

*Solicitors for the intervener Rocco Galati:
Rocco Galati Law Firm Professional Corporation,
Toronto.*

III. Conclusion

[154] Pour ces motifs, je suis d'avis de répondre par l'affirmative à la question 1. Les avocats actuels et les anciens avocats inscrits pendant au moins 10 ans au Barreau du Québec ainsi que les juges actuels ou les anciens juges des cours supérieures du Québec sont tous admissibles à une nomination à l'un des postes de juge de la Cour réservés au Québec. Compte tenu de ma réponse à la question 1, j'estime inutile de répondre à la question 2.

*Jugement en conséquence, le juge MOLDAVER
est dissident.*

*Procureur du procureur général du Canada :
Procureur général du Canada, Ottawa.*

*Procureur de l'intervenant le procureur général
de l'Ontario : Procureur général de l'Ontario,
Toronto.*

*Procureurs de l'intervenant le procureur général
du Québec : Bernard, Roy & Associés, Montréal;
Procureur général du Québec, Montréal.*

*Procureur des intervenants Robert Décaray,
Alice Desjardins et Gilles Létourneau : Sébastien
Grammond, Ottawa.*

*Procureurs de l'intervenant Rocco Galati :
Rocco Galati Law Firm Professional Corporation,
Toronto.*

[2014] 1 R.C.S.

RENOVI RELATIF À LA LOI SUR LA COUR SUPRÈME

497

Solicitor for the intervener the Canadian Association of Provincial Court Judges: Sébastien Grammond, Ottawa.

Solicitors for the intervener the Constitutional Rights Centre Inc.: Slansky Law Professional Corporation, Toronto.

Procureur de l'intervenante l'Association canadienne des juges de cours provinciales : Sébastien Grammond, Ottawa.

Procureurs de l'intervenante Constitutional Rights Centre Inc. : Slansky Law Professional Corporation, Toronto.

Onglet 81

Re Initiative and Referendum Act, [1919] A.C. 935 (C.P.)

A. C.

AND PRIVY COUNCIL.

935

J. C.*

1919

July 3.

[PRIVY COUNCIL.]

*In re THE INITIATIVE AND REFERENDUM ACT.
ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA.*

Canada (Manitoba)—Legislative Power—Constitution of Province—Office of Lieutenant-Governor—Initiative and Referendum Act (6 Geo. 5, c. 59, Manitoba)—Invalidity—Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), s. 2—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 92, head 1.

The British North America Act, 1867, s. 92, head 1, which empowers a Provincial Legislature to amend the constitution of the Province, "excepting as regards the office of Lieutenant-Governor," excludes the making of a law which abrogates any power which the Crown possesses through the Lieutenant-Governor who directly represents the Crown.

The Initiative and Referendum Act, being 6 Geo. 5 c. 59 of the Acts of the Legislative Assembly of Manitoba, is invalid, since it would compel the Lieutenant-Governor to submit a proposed law to a body of voters totally distinct from the legislature of which he is the constitutional head, and would render him powerless to prevent it from becoming an actual law if approved by those voters. The offending provisions of the Act being so interwoven with its scheme as not to be severable, the Colonial Laws Validity Act, 1865, cannot be applied to validate any part of the Act.

Judgment of the Court of Appeal affirmed.

APPEAL by special leave from a judgment of the Court of Appeal of Manitoba (December 20, 1916).

By an Order in Council made on August 22, 1916, in pursuance of R. S. Man. 1913, c. 38, the following questions were referred by the Lieutenant-Governor in Council to the Court of King's Bench of Manitoba for hearing and consideration—namely, (1.) Had the Legislative Assembly jurisdiction to enact the Initiative and Referendum Act, and, if not, in what particular or respect has it exceeded its powers? (2.) Had the Legislative Assembly jurisdiction to enact ss. 3, 4, 4A, 7, 8, 11, 12, 17 (sub-s. 1), of said Act, or any of them; and, if so, which of them?

The Act referred to was 6 Geo. 5 c. 59 of the Legislative

*Present: VISCOUNT HALDANE, LORD BUCKMASTER, LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, and LORD SCOTT-DICKSON.

936

HOUSE OF LORDS

[1919]

J. C.
1919
THE
INITIATIVE
AND
REFER-
ENDUM
ACT,
In re.

Assembly of Manitoba, and provided that laws might be made and repealed by the direct vote of the electors of the province at large. The provisions by which the Act proposed to carry out that object are summarized in the judgment of their Lordships; ss. 7 and 11 are set out in the footnote. (1)

On the matter coming on for hearing before Mathers C.J., counsel having consented that the said questions should be answered without argument, judgment was given on October 27, 1916, declaring that the Legislative Assembly had jurisdiction to enact the said Acts and the sections in question.

The appeal was argued in the Court of Appeal before Howell C.J., and Richards, Perdue, Cameron and Haggart J.J.A., and judgment was given on December 20, 1916, allowing the appeal and answering the questions submitted as follows: "To the first question, No. The particulars in which the Legislative Assembly exceeded its powers are set forth in the several reasons for judgment delivered by members of the Court and forwarded herewith. To the second question, as to ss. 3, 4, 4A, 7, 9, and 11, the answer is 'No.' As to s. 12 and s. 17 (sub-s. 1) the answer is: 'Taken with their context, No.'"

The reasons of the learned judges, which are fully reported at 27 Man. L. R. 1, may be shortly stated as follows. The British North America Act, 1867, declared that for each Province

(1) The Initiative and Referendum Act (6 Geo. 5), c. 59, Manitoba, s. 7: "A proposed law so referred to the electors and approved of by a majority of the votes polled thereon shall, unless a later date is specified therein, take effect and become law, subject, however, to the same powers of veto and disallowance as are provided in the British North America Act or as exist in law with respect to any Act of the Legislative Assembly, as though such law were an Act of the said Assembly, on a date to be fixed by proclamation to be made by the Lieutenant-Governor in Council, which date shall not be later than thirty days

after the Clerk of the Executive Council shall have published in the Manitoba Gazette a statement of the result of the vote on said law in accordance with s. 35 hereof."

Sect. 11: "In the event of such Act or law or part or parts thereof not being approved of by a majority of the votes polled at such referendum, such Act or law or part or parts thereof so disapproved shall, at the end of 30 days, after the Clerk of the Executive Council shall have published in the Manitoba Gazette a statement of the result of the vote on such Act or law, or part or parts thereof, become and be deemed repealed."

A. C.	AND PRIVY COUNCIL.	937
--------------	---------------------------	------------

there should be a Legislature, in which s. 92 vested the power of law-making; the Legislature could not confer that power upon a body other than itself. The procedure proposed by the Act in question would not be an Act of a Legislature within s. 92, would be wholly opposed to the spirit and principles of the Canadian constitution, and would override the Legislature thereby provided. Further, the power to amend the constitution given by s. 92, head 1, expressly excepted "the office of Lieutenant-Governor." Sect. 7 of the proposed Act, while preserving the power of veto and disallowance by the Governor-General provided for by ss. 55 and 90 of the Act of 1867, dispensed with the assent of the Lieutenant-Governor provided for by ss. 56 and 90 of that Act; even if s. 7 was not intended to dispense with that assent, s. 11 clearly did so. The proposed Act also violated the provisions of s. 54 (in conjunction with s. 90) as to money bills.

On the application of the Attorney-General of the Province special leave to appeal to His Majesty in Council was granted.

1919. May 15, 16. *Maughan K.C.* and *Horace Douglas* for the appellant. The Legislature of Manitoba had power to pass the Act now in question under s. 92, head 1 of the British North America Act, 1867. Upon the true construction of the Act the office or powers of the Lieutenant-Governor, as representing the Crown, are not interfered with. The Act should be construed *ut valeat majus quam pereat*. Although ss. 7 and 11 do not expressly reserve the discretionary power of the Lieutenant-Governor, they should be read as impliedly so doing. Sect. 4 (A) shows that it was not intended to enact anything which was *ultra vires*. If upon the necessary construction of any part of the Act the rights of the Lieutenant-Governor are interfered with, that part of the Act is severable and the residue is valid under s. 2 of the Colonial Laws Validity Act, 1865. There is no reason why the power given to the Legislature by s. 92, head 1 to amend the constitution should not be exercised by providing a different machinery for enacting laws, subject to the rights of the Crown. [Reference was made to *Hodge v. The Queen*. (1)]

(1) (1883) 9 App. Cas. 117.

J. C.
1919
THE
INITIATIV.
AND
REFER-
ENDUM
ACT,
In re.

938

HOUSE OF LORDS

[1919]

J. C.
1919
 THE
 INITIATIVE
 AND
 REFER-
 ENDUM
 ACT,
In re.

Sir John Simon K.C. and Hon. M. Macnaghten K.C. for the respondents, and, Hon. F. Russell K.C. and T. Mathew for the Attorney-General for Canada, were not called upon.

July 3.—The judgment of their Lordships was delivered by VISCOUNT HALDANE. In this case questions were raised in the province of Manitoba as to the validity of an Act passed by its Legislature and entitled the Initiative and Referendum Act. In consequence, under a statute which enabled him to do so, the Lieutenant-Governor in Council referred to the Court of King's Bench of the province the two questions which follow : 1. Had the Legislative Assembly jurisdiction to enact the said Act, and, if not, in what particular or respect has it exceeded its powers ? 2. Had the Legislative Assembly jurisdiction to enact ss. 3, 4, 4A, 7, 8, 11, 12, 17, sub-s. 1, of the said Act, or any of them ; and, if so, which of them ?

On October 27, 1916, these questions came before Mathers C.J. By consent there was no argument, and the learned judge decided that the Legislative Assembly had jurisdiction to pass the Act and the several sections referred to in the second question.

The matter was then brought before the Court of Appeal of the province, and was argued before Howell C.J., and Richards, Perdue, Cameron and Haggart JJ.A. On December 20, 1916, the Court of Appeal delivered judgment, answering the questions submitted in the negative. The answer to the first question was : "No. The particulars in which the Legislative Assembly exceeded its powers are set forth in the several reasons for judgment delivered by members of the Court and forwarded herewith." The answer to the second question was : "As to ss. 3, 4, 4A, 7, 9 and 11 the answer is 'No.' As to s. 12 and s. 17, sub-s. 1, the answer is, 'Taken with their context, No.'"

In October, 1918, special leave was granted by His Majesty in Council to the Attorney-General of the province to appeal to the Sovereign in Council, and by Order dated November 25 in the same year leave was granted to the Attorney-General of Canada to intervene.

A. C.	AND PRIVY COUNCIL.	939
-------	--------------------	-----

It would have been a convenient course if, before bringing these questions before the Sovereign in Council, the authorities of the province had seen their way in the first place to submit them for the opinion of the Supreme Court of Canada. It is desirable that topics affecting the Constitution of Canada should come before that Court before being brought to London for argument. However, the parties appear to have concurred in asking that special leave for a direct appeal should be granted. Their Lordships desire to observe that it is by no means a matter of course that such leave should be given, for they attach much importance, not only to the position which belongs to the Supreme Court under the Constitution of Canada, but to the value, in the decision of important points such as those before them, of the experience and learning of the judges of that Court. However, the Attorney-General of the province has succeeded in obtaining special leave to bring the case directly before the Judicial Committee, and their Lordships will therefore deal with it. They will only observe further at this stage that they have derived much assistance from the judgments delivered by the members of the Court of Appeal for Manitoba.

J. C.
1919
THE
INITIATIVE
AND
REFER-
ENDUM
Act,
In re.
—

The validity of the Initiative and Referendum Act, a statute of a type which is not unknown in parts of the world with constitutions different from that of Canada, of course depends on whether the Constitution of Canada as defined by the British North America Act of 1867 permitted a Provincial Legislature to pass it into law for the Province. The first step in the consideration of the matter is therefore to ascertain the exact character of the legislation proposed. In substance it is this. The Legislative Assembly seeks to provide that laws for the Province may be made and repealed by the direct vote of the electors, instead of only by the Legislative Assembly whose members they elect. The machinery created for the accomplishment of this end is that first of all a number of the electors, being not less than eight per cent. of the number of votes polled at the last election, may by petition submit a proposed law to the Legislative Assembly. In the next place, the proposed law, unless enacted without substantial change

940

HOUSE OF LORDS

[1919]

J.C.
1919
THE
INITIATIVE
AND
REFER-
ENDUM
ACT,
In re.

by the Assembly in the session in which it is submitted, must be submitted by the Lieutenant-Governor in Council to a vote of the electors, to be taken at the next general Provincial election, unless a special referendum vote has been asked for in the petition. Provision is made for time being available in which to obtain the opinion of the Attorney-General, and if necessary of the Court, as to whether the proposed law is intra vires. If not it cannot be submitted. If a special referendum vote has been asked for it is usually to be taken within six months from the presentation of the petition. In the third place, if a proposed law has been submitted to the electors, and approved by a majority of the votes polled, it is to take effect, "subject, however, to the same powers of veto and disallowance as are provided in the British North America Act or as exist in law with respect to any Act of the Legislative Assembly, as though such law were an Act of the said Assembly," on a date to be proclaimed by the Lieutenant-Governor, and to be not later than thirty days after the official announcement of the result of the vote.

The proposed law further provides that a number of electors, equivalent in this case to not less than five per cent. of the number of votes polled at the last election, may petition for the repeal of any Act of the Assembly or of any law enacted by the new method, the validity of which is now in question, and provisions, not differing in material respects from these already referred to, are made for the repeal of such Act or law. There are in the Initiative and Referendum Act other provisions which may be mentioned briefly. No Act of the Legislative Assembly is to take effect until three months after the end of the session in which it was passed, unless in a preamble voted for by two-thirds of the members voting, the Act has been declared to be an emergency measure, but this is not to apply to a Supply Bill or Appropriation Act, except as to items for capital expenditure exceeding \$100,000. When a vote is to be taken under the Act the Lieutenant-Governor is to order the issue of writs in His Majesty's name for taking such vote, and he is also to provide for the public dissemination of information and arguments on the

A. C.	AND PRIVY COUNCIL.	941
-------	--------------------	-----

matters referred, not exceeding twelve hundred words for each side.

The framework of the Constitution of Canada was enacted in 1867 by the Imperial Parliament in order to give effect to the desire expressed in the Resolutions adopted by the Conference of Canadian and other delegates held at Quebec in October, 1864. The object was to form in the first instance out of the old Province of Canada, along with Nova Scotia and New Brunswick, a Dominion with a constitution similar in principle to that of the United Kingdom. Provision was made for the extension of this Constitution to other colonies, such as Newfoundland and Prince Edward Island, should they desire to come in, and also to Rupert's Land and the North-Western Territory. It is out of these last that the Province of Manitoba was formed, the provisions of the Act of 1867 that are applicable having been meantime strengthened by subsequent Imperial and Dominion legislation. The Executive Government of Canada was declared by the Act of 1867 to remain vested in the Queen, and, by s. 12, all powers, authorities and functions vested in or exercisable by the Governors or Lieutenant-Governors of the Provinces brought into confederation were, so far as the same continued in existence and were capable of being exercised after the Union in relation to the Government of Canada, to be vested in and exercisable by the Governor-General. A Parliament was then set up for Canada. Part V. of the Act established analogous Constitutions for the Provinces. For each of these there was to be a Lieutenant-Governor. Although he is under s. 58 appointed by the Governor-General, it has been settled by decisions of the Judicial Committee, such as that in *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* (1), that, as the appointment of a Provincial Governor is made under the Great Seal of Canada, and therefore really by the Executive Government of the Dominion which is in the Sovereign, the Lieutenant-Governor is as much the representative of His Majesty for all purposes of Provincial Government as is the Governor-General for all purposes of

J. C.
1919
THE
INITIATIVE
AND
REFER-
ENDUM
Act,
In re.

(1) [1892] A. C. 437.

942

HOUSE OF LORDS

[1919]

J. C.
1919
THE
INITIATIVE
AND
REFER-
ENDUM
ACT,
In re.

Dominion Government. Sect. 65 and the other sections dealing with the subject define the powers of the Lieutenant-Governor as being such of those powers having been exercisable by the Governors or Lieutenant-Governors of the Provinces brought into Confederation, as are exercisable in relation to the Government of a Province. The scheme of the Act passed in 1867 was thus, not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head. Within these limits of area and subjects, its local Legislature, so long as the Imperial Parliament did not repeal its own Act conferring this status, was to be supreme, and had such powers as the Imperial Parliament possessed in the plenitude of its own freedom before it handed them over to the Dominion and the Provinces, in accordance with the scheme of distribution which it enacted in 1867.

The importance of bearing this in mind when construing the subsequent provisions of the British North America Act will presently appear. After thus defining the executive power the statute goes on to provide for a Legislature for each Province, and concludes Part V. by declaring in s. 90 that what has been laid down as to the Dominion Parliament in regard to Appropriation and Money Bills, the recommendation of money votes, the assent to Bills, the disallowance of Acts, and the signification of pleasure on Bills reserved, is to extend and apply to the Legislatures of the several Provinces as if these provisions were re-enacted and made applicable in terms to the respective Provinces and their Legislatures, with the substitution of the Lieutenant-Governor of the Province for the Governor-General, of the Governor-General for the Sovereign and for a Secretary of State and of one year for two years, and of the Province for Canada.

The Act then, by two well-known sections, 91 and 92, distributes the powers of legislation which it confers between the

A. C.	AND PRIVY COUNCIL.	943
-------	--------------------	-----

Dominion Parliament and the Provincial Legislatures. Nothing in s. 91, which relates to Dominion powers, affects the question under consideration, excepting in one important respect. The residuary power of legislation, beyond those powers that are specifically distributed by the two sections, is conferred on the Dominion. Had the Provinces possessed the residuary capacity, as in the case with the States under the Constitutions of the United States and Australia, this might have affected the question of the power of their Legislatures to set up new legislative bodies. But it is not so, and it is therefore unnecessary to pursue a point which is merely speculative. The language of s. 92 is important. That section commences by enacting that "in such Province the Legislature may exclusively make laws in relation to matters" coming within certain classes of subjects. The only one of these classes which is relevant for the present purpose is the first enumerated, "the amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, excepting as regards the office of Lieutenant-Governor."

The references their Lordships have already made to the character of the office of Lieutenant-Governor, and to his position as directly representing the Sovereign in the province, renders natural the exclusion of his office from the power conferred on the Provincial Legislature to amend the constitution of the Province. The analogy of the British Constitution is that on which the entire scheme is founded, and that analogy points to the impropriety, in the absence of clear and unmistakable language, of construing s. 92 as permitting the abrogation of any power which the Crown possesses through a person who directly represents it. For when the Lieutenant-Governor gives to or withdraws his assent from a Bill passed by the Legislature of the province, it is in contemplation of law the Sovereign that so gives or withdraws assent. Moreover, in accordance with the analogy of the British Constitution which the Act of 1867 adopts, the Lieutenant-Governor who represents the Sovereign is a part of the Legislature. This is in terms so enacted in such sections as s. 69, the principle of which has been applied to Manitoba by s. 2 of the Dominion

J. C.
1919
THE
INITIATIVE
AND
REFER-
ENDUM
ACT,
In re.

944

HOUSE OF LORDS

[1919]

J. C.
1919
THE
INITIATIVE
AND
REFER-
ENDUM
ACT,
In re.

Statute of 1870, which formed the new Province out of Rupert's Land and the North Western Territory, and established it with the Constitution provided by the Act of 1867. It follows that if the Initiative and Referendum Act has purported to alter the position of the Lieutenant-Governor in these respects, this Act was in so far ultra vires.

Their Lordships are of opinion that the language of the Act cannot be construed otherwise than as intended seriously to affect the position of the Lieutenant-Governor as an integral part of the Legislature, and to detract from rights which are important in the legal theory of that position. For if the Act is valid it compels him to submit a proposed law to a body of voters totally distinct from the Legislature of which he is the constitutional head, and renders him powerless to prevent it from becoming an actual law if approved by a majority of these voters. It was argued that the words already referred to, which appear in s. 7, preserve his powers of veto and disallowance. Their Lordships are unable to assent to this contention. The only powers preserved are those which relate to Acts of the Legislative Assembly, as distinguished from Bills, and the powers of veto and disallowance referred to can only be those of the Governor-General under s. 90 of the Act of 1867, and not the powers of the Lieutenant-Governor, which are at an end when a Bill has become an Act. Sect. 11 of the Initiative and Referendum Act is not less difficult to reconcile with the rights of the Lieutenant-Governor. It provides that when a proposal for repeal of some law has been approved by the majority of the electors voting, that law is automatically to be deemed repealed at the end of thirty days after the clerk of the Executive Council shall have published in the Manitoba Gazette a statement of the result of the vote. Thus the Lieutenant-Governor appears to be wholly excluded from the new legislative authority.

These considerations are sufficient to establish the ultra vires character of the Act. The offending provisions are in their Lordships' view so interwoven into the scheme that they are not severable. The Colonial Laws Validity Act,

A. C.	AND PRIVY COUNCIL.	945
--------------	---------------------------	------------

1865 (1), therefore, which was invoked in the course of the argument, does not assist the appellants.

Having said so much, their Lordships, following their usual practice of not deciding more than is strictly necessary, will not deal finally with another difficulty which those who contend for the validity of this Act have to meet. But they think it right, as the point has been raised in the Court below, to advert to it. Sect. 92 of the Act of 1867 entrusts the legislative power in a Province to its Legislature, and to that Legislature only. No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done when in *Hodge v. The Queen* (2), the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise.

They have already indicated that on the point considered earlier in this judgment they are of opinion that the first part of the first question submitted for judicial decision, that relating to the jurisdiction to pass the Act, must be answered in the negative. As to the second part of this question and as to the second question submitted which covers the same ground, namely, whether the Legislative Assembly could enact ss. 3, 4, 4A, 7, 9, 11, 12 and 17 (sub-s. 1), or any of them, they agree with the Court of Appeal, subject to a reservation as to s. 12, in thinking that none of them were validly enacted, for they were merely steps towards the accomplishment of a purpose that was ultra vires. As to s. 12, if the last sentence were omitted they think that the main part of this might be made a subject of valid enactment. The earlier part of the section is severable, and if it had been capable of interpretation apart from the title of the Act and

J. C.
1919
THE
INITIATIVE
AND
REFER-
ENDUM
Act,
In re.
—

(1) 28 & 29 Vict. c. 63. (2) 9 App. Cas. 117.

946

HOUSE OF LORDS

[1919]

J. C.
1919
THE
INITIATIVE
AND
REFER-
ENDUM
ACT,
In re.

its context, it could have been validly enacted. But it is obvious that this provision was introduced where it stands in the midst of a number of other sections as preparatory to the accomplishment of ultra vires purposes.

It may well be, therefore, that the Court of Appeal was right in refusing to look at it apart from the rest of the sections, the purposes of which it was put in to subserve. Their Lordships think it unnecessary to decide a point which the appellants did not raise as a separate one at the Bar, and which has no relation to the real topic of controversy, or to interfere with the conclusion come to by the judges in the court below.

They will humbly advise His Majesty that the questions submitted should be answered in the terms indicated. There will be no order as to costs. The appeal should be simply dismissed.

Solicitors for appellant : *Lawrence Jones & Co.*

Solicitors for respondents : *Blake & Redden.*

Solicitors for intervenant : *Charles Russell & Co.*

Onglet 82

SEFPO c. Ontario (Procureur général), [1987] 2 R.C.S. 2

2

OPSEU v. ONTARIO (ATTORNEY GENERAL)

[1987] 2 S.C.R.

**Ontario Public Service Employees' Union,
Marie Wilkinson, Edward E. Faulknor and
Russell B. Smith. Appellants**

v.

Attorney General for Ontario Respondent
and

**The Attorney General of Canada, the
Attorney General of Quebec, the Attorney
General of Nova Scotia, the Attorney General
for New Brunswick, the Attorney General of
British Columbia, the Attorney General for
Saskatchewan and the Attorney General for
Alberta Intervenors**

INDEXED AS: OPSEU v. ONTARIO (ATTORNEY
GENERAL)

File No.: 16464.

1986: March 18, 19; 1987: July 29.

Present: Dickson C.J. and Beetz, McIntyre,
Chouinard*, Lamer, Le Dain and La Forest JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
ONTARIO

*Constitutional law — Division of powers — Province
restricting political activity of provincial civil servants
and Crown employees in federal elections — Whether
or not restrictions intra vires the province — Constitu-
tion Act, 1867, ss. 91, 92(1), (4), (13) — Constitution
Act, 1982, s. 45 — The Public Service Act, R.S.O.
1970, c. 386, ss. 12(1), (2), (3), (4), (5), 13(1), (2), 14, 15,
16, now R.S.O. 1980, c. 418.*

The Ontario Public Service Employees' Union is bargaining agent for Government of Ontario employees subject to *The Public Service Act* and each of the individual appellants is a Crown employee, a civil servant and a member of the appellant union. Each individual appellant wishes to engage in political activities currently prohibited by *The Public Service Act*, including: running for election to Parliament without taking a leave of absence; canvassing and soliciting funds on behalf of federal political parties; and expressing opinions in public on federal political issues. The appellants are concerned that pursuit of these political

**Syndicat des employés de la Fonction
publique de l'Ontario, Marie Wilkinson,
Edward E. Faulknor et Russell B. Smith
Appelants**

a.

Le procureur général de l'Ontario Intimé
et

b.

**Le procureur général du Canada, le procureur
général du Québec, le procureur général de la
Nouvelle-Écosse, le procureur général du
Nouveau-Brunswick, le procureur général de
la Colombie-Britannique, le procureur général
de la Saskatchewan et le procureur général de
l'Alberta Intervenants**

RÉPERTORIÉ: SEFPO c. ONTARIO (PROCUREUR
GÉNÉRAL)

d.

N° du greffe: 16464.

1986: 18, 19 mars; 1987: 29 juillet.

Présents: Le juge en chef Dickson et les juges Beetz,
McIntyre, Chouinard*, Lamer, Le Dain et La Forest.

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

f. *Droit constitutionnel — Partage des pouvoirs —
Restriction par une province des activités politiques des
fonctionnaires et employés de Sa Majesté dans le cadre
d'élections fédérales — Ces restrictions relèvent-elles
de la compétence de la province? — Loi constitu-
tionnelle de 1867, art. 91, 92(1), (4), (13) — Loi constitu-
tionnelle de 1982, art. 45 — The Public Service Act, R.S.O.
1970, chap. 386, art. 12(1), (2), (3), (4), (5), 13(1), (2), 14, 15,
16, maintenant R.S.O. 1980, chap. 418.*

g. *Le Syndicat des employés de la Fonction publique de
l'Ontario est l'agent négociateur des employés du gou-
vernement de l'Ontario qui sont assujettis à *The Public
Service Act* et chacun des appellants est un employé de
Sa Majesté, un fonctionnaire et un membre du syndicat
appelant. Chacun d'eux souhaite exercer des activités*

i. *politiques présentement interdites par *The Public Ser-
vice Act*, dont la possibilité de se porter candidat à des
élections fédérales sans avoir à prendre un congé à cette
fin, celle de faire du démarchage et de solliciter des
fonds pour des partis politiques fédéraux et celle de
prendre position publiquement sur des questions politi-*

j. ** Le juge Chouinard n'a pas pris part au jugement.*

* Chouinard J. took no part in the judgment.

SEFPO c. Ontario (*Procureur général*), [1987] 2 R.C.S. 2

[1987] 2 R.C.S.

SEFPO c. ONTARIO (PROCUREUR GÉNÉRAL)

3

activities would subject them to disciplinary measures pursuant to *The Public Service Act*. A motion for an order declaring ss. 12-16 of the Act unconstitutional was heard prior to the coming into force of the *Charter* and proceeded simply on distribution of powers grounds. The motion was denied by Labrosse J. The Court of Appeal affirmed this decision and the underlying rationale that provincial jurisdiction was grounded in s. 92(13) of the *Constitutional Act, 1867*. The three constitutional questions stated before the Supreme Court of Canada dealt with ss. 12-16 of *The Public Service Act*. Were these sections unconstitutional or inoperative in that (1) they purported to restrain provincial civil servants and Crown employees from engaging in certain federal political activity, (2) they contravened ss. 2, 3 and/or 15(1) of the *Charter*, and (3) if so, whether or not they were justified under s. 1 of the *Charter*. Following this Court's decision on a preliminary issue that it would not hear or decide *Charter* issues, the case proceeded on submissions based upon the distribution of legislative powers and argument relying upon certain statements in *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455.

Held: The appeal should be dismissed and the first constitutional question answered in the negative.

Per Beetz, McIntyre, Le Dain and La Forest JJ.: The impugned provisions constitute an ordinary legislative amendment of the constitution of Ontario, within the meaning of s. 92(1) of the *Constitution Act, 1867*, and they also relate to the tenure of provincial office within the meaning of s. 92(4). The legislation cannot be constitutionally justified on the sole basis that they are in pith and substance labour relations legislation and therefore a matter of property and civil rights in the province. The impugned provisions are not related to the field of federal elections.

In so far as this legislation can be said to confer rights, individual or collective, upon Ontario residents to have an impartial civil service, such rights are not civil but rather public or political rights. Although the Act provides for the general regulation of the hiring, dismissal and terms and conditions of employment of the provincial public service, many of its provisions, including the impugned provisions, can only be explained and justified by the fact that the employment in question is

ques fédérales. Les appellants craignent que l'exercice de ces activités politiques n'ait pour effet de les exposer à des mesures disciplinaires conformément à *The Public Service Act*. Une requête visant à obtenir une ordonnance déclarant inconstitutionnels les art. 12 à 16 de la Loi a été entendue avant l'entrée en vigueur de la *Charte* et était fondée simplement sur le partage des pouvoirs. La requête a été rejetée par le juge Labrosse. La Cour d'appel a confirmé cette décision et le raisonnement sous-jacent selon lequel la compétence provinciale reposait sur le par. 92(13). Les trois questions constitutionnelles formulées devant la Cour suprême du Canada portaient sur les art. 12 à 16 de *The Public Service Act*. Ces articles sont-ils inconstitutionnels ou inopérants du fait (1) qu'ils ont pour objet d'interdire aux fonctionnaires provinciaux et aux employés de Sa Majesté d'exercer certaines activités politiques au niveau fédéral, (2) qu'ils portent atteinte aux art. 2 et 3 ou le par. 15(1) de la *Charte*, et (3) dans l'affirmative, sont-ils justifiés en vertu de l'article premier de la *Charte*? Après que cette Cour eut décidé, relativement à une question préliminaire, qu'elle n'entendrait pas et ne trancherait pas les questions concernant la *Charte*, l'affaire a été entendue en fonction d'arguments fondés sur le partage des pouvoirs législatifs ainsi que d'un argument fondé sur certaines déclarations contenues dans l'arrêt *Fraser c. Commission des relations de travail dans la Fonction publique*, [1985] 2 R.C.S 455.

Arrêt: Le pourvoi est rejeté et la première question constitutionnelle reçoit une réponse négative.

Les juges Beetz, McIntyre, Le Dain et La Forest: Les dispositions contestées constituent une modification législative ordinaire de la constitution de l'Ontario au sens du par. 92(1) de la *Loi constitutionnelle de 1867*, et elles ont également trait à la durée des charges provinciales au sens du par. 92(4). Ces dispositions ne peuvent être justifiées du point de vue constitutionnel pour le seul motif qu'elles constituent, de par leur caractère véritable, des dispositions en matière de relations de travail et qu'elles relèvent, par conséquent, de la propriété et des droits civils dans la province. Les dispositions contestées n'ont rien à voir avec le domaine des élections fédérales.

Dans la mesure où on peut dire que cette loi confère aux résidents de l'Ontario des droits, individuels ou collectifs, d'avoir une fonction publique impartiale, ces droits sont non pas civils, mais plutôt publics ou politiques. Bien que la Loi réglemente d'une manière générale l'embauchage, le congédiement et les conditions de travail dans la fonction publique provinciale, un bon nombre de ses dispositions, y compris les dispositions contestées, ne peuvent s'expliquer et se justifier que par

SEFPO c. Ontario (*Procureur général*), [1987] 2 R.C.S. 2

4

OPSEU v. ONTARIO (ATTORNEY GENERAL)

[1987] 2 S.C.R.

public employment. They cannot, therefore, be grounded only in s. 92(13) of the *Constitution Act, 1867* but can be fully grounded in s. 92(1) and (4).

The constitution of Ontario is not to be found in a comprehensive, written instrument called a constitution. An enactment can generally be considered as an amendment of the constitution of a province when it bears on the operation of an organ of the government of the province, provided it is not otherwise entrenched as being indivisibly related to the implementation of the federal principle or to a fundamental term or condition of the union, and provided of course it is not explicitly or implicitly excepted from the amending power bestowed upon the province by s. 92(1), such as the offices of Lieutenant-Governor and of the Queen. The fact that a province can validly give legislative effect to a prerequisite condition of responsible government does not necessarily mean it can do anything it pleases with the principle of responsible government itself. Thus, it is uncertain, to say the least, that a province could touch upon the power of the Lieutenant-Governor to dissolve the legislature, or his power to appoint and dismiss ministers, without unconstitutionally touching his office itself. The principle of responsible government could, to the extent that it depends on those important royal powers, be entrenched to a substantial extent. The power of constitutional amendment given to the provinces by s. 92(1) does not necessarily comprise the power to bring about a profound constitutional upheaval by the introduction of political institutions foreign to and incompatible with the Canadian system.

The provisions impugned here are constitutional for they bear on the operation of the Ontario Public Service, which is an organ of government, and they impose on its members the duty to abstain from certain political activities in order to implement the principle of impartiality of the public service which is considered as an essential prerequisite of responsible government. It can similarly be said that the public service in Ontario is a part of the executive branch of the government of Ontario.

The impugned provisions are not related to the exclusively federal subject of federal elections. Rather than affecting federal elections *per se*, these provisions create a disability from membership in the Ontario Public Service, thereby affecting a provincially created relationship.

le fait que l'emploi en question est un emploi public. Elles ne peuvent donc être fondées uniquement sur le par. 92(13) de la *Loi constitutionnelle de 1867*, mais elles peuvent être entièrement fondées sur les par. 92(1) et (4).

a La constitution de l'Ontario ne se trouve pas dans un document complet appelé constitution. Une disposition peut généralement être considérée comme une modification de la constitution d'une province lorsqu'elle porte b sur le fonctionnement d'un organe du gouvernement de la province, pourvu qu'elle ne soit pas par ailleurs intangible parce qu'indivisiblement liée à la mise en œuvre du principe fédéral ou à une condition fondamentale de l'union et pourvu évidemment qu'elle ne soit pas explicitement ou implicitement exemptée du pouvoir de modification que le par. 92(1) accorde à la province comme, par exemple, les charges de lieutenant-gouverneur et de souverain. Le fait qu'une province puisse légitimement conférer un effet législatif à une condition préalable d'un gouvernement responsable ne signifie pas nécessairement qu'elle peut faire tout ce qu'il lui plaît du principe du gouvernement responsable lui-même. Ainsi, il n'est pas certain, à tout le moins, qu'une province puisse toucher au pouvoir du lieutenant-gouverneur de dissoudre l'assemblée législative, ou à son pouvoir de nommer et de destituer les ministres, sans toucher de manière inconstitutionnelle à sa charge elle-même. Le principe du gouvernement responsable pourrait, dans la mesure où il est fonction de ces pouvoirs royaux importants, être en grande partie intangible. Le pouvoir de modification constitutionnelle que le par. 92(1) accorde aux provinces ne comprend pas nécessairement le pouvoir de provoquer des bouleversements constitutionnels profonds par l'introduction d'institutions politiques étrangères et incompatibles avec le système canadien.

b Les dispositions contestées en l'espèce sont de nature constitutionnelle en ce sens qu'elles portent sur le fonctionnement de la fonction publique de l'Ontario, qui est un organe du gouvernement, et elles imposent à ses membres l'obligation de s'abstenir d'exercer certaines h activités politiques afin de mettre en œuvre le principe de l'impartialité de la fonction publique considérée comme une condition essentielle à l'existence d'un gouvernement responsable. On peut dire de la même manière que la fonction publique en Ontario fait partie i de l'exécutif du gouvernement de l'Ontario.

j Les dispositions contestées n'ont rien à voir avec le chef de compétence fédérale exclusive que sont les élections fédérales. Ces dispositions ne touchent pas aux élections fédérales en soi, elles créent plutôt une incapacité de faire partie de la fonction publique de l'Ontario, portant ainsi atteinte à une relation créée par la province.

SEFPO c. Ontario (Procureur général), [1987] 2 R.C.S. 2[1987] 2 R.C.S.SEFPO C. ONTARIO (PROCUREUR GÉNÉRAL)

5

This disability extended to federal elections in order to ensure global political independence for provincial officers. The object of political discourse, the ultimate form of political activity, remains indivisible even in federations with divided jurisdictions. Political activities in the federal field, therefore, had to be included in the impugned provisions to ensure the impartiality of the provincial public service. The alternative would have made the legislation miss its target altogether. The aim of the legislation, far from violating the federal principle, was to reinforce it and to secure the operation of responsible government within a federal framework; its effects on federal political activities were necessarily incidental. The constitutional validity of the impugned provisions may also be supported under s. 92(4) of the *Constitution Act, 1867*, which in any event buttresses the argument already made under s. 92(1).

In a distribution of powers case, once it is demonstrated that the enacting legislature is competent, the balancing of conflicting values depends on the political judgment of such legislature and cannot be reviewed by the courts without their passing upon the wisdom of the legislation.

The fundamental right in Canada to participate in certain political activities is not infringed by the impugned legislation; federal and provincial elections are only affected in an incidental way. The basic structure of the Constitution established by the *Constitution Act, 1867* contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels. Neither Parliament nor the provincial legislatures may enact legislation which would substantially interfere with the operation of this basic structure. Quite apart from *Charter* considerations, the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them.

Per Dickson C.J.: *The Public Service Act* is directed to the general regulation of the hiring, dismissal, and terms and conditions of employment in the public service and in essence governs the establishment, functions, responsibilities and employment relationships of the Ontario Public Service. Viewed in its entirety, it is easily and explicitly authorized by s. 92(4) of the *Constitution Act, 1867* concerning provincial offices and appointments. The Act, which deals with many of the traditional components of an employer-employee relationship, also falls within the province's property and civil rights power, since labour relations has long been a subject

Cette incapacité s'étend aux élections fédérales en vue d'assurer l'indépendance politique globale des fonctionnaires provinciaux. L'objet du débat politique, la forme ultime d'activité politique, demeure indivisible même dans une fédération qui présente des compétences partagées. Il fallait donc inclure dans les dispositions contestées les activités politiques liées au domaine fédéral pour assurer l'impartialité de la fonction publique provinciale, sinon la mesure législative aurait complètement raté son objectif. Loin de violer le principe fédéral, les dispositions en cause visent à la renforcer et à assurer le fonctionnement d'un gouvernement responsable à l'intérieur d'un régime fédéral; leur effet sur les activités politiques fédérales est nécessairement accessoire. La constitutionnalité des dispositions contestées peut aussi être étayée en vertu du par. 92(4) de la *Loi constitutionnelle de 1867* qui, en tout état de cause, appuie l'argument déjà soumis en vertu du par. 92(1).

Dans une affaire de partage des pouvoirs, lorsqu'on a démontré que le législateur a agi dans les limites de sa compétence, l'établissement de l'équilibre entre des valeurs contradictoires repose sur le jugement politique de ce législateur et ne peut pas être révisé par les tribunaux sans qu'ils examinent la sagesse de la mesure législative.

Les dispositions contestées ne violent pas le droit fondamental, qui existe au Canada, de participer à certaines activités politiques; les élections fédérales et provinciales ne sont touchées que d'une façon accessoire. La structure fondamentale de la Constitution établie par la *Loi constitutionnelle de 1867* envisage l'existence de certaines institutions politiques dont des corps législatifs librement élus aux niveaux fédéral et provincial. Ni le Parlement ni les législatures provinciales ne peuvent légitimer de façon à porter atteinte sensiblement au fonctionnement de cette structure fondamentale. Indépendamment de considérations fondées sur la *Charte*, les corps législatifs dans notre pays doivent se conformer à ces impératifs structurels fondamentaux et ne doivent en aucun cas y passer outre.

Le juge en chef Dickson: *The Public Service Act* a pour objet de réglementer, d'une manière générale, l'embauchage, le congédiement et les conditions de travail dans la fonction publique et elle porte essentiellement sur la création, le rôle et les responsabilités de la fonction publique de l'Ontario, ainsi que sur les relations de travail au sein de cet organisme. Dans son ensemble, elle est explicitement autorisée par le par. 92(4) de la *Loi constitutionnelle de 1867*, concernant les charges provinciales et les nominations. La Loi, qui traite d'un bon nombre d'éléments traditionnels des rapports employeur-employé, relève également de la compétence

SEFPO c. Ontario (*Procureur général*), [1987] 2 R.C.S. 2

6

OPSEU v. ONTARIO (ATTORNEY GENERAL)

[1987] 2 S.C.R.

matter generally within provincial jurisdiction under s. 92(13). Constitutional authority granted under s. 92(4) and (13) extends to the specific prohibitions against political activity in ss. 12-16 of the Act. There was no reason, given the Act's validity as a whole under both s. 92(4) and (13), to consider s. 92(1) with the attendant difficulties of assigning a precise content to the concept of "a provincial constitution".

The doctrine of interjurisdictional immunity is not a particularly compelling doctrine given its inconsistency with the basic pith and substance doctrine that a law "in relation to" a provincial matter may validly "affect" a federal matter. Furthermore Parliament, while it can easily enact appropriate laws effecting paramountcy over conflicting provincial laws, has not done so here. The Court, in light of the federal government's intervention in support of the Ontario law and its legislation based on the same constitutional approach adopted by Ontario, should be particularly cautious about invalidating a provincial law.

Appellants argued that the prohibitions were overbroad in that the prohibitions applied to all civil servants without distinguishing between the types of jobs performed and that they covered too wide a range of political activities. Overreach in the sense here used is not arguable in a distribution of powers case.

Appellants also argued, relying on a statement in *Fraser v. Public Service Staff Relations Board*, that Canadian constitutional jurisprudence recognized the existence of certain fundamental political rights and freedoms in the citizens to participate in federal political activities. Freedom of speech and expression is a fundamental animating value in the Canadian constitutional system. No single value, however, no matter how exalted, can bear the full burden of upholding a democratic system of government and some underlying and important values may even conflict. It would be inappropriate to enter into a detailed application of the *Fraser* principles to the facts of the present case because none of the individual appellants has actually been subjected to disciplinary proceedings.

Per Lamer J.: The *Public Service Act* is authorized by s. 92(4) of the *Constitution Act, 1867*; there was no need to consider s. 92(1) or (13).

provinciale en matière de propriété et de droits civils puisque les relations de travail constituent depuis longtemps une matière qui est généralement du ressort des provinces en vertu du par. 92(13). La constitutionnalité en vertu des par. 92(4) et (13) s'applique aux interdictions expresses d'exercer des activités politiques, que l'on trouve aux art. 12 à 16 de la Loi. Étant donné que la Loi dans son ensemble est valide en vertu des par. 92(4) et (13), il n'y a aucune raison d'examiner le par. 92(1) étant donné la difficulté que pose l'attribution d'un sens précis à la notion de «constitution provinciale».

Le principe de l'exclusivité des compétences n'est pas un principe particulièrement impérieux étant donné son incompatibilité avec le principe fondamental du caractère véritable suivant lequel une loi «relative à» une matière provinciale peut régulièrement «toucher» une matière fédérale. En outre, bien que le Parlement puisse facilement adopter des lois appropriées qui l'emporteraient sur les lois provinciales incompatibles, il ne l'a pas fait en l'espèce. Étant donné que le gouvernement fédéral est intervenu pour appuyer la loi ontarienne et qu'il a lui-même adopté une loi fondée sur le même point de vue constitutionnel que celui adopté par l'Ontario, le Cour devrait se montrer particulièrement réticente à invalider une loi provinciale.

Les appellants ont soutenu que les interdictions sont de portée trop large étant donné qu'elles s'appliquent à tous les fonctionnaires sans distinguer entre les types d'emplois qu'ils occupent, et qu'elles visent une gamme trop large d'activités politiques. La portée trop large au sens où on l'entend ici n'est pas plaidable dans une affaire ayant trait au partage des pouvoirs.

Invoquant une déclaration contenue dans l'arrêt *Fraser c. Commission des relations de travail dans la Fonction publique*, les appellants font également valoir que la jurisprudence canadienne en matière constitutionnelle reconnaît l'existence de certains droits et libertés politiques fondamentaux qui permettent aux citoyens de participer aux activités politiques fédérales. La liberté de parole et d'expression représente une valeur fondamentale qui anime le régime constitutionnel canadien. Toutefois, aucune valeur, si noble soit-elle, ne peut à elle seule permettre de soutenir un régime de gouvernement démocratique et il peut même arriver que certaines valeurs fondamentales entrent en conflit. Il ne conviendrait guère de procéder à une application détaillée des principes énoncés dans l'arrêt *Fraser* aux faits de la présente affaire puisqu'aucun des appellants n'a fait l'objet de mesures disciplinaires.

Le juge Lamer: The *Public Service Act* est autorisée par le par. 92(4) de la *Loi constitutionnelle de 1867*; il n'est pas nécessaire d'examiner les par. 92(1) ou (13).

SEFPO c. Ontario (Procureur général), [1987] 2 R.C.S. 2

[1987] 2 R.C.S.

SEFPO C. ONTARIO (PROCUREUR GÉNÉRAL)

7

Cases Cited

By Beetz J.

Considered: *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455; *In re Initiative and Referendum Act*, [1919] A.C. 935; **distinguished:** *McKay v. The Queen*, [1965] S.C.R. 798, reversing [1964] 1 O.R. 641, reversing [1963] 2 O.R. 162; **referred to:** *Re United Glass & Ceramic Workers of North America and Domglas Ltd.* (1978), 19 O.R. (2d) 353; *Maritime Bank of Canada (Liquidators of) v. Receiver-General of New Brunswick*, [1892] App. Cas. 437; *Attorney-General of Ontario v. Mercer* (1883), 8 App. Cas. 767; *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753; *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016, affirming [1978] C.A. 351; *R. v. Ulmer*, [1923] 1 W.W.R. 1, 1 D.L.R. 304; *Fielding v. Thomas*, [1896] A.C. 600; *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182; *Valin v. Langlois* (1879), 5 A.C. 115, affirming (1879), 3 S.C.R. 1; *Attorney-General for Canada v. Attorney-General for Ontario*, [1898] A.C. 247; *Lenoir v. Ritchie* (1879), 3 S.C.R. 575; *Reference re Minimum Wage Act of Saskatchewan*, [1948] S.C.R. 248; *Johannesson v. Municipality of West St. Paul*, [1952] 1 S.C.R. 292; *Attorney General of Quebec and Keable v. Attorney General of Canada*, [1979] 1 S.C.R. 218; *Reference re Alberta Statutes*, [1938] S.C.R. 100; *Switzman v. Elbling*, [1957] S.C.R. 285.

By Dickson C.J.

Overruled: *McKay v. The Queen*, [1965] S.C.R. 798; **referred to:** *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455; *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396; *John Deere Plow Co. v. Wharton*, [1915] A.C. 330; *Great West Saddlery Co. v. The King*, [1921] 2 A.C. 91; *Attorney-General for Manitoba v. Attorney-General for Canada (Manitoba Securities Case)*, [1929] A.C. 260; *Commission du Salaire Minimum v. Bell Telephone Co.*, [1966] S.C.R. 767; *Walter v. Attorney General of Alberta*, [1969] S.C.R. 383; *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695; *Attorney General of Quebec v. Kellogg's Co. of Canada*, [1978] 2 S.C.R. 211; *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Oil Chemical and Atomic Workers International Union v. Imperial Oil Ltd.*, [1963] S.C.R. 584; *Re C.F.R.B. and Attorney-General for Canada*, [1973] 3 O.R. 819; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

Jurisprudence

Citée par le juge Beetz

Arrêts examinés: *Fraser c. Commission des relations de travail dans la Fonction publique*, [1985] 2 R.C.S. 455; *In re Initiative and Referendum Act*, [1919] A.C. 935; **distinction d'avec l'arrêt:** *McKay v. The Queen*, [1965] R.C.S. 798, infirmant [1964] 1 O.R. 641, infirmant [1963] 2 O.R. 162; **arrêts mentionnés:** *Re United Glass & Ceramic Workers of North America and Domglas Ltd.* (1978), 19 O.R. (2d) 353; *Maritime Bank of Canada (Liquidators of) v. Receiver-General of New Brunswick*, [1892] App. Cas. 437; *Attorney-General of Ontario v. Mercer* (1883), 8 App. Cas. 767; *Renvoi: Résolution pour modifier la Constitution*, [1981] 1 R.C.S. 753; *Procureur général du Québec c. Blaikie*, [1979] 2 R.C.S. 1016, confirmant [1978] C.A. 351; *R. v. Ulmer*, [1923] 1 W.W.R. 1, 1 D.L.R. 304; *Fielding v. Thomas*, [1896] A.C. 600; *Jones c. Procureur général du Nouveau-Brunswick*, [1975] 2 R.C.S. 182; *Valin v. Langlois* (1879), 5 A.C. 115, confirmant (1879), 3 R.C.S. 1; *Attorney-General for Canada v. Attorney-General for Ontario*, [1898] A.C. 247; *Lenoir v. Ritchie* (1879), 3 R.C.S. 575; *Reference re Minimum Wage Act of Saskatchewan*, [1948] R.C.S. 248; *Johannesson v. Municipality of West St. Paul*, [1952] 1 R.C.S. 292; *e Procureur général du Québec et Keable c. Procureur général du Canada*, [1979] 1 R.C.S. 218; *Reference re Alberta Statutes*, [1938] R.C.S. 100; *Switzman v. Elbling*, [1957] R.C.S. 285.

f Citée par le juge en chef Dickson

Arrêt rejeté: *McKay v. The Queen*, [1965] R.C.S. 798; **arrêts mentionnés:** *Fraser c. Commission des relations de travail dans la Fonction publique*, [1985] 2 R.C.S. 455; *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396; *John Deere Plow Co. v. Wharton*, [1915] A.C. 330; *Great West Saddlery Co. v. The King*, [1921] 2 A.C. 91; *Attorney-General for Manitoba v. Attorney-General for Canada (l'affaire des valeurs mobilières du Manitoba)*, [1929] A.C. 260; *Commission du Salaire Minimum v. Bell Telephone Co.*, [1966] R.C.S. 767; *Walter v. Attorney General of Alberta*, [1969] R.C.S. 383; *Cardinal c. Procureur général de l'Alberta*, [1974] R.C.S. 695; *Procureur général du Québec c. Kellogg's Co. of Canada*, [1978] 2 R.C.S. 211; *Construction Montcalm Inc. c. Commission du salaire minimum*, [1979] 1 R.C.S. 754; *Four B Manufacturing Ltd. c. Travailleurs unis du vêtement d'Amérique*, [1980] 1 R.C.S. 1031; *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161; *Oil Chemical and Atomic Workers International Union v. Imperial Oil Ltd.*, [1963] R.C.S. 584; *Re C.F.R.B. and Attorney-General for Canada*, [1973] 3 O.R. 819; *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573.

SEFPO c. Ontario (Procureur général), [1987] 2 R.C.S. 2

8

OPSEU v. ONTARIO (ATTORNEY GENERAL)

[1987] 2 S.C.R.

By Lamer J.

Overruled: McKay v. The Queen, [1965] S.C.R. 798.**Statutes and Regulations Cited**

Canada Elections Act, R.S.C. 1970 (1st Supp.), c. 14.
Canada Elections Act, S.C. 1960, c. 39, s. 71.
Canadian Charter of Rights and Freedoms, ss. 2, 3, 15(1).
Constitution Act, 1867, ss. 58-70, 82-87, 91, 92(1), (4), (13).
Constitution Act, 1982, s. 45.
Crown Employees Collective Bargaining Act, 1972, S.O. 1972, c. 67.
Executive Council Act, R.S.O. 1970, c. 153.
Legislative Assembly Act, R.S.O. 1970, c. 240.
Official Languages Act, R.S.C. 1970, c. O-2.
Public Service Act, R.S.O. 1970, c. 386, ss. 2, 3, 10, 12(1), (2), (3), (4), (5), 13(1), (2), 14, 15, 16, 23, 24, 26, 27, 28, 28a, now R.S.O. 1980, c. 418.
Public Service Employment Act, R.S.C. 1970, c. P-32, s. 32.
Representation Act, R.S.O. 1970, c. 413.

Authors Cited

Clement, W. H. P. *The Law of the Canadian Constitution*, 2nd ed. Toronto: Carswells, 1904.
Garant, Patrice. *La fonction publique canadienne et québécoise*. Québec: Presses de l'Université Laval, 1973.
Hogg, Peter W. *Constitutional Law of Canada*, 2nd ed. Toronto: Carswells, 1985.

APPEAL from a judgment of the Ontario Court of Appeal (1980), 31 O.R. (2d) 321, 118 D.L.R. (3d) 661, dismissing an appeal from a judgment of Labrosse J. (1979), 24 O.R. (2d) 324, 98 D.L.R. (3d) 168. Appeal dismissed; the first constitutional question is answered in the negative.

Stephen T. Goudge and Ian McGilp, for the appellants.

Blenus Wright and Carol Creighton, for the respondent.

Graham R. Garton, for the intervenor the Attorney General of Canada.

Réal A. Forest and Alain Gingras, for the intervenor the Attorney General of Quebec.

William M. Wilson, for the intervenor the Attorney General of Nova Scotia.

Citéé par le juge Lamer

Arrêt rejeté: McKay v. The Queen, [1965] R.C.S. 798.**a Lois et règlements cités**

Charte canadienne des droits et libertés, art. 2, 3, 15(1).
Crown Employees Collective Bargaining Act, 1972, S.O. 1972, chap. 67.
Executive Council Act, R.S.O. 1970, chap. 153.
Legislative Assembly Act, R.S.O. 1970, chap. 240.
Loi constitutionnelle de 1867, art. 58 à 70, 82 à 87, 91, 92(1), (4), (13).
Loi constitutionnelle de 1982, art. 45.
Loi électorale du Canada, S.C. 1960, chap. 39, art. 71.
c *Loi électorale du Canada*, S.R.C. 1970 (1^{re} supp.), chap. 14.
Loi sur l'emploi dans la Fonction publique, S.R.C. 1970, chap. P-32, art. 32.
Loi sur les langues officielles, S.R.C. 1970, chap. O-2.
Public Service Act, R.S.O. 1970, chap. 386, art. 2, 3, 10, 12(1), (2), (3), (4), (5), 13(1), (2), 14, 15, 16, 23, 24, 26, 27, 28, 28a, maintenant R.S.O. 1980, chap. 418.
Representation Act, R.S.O. 1970, chap. 413.

Doctrine citée

e Clement, W. H. P. *The Law of the Canadian Constitution*, 2nd ed. Toronto: Carswells, 1904.
Garant, Patrice. *La fonction publique canadienne et québécoise*. Québec: Presses de l'Université Laval, 1973.
f Hogg, Peter W. *Constitutional Law of Canada*, 2nd ed. Toronto: Carswells, 1985.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1980), 31 O.R. (2d) 321, 118 D.L.R. (3d) 661, qui a rejeté l'appel d'un jugement du juge Labrosse (1979), 24 O.R. (2d) 324, 98 D.L.R. (3d) 168. Pourvoi rejeté; la première question constitutionnelle reçoit une réponse négative.

h Stephen T. Goudge et Ian McGilp, pour les appellants.

Blenus Wright et Carol Creighton, pour l'intimé.

i Graham R. Garton, pour l'intervenant le procureur général du Canada.

Réal A. Forest et Alain Gingras, pour l'intervenant le procureur général du Québec.

j William M. Wilson, pour l'intervenant le procureur général de la Nouvelle-Écosse.

SEFPO c. Ontario (Procureur général), [1987] 2 R.C.S. 2

[1987] 2 R.C.S.

SEFPO c. ONTARIO (PROCUREUR GÉNÉRAL) *Le Juge en chef*

9

Richard C. Speight, for the intervenor the Attorney General for New Brunswick.

Joseph J. Arvay, for the intervenor the Attorney General of British Columbia.

Robert G. Richards, for the intervenor the Attorney General for Saskatchewan.

William Henkel, Q.C., and *Robert J. Normey*, for the intervenor the Attorney General for Alberta.

The following are the reasons delivered by

THE CHIEF JUSTICE—This appeal involves an important area of constitutional law, namely, the scope of provincial jurisdiction to regulate certain political activities of provincial civil servants and Crown employees.

I

The Facts

The Ontario Public Service Employees' Union is bargaining agent for approximately 50,000 employees of the Government of Ontario who are subject to *The Public Service Act*, R.S.O. 1970, c. 386, now R.S.O. 1980, c. 418, of that province. Marie Wilkinson is employed by the Ontario Ministry of Community and Social Services as a counsellor at a centre for the care of the mentally retarded. Edward Faulknor is employed by the Ontario Ministry of Revenue as an assessor. Russell Smith is employed by the Ministry of Natural Resources as a laboratory technician.

Each of the individual appellants is a Crown employee, a civil servant and a member of the appellant union. Each individual appellant wishes to engage in political activities currently prohibited by *The Public Service Act*, including: running for election to Parliament without taking a leave of absence; canvassing and soliciting funds on behalf of federal political parties; and expressing opinions in public on federal political issues. The appellants are concerned that pursuit of these political activi-

Richard C. Speight, pour l'intervenant le procureur général du Nouveau-Brunswick.

Joseph J. Arvay, pour l'intervenant le procureur général de la Colombie-Britannique.

Robert G. Richards, pour l'intervenant le procureur général de la Saskatchewan.

William Henkel, c.r., et *Robert J. Normey*, pour l'intervenant le procureur général de l'Alberta.

Version française des motifs rendus par

LE JUGE EN CHEF—Ce pourvoi touche à un domaine important du droit constitutionnel, savoir celui de la portée de la compétence des provinces pour réglementer certaines activités politiques des fonctionnaires et des employés provinciaux de Sa Majesté.

I

Les faits

Le Syndicat des employés de la Fonction publique de l'Ontario est l'agent négociateur d'environ 50 000 employés du gouvernement de l'Ontario qui sont assujettis à la loi de cette province, dite *The Public Service Act*, R.S.O. 1970, chap. 386, maintenant R.S.O. 1980, chap. 418. Marie Wilkinson est employée par le ministère des Services sociaux et communautaires de l'Ontario en tant que conseillère en réadaptation dans un centre pour déficients mentaux. Edward Faulknor travaille pour le ministère du Revenu de l'Ontario en tant que contrôleur des contributions. Russell Smith occupe le poste de technicien de laboratoire au ministère des Richesses naturelles.

Chacun des appellants est un employé de Sa Majesté, un fonctionnaire et un membre du syndicat appelant. Chacun d'eux souhaite exercer des activités politiques présentement interdites par *The Public Service Act*, dont: la possibilité de se porter candidat à des élections fédérales sans avoir à prendre un congé à cette fin, celle de faire du démarchage et de solliciter des fonds pour des partis politiques fédéraux et celle de prendre position publiquement sur des questions politiques fédérales. Les appellants craignent que l'exercice de ces activités politiques n'ait pour effet de les

SEFPO c. Ontario (*Procureur général*), [1987] 2 R.C.S. 2

36

OPSEU v. ONTARIO (ATTORNEY GENERAL) Beetz J.

[1987] 2 S.C.R.

my view, a public status which extends beyond the limits of civil rights.

There remains the category of Crown employees who are not included in the classified service. Their relationship with the Crown may well be governed by the law of contract, whether it be on an individual or on a collective basis, but the obligation to comply with the impugned provisions is not negotiable for them either and does not flow from their contract of employment. It is derived from the Act, a public law of Ontario which imposes this obligation upon them because they are employed in the service of the state.

We are not called upon to characterize the Act as a whole, as opposed to the impugned provisions. Yet it is worth observing that the only sections of the Act which can be considered as straight labour relations provisions are ss. 27, 28 and 28a which regulate the collective bargaining of the Ontario Provincial Police Force, a special case. The rest of the Act, a relatively short act comprising 32 sections, contains provisions several of which are not related directly or not related at all to labour relations. Thus, s. 1 is a definition section. Sections 2 and 3 provide for the composition and responsibility of the Civil Service Commission. I have already referred to s. 10 relating to oaths of office, secrecy and allegiance. Section 11 allows political activities in municipal elections at certain conditions, and provided that candidacies, services and activities be not affiliated with or sponsored by provincial or federal political parties. Sections 11, 12, 13, 14, 15 and 16 are the impugned provisions. Sections 23 and 24 provide for delegation of powers by deputy ministers and the Commission. I have already referred also to ss. 26, 27, 28 and 28a which relate to the labour relations of the Ontario Provincial Police Force. Finally, s. 29 confers broad regulatory powers to the Commission, subject to the approval of the Lieutenant-Governor in Council. The objects of these regulations comprise classifications for positions including salaries except classifications in which salaries are determined through bargaining pursuant to *The Crown Employees Collective Bargaining Act, 1972*, S.O.

Commission de la fonction publique et ils se voient conférer, en vertu de la Loi, un statut spécial et, à mon avis, public qui va au-delà des limites des droits civils.

^a Reste la catégorie des employés de Sa Majesté qui n'occupent pas un poste classifié dans la fonction publique. Leurs rapports avec Sa Majesté peuvent bien être régis par le droit des contrats.

^b que ce soit sur une base individuelle ou collective, mais eux non plus ne peuvent négocier l'obligation de se conformer aux dispositions contestées et cette obligation ne découle pas de leur contrat de travail. Elle découle de la Loi, une loi publique de l'Ontario qui leur impose cette obligation parce qu'ils sont au service de l'État.

^c On ne nous demande pas de qualifier la Loi dans son ensemble, par opposition aux dispositions contestées. Pourtant, il vaut la peine de souligner que les seuls articles de la Loi qui peuvent être considérés comme des dispositions qui portent directement sur les relations de travail sont les art. 27, 28 et l'al. 28a qui réglementent la négociation collective de la Sûreté de l'Ontario, un cas spécial. Le reste de la Loi, qui est relativement courte vu qu'elle ne compte que 32 articles, contient des dispositions dont plusieurs ne sont pas directement liées, ou ne sont pas liées du tout, aux relations de travail. Ainsi, l'article 1 est un article de définition. Les articles 2 et 3 prescrivent la composition et les attributions de la Commission de la fonction publique. J'ai déjà parlé de l'art. 10 qui a trait aux serments d'entrée en fonction, de discréption et d'allégeance. L'article 11 autorise les activités politiques lors d'élections municipales à certaines conditions et pourvu que les candidatures, les services et les activités ne soient pas rattachés à des partis politiques provinciaux ou fédéraux ni parrainés par ceux-ci. Les articles 11, 12, 13, 14, 15 et 16 sont les dispositions contestées. Les articles 23 et 24 prévoient la délégation de pouvoirs par les sous-ministres et la Commission. J'ai également déjà mentionné les art. 26, 27, 28 et l'al. 28a qui ont trait aux relations de travail de la Sûreté de l'Ontario. Enfin, l'art. 29 confère de larges pouvoirs de réglementation à la Commission, sous réserve de l'approbation du lieutenant-gouverneur en conseil. Ces règlements portent notamment sur les classifi-

SEFPO c. Ontario (*Procureur général*), [1987] 2 R.C.S. 2

[1987] 2 R.C.S.

SEFPO c. ONTARIO (PROCUREUR GÉNÉRAL) *Le juge Beetz*

37

1972, c. 67, defining overtime work, and the regulation of conduct of public servants, including the imposition of fines, removal from employment and demotion, and the designation of positions or classifications for the purpose of s. 11. Subsection 29(3) provides that a collective agreement prevails where it conflicts with a regulation.

Thus, the Act does contain some elements relating to labour relations, but they are not its chief characteristics as they are for instance in *The Crown Employees Collective Bargaining Act*, 1972.

While it can be said also that the Act provides for the general regulation of the hiring, dismissal and terms and conditions of employment of the provincial public service, many of its provisions, including the impugned provisions, can only be explained and justified by the fact that the employment in question is public employment. That is why they cannot in my opinion be grounded, or be grounded only in s. 92(13) of the *Constitution Act, 1867*. But they can be fully grounded in s. 92(1) and (4).

2. The Amendment of the Constitution of the Province

Section 92(1) of the *Constitution Act, 1867* provides for the process whereby the constitution of the province can be amended. This process is an ordinary law or statute of the provincial legislature. But the *Constitution Act, 1867* nowhere defines the expression "constitution of the province".

The constitution of Ontario, like that of the other provinces and that of the United Kingdom, but unlike that of many states, is not to be found in a comprehensive, written instrument called a constitution. It is partly contained in a variety of statutory provisions. Some of these provisions have been enacted by the Parliament at Westminster, such as ss. 58 to 70 and ss. 82 to 87 of the

cations de poste y compris les traitements à l'exception des classifications dans lesquelles les traitements sont fixés par voie de négociation conformément à *The Crown Employees Collective*

- Bargaining Act, 1972*, S.O. 1972, chap. 67, qui définit le travail en surtemps, et sur la réglementation de la conduite des fonctionnaires, y compris l'imposition d'amendes, le renvoi et la rétrogradation, ainsi que la désignation de postes ou de classifications aux fins l'art. 11. Le paragraphe 29(3) prévoit que la convention collective prévaut lorsqu'elle entre en conflit avec un règlement.

Ainsi, la Loi contient bien des éléments relatifs aux relations de travail, mais ils ne constituent pas ses caractéristiques principales comme c'est le cas par exemple dans *The Crown Employees Collective Bargaining Act, 1972*.

- d* Bien qu'on puisse également dire que la Loi réglemente d'une manière générale l'embauchage, le congédiement et les conditions de travail dans la fonction publique provinciale, un bon nombre de ses dispositions, y compris les dispositions contestées, ne peuvent s'expliquer et se justifier que par le fait que l'emploi en question est un emploi public. C'est pourquoi elles ne peuvent à mon avis être fondées, ou être fondées uniquement, sur le par. 92(13) de la *Loi constitutionnelle de 1867*. Mais elles peuvent être entièrement fondées sur les par. 92(1) et (4).

2. La modification de la constitution de la province

- g* Le paragraphe 92(1) de la *Loi constitutionnelle de 1867* prescrit la méthode par laquelle la constitution de la province peut être modifiée. Cette méthode consiste en l'adoption d'une loi ordinaire par la législature provinciale. Toutefois, la *Loi constitutionnelle de 1867* ne définit nulle part l'expression «constitution de la province».

- i* La constitution de l'Ontario, comme celle des autres provinces et du Royaume-Uni, mais contrairement à celle de nombreux États, ne se trouve pas dans un document complet appelé constitution. Elle se trouve en partie dans une variété de dispositions législatives. Certaines de ces dispositions ont été adoptées par le Parlement de Westminster, comme les art. 58 à 70 et 82 à 87 de la *Loi*

SEFPO c. Ontario (*Procureur général*), [1987] 2 R.C.S. 2

38

OPSEU v. ONTARIO (ATTORNEY GENERAL) Beetz J.

[1987] 2 S.C.R.

Constitution Act, 1867. Other provisions relating to the constitution of Ontario have been enacted by ordinary statutes of the Legislature of Ontario, for instance *The Legislative Assembly Act*, R.S.O. 1970, c. 240; *The Representation Act*, R.S.O. 1970, c. 413, and *The Executive Council Act*, R.S.O. 1970, c. 153.

Another part of the constitution of Ontario consists of the rules of the common law, developed or recognized over the years by the courts. Many of these common law rules concern the royal prerogative. For instance, they have put the Crown in right of the province in a preferred position as a creditor (*Maritime Bank of Canada (Liquidators of) v. Receiver-General of New Brunswick*, [1892] App. Cas. 437) and with respect to the inheritance of lands for defect of heirs (*Attorney-General of Ontario v. Mercer* (1883), 8 App. Cas. 767).

As was explained in *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, at pp. 876-78, with respect to the Constitution of Canada—but the same can generally be said of the constitution of Ontario—"those parts which are composed of statutory rules and common law rules are generically referred to as the law of the constitution". In addition, the constitution of Ontario comprises rules of a different nature but of great importance called conventions of the constitution. The most fundamental of these is probably the principle of responsible government which is largely unwritten, although it is implicitly referred to in the preamble of the *Constitution Act, 1867*, and one of its facets is articulated in s. 83 of this Act—possibly spent—which, in Ontario and Quebec, "Until the Legislature of Ontario or of Quebec otherwise provides", puts a restriction on the election of holders of offices other than ministerial offices.

If Ontario were a unitary state, like the United Kingdom, the question whether a given enactment forms part of its constitution or amends its constitution could be resolved in the affirmative by only one relatively simple test: is the enactment consti-

constitutionnelle de 1867. D'autres dispositions relatives à la constitution de l'Ontario ont été adoptées par voie de lois ordinaires de la législature de l'Ontario comme, par exemple, *The Legislative Assembly Act*, R.S.O. 1970, chap. 240, *The Representation Act*, R.S.O. 1970, chap. 413, et *The Executive Council Act*, R.S.O. 1970, chap. 153.

a Une autre partie de la constitution de l'Ontario est formée de règles de *common law*, énoncées ou reconnues au cours des ans par les tribunaux.

Plusieurs de ces règles de *common law* concernent la prérogative royale. Par exemple, elles ont placé

b Sa Majesté du chef de la province dans une situation privilégiée en tant que créancière (*Maritime Bank of Canada (Liquidators of) v. Receiver-General of New Brunswick*, [1892] App. Cas. 437) et en ce qui concerne l'héritage de terres à défaut

c d'héritiers (*Attorney-General of Ontario v. Mercer* (1883), 8 App. Cas. 767).

Une autre partie de la constitution de l'Ontario est formée de règles de *common law*, énoncées ou reconnues au cours des ans par les tribunaux.

Plusieurs de ces règles de *common law* concernent la prérogative royale. Par exemple, elles ont placé

d e Sa Majesté du chef de la province dans une situation privilégiée en tant que créancière (*Maritime Bank of Canada (Liquidators of) v. Receiver-General of New Brunswick*, [1892] App. Cas. 437) et en ce qui concerne l'héritage de terres à défaut

f g d'héritiers (*Attorney-General of Ontario v. Mercer* (1883), 8 App. Cas. 767).

Comme on l'explique dans le *Renvoi: Résolution pour modifier la Constitution*, [1981] 1 R.C.S.

h i 753, aux pp. 876 à 878, au sujet de la Constitution du Canada—mais de façon générale, on peut dire la même chose de la constitution de l'Ontario—

«On désigne du terme générique de droit constitutionnel les parties [...] qui sont formées de règles législatives et de règles de *common law*». En outre,

la constitution de l'Ontario comprend des règles d'une nature différente mais d'une grande importance appelées conventions de la constitution. La

j g plus fondamentale d'entre elles est probablement le principe du gouvernement responsable qui est en grande partie non écrit, bien qu'il soit mentionné

i h implicitement dans le préambule de la *Loi constitutionnelle de 1867* et qu'une de ses facettes soit

j ; formulée à l'art. 83 de cette loi, peut-être désuète, qui, en Ontario et au Québec, et «Jusqu'à ce que la

h Législature de l'Ontario ou du Québec en ordonne autrement», établit une restriction quant à l'élection de titulaires de charges autres que les charges de ministres.

Si l'Ontario était un État unitaire, comme le Royaume-Uni, la question de savoir si une disposition donnée fait partie de sa constitution ou la modifie pourrait recevoir une réponse affirmative par l'application d'un seul critère relativement

SEFPO c. Ontario (Procureur général), [1987] 2 R.C.S. 2

[1987] 2 R.C.S.

SEFPO C. ONTARIO (PROCUREUR GÉNÉRAL) *Le juge Beetz*

39

tutional in nature? In other words, is the enactment in question, by its object, relative to a branch of the government of Ontario or, to use the language of this Court in *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016, at p. 1024, does "it [bear] on the operation of an organ of the government of the Province"? Does it for instance determine the composition, powers, authority, privileges and duties of the legislative or of the executive branches or their members? Does it regulate the interrelationship between two or more branches? Or does it set out some principle of government? In a unitary state without a comprehensive written constitution, this test is the only one available.

Because Ontario, following the British model, is without a comprehensive written constitution, its laws do not qualify as constitutional laws unless they also satisfy first the test as to whether they are constitutional in nature.

This first test, however, even if *prima facie* satisfied, is not determinative of the issue whether an Ontario statute forms part of the constitution of Ontario or is an amendment of the constitution of Ontario, within the meaning of s. 92(1) of the *Constitution Act, 1867*. The main reason for the insufficiency of the first test is that Ontario is not a unitary state. It is an integral part of a federal one and provisions relating to the constitution of the federal state, considered as a whole, or essential to the implementation of the federal principle, are beyond the reach of the amending power bestowed upon the province by s. 92(1). An obvious example is the whole of s. 92 itself. With respect to Ontario, it is in a sense constitutional in nature in so far as it defines the legislative competence of the legislature of this province. But it also sets limits to the legislative competence of Parliament. It lies at the core of the scheme under which legislative competence is distributed in the federation. It forms part of the constitution of the federation considered as a whole rather than of the constitution of Ontario, within the meaning of s. 92(1) of the *Constitution Act, 1867*. Prior to 1982, that part of the constitution of the federation was

simple: la disposition est-elle de nature constitutionnelle? En d'autres termes, la disposition en question a-t-elle trait, de par son objet, à une branche du gouvernement de l'Ontario ou, pour reprendre les termes de cette Cour dans l'arrêt *Procureur général du Québec c. Blaikie*, [1979] 2 R.C.S. 1016, à la p. 1024, est-ce qu'elle «porte sur le fonctionnement d'un organe du gouvernement de la province»? Détermine-t-elle, par exemple, la composition, les pouvoirs, l'autorité, les priviléges et les fonctions des organes législatif ou exécutif ou de leurs membres? Réglemente-t-elle la corrélation entre deux ou plusieurs branches? Ou établit-elle quelque principe de gouvernement? Dans un État unitaire qui n'a pas de constitution écrite complète, ce critère est le seul applicable.

Parce que l'Ontario, à l'instar du modèle britannique, n'a pas de constitution écrite complète, ses lois ne peuvent être considérées comme des lois constitutionnelles à moins qu'elles ne satisfassent également au critère consistant à déterminer si elles sont de nature constitutionnelle.

Cependant, même si on y a satisfait à première vue, le premier critère n'est pas déterminant quant à la question de savoir si une loi de l'Ontario fait partie de la constitution de l'Ontario ou s'il s'agit d'une modification de la constitution de l'Ontario au sens du par. 92(1) de la *Loi constitutionnelle de 1867*. La raison principale de l'insuffisance du premier critère est que l'Ontario n'est pas un État unitaire. Elle fait partie intégrante d'un État fédéral et les dispositions relatives à la constitution de l'État fédéral, prises dans leur ensemble, ou essentielles à la mise en œuvre du principe fédéral échappent au pouvoir de modification que le par. 92(1) accorde à la province. L'ensemble de l'art. 92 lui-même en est un exemple évident. À l'égard de l'Ontario, il est en un sens de nature constitutionnelle dans la mesure où il définit la compétence législative de la législature de cette province. Mais il établit également des limites à la compétence législative du Parlement. Il se situe au cœur du régime en vertu duquel la compétence législative est partagée dans la fédération. Il fait partie de la constitution de la fédération considérée dans son ensemble plutôt que de la constitution de l'Ontario, au sens du par. 92(1) de la *Loi constitu-*

SEFPO c. Ontario (*Procureur général*), [1987] 2 R.C.S. 2

40

OPSEU v. ONTARIO (ATTORNEY GENERAL) Beetz J.

[1987] 2 S.C.R.

therefore entrenched in the sense that it could only be amended by the Parliament at Westminster, in accordance with constitutional conventions.

Furthermore, other provisions of the *Constitution Act, 1867* could be similarly entrenched and held to be beyond the reach of s. 92(1), not because they were essential to the implementation of the federal principle, but because, for historical reasons, they constituted a fundamental term or condition of the union formed in 1867. Thus, s. 133 of the *Constitution Act, 1867* was held in *Blaikie, supra*, to constitute such a provision and to be a "part of the Constitution of Canada and of Quebec in an indivisible sense" and not a part of the constitution of Quebec within s. 92(1).

To sum up, therefore, and subject to the *caveat* I will mention later, an enactment can generally be considered as an amendment of the constitution of a province when it bears on the operation of an organ of the government of the province, provided it is not otherwise entrenched as being indivisibly related to the implementation of the federal principle or to a fundamental term or condition of the union, and provided of course it is not explicitly or implicitly excepted from the amending power bestowed upon the province by s. 92(1), such as the office of Lieutenant-Governor and, presumably and *a fortiori*, the office of the Queen who is represented by the Lieutenant-Governor.

The above-described approach seems to me to be consistent with the line followed by this Court in *Blaikie, supra*, where it explicitly declined to adopt a narrower line. It had been held by the Appellate Division of the Alberta Supreme Court in *R. v. Ulmer*, [1923] 1 W.W.R. 1, 1 D.L.R. 304, and by the Quebec Court of Appeal in *Procureur général du Québec c. Blaikie*, [1978] C.A. 351, that s. 92(1) of the *Constitution Act, 1867* should be given a restricted meaning embracing only those provisions included under the number and heading V of the *Constitution Act, 1867*, entitled "Provincial Constitutions". This restrictive inter-

titionnelle de 1867. Avant 1982, cette partie de la constitution de la fédération était donc intangible, en ce sens qu'elle ne pouvait être modifiée que par le Parlement de Westminster conformément à des conventions constitutionnelles.

En outre, d'autres dispositions de la *Loi constitutionnelle de 1867* ont pu de même être intangibles et considérées comme échappant au par. 92(1), non pas parce qu'elles étaient essentielles à la mise en œuvre du principe fédéral, mais parce que, pour des raisons historiques, elles constituaient une condition fondamentale de l'union formée en 1867. Ainsi, dans l'arrêt *Blaikie*, précité, on a conclu que l'art. 133 de la *Loi constitutionnelle de 1867* était une disposition de ce genre et faisait «partie indivisiblement de la constitution du Canada et du Québec» et non pas partie de la constitution du Québec au sens du par. 92(1).

Pour résumer donc, et sous réserve de ce que je mentionnerai plus loin, une disposition peut généralement être considérée comme une modification de la constitution d'une province lorsqu'elle porte sur le fonctionnement d'un organe du gouvernement de la province, pourvu qu'elle ne soit pas par ailleurs intangible parce qu'indivisiblement liée à la mise en œuvre du principe fédéral ou à une condition fondamentale de l'union et pourvu évidemment qu'elle ne soit pas explicitement ou implicitement exemptée du pouvoir de modification que le par. 92(1) accorde à la province, comme par exemple la charge de lieutenant-gouverneur et, probablement et à plus forte raison, la charge de la souveraine qui est représentée par le lieutenant-gouverneur.

Le point de vue que je viens de décrire semble compatible avec celui adopté par cette Cour dans l'arrêt *Blaikie*, précité, où elle a explicitement refusé d'adopter une attitude plus stricte. La Division d'appel de la Cour suprême de l'Alberta, dans l'arrêt *R. v. Ulmer*, [1923] 1 W.W.R. 1, 1 D.L.R. 304, et la Cour d'appel du Québec, dans l'arrêt *Procureur général du Québec c. Blaikie*, [1978] C.A. 351, ont conclu qu'on devrait prêter au par. 92(1) de la *Loi constitutionnelle de 1867* un sens restreint qui engloberait seulement les dispositions figurant sous la rubrique V de la *Loi constitutionnelle de 1867*, intitulée «Constitu-

SEFPO c. Ontario (*Procureur général*), [1987] 2 R.C.S. 2

[1987] 2 R.C.S.

SEFPO c. ONTARIO (PROCUREUR GÉNÉRAL) *Le juge Beetz*

41

pretation could not be reconciled with *Fielding v. Thomas*, [1896] A.C. 600, where it had been held that the privileges and immunities of members of the Nova Scotia Legislative Assembly, and legislation giving immunity from civil liability in respect of words and conduct in the Assembly, were matters coming within s. 92(1). These matters could not conceivably be included under heading V of the *Constitution Act, 1867*. In *Blaikie, supra*, this Court had this to say about the question at pp. 1024-25:

The fact that *Fielding v. Thomas* concerned matters relating to the Constitution of the Province, in the sense that it bore on the operation of an organ of the government of the Province, does not help to establish the appellant's position as to the unlimited scope of s. 92(1). The latter may, of course, cover such changes as were dealt with in *Fielding v. Thomas* and, also, other matters not expressly covered by the *British North America Act* but implicit in the Constitution of the Province. That does not, however, carry the necessary conclusion that s. 133 is unilaterally amendable. Indeed, the argument goes too far because, as pressed, it would permit amendment of the catalogue of legislative powers in the succeeding catalogue of classes of subjects in s. 92 and this was not suggested. [Emphasis added.]

We must now apply these tests to the provisions impugned in the case at bar.

It is clear to me that those provisions are constitutional in nature in the sense that they bear on the operation of an organ of government in Ontario and that they impose duties on the members of a branch of government in order to implement a principle of government. The organ of government is the Ontario Public Service. The duty is the one imposed upon the members of the public service to abstain from the political activities contemplated by the impugned provisions. The principle of government is the impartiality of the public service considered as an essential prerequisite of responsible government.

In *Fraser, supra*, Dickson C.J., speaking for the full Court, stressed "the importance and necessity

tions des provinces». Cette interprétation restreinte ne pouvait être conciliée avec l'arrêt *Fielding v. Thomas*, [1896] A.C. 600, dans lequel on avait jugé que les priviléges et immunités des députés de

a l'assemblée législative de la Nouvelle-Écosse et les lois accordant l'immunité contre la responsabilité civile pour les paroles et la conduite devant l'Assemblée, étaient des matières visées par le par. 92(1). Ces matières ne pouvaient pas, en principe, b être incluses sous la rubrique V de la *Loi constitutionnelle de 1867*. Voici ce que cette Cour affirme à ce sujet dans l'arrêt *Blaikie*, précité, aux pp. 1024 et 1025:

c Le fait que l'arrêt *Fielding v. Thomas* touche à des questions relatives à la constitution de la province, dans la mesure où il porte sur le fonctionnement d'un organe du gouvernement de la province, n'appuie pas la thèse de l'appelant sur la portée illimitée du par. 92(1). Ce dernier peut évidemment viser des changements comme ceux qui font l'objet de l'arrêt *Fielding v. Thomas* ainsi que d'autres matières qui ne sont pas expressément régies par l'*Acte de l'Amérique du Nord britannique* mais font implicitement partie de la constitution de la province. Mais cela ne signifie pas nécessairement que l'art. 133 puisse être modifié unilatéralement. De fait, l'argument va trop loin car, ainsi qu'on l'a fait valoir, il permettrait de modifier la liste des pouvoirs législatifs compris dans l'énumération des catégories de sujets qui figure ensuite à l'art. 92, et l'on n'est pas allé jusqu'à avancer cette prétention. [Je souligne.]

Nous devons maintenant appliquer ces critères aux dispositions contestées en l'espèce.

g À mon avis, il est évident que ces dispositions sont de nature constitutionnelle en ce sens qu'elles portent sur le fonctionnement d'un organe du gouvernement en Ontario et qu'elles imposent aux membres d'un organe du gouvernement des obligations pour mettre en œuvre un principe de gouvernement. La fonction publique de l'Ontario est cet organe du gouvernement. L'obligation est celle qui est imposée aux membres de la fonction publique de s'abstenir d'exercer les activités politiques envisagées par les dispositions contestées. Le principe de gouvernement est l'impartialité de la fonction publique considérée comme une condition essentielle à l'existence d'un gouvernement responsable.

Dans l'arrêt *Fraser*, précité, le juge en chef Dickson, s'exprimant au nom de la Cour au com-

SEFPO c. Ontario (Procureur général), [1987] 2 R.C.S. 2

42

OPSEU v. ONTARIO (ATTORNEY GENERAL) *Beetz J.*

[1987] 2 S.C.R.

of an impartial and effective public service" at p. 469. He then continued as follows on the same page and on pp. 469-70:

There is in Canada a separation of powers among the three branches of government—the legislature, the executive and the judiciary. In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy.

The federal public service in Canada is part of the executive branch of Government. As such, its fundamental task is to administer and implement policy. In order to do this well, the public service must employ people with certain important characteristics. Knowledge is one, fairness another, integrity a third.

As the Adjudicator indicated, a further characteristic is loyalty. As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty owed is to the Government of Canada, not the political party in power at any one time. A public servant need not vote for the governing party. Nor need he or she publicly espouse its policies. [The underlining is mine.]

It can similarly be said that the public service in Ontario is a part of the executive branch of the government of Ontario. The ministers and the executive council of Ontario would be powerless and quite incapable of administering the province if they were deprived of the public service and left to their own device. The government of a large modern state is impossible to manage without a relatively large public service which effectively participates in the exercise of political power under the supervision of responsible ministers:

[TRANSLATION] However, while a public servant always remains a citizen he is also a servant of the State. As the holder of a small part of governmental authority and possessor of exceptional prerogatives at common law, the public servant shares in the exercise of power. This is indeed the reason that the State imposes a duty of loyalty and silence on him. Would not allowing public servants to exercise their political freedoms to the fullest risk compromising the action, even the very existence, of established governments, paralyze political control and weaken the confidence of individuals in government, if the public servant were to fail to demonstrate the impartiality of the government?

plet, souligne, à la p. 469, qu'il est «important et nécessaire d'avoir une fonction publique impartiale et efficace». Il ajoute alors, aux pp. 469 et 470:

Il existe au Canada une séparation des pouvoirs entre les trois branches du gouvernement—le législatif, l'exécutif et le judiciaire. En termes généraux, le rôle du judiciaire est, il va sans dire, d'interpréter et d'appliquer la loi; le rôle du législatif est de prendre des décisions et d'énoncer des politiques; le rôle de l'exécutif est d'administrer et d'appliquer ces politiques.

La fonction publique fédérale au Canada fait partie de l'exécutif du gouvernement. A ce titre, sa tâche fondamentale est d'administrer et d'appliquer les politiques. Pour bien accomplir sa tâche, la fonction publique doit employer des personnes qui présentent certaines caractéristiques importantes parmi lesquelles les connaissances, l'équité et l'intégrité.

Comme l'arbitre l'a indiqué, il existe une autre caractéristique qui est la loyauté. En règle générale, les fonctionnaires fédéraux doivent être loyaux envers leur employeur, le gouvernement du Canada. Ils doivent être loyaux envers le gouvernement du Canada et non envers le parti politique au pouvoir. Un fonctionnaire n'est pas tenu de voter pour le parti au pouvoir. Il n'est pas non plus tenu d'endosser publiquement ses politiques. [Je souligne.]

On peut dire de la même manière que la fonction publique en Ontario fait partie de l'exécutif du gouvernement de l'Ontario. Les ministres et le conseil exécutif de l'Ontario seraient impuissants et tout à fait incapables d'administrer la province s'ils étaient privés de la fonction publique et laissés à leurs propres moyens. Il est impossible de gouverner un grand État moderne sans une fonction publique relativement importante qui participe efficacement à l'exercice du pouvoir politique sous la surveillance de ministres responsables:

Cependant, si le fonctionnaire demeure toujours un citoyen il est aussi le serviteur de l'État. Détenteur d'une parcelle de la puissance publique, jouissant de prérogatives exorbitantes du droit commun, le fonctionnaire participe à l'exercice du pouvoir. C'est pour cette raison d'ailleurs que l'État lui impose l'obligation de loyauté et de réserve. Reconnaître au fonctionnaire le plein exercice de ses libertés politiques ne risquerait-il pas de compromettre l'action, voire l'existence même, des gouvernements en place, de paralyser la direction politique de la nation, d'ébranler la confiance des administrés dans l'administration advenant que le fonctionnaire se départisse de l'impartialité dont l'administration doit faire preuve?

SEFPO c. Ontario (*Procureur général*), [1987] 2 R.C.S. 2

[1987] 2 R.C.S.

SEFPO c. ONTARIO (PROCUREUR GÉNÉRAL) *Le juge Beetz*

43

(Patrice Garant, *La fonction publique canadienne et québécoise* (Québec 1973), at pp. 347-48.)

So much for the branch of government which is regulated by the impugned provisions. As for the principles of government which they purport to fulfil, I think that much of what the Ontario Court of Appeal had to say on the matter in the case at bar is apposite. MacKinnon A.C.J.O. wrote:

In Vol. II, Part 2, of *Law and Custom of the Constitution* (1908), Anson wrote at p. 69 that a principal feature of responsible government in colonial Canada was "the permanent tenure of office by the civil servant, and his exclusion from the Legislature". It was clearly the intention of those who framed the *British North America Act, 1867*, that responsible government should continue in Canada when they stated in the preamble to that Act that Canada was to have "a Constitution similar in Principle to that of the United Kingdom".

The history of the development of the Legislature's control over the civil service and the gradual emancipation of civil service appointment from political patronage is of importance in determining what conventions existed in this connection at the time of Confederation. It helps determine what was imported into Canada in this regard by the words "a Constitution similar in Principle to that of the United Kingdom".

In 1914 the MacDonnell Commission in the United Kingdom, in its report, pointed out that, as part of responsible government, it was necessary to impose upon civil servants some restraint on partisan political activities; this in turn would ensure and promote efficiency of public administration by civil servants. This view was adopted in 1949 by the Masterman Committee in its report on "The Political Activities of Civil Servants".

MacKinnon A.C.J.O. then quoted a passage of the MacDonnell Committee Report including the following one which was also quoted later by Dickson C.J. in *Fraser, supra*, at p. 471:

Speaking generally, we think that if restrictions on the political activities of public servants were withdrawn two results would probably follow. The public might cease to believe, as we think they do now with reason believe, in the impartiality of the permanent Civil Service; and Ministers might cease to feel the well-merited confidence which they possess at present in the loyal and faithful support of their official subordinates; indeed

(Patrice Garant, *La fonction publique canadienne et québécoise* (Québec 1973), aux pp. 347 et 348.)

Voilà en ce qui concerne la branche de gouvernement réglementée par les dispositions contestées. Quant aux principes de gouvernement qu'elles ont pour objet de favoriser, je pense qu'une bonne partie de ce qu'a dit la Cour d'appel de l'Ontario sur le sujet en l'espèce est juste. Le juge en chef adjoint MacKinnon écrit:

[TRADUCTION] Dans le volume II, partie 2 de l'ouvrage *Law and Custom of the Constitution* (1908), Anson écrit à la p. 69 qu'une caractéristique principale du gouvernement responsable dans le Canada colonial était «la permanence du fonctionnaire et son exclusion de la législature». Les rédacteurs de l'*Acre de l'Amérique du Nord britannique de 1867* ont clairement voulu que le gouvernement responsable se perpétue au Canada lorsqu'ils ont affirmé dans le préambule de cette loi que le Canada devait avoir «une constitution semblable dans son principe à celle du Royaume-Uni».

L'historique de l'évolution du contrôle de la législature sur la fonction publique et de l'affranchissement progressif, du patronage politique, des nominations dans la fonction publique est important pour déterminer quelles conventions existaient à cet égard à l'époque de la Confédération. Cela aide à déterminer ce qu'on a voulu dire au Canada à ce sujet par les mots «une constitution semblable dans son principe à celle du Royaume-Uni».

Au Royaume-Uni en 1914, la commission MacDonnell a souligné dans son rapport que, dans le cadre d'un gouvernement responsable, il était nécessaire d'imposer aux fonctionnaires des restrictions relativement aux activités politiques partisanes; cela permettrait d'assurer et de favoriser l'efficacité de l'administration publique par les fonctionnaires. Le comité Masterman a adopté ce point de vue en 1949 dans son rapport sur «The Political Activities of Civil Servants».

^h Le juge en chef adjoint MacKinnon cite alors un extrait du rapport du comité MacDonnell, dont le suivant repris plus tard par le juge en chef Dickson dans l'arrêt *Fraser*, précité, à la p. 471:

[TRADUCTION] D'une manière générale, nous croyons que si les restrictions relatives aux activités politiques des fonctionnaires devaient être levées, cela aurait probablement deux conséquences. Le public pourrait cesser de croire, comme nous pensons qu'il le fait maintenant avec raison, en l'impartialité de la fonction publique permanente; et les ministres pourraient cesser de sentir la confiance bien méritée qu'ils possèdent à l'heure

SEFPO c. Ontario (Procureur général), [1987] 2 R.C.S. 2

44

OPSEU v. ONTARIO (ATTORNEY GENERAL) *Beetz J.*

[1987] 2 S.C.R.

they might be led to scrutinise the utterances or writings of such subordinates, and to select for positions of confidence only those whose sentiments were known to be in political sympathy with their own.

If this were so, the system of recruitment by open competition would provide but a frail barrier against Ministerial patronage in all but the earlier years of service: the Civil Service would cease to be in fact an impartial, non-political body, capable of loyal service to all Ministers and parties alike; the change would soon affect the public estimation of the Service, and the result would be destructive of what undoubtedly is at present one of the greatest advantages of our administrative system, and one of the most honourable traditions of our public life.

MacKinnon A.C.J.O. continued:

The Masterman Committee, in its summary of conclusions, stated that "the political neutrality of the Civil Service is a fundamental feature of British democratic government and is essential for its efficient operation. It must be maintained even at the cost of some loss of political liberty by certain of those who elect to enter the Service". A subsequent committee on the subject in the United Kingdom (the Armitage Committee) reported in the same fashion in 1978.

MacKinnon A.C.J.O. then proceeded to make findings which in my view are as crucial as they are unassailable:

Clearly there was a convention of political neutrality of Crown servants at the time of Confederation and the reasoning in support of such convention has been consistent throughout the subsequent years. Whether it was honoured fully at that time in practice is irrelevant. The consideration is, as stated earlier, not as to the social desirability of the legislation but rather the fact that historically there was such a convention existing in 1867. It is difficult to take exception to Mr. Justice Labrosse's conclusion that: "Public confidence in the civil service requires its political neutrality and impartial service to whichever political party is in power" (p. 173 O.R., p. 328 D.L.R.). The impugned provisions seem to do no more than reflect the existing convention.

actuelle dans l'appui loyal et fidèle de leurs fonctionnaires: en fait, ils pourraient être portés à examiner à fond les paroles et les écrits de leurs subordonnés et à choisir pour occuper des postes de confiance, seulement ceux dont ils savent qu'ils partagent les mêmes sympathies politiques.

Si tel était le cas, le système de recrutement par concours public constituerait seulement une barrière fragile contre le népotisme ministériel au cours de toutes les années de service sauf au début: la fonction publique cesserait en fait d'être un organisme impartial, apolitique, capable de loyaux services envers tous les ministres et les partis; le changement aurait rapidement des effets sur l'opinion que le public se fait de la fonction publique et le résultat serait destructif à l'égard de ce qui est sans aucun doute, à l'heure actuelle, l'un des plus grands avantages de notre système administratif et l'une des traditions les plus honorables de notre vie publique.

d Le juge en chef adjoint MacKinnon poursuit:

[TRADUCTION] Dans le résumé de ses conclusions, le comité Masterman affirme que «la neutralité politique de la fonction publique est une caractéristique fondamentale du gouvernement démocratique britannique et est essentielle à son fonctionnement efficace. Elle doit être maintenue même au prix d'une certaine perte de liberté politique par certains de ceux qui choisissent d'entrer dans la fonction publique». Un comité ultérieur constitué pour étudier le sujet au Royaume-Uni (le comité Armitage) a conclu de la même façon en 1978.

Le juge en chef MacKinnon a alors tiré des conclusions qui, à mon avis, sont aussi cruciales qu'inattaquables:

[TRADUCTION] De toute évidence il existait une convention de neutralité politique des employés de Sa Majesté à l'époque de la Confédération et le raisonnement à l'appui de cette convention est demeuré le même tout au long des années qui ont suivi. Qu'elle fut complètement respectée à cette époque en pratique est sans importance. Ce qui importe, comme je l'ai déjà dit, ce n'est pas le caractère souhaitable des dispositions de la loi du point de vue social mais plutôt le fait que, historiquement, cette convention existait en 1867. Il est difficile de ne pas approuver la conclusion de M. le juge Labrosse selon laquelle «La confiance du public dans la fonction publique exige sa neutralité politique et son impartialité dans la prestation de ses services, peu importe le parti politique au pouvoir» (p. 173 O.R., p. 328 D.L.R.) Les dispositions contestées semblent ne faire rien de plus que refléter la convention existante.

SEFPO c. Ontario (*Procureur général*), [1987] 2 R.C.S. 2

[1987] 2 R.C.S.

SEFPO c. ONTARIO (PROCUREUR GÉNÉRAL) *Le juge Beetz*

45

I agree with these findings. I would however express the last one in more positive terms: to me, the impugned provisions do not merely seem to reflect the existing convention; they clearly give it the additional force and precision of legislative effect, and they are constitutional provisions by nature and *prima facie* competent under s. 92(1) of the *Constitution Act, 1867*.

I do not think that this *prima facie* conclusion can be altered by the negative parts of the above-described tests.

Far from violating a fundamental term or condition of the union as was the case in *Blaikie, supra*, the impugned provisions give additional legislative effect to one of its basic tenets, the principle of responsible government. In this respect, the impugned provisions bear a closer relationship to those of the federal *Official Languages Act*, R.S.C. 1970, c. O-2, found constitutionally valid by this Court in *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182.

I do not think either that the rules introduced by the impugned provisions can be said to be incompatible with the implementation of the federal principle.

I understand that, according to the appellants' first submission, the impugned provisions are related to the exclusively federal subject of federal elections (*Valin v. Langlois* (1879), 3 S.C.R. 1, 5 A.C. 115), and that, according to their alternative submission, even if the impugned provisions are related to a provincial object, they cannot constitutionally extend to the federal subject of federal elections.

I doubt that either of these submissions reaches the level of the federal principle argument. But, be that as it may, I agree with neither of these submissions. I will deal with the second and alternative submissions in a separate chapter.

As for the first submission, I take the view that it should be dismissed for the following reasons.

Je suis d'accord avec ces conclusions. Je formulerais toutefois la dernière en des termes plus positifs: à mon avis, les dispositions contestées ne semblent pas simplement refléter la convention existante; elles lui confèrent clairement la force et la précision additionnelles de l'effet législatif et elles sont de nature constitutionnelle et valides à première vue en vertu du par. 92(1) de la *Loi constitutionnelle de 1867*.

b Je ne crois pas que cette conclusion tirée à première vue puisse être modifiée par les parties négatives des critères déjà décrits.

c Loin de violer une condition fondamentale de l'union comme c'était le cas dans l'affaire *Blaikie*, précitée, les dispositions contestées confèrent un effet législatif additionnel à l'un de ses préceptes fondamentaux, le principe du gouvernement responsable. À cet égard, les dispositions contestées sont plus rapprochées de celles de la *Loi sur les langues officielles* fédérale, S.R.C. 1970, chap. O-2, que cette Cour a jugées constitutionnelles dans l'arrêt *Jones c. Procureur général du Nouveau-Brunswick*, [1975] 2 R.C.S. 182.

f Je ne crois pas non plus que l'on puisse dire que les règles introduites par les dispositions contestées sont incompatibles avec la mise en œuvre du principe fédéral.

g Si je comprends bien, suivant le premier argument des appellants, les dispositions contestées ont trait au domaine de compétence exclusive fédérale que sont les élections fédérales (*Valin v. Langlois* (1879), 3 R.C.S. 1, 5 A.C. 115) et, suivant leur argument subsidiaire, même si les dispositions contestées ont trait à un objet provincial, elles ne peuvent pas constitutionnellement aller jusqu'à s'appliquer à la matière fédérale que constituent les élections fédérales.

j Je doute que l'un ou l'autre de ces arguments atteigne le niveau de l'argument du principe fédéral. Quoi qu'il en soit, je ne suis d'accord avec ni l'un ni l'autre de ces arguments. Je traiterai du second argument, l'argument subsidiaire, dans un chapitre distinct.

i Quant au premier argument, je suis d'avis qu'il doit être rejeté pour les motifs suivants. Les dispo-

SEFPO c. Ontario (*Procureur général*), [1987] 2 R.C.S. 2

46

OPSEU v. ONTARIO (ATTORNEY GENERAL) *Beetz J.*

[1987] 2 S.C.R.

The impugned provisions constitute properly framed legislation which in no way affects the validity of federal elections or eligibility to the House of Commons, or qualifications or disqualifications to sit in this House; nor do they make the political activities which they contemplate unlawful; what they do is to create a disability from membership in the Ontario Public Service, thereby affecting a provincially created relationship; the impugned provisions are not aimed specifically at federal political activity; they are comprehensively aimed at regulating the political activities of Ontario public servants as such, that is as members of the executive branch of government, in order to safeguard their neutrality and impartiality. With all due respect, I can find no merits in the appellants' first submission.

In my opinion, the impugned provisions constitute an ordinary legislative amendment of the constitution of Ontario, within the meaning of s. 92(1) of the *Constitution Act, 1867*.

However, let me say one word of caution before I conclude this chapter. The fact that a province can validly give legislative effect to a prerequisite condition of responsible government does not necessarily mean it can do anything it pleases with the principle of responsible government itself. Thus, it is uncertain, to say the least, that a province could touch upon the power of the Lieutenant-Governor to dissolve the legislature, or his power to appoint and dismiss ministers, without unconstitutionally touching his office itself. It may very well be that the principle of responsible government could, to the extent that it depends on those important royal powers, be entrenched to a substantial extent.

But there may be more to it.

In *In re Initiative and Referendum Act*, [1919] A.C. 935, the Judicial Committee invalidated legislative provisions which empowered the electors of Manitoba to legislate directly by way of a referendum procedure. The Judicial Committee found the legislation in question invalid on some-

sitions contestées sont des mesures législatives bien formulées qui ne touchent aucunement ni à la validité des élections fédérales ou à l'éligibilité à la Chambre des communes, ni aux qualifications nécessaires pour siéger en cette chambre ou à l'inhabitabilité à y siéger; elles ne rendent pas non plus illégales les activités politiques qu'elles envisagent; elles ne font que créer une incapacité de faire partie de la fonction publique de l'Ontario, portant ainsi atteinte à une relation créée par la province; les dispositions contestées ne visent pas spécifiquement les activités politiques fédérales; elles sont globalement destinées à réglementer les activités politiques des fonctionnaires de l'Ontario en tant que tels, c'est-à-dire en tant que membres de l'exécutif du gouvernement, dans le but de préserver leur neutralité et leur impartialité. Avec égards, je ne puis voir aucun bien-fondé dans le premier argument des appellants.

À mon avis, les dispositions contestées constituent une modification législative ordinaire de la constitution de l'Ontario au sens du par. 92(1) de la *Loi constitutionnelle de 1867*.

Qu'il me soit cependant permis de faire une mise en garde avant de terminer ce chapitre. Le fait qu'une province puisse validement conférer un effet législatif à une condition préalable d'un gouvernement responsable ne signifie pas nécessairement qu'elle peut faire tout ce qui lui plaît du principe du gouvernement responsable lui-même. Ainsi, il n'est pas certain, à tout le moins, qu'une province puisse toucher au pouvoir du lieutenant-gouverneur de dissoudre l'assemblée législative, ou à son pouvoir de nommer et de destituer les ministres, sans toucher de manière inconstitutionnelle à sa charge elle-même. Il se peut fort bien que le principe du gouvernement responsable puisse, dans la mesure où il est fonction de ces pouvoirs royaux importants, être en grande partie intangible.

Mais il y a peut-être plus.

Dans *In re Initiative and Referendum Act*, [1919] A.C. 935, le comité judiciaire a annulé des dispositions législatives qui permettaient aux électeurs du Manitoba de légiférer directement par voie de référendum. Le comité judiciaire a conclu que les dispositions en question étaient nulles pour

what narrow grounds related to the office of Lieutenant-Governor. The Judicial Committee was undoubtedly conscious of the fact that the technical flaws it found in the legislation could easily be corrected without any effect on the major feature of the legislation. Viscount Haldane, who delivered the reasons of the Judicial Committee, accordingly pronounced a deliberate and important *obiter* at p. 945, reading as follows:

No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done when in *Hodge v. The Queen* [9 App. Cas. 117], the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise.

While this *obiter* is confined to the particular facts of that case, it may stand for the wider proposition that the power of constitutional amendment given to the provinces by s. 92(1) of the *Constitution Act, 1867* does not necessarily comprise the power to bring about a profound constitutional upheaval by the introduction of political institutions foreign to and incompatible with the Canadian system.

3. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers

Section 92(4) of the *Constitution Act, 1867* empowers the province to make laws in relation to "The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers". Parliament has been given a corresponding albeit differently described power by s. 91(8) relating to "The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada".

des motifs quelque peu restreints liés à la charge de lieutenant-gouverneur. Le comité judiciaire était sans doute conscient du fait que les vices qu'il a constatés dans les dispositions de la loi pouvaient être facilement corrigés sans aucunement modifier la caractéristique principale de la loi en question. Le vicomte Haldane, qui a rédigé les motifs du comité judiciaire, a donc de propos délibéré formulé une opinion incidente mais importante, à la p. 945:

[TRADUCTION] Nul doute qu'un organisme jouissant sur les matières qui relèvent de sa compétence, d'un pouvoir de légiférer aussi étendu que celui qui appartient à une législature provinciale au Canada pourrait, tout en préservant l'intégrité de ses propres pouvoirs, se faire aider par des organismes subordonnés. Ceci était le cas lorsque, dans l'affaire *Hodge v. The Queen* [9 App. Cas. 117], il a été décidé que la législature de l'Ontario avait le droit de confier à un bureau de commissaires le pouvoir d'édicter des règlements relatifs aux tavernes; il ne s'ensuit pas toutefois qu'il peut créer et doter de sa propre capacité un nouveau pouvoir législatif non créé par la loi à laquelle il doit sa propre existence. Leurs Seigneuries ne font ici rien d'autre que souligner la gravité des questions constitutionnelles qui se posent à cet égard.

Bien que cette opinion incidente ne vise que les faits particuliers de cette affaire, elle peut étayer la proposition plus générale que le pouvoir de modification constitutionnelle que le par. 92(1) de la *Loi constitutionnelle de 1867* accorde aux provinces ne comprend pas nécessairement le pouvoir de provoquer des bouleversements constitutionnels profonds par l'introduction d'institutions politiques étrangères et incompatibles avec le système canadien.

3. La création et la durée des charges provinciales, ainsi que la nomination et le paiement des fonctionnaires provinciaux

Le paragraphe 92(4) de la *Loi constitutionnelle de 1867* habilite la province à légiférer concernant «la création et la durée des charges provinciales, ainsi que la nomination et le paiement des fonctionnaires provinciaux». Le Parlement s'est vu conférer un pouvoir correspondant, quoique décrit différemment au par. 91(8), concernant «la fixation et le paiement des traitements et allocations des fonctionnaires civils et autres du gouvernement du Canada».

Onglet 83

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

CASES
DETERMINED BY THE
SUPREME COURT OF CANADA ON APPEAL
FROM
DOMINION AND PROVINCIAL COURTS

IN THE MATTER OF A REFERENCE AS TO THE
 VALIDITY OF THE REGULATIONS IN RELA-
 TION TO CHEMICALS ENACTED BY THE GOV-
 ERNOR GENERAL OF CANADA ON THE 10TH
 DAY OF JULY, 1941, P.C. 4996, AND OF AN
 ORDER OF THE CONTROLLER OF CHEMICALS,
 DATED THE 16TH DAY OF JANUARY, 1942,
 MADE PURSUANT THERETO.

1942
 *Dec. 14, 15.
 1943
 *Jan. 5.

Constitutional law—Power of the Governor General in Council, under the War Measures Act, 1914, to delegate his powers to subordinate agencies—Order in Council same as Act of Parliament—Final responsibility for acts of Governor General in Council resting upon Parliament—Enactment contained in Order in Council not open to review by courts of law—Regulations as to chemicals and Order by Controller of Chemicals declared intra vires—Applicability of the maxim: Delegatus non potest delegare.

Held: Regulations respecting chemicals established by an Order in Council, which is expressed to be made pursuant to the powers conferred by the Department of Munitions and Supply Act and by the War Measures Act, are not *ultra vires* of the Governor General in Council either in whole or in part, except paragraph four which is *ultra vires*.

Paragraph four of the Order in Council provides that the compensation, to which a person may be entitled whenever the Controller of Chemicals takes possession of any chemicals, or equipment, or real or personal property, shall be as prescribed and determined by the Controller, with the approval of the Minister of Munitions and Supply. Such paragraph is in conflict with section 7 of the War Measures Act, which enacts that, whenever any property has been expropriated by the Crown, the claim for compensation must be referred by the Minister of Justice to the Exchequer Court of Canada or to other mentioned courts.

Held, also: An Order of the Controller of Chemicals, appointed by these Regulations, relating to the control of the production and consumption of, as well as the dealing in, glycerine, is not *ultra vires* of the Controller either in whole or in part.

No opinion was expressed by the Court, such questions not having been referred to it, as to the meaning or the application of any of the Regulations or of the Order of the Controller.

*PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

2

SUPREME COURT OF CANADA

[1943]

1943

REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.

The authority vested in the Governor General in Council by the *War Measures Act*, (its constitutional validity having been finally determined in *Re Gray*, 57 S.C.R. 150 and *Fort Frances* case, [1923] A.C. 695), is legislative in its character; and an order in council passed in conformity with the conditions prescribed by, and the provisions of, that Act, i.e. a legislative enactment such as should be deemed necessary and advisable by reason of war, have the effect of an Act of Parliament: *In re Gray, supra*.

Held, further, that the Governor General in Council has the power, under section 3 of the *War Measures Act*, to delegate his powers, whether legislative or administrative, to subordinate agencies (Boards, Controllers and other officers) to make orders, rules and by-laws generally of the nature of those the Controller of Chemicals is empowered to make by the Regulations above mentioned.

— But, under the *War Measures Act*, the final responsibility for the acts of the Executive Government rests upon Parliament.

Per Rinfret and Taschereau JJ.:—Parliament has not abdicated its general legislative powers nor abandoned its control. The subordinate instrumentality, which it has created for exercising the powers, remains responsible directly to Parliament and depends upon the will of Parliament for the continuance of its official existence.

Per Davis J.:—Parliament has not effaced itself, and has full power to amend or repeal the *War Measures Act* or to make ineffective any of the orders in council passed in pursuance of its provisions.

Per Kerwin J.:—If at any time Parliament considers that too great a power has been conferred upon the Governor General in Council, the remedy lies in its own hand.

Per Rinfret and Taschereau JJ.:—The advisability of the delegation of his powers to other agencies is in the discretion of the Governor General in Council; and once the discretion is exercised, the resulting enactment is a law by which every court is bound in the same manner and to the same extent as if Parliament had enacted it.

Comments as to the applicability of the maxim *Delegatus non potest delegare*.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada in the exercise of the powers conferred by section 55 of the *Supreme Court Act* (R.S.C. 1927, c. 35) of the following questions: 1. Are the regulations in relation to chemicals dated the 10th day of July, 1941, P.C. 4996 aforesaid, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent? 2. Is the order dated the 16th day of January, 1942, respecting glycerine (referred to as Order No. C.C. 2-B) *ultra vires* of the Controller of Chemicals either in whole or in part and, if so, in what particular or particulars and to what extent?

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

S.C.R.]	SUPREME COURT OF CANADA	3
---------	-------------------------	---

The Order in Council referring these questions to the Court is as follows:—

“Whereas section three of the *War Measures Act*, chapter 206 of the Revised Statutes of Canada, 1927, provides as follows:

3. The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:—

- (a) Censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;
- (b) Arrest, detention, exclusion and deportation;
- (c) Control of the harbours, ports and territorial waters of Canada and the movements of vessels;
- (d) Transportation by land, air, or water and the control of the transport of persons and things;
- (e) Trading, exportation, importation, production and manufacture;
- (f) Appropriation, control, forfeiture and disposition of property and of the use thereof.

2. All orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation; but if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder, shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation, extension or revocation.

“And whereas by reason of the state of war now existing, the Governor General in Council has deemed it necessary or advisable for the security, defence, peace, order and welfare of Canada to authorize acts and things to be done and, from time to time, to make orders and regulations pursuant to the *War Measures Act* aforesaid and in particular to control, restrict and regulate by means of Controllers the production, sale, distribution, consumption and use of essential supplies and thereby powers have been conferred upon the said Controllers in the exercise of which numerous orders and regulations have been made by the aforesaid Controllers affecting the community at large and a question of general application has arisen as to the authority of the Governor General in Council to establish this method and system of control;

1943
REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

4

SUPREME COURT OF CANADA

[1943]

1943
REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.

"And whereas the Minister of Justice reports that a charge of an offence against an order duly made by a Controller was recently dismissed by a County Court Judge of the county of York in the province of Ontario on the ground that the order of the Governor General in Council conferring power upon the Controller was invalid inasmuch as it constituted a delegation of the authority of the Governor General in Council under the *War Measures Act*, and that magistrates who have heard other complaints have as a result of this decision either dismissed the complaints or withheld their decisions for the time being;

"That the aforesaid method or system of control of essential supplies is in principle identical to that adopted in other fields in connection with the conduct of the war.

"And whereas orders and regulations have been made,—

- (a) to empower ministers of the Crown and other authorized persons, under the Defence of Canada Regulations, to act in relation to matters affecting the security and defence of Canada;
- (b) to empower the Wartime Prices and Trade Board and Administrators appointed by the said Board, with the approval of the Governor General in Council, to make orders and regulations to provide against undue enhancement in the prices of goods and services and in rentals for real property;
- (c) to provide, under the direction of the National War Labour Board, for the stabilization of wage rates and for the payment of cost of living bonuses;
- (d) to empower the Foreign Exchange Control Board to make regulations for the control of the importation and exportation of money, securities and foreign exchange;

"And whereas the Minister of Justice further reports that in these circumstances it is urgently required in the public interest that the opinion of the Supreme Court of Canada upon the question of the extent of the powers of the Governor General in Council under the *War Measures Act* be obtained with the least possible delay, which in the opinion of the Minister is an important question of law touching the interpretation of Dominion legislation; and

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

S.C.R.] SUPREME COURT OF CANADA

5

"That typical of the method and system of control adopted are the regulations in relation to chemicals enacted by the Governor General in Council on the 10th day of July, 1941, P.C. 4996, providing for a Controller of Chemicals exercising wide powers and an order made by the Controller of Chemicals pursuant thereto dated January 16, 1942, respecting glycerine (referred to as Order No. C.C. 2-B).

"Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Justice and under and by virtue of the authority conferred by section fifty-five of the *Supreme Court Act*, is pleased to refer and doth hereby refer the following questions to the Supreme Court of Canada for hearing and consideration, namely:

1. Are the regulations in relation to chemicals dated the 10th of July, 1941, P.C. 4996 aforesaid, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent?
2. Is the order dated the 16th day of January, 1942, respecting glycerine (referred to as Order No. C.C. 2-B) *ultra vires* of the Controller of Chemicals either in whole or in part and, if so, in what particular or particulars and to what extent?

(Sgd.) A. D. P. HEENEY,
Clerk of the Privy Council."

The respective Attorneys-General of the provinces of Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan were, pursuant to order of the Court, notified of the hearing of the Reference.

Aimé Geoffrion K.C. and *David Mundell* for the Attorney-General of Canada.

D. L. McCarthy K.C. and *John J. Robinette*, counsel appointed by the Supreme Court of Canada pursuant to the provisions of sub-section 5 of section 55 of the *Supreme Court Act*.

Rosario Genest K.C. for the Attorney-General of Quebec.

1943
REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.
—

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

6

SUPREME COURT OF CANADA

[1943]

1943REFERENCEAs to theValidity oftheRegulationsin relation toChemicalsenacted byOrder inCouncil andof an Orderof theController ofChemicalsmadepursuantthereto.Duff C.J.

THE CHIEF JUSTICE: His Excellency the Governor General in Council by an order in council of November 30th, 1942, has been pleased to refer to this Court for hearing and consideration two questions, namely:—

1. Are the regulations in relation to chemicals dated the 10th day of July, 1941, P.C. 4996 aforesaid, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent?
2. Is the order dated the 16th day of January, 1942, respecting glycerine (referred to as Order No. C.C. 2-B) *ultra vires* of the Controller of Chemicals either in whole or in part and, if so, in what particular or particulars and to what extent?

The Regulations in relation to chemicals (the subject of the first interrogatory) were enacted by an order in council of July 10th, 1941. In this order it is stated that the Minister of Munitions and Supply has, amongst other duties, those of organizing the resources of Canada contributory to the production of munitions of war and supplies and of mobilizing the economic and industrial facilities in respect thereof for the effective prosecution of the present war. It is also recited that it is deemed necessary to control, restrict and regulate the production, sale, distribution, consumption and use of chemicals necessary or useful in connection with the production and supply of munitions of war and for the needs of the Government or of the community in war; and the order in council is expressed to be made pursuant to the powers conferred by the *Department of Munitions and Supply Act* and by the *War Measures Act*.

By the Regulations a Controller of Chemicals is appointed and his duties and powers are enumerated.

The Order of the Controller of Chemicals, dated the 16th day of January, 1942 (the subject of the second interrogatory) relates to the control of the production and consumption of, as well as the dealing in, glycerine.

Although the Regulations of the 10th of July, 1941, were enacted pursuant to the powers conferred by the *Department of Munitions and Supply Act*, as well as by the *War Measures Act*, it will be unnecessary to discuss the first mentioned statute. The question of substance concerns the scope and effect of the *War Measures Act*. By section 3 of that Act it is enacted as follows:—

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

S.C.R.]

SUPREME COURT OF CANADA

7

3. The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:—

- (a) Censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;
- (b) Arrest, detention, exclusion and deportation;
- (c) Control of the harbours, ports and territorial waters of Canada, and the movement of vessels;
- (d) Transportation by land, air, or water and the control of the transport of persons and things;
- (e) Trading, exportation, importation, production and manufacture;
- (f) Appropriation, control, forfeiture and disposition of property and of the use thereof.

2. All orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation; but if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder, shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation, extension or revocation.

This is a convenient place to notice that the *War Measures Act* contains specific provisions relating to particular subjects in sections 4, 5, 6, 7, 8, 9, and in the second limb of paragraph 2 of section 3. It may be said at once that in so far as they have not been affected by subsequent legislation, the enactments of these sections would appear to have primacy over the orders and regulations of the Governor General in Council under section 3, and it would seem that in case of any inconsistency between these provisions and any order or regulation made under section 3, it is the statute which prevails. The same rule governs the relation between the *Department of Munitions and Supply Act* and orders and regulations made under the authority of that statute. It would appear that section 4 of the Regulations is not consistent with section 7 of the *War Measures Act*. Subject to this observation, it is apparent, from inspection, that the subject matters dealt with in the Regulations are matters to which the powers of the Governor General in Council extend

1943
 REFERENCE
 As to the
 Validity of
 the
 Regulations
 in relation to
 Chemicals
 enacted by
 Order in
 Council and
 of an Order
 of the
 Controller of
 Chemicals
 made
 pursuant
 thereto.

Duff C.J.

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

8

SUPREME COURT OF CANADA

[1943]

1943
REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.

The order of His Excellency in Council directing the Reference proceeds *inter alia* upon these recitals:—

And whereas the Minister of Justice reports that a charge of an offence against an order duly made by a Controller was recently dismissed by a County Court Judge of the county of York in the province of Ontario on the ground that the order of the Governor General in Council conferring power upon the Controller was invalid inasmuch as it constituted a delegation of the authority of the Governor General in Council under the *War Measures Act*, and that magistrates who have heard other complaints have as a result of this decision either dismissed the complaints or withheld their decisions for the time being;

Duff C.J.

That the aforesaid method or system of control of essential supplies is in principle identical to that adopted in other fields in connection with the conduct of the war.

And whereas orders and regulations have been made,—

- (a) to empower ministers of the Crown and other authorized persons, under the Defence of Canada Regulations, to act in relation to matters affecting the security and defence of Canada;
- (b) to empower the Wartime Prices and Trade Board and Administrators appointed by the said Board, with the approval of the Governor General in Council, to make orders and regulations to provide against undue enhancement in the prices of goods and services and in rentals for real property;
- (c) to provide, under the direction of the National War Labour Board, for the stabilization of wage rates and for the payment of cost of living bonuses;
- (d) to empower the Foreign Exchange Control Board to make regulations for the control of the importation and exportation of money, securities and foreign exchange;

And whereas the Minister of Justice further reports that in these circumstances it is urgently required in the public interest that the opinion of the Supreme Court of Canada upon the question of the extent of the powers of the Governor General in Council under the *War Measures Act* be obtained with the least possible delay, which in the opinion of the Minister is an important question of law touching the interpretation of Dominion legislation; and

That typical of the method and system of control adopted are the regulations in relation to chemicals enacted by the Governor General in Council on the 10th day of July, 1941, P.C. 4996, providing for a Controller of Chemicals exercising wide powers and an order made by the Controller of Chemicals pursuant thereto dated January 16, 1942, respecting glycerine (referred to as Order No. C.C. 2-B).

From these recitals it appears that the primary purpose of the Reference is the determination of the question that has been raised as to the power of the Governor General in Council under section 3 of the *War Measures Act* to delegate

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

S.C.R.]	SUPREME COURT OF CANADA	9
---------	-------------------------	---

authority to subordinate agencies (Boards, Controllers and other officers) to make orders, rules and by-laws generally of the nature of those the Controller of Chemicals is empowered to make by the Regulations of the 10th of July, 1941.

No doubt has been suggested that the various subject matters which have been dealt with by regulation and order, whether by the Governor General in Council direct or by subordinate agencies under a delegated authority, are within the ambit of the powers with which His Excellency is invested by force of section 3. The cardinal matter for consideration is that which concerns the validity of delegation to subordinate agencies of the character explained.

The Attorneys-General of the provinces were informed of the Reference, but, in view, no doubt, of the fact that the constitutional validity of the *War Measures Act* was finally determined by the Privy Council in the *Fort Frances* case (*Fort Frances Pulp & Power Co. v. Manitoba Free Press Co.* (1)), no argument was presented on the part of any of the provinces.

The Court invited Mr. D. L. McCarthy K.C. and Mr. J. J. Robinette to file a factum and address to us an argument in opposition to the argument on behalf of the Dominion in support of the validity of the instruments in question, and, accordingly, we had the advantage of a very able argument from them in this sense.

The *War Measures Act* came before this Court for consideration in 1918 in *re Gray* (2), and a point of capital importance touching its effect was settled by the decision in that case. It was decided there that the authority vested in the Governor General in Council is legislative in its character and an order in council which had the effect of radically amending the *Military Service Act, 1917*, was held to be valid. The decision involved the principle, which must be taken in this Court to be settled, that an order in council in conformity with the conditions prescribed by, and the provisions of, the *War Measures Act* may have the effect of an Act of Parliament.

In the same case it was also decided, and the point was subsequently settled by the decision of the Judicial Com-

1943
REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.
Duff C.J.

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

10

SUPREME COURT OF CANADA

[1943]

mittee in *Fort Frances Pulp & Power Co. v. Manitoba Free Press Co.* supra (1) that the *War Measures Act* was validly enacted.

1943

REFERENCE

As to the

Validity of

the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.

Duff C.J.

There is, however, an observation which ought to be made touching the sweeping language of section 3, in which are set forth the subject matters to which the authority of the Governor General in Council extends and in which the scope of his powers in relation to those subject matters is indicated. The judgment of the Privy Council in the last mentioned case laid down the principle that, in an emergency such as war, the authority of the Dominion in respect of legislation relating to the peace, order and good government of Canada may, in view of the necessities arising from the emergency, displace or overbear the authority of the provinces in relation to a vast field in which the provinces would otherwise have exclusive jurisdiction. It must not, however, be taken for granted that every matter within the jurisdiction of the Parliament of Canada, even in ordinary times, could be validly committed by Parliament to the Executive for legislative action in the case of an emergency.

It is not necessary for the purposes of the present Reference to consider whether it is within the power of Parliament, even in an emergency, to give authority to the Governor General in Council to exercise legislative powers in relation to such matters as, for example, those within the scope of sections 53 and 54 of the *British North America Act*. It is in the highest degree unlikely that any such question will ever arise touching such matters. But it ought to be observed that, apart from the conditions expressed in the *War Measures Act*, the validity of any Order, or Regulation, made under the authority of section 3, is affected by a two-fold condition: that it could be enacted as a statute, by Parliament, in execution of its emergency powers, or otherwise; and, furthermore, that Parliament is not precluded by the *British North America Act*, or by any later lawful enactment concerning its legislative powers, from committing the subject matter of it to the Executive Government for legislative action. The application of this two-fold condition does not require consideration on this Reference.

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

S.C.R.]

SUPREME COURT OF CANADA

11

I turn now to the conditions prescribed by the *War Measures Act* itself. As already observed, any Order or Regulation made under the *War Measures Act* is subject to the specific provisions mentioned above of that statute. Subject to that, the *War Measures Act* by its terms requires only that the act or thing done, or the order or regulation made, shall be such that the Governor General in Council by reason of (in the present case) "real * * * war" deems it to be necessary or advisable for the security, defence, peace, order and welfare of Canada.

I do not think that in their natural meaning the scope of these words is so narrow as to preclude the Governor General in Council from acting through subordinate agencies having a delegated authority to make orders and rules.

The duty of the Governor General in Council to safeguard the supreme interests of the state, as contemplated by section 3, may, it seems plain, necessitate for its adequate performance the appointment of subordinate officers endowed with such delegated authority. I find it impossible to suppose that the authors of that enactment did not envisage the likelihood of the Executive finding itself obliged, in discharging its responsibility in relation to the matters enumerated in sub-paragraphs (a) to (f), to make use of such agencies. As is well-known, during the last war, in the United Kingdom under the statutes known generally as *The Defence of the Realm Acts*, in which the grant of authority to the Executive was expressed in words less comprehensive than those implied in the *War Measures Act*, extensive powers were delegated to Boards and Controllers under Regulations enacted by orders in council, and the acts of these subordinate agencies were again and again before the courts without question being raised as to the legality of these delegations. The necessity of this procedure is recognized in the *Defence of the Realm Act* of 1939.

Mr. McCarthy, in his admirable argument, contended that, if such had been the intention of the framers of the statute, explicit provision would have been made for such devolution, as was done in the *Defence of the Realm Act* of 1939 in the United Kingdom. There would be much force in the suggestion that if the *War Measures Act* were now being re-enacted the legislation might well be cast in

*1943
REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.*

Duff C.J.

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

12

SUPREME COURT OF CANADA

[1943]

1943
REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.

Duff C.J.

some such form; but the function of a court of law is to give effect to the language which the legislature itself has selected for expressing its intention. I repeat, there is nothing in the words of section 3 that, when read according to their natural meaning, precludes the appointment of subordinate officials, or the delegation to them of such powers as those in question. *Ex facie* such measures are plainly within the comprehensive language employed, and I know of no rule or principle of construction requiring or justifying a qualification that would exclude them.

As in respect of any other measure which the Executive Government may be called upon to consider, the duty rests upon it to decide whether, in the conditions confronting it, it deems it necessary or advisable for the safety of the state to appoint such subordinate agencies and to determine what their powers shall be.

There is always, of course, some risk of abuse when wide powers are committed in general terms to any body of men. Under the *War Measures Act* the final responsibility for the acts of the Executive rests upon Parliament. Parliament abandons none of its powers, none of its control over the Executive, legal or constitutional.

The enactment is, of course, of the highest political nature. It is the attribution to the Executive Government of powers legislative in their character, described in terms implying nothing less than a plenary discretion, for securing the safety of the country in time of war. Subject only to the fundamental conditions explained above, (and the specific provisions enumerated), when Regulations have been passed by the Governor General in Council in professed fulfilment of his statutory duty, I cannot agree that it is competent to any court to canvass the considerations which have, or may have, led him to deem such Regulations necessary or advisable for the transcendent objects set forth. The authority and the duty of passing on that question are committed to those who are responsible for the security of the country —the Executive Government itself, under, I repeat, its responsibility to Parliament. The words are too plain for dispute: the measures authorized are such as the Governor General in Council (not the courts) deems necessary or advisable.

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

S.C.R.]

SUPREME COURT OF CANADA

13

True, it is perhaps theoretically conceivable that the Court might be required to conclude from the plain terms of the order in council itself that the Governor General in Council had not deemed the measure to be necessary or advisable, or necessary or advisable by reason of the existence of war. In such a case I agree with Clauson L.J. (as he then was) that the order in council would be invalid as showing on its face that the essential conditions of jurisdiction were not present (*Rex v. Comptroller General of Patents* (1)); but such theoretical speculations cannot affect the question we have to decide.

It is perhaps advisable to observe also that subordinate agencies appointed by the Governor General in Council are not, by the *War Measures Act*, outside the settled rule that all statutory powers must be employed in good faith for the purposes for which they are given, although here again, as regards the present Reference, that rule has only a theoretical interest.

/One observation of a general character remains. It is possible that in what has been said above it has not been sufficiently emphasized that every order in council, every regulation, every rule, every order, whether emanating immediately from His Excellency the Governor General in Council or from some subordinate agency, derives its legal force solely from the *War Measures Act*, or some other Act of Parliament. All such instruments

derive their validity from the statute which creates the power, and not from the executive body by which they are made (*The Zamora* (2));

and the *War Measures Act* does not, of course, attempt to transform the Executive Government into a legislature, in the sense in which the Parliament of Canada and the legislatures of the provinces are legislatures.

The answer to interrogatory number one is: The Regulations are not *ultra vires* of the Governor General in Council either in whole or in part, except paragraph four which is *ultra vires*. No question is before us concerning the meaning, or the application, of any of the Regulations.

The answer to interrogatory number two is: The Order is not *ultra vires* of the Controller of Chemicals either in

1943
REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.

Duff C.J.

(1) [1941] 2 K.B. 306, at 316.

(2) [1916] 2 A.C. 77, at 90.

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

14

SUPREME COURT OF CANADA

[1943]

1943 whole or in part. Here again no question is before us concerning the meaning, or the application, of the Order or any part thereof.

REFERENCE As to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto.

The judgment of Rinfret and Taschereau JJ. was delivered by

RINFRET J.—The *War Measures Act* (now c. 206 of the Revised Statutes of Canada, 1927) was adopted by Parliament in 1914 to confer certain powers upon the Governor in Council in the event of war, invasion or insurrection.

Duff C.J. By reason of the state of war now existing, the Governor General in Council has deemed it necessary or advisable for the security, defence, peace, order and welfare of Canada to authorize acts and things to be done, and from time to time to make orders and regulations pursuant to the Act aforesaid and, in particular, to control, restrict and regulate by means of controllers the production, sale, distribution, consumption and use of essential supplies; powers have been conferred upon these controllers in the exercise of these numerous orders, and regulations have been made by the controllers affecting the community at large.

A question of general application has arisen as to the authority of the Governor in Council to establish this method and system of control.

It has been found in the public interest that, by virtue of the authority conferred by section 55 of the *Supreme Court Act*, the opinion of the Supreme Court of Canada upon the question of the extent of the powers of the Governor General in Council under the *War Measures Act* be obtained; and, for that purpose, as typical of the method and system of control adopted, the Governor General in Council has chosen the regulations in relation to chemicals enacted on the 10th day of July, 1941 (P.C. 4996), providing for a controller of chemicals exercising wide powers, and an order made by the controller of chemicals pursuant thereto, dated January 16th, 1942, respecting glycerine (referred to as Order No. C.C. 2-B).

Two questions were referred to the Court for hearing and consideration, namely:

1. Are the regulations in relation to chemicals dated the 10th day of July, 1941, P.C. 4996 aforesaid, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent?

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

S.C.R.]

SUPREME COURT OF CANADA

15

2. Is the order dated the 16th day of January, 1942, respecting glycerine (referred to as Order No. C.C. 2-B) *ultra vires* of the Controller of Chemicals either in whole or in part and, if so, in what particular or particulars and to what extent?

1943

REFERENCE
As to the
Validity of
the

In the recitals of the Order in Council P.C. 4996, it is stated that the Minister of Munitions and Supply has, amongst other duties, those of organizing the resources of Canada contributory to the production of munitions of war and supplies and of mobilizing the economic and industrial facilities in respect thereof for the effective prosecution of the present war.

Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.

Rinfret J.

It is further recited that it is deemed necessary to control, restrict and regulate the production, sale, distribution, consumption and use of chemicals necessary or useful in connection with the supply of munitions of war and for the needs of the community in war.

The order in council is expressed to be made pursuant to the powers conferred by the *Department of Munitions and Supply Act* and by the *War Measures Act*.

A Controller of Chemicals is appointed, and certain powers are conferred upon him which it is not necessary to enumerate for the present purposes.

Under other orders in council, either anterior or posterior to that of the 10th of July, 1941 (P.C. 4996), a Wartime Industries Control Board was established, and it was provided that the power of every controller to fix prices shall be exercised only with the concurrence of the Wartime Prices and Trade Board, and further that no controller's order of general effect throughout Canada, or part of Canada, except an order fixing prices, shall be effective, unless approved by the Chairman of the Wartime Industries Control Board in writing.

The order of the Controller of Chemicals respecting glycerine provides for a very wide control of crude, refined or dynamite glycerine, as to its sale, dealing in, consumption, import or export; the general scheme being that none of these things may be done, except under either a permit issued by the controller or a licence issued by the Minister of Trade and Commerce or by the Minister of National Revenue respectively.

In my view, it is not necessary to consider the provisions of the *Department of Munitions and Supply Act*. The reference would appear to have been made because the

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

16

SUPREME COURT OF CANADA

[1943]

1943
REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.

Rinfret J.

regulations enacted by the order in council were adopted, as set out in the recital, to assist the Minister of Munitions and Supply in carrying out the duties imposed upon him by that Act, and it is sufficient, for the purpose of answering the questions submitted, to limit our considerations to the *War Measures Act*. In turn, no question of constitutionality under the *B.N.A. Act* is raised with regard to the *War Measures Act*. The Act is within the legislative field of the Dominion Parliament (*Fort Frances Pulp and Power Co. v. Manitoba Free Press* (1); and it is well established that it is within the power of Parliament, when legislating within its legislative field, to confer subordinate administrative and legislative powers (*Hodge v. The Queen* (2); *Re Gray* (3); *Shannon v. Lower Mainland Dairy Products Board and Attorney-General for British Columbia* (4)).

The question of the powers of the Governor in Council under the *War Measures Act* is, therefore, solely one of interpretation of the provisions of that Act, and it is to be determined by reference to those provisions by which the powers were conferred.

The Act has already received authoritative interpretation, both in this Court and in the Judicial Committee of the Privy Council. In the *Gray case* (3), Fitzpatrick C.J., at page 158, said:

It seems to me obvious that parliament intended, as the language used implies, to clothe the executive with the widest powers in time of danger. Taken literally, the language of the section (i.e. section 3 of the Act) contains unlimited powers.

The present Chief Justice of this Court, at p. 166, expressed the following view of the Act:

The words are comprehensive enough to confer authority for the duration of the war to "make orders and regulations" concerning any subject falling within the jurisdiction of parliament—subject only to the conditions that the Governor in Council shall deem such orders and regulations to be by reason of the existence of real or apprehended war, etc., advisable.

And, at page 167:

The judgments of the Law Lords in *Rex. v. Halliday* (5), afford a conclusive refutation of the contention that a general authority to make "orders and regulations" for securing the public defence and safety and for like purposes is, as regards existing law resting on statute, limited to the

(1) [1923] A.C. 695.

(3) (1918) 57 Can. S.C.R. 150.

(2) (1883) 9 App. Cas. 117.

(4) [1938] A.C. 708.

(5) [1917] A.C. 200.

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

S.C.R.] SUPREME COURT OF CANADA

17

functions of supplementing some legislative enactment or carrying it into effect and is not adequate for the purpose of super-session. The authority conferred by the words quoted is a law-making authority.

And it is as well immediately to set out here the following further quotations from the judgment of my Lord the Chief Justice in the *Gray* case (1):

It is the function of a court of law to give effect to the enactments of the legislature according to the force of the language which the legislature has finally chosen for the purpose of expressing its intention. Speculation as to what may have been passing in the minds of the members of the legislature is out of place, for the simple reason that it is only the corporate intention so expressed with which the court is concerned (p. 169).

1943
REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.

Rinfret J.

The authority devolving upon the Governor in Council is, as already observed, strictly conditioned in two respects: First—It is exercisable during war only.

(*Nota bene.* In connection with this first condition, reference may be had to the subsequent judgment of the Privy Council in the *Fort Frances* case (2), whereby it was decided that a Dominion Act passed after the cessation of hostilities for continuing the control of newsprint paper until the proclamation of peace, with power to conclude matters then pending, was *intra vires*, in view of certain circumstances there mentioned.)

Secondly—The measures passed under it must be such as the Governor in Council deems advisable by reason of war (p. 170).

* * *

In the case of the *War Measures Act* there was not only no abandonment of legal authority

(by Parliament),

but no indication of any intention to abandon control and no actual abandonment of control in fact, and the council on whom was to rest the responsibility for exercising the powers given was the Ministry responsible directly to Parliament and dependent upon the will of Parliament for the continuance of its official existence (p. 171).

There follows from the principles so enunciated these consequences:

The powers conferred upon the Governor in Council by the *War Measures Act* constitute a law-making authority, an authority to pass legislative enactments such as should be deemed necessary and advisable by reason of war; and, when acting within those limits, the Governor in Council is vested with plenary powers of legislation as large and of the

(1) (1918) 57 Can. S.C.R. 150. (2) [1923] A.C. 695.
70384-2

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

18

SUPREME COURT OF CANADA

[1943]

1943

REFERENCE

As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.

Rinfret J.

same nature as those of Parliament itself (Lord Selborne in *The Queen v. Burah* (1)). Within the ambit of the Act by which his authority is measured, the Governor in Council is given the same authority as is vested in Parliament itself. He has been given a law-making power.

The conditions for the exercise of that power are: The existence of a state of war, or of apprehended war, and that the orders or regulations are deemed advisable or necessary by the Governor in Council by reason of such state of war, or apprehended war.

Parliament retains its power intact and can, whenever it pleases, take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies and how long it shall continue them in existence, are matters for Parliament and not for courts of law to decide. Parliament has not abdicated its general legislative powers. It has not effaced itself, as has been suggested. It has indicated no intention of abandoning control and has made no abandonment of control, in fact. The subordinate instrumentality, which it has created for exercising the powers, remains responsible directly to Parliament and depends upon the will of Parliament for the continuance of its official existence.

As a result of what precedes, and to use the words of Sir Barnes Peacock delivering the judgment of the Privy Council in *Hodge v. The Queen* (2), the powers conferred upon the Governor in Council by the Dominion Parliament are

not in any sense to be exercised by delegation from or as agents of the Parliament.

Within the limits prescribed, the authority of the Governor in Council is as plenary and as ample as the Parliament "in the plenitude of its power possessed and could bestow". The "devolution effected by the *War Measures Act*" (to borrow the expression of my Lord the Chief Justice in the *Gray* case (3)) is not to be assimilated to a so-called delegation; and such a devolution has no analogy with agency.

The maxim *Delegatus non potest delegare* is a rule of the law of agency. It has no reference to an authority to legislate conferred by statute of Parliament. Indeed, the power

(1) (1878): 3 App. Cas. 889.

(2) (1883) 9 App Cas 117

(3) (1918)-57 Cap. S.C.B. 150

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

S.C.R.] SUPREME COURT OF CANADA

19

of delegation being absolutely essential, in the circumstances for which the *War Measures Act* has been designed, so as to have a workable Act, that power of delegation must be deemed to form part of the powers conferred by Parliament in the Act. The Governor in Council, within the ambit of the Act, is not a delegate. The Act constitutes a devolution of the legislative power of Parliament, and, within the prescribed limits, it can legislate as Parliament itself could. Therefore, it can delegate its powers, whether legislative or administrative.

Assuming his powers have been delegated without express reference to any standard, as mentioned in the United States Supreme Court in the *Panama Refining Company* case (1), the standard, in the words of Cardozo J., is "implicit within the Act".

In like circumstances, the Legislature

confides to a municipal institution or body of its own creation authority to make bylaws or resolutions as to subjects specified in the enactment and with the object of carrying the enactment into operation and effect. (*Hodge v. The Queen* (2)).

Here, Parliament was confronted with a tremendous emergency and it had to meet the situation with a workable Act. Hence the *War Measures Act*.

That Act conferred on the Governor in Council subordinate legislative powers; and it is conceded that it was within the legislative jurisdiction of Parliament so to do. In fact, delegation to other agencies is, in itself, one of the things that the Governor in Council may, under the Act, deem "advisable for the security, defence, peace, order and welfare of Canada" in the conduct of the war. The advisability of the delegation is in the discretion of the Governor in Council; and once the discretion is exercised, the resulting enactment is a law by which every court is bound in the same manner and to the same extent as if Parliament had enacted it, or as if it were part of the common law—subject always to the conditions already stated. For a court to review the enactment would be to assume the roll of legislator.

It need not be added that in discussing these questions it should not be assumed that the powers granted will be abused. We are warned by the Privy Council, in many of

1943
REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.
Rinfret J.

(1) (1934) 55 S.C. Rep. (U.S.) 241. (2) (1883) 9 App. Cas. 117, at 132.

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

20

SUPREME COURT OF CANADA

[1943]

1943 its judgments on Canadian Constitutional Law, against such a line of discussion. In laying down the general principles whereby one is to be guided in answering the questions referred to the Court, one must remain within the bounds of reasonableness, and a broad view of the situation must be envisaged. It need not be assumed that, for example, the Governor in Council would substitute a Board to exercise in his place the entirety of the powers which have been conferred upon him by the *War Measures Act*; nor, to use an illustration at the other extreme end of possibilities, that the Governor in Council might deem it advisable to confer upon a Controller of his choice the power to amend or abrogate a statute of Parliament. The answer to such objections based upon unexpected occurrences is that, in my view, it is hardly conceivable that the powers of the Governor in Council would be exercised in such a way, and they are not to be taken into account in the ordinary and normal interpretation of the *War Measures Act*.

Rinfret J.

It is, of course, impossible to foresee every case that may occur in the practical application of the principles discussed; but a careful examination of Order P.C. 4996 and of the Controller of Chemicals' Order No. C.C. 2-B has failed to reveal any exercise of powers in excess of the authority conferred upon the Governor in Council under the *War Measures Act*, or upon the Controller of Chemicals by Order P.C. 4996; except that I agree that paragraph 4 of the latter Order is in conflict with section 7 of the *War Measures Act*, in as far as, under section 7, whenever any property has been expropriated by His Majesty and compensation is to be made therefor and has not been agreed upon, the claim must be referred by the Minister of Justice to the Exchequer Court of Canada, or to a Superior Court, or County Court, of the province within which the claim arises, or to a judge of any such court. While, if paragraph 4 of the order in council should be followed, whenever the Controller takes possession of any chemicals, or equipment, or real or personal property and the Minister of Munitions and Supply determines that any person is entitled to compensation, then the compensation to be paid in respect thereof, in default of agreement, shall be as prescribed and determined by the Con-

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

S.C.R.]	SUPREME COURT OF CANADA	21
---------	-------------------------	----

troller, with the approval of the Minister. In other cases, by force of the same paragraph 4, the compensation is to be such as is determined by the Exchequer Court of Canada on reference thereto by the Minister of Munitions and Supply. The method adopted for fixing compensation under paragraph 4 of Order 4996 is different from that provided for in section 7 of the *War Measures Act*, and, in my opinion, section 7 of the *War Measures Act* must prevail over paragraph 4 of the order in council, since it is not open to the Governor in Council to derogate from the provisions of the *War Measures Act*, except in so far as that Act may have been amended or modified by a subsequent Act of Parliament.

Subject to the above, my answers to the questions as put are, therefore, in the negative; and I join with the other members of the Court in formally answering them as follows:

The answer to interrogatory number one is: The Regulations are not *ultra vires* of the Governor General in Council either in whole or in part, except paragraph four which is *ultra vires*. No question is before us concerning the meaning, or the application, of any of the Regulations.

The answer to interrogatory number two is: The order is not *ultra vires* of the Controller of Chemicals either in whole or in part. Here again no question is before us concerning the meaning, or the application, of the order or any part thereof.

DAVIS, J.—The Order of the Governor General in Council, the validity of which is in question in this Reference to the Court, was passed pursuant to the provisions of the *War Measures Act*, R.S.C. 1927, ch. 206. This statute was enacted by Parliament soon after the outbreak of the last war, being ch. 2 of the statutes of the 2nd Session, 1914. The validity of the statute itself is not in question; its validity was determined by the Judicial Committee of the Privy Council in the *Fort Frances* case (1). But the constitutional question now raised before us did not arise in that case.

The Order in Council recites:

And whereas it is deemed necessary to control, restrict and regulate the production, sale, distribution, consumption and use of chemicals which

1943
REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.

Rinfret J.

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

22:

SUPREME COURT OF CANADA

[1943]

1943
REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.

Davis J.

are, or are likely to be, or may be, necessary or useful for, or in connection with, the production, storage, transportation, and/or supply of munitions of war, or necessary or useful for the needs of the Government or of the community in war, with a view to conserving the financial, material and other resources of Canada and facilitating the production of munitions of war and supplies essential for fulfilling the present and potential needs of Canada and her allies;

The Order in Council then appoints a named Controller of Chemicals and vests in him the widest sort of powers. I shall only take time to refer to a couple of the numerous specific powers which the Controller may exercise from time to time:

2. (1) (m) To make orders regulating, fixing, determining and/or establishing the kind, type, grade, quality, standard, strength and/or quantity of any chemicals and/or any equipment that may be made and/or dealt in by any person; and to prohibit any making and/or dealing in any chemicals and/or any equipment, contrary to any such order or orders;

2. (1) (t) To regulate and control, by prohibition or otherwise any or all dealings or transactions between any person making and/or dealing in any chemicals and/or any equipment and any other such person in respect of, or in connection with, any making and/or dealing in any chemicals and/or any equipment and/or the acquisition and/or use of any real and/or personal property, including any equipment, for or in connection therewith.

Section 3 of the Order in Council is very wide and is as follows:

3. Wherever herein any power is given to the Controller whether or not subject to the consent or approval of the Minister or of the Governor General in Council, to make or give any order to, or with respect to, or impose any restriction, prohibition or requirement on, or with respect to, any person or thing, the Controller may exercise such power either generally with respect to the whole subject matter thereof, or partially or selectively with respect only to a portion or portions of the subject matter thereof, and, without restricting the generality of the foregoing, the provision or provisions of this Order in Council granting such power shall be deemed and construed to mean that such power is given, and may be exercised, in respect of, and/or in relation to:

(i) * * *

(ii) * * *

(iii) such person and/or thing either generally throughout Canada or in any particular province, place, area, zone or locality designated by the Controller; and

(iv) such a person of any particular trade, industry, occupation, profession, group, class, organization or society, and/or such a thing of any particular kind, type, grade, classification, quality or species; and

(v) an indefinite, undetermined or unspecified time or such period or periods of time as the Controller may specify.

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

S.C.R.]

SUPREME COURT OF CANADA

23

While the *War Measures Act* limits its operation "during war," the powers given to the Controller are by the Order in Council to be deemed and construed to mean that such powers are given and may be exercised for

an indefinite, undetermined or unspecified time or such period or periods of time as the Controller may specify.

As the Order in Council derives its validity from the statute itself and not from the executive body by which it is made, the Order must be read as subject to an implied proviso that nothing in it shall be considered to sanction a departure from the limitation of time fixed by the statute itself.

The questions propounded for our consideration and advice are of grave concern in that it is admitted by the Attorney General of Canada that the regulations in relation to chemicals enacted by the Governor in Council in the Order before us, providing for a Controller of Chemicals exercising wide powers, and the order before us made by the Controller of Chemicals pursuant thereto, are "typical of the method and system of control adopted" in this country at this time. Since the argument, information has been furnished us on behalf of the Attorney General of Canada of the different boards, administrators and controllers now functioning along similar lines. To take only one case for illustration, the Wartime Prices and Trade Board functions in relation to price levels and rentals of real property. The Board has already appointed 68 Administrators and 4 Coordinators. All these officers and the Board, it is stated, have power to make orders of varying natures. The Board has already made 209 orders, and the Administrators have made 574 orders, including amendments.

The *War Measures Act* is extraordinarily wide in its scope, even wider than the (English) *Defence of the Realm Consolidation Act, 1914*. It may be observed that the *Emergency Powers (Defence) Act, 1939*, being ch. 62 of the English statutes of 1939, gave authority to His Majesty by Order in Council to make such Regulations (in the Act referred to as "Defence Regulations") as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His

1943
REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.

Davis J.

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

24

SUPREME COURT OF CANADA

[1943]

1943 Majesty may be engaged, and for maintaining supplies and services essential to the life of the community. But by section 11 this Act was only to continue in force for the period of one year beginning with the date of the passing of the Act,

REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.

and shall then expire: Provided that, if at any time while this Act is in force, an address is presented to His Majesty by each House of Parliament praying that this Act should be continued in force for a further period of one year from the time at which it would otherwise expire, His Majesty may by Order in Council direct that this Act shall continue in force for that further period.

Davis J.

Fundamentally, the function of Parliament is to legislate—the function of the Executive is to administer. The exercise of supreme legislative power, the outward and visible sign of sovereignty, rests with Parliament. But Parliament, by our statute, in effect lifted much of its wartime legislative authority and handed it over to the Executive, subject only to two limitations, firstly, “such acts and things” as the Governor in Council may by reason of the existence of war “deem necessary or advisable for the security, defence, peace, order and welfare of Canada” (sec. 3); and, secondly, “during war” (sec. 6). All orders and regulations made under the special powers entrusted to the Governor in Council “shall have the force of law” (sec. 3 (2)). That Parliament may so legislate is no longer a matter of any doubt, but to the extent of the wide powers of legislative authority entrusted to what is normally the executive branch of government such a statute may constitute a virtual resignation during war of the essential character of Parliament as a legislative body. It may well be, however, as Lord Finlay said in the *Halliday* case (1): that it may be necessary in a time of great public danger to entrust great powers to His Majesty in Council, and that Parliament may do so feeling certain that such powers will be reasonably exercised.

Viscount Maugham as recently as November, 1941, in the House of Lords in *Liversidge v. Anderson* (2), stated, at p. 219, what he thought to be the proper approach to the construction of such an Order in Council, in these words:

My Lords, I think we should approach the construction of reg. 18B of the Defence (General) Regulations without any general presumption as to its meaning except the universal presumption, applicable to Orders in Council and other like instruments, that, if there is a reasonable doubt as to the meaning of the words used, we should prefer a construction which will carry into effect the plain intention of those responsible for the Order in Council rather than one which will defeat that intention.

(1) [1917] A.C. 260, at 268.

(2) [1942] A.C. 206.

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

S.C.R.]

SUPREME COURT OF CANADA

25

Lord Macmillan in the same case, at p. 251, said:

In the first place, it is important to have in mind that the regulation in question is a war measure. This is not to say that the courts ought to adopt in war time canons of construction different from those which they follow in peace time. The fact that the nation is at war is no justification for any relaxation of the vigilance of the courts in seeing that the law is duly observed, especially in a matter so fundamental as the liberty of the subject—rather the contrary. But in a time of emergency when the life of the whole nation is at stake it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of its drastic invasion of the liberty of the subject the courts would be slow to attribute to a peace time measure. The purpose of the regulation is to ensure public safety, and it is right so to interpret emergency legislation as to promote rather than to defeat its efficacy for the defence of the realm. That is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulations in peace time as well as in war time.

1943

REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.

Davis J.

And Lord Wright added at p. 261:

I have ventured on these elementary and obvious observations because it seems to have been suggested on behalf of the appellant that this House was being asked to countenance arbitrary, despotic or tyrannous conduct. But in the constitution of this country there are no guaranteed or absolute rights. The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved. If extraordinary powers are here given, they are given because the emergency is extraordinary and are limited to the period of the emergency.

The effect of the *War Measures Act* is to entrust to the Executive the making of orders and regulations which shall have the force of law. If the appointment of the Controller and the vesting of the powers in him were in the statute itself, that is in the *War Measures Act*, there could be no valid objection to the enactment. But it is said that the Governor in Council has passed on to a named individual the legislative power that was by the statute entrusted to and conferred upon the Executive itself, and that there is no authority, either express or necessarily implied, in the statute to permit the Executive to do this—that it may confer administrative functions is of course admitted, but not legislative functions.

There may be ground for complaint in the system adopted by the Executive of giving the most extensive and drastic powers of control into the hands of individuals or boards who are in no way responsive to the will of the electorate. The orders made from time to time by all these controllers and boards may well appear to the people to constitute an

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

26

SUPREME COURT OF CANADA

[1943]

1943
 REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.

Davis J.

arbitrary abuse of government by persons not representative of or responsible to the people. But the safety valve of our constitutional system of government remains intact. Parliament has not effaced itself. In the ultimate analysis the House of Commons as representative of the people has, in a practical sense, full power to amend or repeal the *War Measures Act* or to make ineffective any of the Orders in Council passed in pursuance of its provisions. The Judicial Committee of the Privy Council in *Hodge v. The Queen* (1), said:

It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature and not for Courts of Law, to decide.

In 1922 the House of Lords had to deal with an information at the suit of the Attorney-General where under the *Defence of the Realm Acts* and regulations the Food Controller had imposed as a condition of the granting of a licence to purchase milk in certain areas a charge of 2d. per gallon payable to him by the purchaser, the charge being part of a scheme for the regulation of prices. That was the case of *Attorney-General v. Wilts United Dairies* (2). Lord Buckmaster in delivering judgment said this in part:

The question before this House is not whether or not that was a wise and necessary step to take having regard to the difficulties by which the whole question of the milk supply was surrounded; the only question which we have to decide is whether there was any power conferred upon the Food Controller to do what he did. The Attorney-General has urged your Lordships to consider the extreme difficulty of the situation in which this country found itself owing to the war, and the importance of all the officials who had charge of our vital supplies being enabled to act under the powers conferred upon them without the fear of technical and vexatious objections being taken to the powers which they used. All that may be readily accepted, but it cannot possibly give to any official a right to act outside the law; nor can the law be unreasonably strained in order to legalise that which it might be perfectly reasonable should be done if in fact it was unauthorized. The real answer to such an argument is to be found in this, that in times of great national crisis Parliament should be, and generally is, in continuous session, and the powers which are required for the purpose of maintaining the integrity of the country, both economic and military, ought always to be obtained readily from loyal Houses of Parliament. The only question here is, were such powers granted?

(1) (1883) 9 App. Cas. 117, at 132. (2) [1922] 91 L.J. (K.B.) 897.

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

S.C.R.]

SUPREME COURT OF CANADA

27

I should like now to quote a passage from the judgment of Lord Dunedin in the House of Lords in the *Halliday* case (1), at page 271:

That preventive measures * * * may be necessary under the circumstances of a war like the present is really an obvious consideration. Parliament has in my judgment in order to secure this and kindred objects, risked the chance of abuse which will always be theoretically present when absolute powers in general terms are delegated to an executive body; and has thought the restriction of the powers to the period of the duration of the war to be a sufficient safeguard.

And Lord Wrenbury in the same case (1) (at p. 307):

There is room for difference of opinion whether what I may call legislation by devolution is expedient; whether a statute ought not to be self-contained; whether it is desirable that a statute should provide that regulations made by a defined authority or in a defined matter shall themselves have the effect of a statute. But I think it clear that this statute has conferred upon His Majesty in Council power to issue regulations which, when issued, will take effect as if they were contained in the statute.

In the light of the foregoing statements of the proper principles to apply and of the fact that the Order in Council has by statute "the force of law," I have come to the conclusion, subject to the reservation which I shall presently mention, that the Order in Council except section 4 thereof is valid.

The second question submitted is as to the validity of the Controller's order. The individual Controller, having been vested with the wide powers given to him by the Order in Council, issues an "order" so sweeping and drastic that "the method or system of control adopted," of which this order is said to be typical, may well be regarded by many as an abuse of government. But once granted the validity of the Order in Council, the Controller is within his authority so long as he does not exceed the general powers conferred upon him by the Order in Council. Those powers, as I have already said, are so extensive that it is not possible to say, as a general proposition, that the Controller has acted in excess of them.

The whole matter is for Parliament, not for the courts.

We should reserve for consideration any particular question which may hereafter arise on specific facts or in a particular case under the Order in Council or the Controller's order (or under any such orders of which those before us are said to be typical).

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

28

SUPREME COURT OF CANADA

[1943]

1943 KERWIN J.—This is a reference to the Court by His
 REFERENCE Excellency the Governor General in Council of the following
 As to the two questions for hearing and consideration:—
 Validity of
 the
 Regulations
 in relation to
 Chemicals
 enacted by
 Order in
 Council and
 of an Order
 of the
 Controller of
 Chemicals
 made
 pursuant
 thereto.

1. Are the regulations in relation to chemicals dated the 10th day of July, 1941, P.C. 4996 aforesaid, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent?

2. Is the order dated the 16th day of January, 1942, respecting glycerine (referred to as Order No. C.C.2-B) *ultra vires* of the Controller of Chemicals either in whole or in part and, if so, in what particular or particulars and to what extent?

Kerwin J.

The order of the Controller of Chemicals, mentioned in question 2, is stated to be made pursuant to the powers granted by Order in Council P.C. 4996 (referred to in question 1), and also with the approval of the Minister of Munitions and Supply and the Wartime Industries Control Board. The approval of the Minister and Chairman and the relations between them and the Board and the Controller need not be further noticed because the validity of the order of the Controller and of P.C. 4996 depend primarily upon the proper construction of the *War Measures Act*, R.S.C. 1927, chapter 206.

We are not concerned with any constitutional question, that is, as to whether the Dominion Parliament itself could enact into law all the provisions either of the order in council or of the order of the Controller of Chemicals. When, under the provisions of the *War Measures Act*, a state of war is declared to exist by the Governor in Council, Parliament may do many things which in ordinary times would be held, under the terms of *The British North America Act*, clearly to be within the competence of the provincial legislatures. The only question is whether the order in council and the order of the Controller are authorized by what Parliament itself has done in enacting the *War Measures Act*.

That Act was first enacted in 1914 at the outbreak of the first great war and now appears as chapter 206 of the last revision of the Dominion statutes in 1927. By section 2, the issue of a proclamation is conclusive evidence that war, invasion or insurrection, real or apprehended, exists, and of its continuance. Such a proclamation has been issued.

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

S.C.R.]	SUPREME COURT OF CANADA	29
---------	-------------------------	----

Sections 3 and 4 of the Act read as follows:—

1943

3. The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:—

REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.

Kerwin J.

- (a) Censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;
- (b) Arrest, detention, exclusion and deportation;
- (c) Control of the harbours, ports and territorial waters of Canada and the movements of vessels;
- (d) Transportation by land, air, or water and the control of the transport of persons and things;
- (e) Trading, exportation, importation, production and manufacture;
- (f) Appropriation, control, forfeiture and disposition of property and of the use thereof.

(2) All orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation: but if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder, shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation, extension or revocation.

4. The Governor in Council may prescribe the penalties that may be imposed for violations of orders and regulations made under this Act, and may also prescribe whether such penalties shall be imposed upon summary conviction or upon indictment, but no such penalty shall exceed a fine of five thousand dollars or imprisonment for any term not exceeding five years, or both fine and imprisonment.

The provisions of subsection 1 of section 3 are in as wide terms as may be imagined. As Mr. Justice Anglin stated in *In Re Gray* (1) "more comprehensive language it would be difficult to find." Unless there is found to be some rule to the contrary or some valid reason why the provisions of the *War Measures Act* cannot operate to their fullest extent, they authorize, in the main, both the order in council and the order of the Controller. In a reference such as this, the Court is not bound by any admission of counsel or by the omission to urge any point that might be open either for or against the validity of these documents. I have been unable to envisage any objections

(1) (1918) 57 Can. S.C.R. 150.

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

30

SUPREME COURT OF CANADA

[1943]

1943
REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.

Kerwin J.

against the validity of either, as a whole, other than those raised by Mr. McCarthy and Mr. Robinette and these I now proceed to examine.

Mr. McCarthy sought to read the first part of subsection 1 of section 3 of the Act in such a way as to draw a distinction between "acts or things" and "orders and regulations". He pointed out that the Governor in Council might do and authorize the first of these while the Governor in Council might make, from time to time, the second, and he also pointed out the comma after the word "things". I am unable so to read this subsection. In my view such a method would be to lose sight of the purpose and intent of the Act, which was to place in the hands of the Governor General in Council all possible power in order that the war should be carried to a successful conclusion. In so concluding, it may be pointed out that one would be but carrying out the provisions of section 15 of the *Interpretation Act*, R.S.C. 1927, chapter 1:—

15. Every Act and every provision and enactment thereof shall be deemed remedial, whether its immediate purport is to direct the doing of any thing which Parliament deems to be for the public good, or to prevent or punish the doing of any thing which it deems contrary to the public good; and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit.

The purpose of the Act would not be carried out by confining the Governor in Council, under the words "do and authorize such acts and things" to the doing and authorization of a single specified act or thing, and under the words "make from time to time such orders and regulations" to the making of a provision of general application. Parliament intended by the *War Measures Act* to confer upon the Governor in Council the widest possible powers of legislation and devolution, because of the necessity of acting speedily and in the realization that celerity could not be accomplished by Parliament itself, or even by the Governor in Council, when it might be most urgently required. If at any time Parliament considers that too great a power has been conferred upon the Governor in Council, the remedy lies in its own hands.

The burden of the argument is that the Governor in Council, by re-delegating or sub-delegating the powers vested in him by the *War Measures Act*, to make orders

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

S.C.R.]

SUPREME COURT OF CANADA

31

and enforce them, to persons without the purview of the Act has gone beyond the prescribed limits and beyond the powers vested in him under the Act.

We need not, I think, concern ourselves with certain decisions in the United States, of which *Panama Refining Co. v. Ryan* (1), cited by Mr. Robinette, may be taken as typical. That and similar cases depend upon the language of the United States constitution and the theory of government which underlies it. Nor is the question the same as that considered in the courts of the province of Ontario in discussing the ability of municipal councils to delegate their powers. At common law the maxim *delegatus non potest delegare* is not confined to agency, although it there has its widest application, but in my opinion there is no foundation in principle or authority for applying it in answering the questions submitted to us.

It is suggested, however, that the maxim may be at least used as a canon of construction and that unless a power to delegate legislative functions appears expressly or by necessary implication in the terms of the *War Measures Act*, it should be declared that such a power had not been conferred. While I think that that would be putting the matter too strictly, I am of opinion that even on that basis the *War Measures Act* does confer such a power. The Judicial Committee of the Privy Council found no difficulty in deciding that this had been done by the legislation under review in *Hodge v. The Queen* (2) and in *Shannon v. Lower Mainland Dairy Products Board* (3). In the latter case, it appears that counsel for the respondent was not called upon to argue the question of delegation and Lord Justice Atkin, in delivering the judgment of the Judicial Committee, approved the judgment of Chief Justice Martin of British Columbia on that point. It would be idle to compare the provisions of the provincial statutes in question in either of these cases with the terms of the *War Measures Act*. Speaking generally, however, I am of opinion that the terms of the *War Measures Act* authorize the provisions of P.C. 4996 and that the latter, in turn, authorize the provisions of the order of the Controller of Chemicals.

1943
REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.

Kerwin J.

(1) (1934) 55 S.C. Rep. (U.S.) 241.

(2) (1883) 9 App. Cas. 117.

(3) (1938) A.C. 708.

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

32

SUPREME COURT OF CANADA

[1943]

1943 Questions may arise from time to time as to the exact meaning of the clauses of either document, just as in England similar questions arose under *The Defence of the Realm Act* as, for instance, in *Attorney General v. De Keyser's Royal Hotel Limited* (1); *Chester v. Bateson* (2); *Newcastle Breweries Limited v. The King* (3). It is impossible on a reference such as this to conceive of all the issues that might arise in the carrying out of the provisions of the order in council and of the order of the Controller but attention should be called to paragraph 4 of the order in council:—

Kerwin J. 4. If the Controller takes possession of any chemicals and/or any equipment and/or of any real and/or personal property, or if the Minister determines that any person is entitled to compensation by reason of any order, then the compensation to be paid in respect thereof, in default of agreement, shall be such, in the case of any chemicals and/or any equipment, as is prescribed and determined by the Controller with the approval of the Minister, and in other cases shall be such as is determined by the Exchequer Court on reference thereto by the Minister.

This is certainly in conflict with section 7 of the *War Measures Act*:—

7. Whenever any property or the use thereof has been appropriated by His Majesty under the provisions of this Act, or any order in council, order or regulation made thereunder, and compensation is to be made therefore and has not been agreed upon, the claim shall be referred by the Minister of Justice to the Exchequer Court, or to a superior or county court of the province within which the claim arises, or to a judge of any such court.

and possibly also in conflict with subsection 5 of section 12 and subsection 2 of section 16 of *The Department of Munitions and Supply Act*.

I would therefore answer the questions as follows. (1) The regulations are not *ultra vires* of the Governor General in Council either in whole or in part, except paragraph four which is *ultra vires*. No question is before us concerning the meaning, or the application, of any of the regulations.

(2) The order is not *ultra vires* of the Controller of Chemicals either in whole or in part. Here again no question is before us concerning the meaning, or the application, of the order or any part thereof.

(1) [1920] A.C. 508.

(2) [1920] 1 K.B. 829.

(3) [1920] 1 K.B. 854.

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

S.C.R.] SUPREME COURT OF CANADA

33

HUDSON J.—The questions submitted by His Excellency the Governor General in Council to this Court for hearing and consideration are the following:

1. Are the regulations in relation to chemicals dated the 10th day of July, 1941, P.C. 4996 aforesaid, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent?

2. Is the order dated the 16th day of January, 1942, respecting glycerine (referred to as Order No. C.C. 20B) *ultra vires* of the Controller of Chemicals either in whole or in part and, if so, in what particular or particulars and to what extent?

The terms of the Order in Council referred to in the first question and the order of the Controller of Chemicals referred to in the second have already been quoted by other members of the Court, and it is not necessary for me now to repeat them.

It is quite clear that in time of war Parliament has power to legislate in respect of the subject matter of the orders under consideration.

It is equally clear that Parliament could delegate such powers to the Governor General in Council or to others.

So much is conclusively established by a decision of this Court in *Re Gray*, (1) and by the Judicial Committee of the Privy Council in *Fort Frances Pulp and Power Company Ltd. v. Manitoba Free Press Company Ltd.* (2).

The subject matter of the orders in question falls within the provisions of section 3 of the *War Measures Act*, and in particular paragraphs (e) and (f) of such section.

That the Governor General in Council himself could deal with this matter is not open to serious question.

But it is contended that under the terms of the statute the Governor General in Council had no power to delegate to others the authority to make orders and regulations such as is done here.

The statute does not in express terms provide for delegation and the maxim *delegatus non potest delegare* is invoked to support a construction as would deny any implication of such an authority.

The general principle is stated in Broom's Legal Maxims at page 570, as follows:

This principle is that a delegated authority cannot be re-delegated: *delegata potestas non potest delegari*, that is, one agent cannot lawfully

(1) (1918) 57 Can. S.C.R. 150 (2) [1923] A.C. 695.
70384—3

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

34

SUPREME COURT OF CANADA

[1943]

1943
REFERENCE
As to the
Validity of
the
Regulations
in relation to

Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.

Hudson J. And again:

appoint another to perform the duties of his agency. This rule applies wherever the authority involves a trust or discretion in the agent for the exercise of which he is selected, but does not apply where it involves no matter of discretion, and it is immaterial whether the act be done by one person or another, and the original agent remains responsible to the principal.

The principle thus stated is somewhat qualified by Broom, at page 572, as follows:

Although, however, a deputy cannot, according to the above rule, transfer his entire powers to another, yet a deputy possessing general powers may, in many cases, constitute another person his servant or bailiff, for the purpose of doing some particular act; provided, of course, that such act be within the scope of his own legitimate authority.

Hudson J. And again:

The rule as to delegated functions must, moreover, be understood with this necessary qualification, that, in the particular case, no power to re-delegate such functions has been given. Such an authority to employ a deputy may be either express or implied by the recognised usage of trade.

The maxim is most frequently applied in matters pertaining to principal and agent but it is also applied in respect of legislative grants of authority; for example in *Re Behari Lal et al*, (1), it was held that the power conferred on the Governor General in Council by section 30 of the *Immigration Act* to prohibit the landing of immigrants of a specified class could not be delegated to the Minister of the Interior. Mr. Justice Clement said:

***In my opinion, nothing short of express words would avail to enable His Excellency in Council to delegate to another or others a power of this nature, the exercise of which is conditioned upon his consideration of its necessity or expediency.

Again in *Geraghty v. Porter*, (2), it was held that a delegated power of legislation must be exercised strictly in accordance with the powers creating it; and in the absence of express power so to do the authority cannot be delegated to any other person or body.

The maxim, however, is at most a rule of construction, subject to qualifications, some of which are referred to by Broom.

In the case of a statute, there, of course, must be a consideration of the language of the whole enactment and of its purposes and objects.

(1) (1908) 43 B.C.R. 415.

(2) (1917) New Zealand Law Rep. 554.

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

S.C.R.]

SUPREME COURT OF CANADA

35

The *War Measures Act* was passed soon after the commencement of the war in 1914. Section 3 provided that:

The Governor in Council may do and authorise such acts and things, and make from time to time such orders and regulations as he may, by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada;

In the course of that war, under the authority of this Act, the Governor General in Council appointed many controllers who actively exercised powers in general not dissimilar from those here under consideration. In no case was it ever held that such delegation was *ultra vires*. On the contrary, in the case of *Fort Frances Pulp and Power Company Ltd. v. Manitoba Free Press Company Ltd.* (3), it was expressly held by Mr. Justice Riddell at the trial (4) that such delegation by the Governor in Council to a controller of pulp and paper was valid. Mr. Justice Riddell said at page 119:

Moreover, if the Dominion have regulative power over any class of subjects, it may exercise such power through any agency selected by itself—the power of the Dominion is not delegated, and the maxim *Delegatus non potest delegare* has no application.

And again:

The Governor in Council in effect regulated the trading, etc., so far as it consisted in paper, etc., by directing those concerned to obey the orders and regulations of the Minister: I think that this was perfectly valid.

The case went to the Ontario Court of Appeal, but this question was not there dealt with, the appeal being dismissed on another ground. In the Judicial Committee of the Privy Council the appeal was again dismissed. Their Lordships held that the *War Measures Act* and the Orders in Council thereunder were *intra vires*. At the conclusion of his judgment Lord Haldane accepted in general the views of Mr. Justice Riddell, although guarding himself against accepting his statement on one point which is not here relevant.

At the commencement of the present war the *War Measures Act* again came into operation. Since then the practice of 1914-1918 has been followed and extended, commensurate with the vastly increased national obligations.

(3) (1923) A.C. 695.

(4) (1922) 52 O.L.R. 118.

1943
REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.
Hudson J.

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

36

SUPREME COURT OF CANADA

[1943]

1943
REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.

Hudson J.

It is manifest that the business of government in war time cannot be effectively carried on without delegation by the Executive of a very great part of its duties.

This was found to be the case in Great Britain during the last war. There was first a general delegation of powers to His Majesty in Council, and then a sub-delegation by His Majesty in Council to controllers or directors of different governmental activities arising out of the prosecution of the war. Notwithstanding that His Majesty in Council had no express power of sub-delegation, none of the acts of the controllers or directors were ever declared to be *ultra vires* because of such sub-delegation. The attitude of the courts in England is sufficiently shown by the following extracts from Halsbury's Laws of England, vol. 6, p. 527:

Presumptions in favour of the liberty or property of the subject, which are usually of great effect in interpreting statutes in time of peace, become relatively weak in time of war when the safety of the realm is in danger.

Again at page 533:

Note (d). The main Act was the *Defence of the Realm Consolidation Act*, 1914 (5 Geo. 5, c. 8), which was in form declaratory, though it undoubtedly introduced some new law*** It was held, on more than one occasion, that no regulation which was made with the honest intention of securing the public safety and defence of the realm could be treated by the Courts as invalid, unless it was clear, upon the face of it, that it could not possibly aid in securing the public safety or the defence of the realm.

After the conclusion of the war several emergency Acts were passed, and the latest which came into effect at the commencement of the present war contained express authority to His Majesty in Council to delegate. It was pressed upon us as an argument that it was then recognized in England that the prior legislation was insufficient. This, however, would not be conclusive even in England and much less so when construing the Canadian Act.

Bearing in mind that we are not now called upon to construe a constitutional Act but an Act which the Canadian Parliament passed in war time for the security, defence and welfare of Canada, I do not think that the maxim *delegatus non potest delegare* is applicable.

By the statute the Governor in Council is given power to do and authorise such acts and things and make from time to time such orders and regulations as he may deem necessary or advisable for the security, defence, peace, order and welfare of Canada, and by subsection 2 such orders and regulations shall have the force of law.

Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto, [1943] R.C.S. 1

S.C.R.]

SUPREME COURT OF CANADA

37

In the light of the necessity for delegation and what took place during the last war, and the decision of the courts in the case of *Fort Frances Pulp and Paper Co. v. Manitoba Free Press* (1), I think it must be held that the Governor in Council has the power to delegate to others the performance of such duties as has been done in the present case. Any such delegation would, of course, not confer on the delegate power to do anything in conflict with other provisions of the *War Measures Act*. One of such provisions has been called to our attention, namely clause 4 of Order in Council No. 4996, in regard to compensation. This conflicts with section 7 of the *War Measures Act* and, for that reason, is invalid.

For these reasons, I concur in the following answers to the questions referred to us:

The answer to interrogatory number one is: The Regulations are not *ultra vires* of the Governor General in Council either in whole or in part; except paragraph four which is *ultra vires*. No question is before us concerning the meaning, or the application, of any of the Regulations.

The answer to interrogatory number two is: The order is not *ultra vires* of the Controller of Chemicals either in whole or in part. Here again no question is before us concerning the meaning, or the application, of the order or any part thereof.

1943
REFERENCE
As to the
Validity of
the
Regulations
in relation to
Chemicals
enacted by
Order in
Council and
of an Order
of the
Controller of
Chemicals
made
pursuant
thereto.

Hudson J.

Onglet 84

R. c. Mercure, [1988] 1 R.C.S. 234

234

R. v. MERCURE

[1988] 1 S.C.R.

André Mercure Appellant

v.

The Attorney General for Saskatchewan Respondent

and

The Fédération des francophones hors Québec, the Association canadienne-française de l'Alberta and the Association culturelle franco-canadienne de la Saskatchewan Intervenors (principal parties)

and

The Attorney General for Alberta Intervener

and

Freedom of Choice Movement Intervener

INDEXED AS: R. v. MERCURE

File No.: 19688.

1986: November 26, 27; 1988: February 25.

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

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law — Continuance of laws — Saskatchewan Act — Language rights — Legislature and courts of Saskatchewan — Whether s. 110 of The North-West Territories Act continued to apply to Saskatchewan by virtue of the Saskatchewan Act — Saskatchewan Act, S.C. 1905, c. 42, ss. 14, 16.

Constitutional law — Amendment of provincial constitution — Language rights — Legislature and courts of Saskatchewan — Whether rights derived from s. 110 of The North-West Territories Act can be modified unilaterally by Saskatchewan — Saskatchewan Act, S.C. 1905, c. 42, s. 16 — Constitution Act, 1982, s. 45.

Constitutional law — Language rights — Saskatchewan statutes — Whether s. 110 of The North-West Territories Act requires Saskatchewan Legislature to

* Chouinard J. took no part in the judgment.

André Mercure Appellant

c.

Le procureur général de la Saskatchewan

^a *Intimé*

et

La Fédération des francophones hors Québec, b l'Association canadienne-française de l'Alberta et l'Association culturelle franco-canadienne de la Saskatchewan Intervenantes (parties principales)

^c et

Le procureur général de l'Alberta Intervenant

et

d Le Mouvement de la liberté de choix Intervenant

RÉPERTORIÉ: R. c. MERCURE

N° du greffe: 19688.

^e 1986: 26, 27 novembre; 1988: 25 février.

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

^f EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Droit constitutionnel — Maintien en vigueur des lois — Loi sur la Saskatchewan — Droits linguistiques — Assemblée législative et tribunaux de la Saskatchewan — L'article 110 de l'Acte des territoires du Nord-Ouest est-il toujours applicable à la Saskatchewan en vertu de la Loi sur la Saskatchewan? — Loi sur la Saskatchewan, S.C. 1905, chap. 42, art. 14, 16.

^g *Droit constitutionnel — Modification de la constitution de la province — Droits linguistiques — Assemblée législative et tribunaux de la Saskatchewan — Les droits qui découlent de l'art. 110 de l'Acte des territoires du Nord-Ouest peuvent-ils être modifiés unilatéralement par la Saskatchewan? — Loi sur la Saskatchewan, S.C. 1905, chap. 42, art. 16 — Loi constitutionnelle de 1982, art. 45.*

Droit constitutionnel — Droits linguistiques — Lois de la Saskatchewan — L'article 110 de l'Acte des territoires du Nord-Ouest exige-t-il que l'Assemblée

* Le juge Chouinard n'a pas pris part au jugement.

[1988] 1 R.C.S.

R. C. MERCURE

235

publish its laws in English and in French — Saskatchewan Act, S.C. 1905, c. 42, ss. 14, 16.

Constitutional law — Language rights — Saskatchewan courts — Provincial offence — Whether accused has a right to use the French language in proceedings before the Saskatchewan courts — Content of right — The North-West Territories Act, R.S.C. 1886, c. 50, s. 110 (am. S.C. 1891, c. 22, s. 18) — Saskatchewan Act, S.C. 1905, c. 42, s. 16.

Criminal law — Provincial offence — Trial — Saskatchewan courts — Whether accused has a right to use the French language in proceedings before the Saskatchewan courts — Content of right — The North-West Territories Act, R.S.C. 1886, c. 50, s. 110 (am. S.C. 1891, c. 22, s. 18) — Saskatchewan Act, S.C. 1905, c. 42, s. 16.

Appellant, charged with speeding under the Saskatchewan *Vehicles Act*, made an application in the Provincial Court to enter a plea in French, to have his trial proceeded with in that language, and to have the hearing delayed until the relevant provincial statutes could be produced in French. The application was based on s. 110 of *The North-West Territories Act* which provides that "Either the English or the French language may be used by any person in the debates of the Legislative Assembly of the Territories and in the proceedings before the courts; . . . and all ordinances made under the Act shall be printed in both those languages . . ." Appellant maintained that this provision still applies to the courts and the Legislature of Saskatchewan by virtue of s. 16 of the *Saskatchewan Act*. The Provincial Court judge denied appellant's application. He held that s. 110 of *The North-West Territories Act* was applicable to the Saskatchewan courts and entitled appellant to use the French language before the Provincial Court and to be provided with an interpreter. But he also held that appellant was not entitled to be provided with statutes printed in French because the requirement in s. 110 regarding the publication of laws was in terms restricted to the Territorial Assembly and had no application to the Saskatchewan Legislature. When asked to enter a plea, appellant indicated that he wished to stand mute. The trial judge entered a plea of not guilty and the trial was conducted entirely in English. No interpreter was present because appellant took the position that having an interpreter did not comply with s. 110 and that he could not defend himself without access to the relevant statutes printed in French. Appel-

législative de la Saskatchewan publie ses lois en français et en anglais? — Loi sur la Saskatchewan, S.C. 1905, chap. 42, art. 14, 16.

Droit constitutionnel — Droits linguistiques — Tribunaux de la Saskatchewan — Infraction provinciale — L'accusé a-t-il le droit d'utiliser le français dans les procédures devant les tribunaux de la Saskatchewan? — Contenu du droit — Acte des territoires du Nord-Ouest, S.R.C. 1886, chap. 50, art. 110 (mod. S.C. 1891, b chap. 22, art. 18) — Loi sur la Saskatchewan, S.C. 1905, chap. 42, art. 16.

Droit criminel — Infraction provinciale — Procès — Tribunaux de la Saskatchewan — L'accusé a-t-il le droit d'utiliser le français dans les procédures devant les tribunaux de la Saskatchewan? — Contenu du droit — Acte des territoires du Nord-Ouest, S.R.C. 1886, chap. 50, art. 110 (mod. S.C. 1891, chap. 22, art. 18) — Loi sur la Saskatchewan, S.C. 1905, chap. 42, art. 16.

*d L'appelant, accusé d'avoir commis un excès de vitesse contrairement à *The Vehicles Act* de la Saskatchewan, a présenté une demande en Cour provinciale pour inscrire un plaidoyer en français, pour que son procès soit tenu dans cette langue et pour qu'il soit retardé jusqu'à ce qu'on puisse produire les lois provinciales pertinentes en français. La demande se fondait sur l'art. 110 de l'*Acte des territoires du Nord-Ouest* selon lequel «Toute personne pourra faire usage soit de la langue anglaise, soit de la langue française, dans les débats de l'Assemblée législative des territoires, ainsi que dans les procédures devant les cours de justice; [...] et toutes les ordonnances rendues sous l'empire du présent acte seront imprimées dans ces deux langues . . .» L'appelant a soutenu que cette disposition s'applique toujours aux tribunaux et à l'Assemblée législative de la Saskatchewan en vertu*

*e de l'art. 16 de la *Loi sur la Saskatchewan*. Le juge de la Cour provinciale a rejeté la demande de l'appelant. Il a conclu que l'art. 110 de l'*Acte des territoires du Nord-Ouest* s'appliquait aux tribunaux de la Saskatchewan et que l'appelant avait le droit d'utiliser le français devant*

f la Cour provinciale et le droit aux services d'un interprète. Toutefois, il a également conclu que l'appelant n'avait pas le droit d'obtenir les lois imprimées en français parce que l'exigence de l'art. 110 concernant la publication des lois était, par ses termes mêmes, limitée à l'Assemblée territoriale et ne s'appliquait pas à l'Assemblée législative de la Saskatchewan. Lorsqu'on a demandé à l'appelant d'inscrire un plaidoyer, il a indiqué qu'il voulait garder le silence. Le juge du procès a inscrit un plaidoyer de non-culpabilité et le procès s'est déroulé entièrement en anglais. Aucun interprète n'était présent, car l'appelant a adopté le point de vue selon

g i j le fait de disposer des services d'un interprète ne

lant was convicted and his appeal by way of stated case to the Court of Appeal was dismissed.

Held (Estey and McIntyre JJ. dissenting): The appeal should be allowed.

Per Dickson C.J. and Beetz, Lamer, Wilson, Le Dain and La Forest JJ.: Parliament, in establishing the province of Saskatchewan out of the North-West Territories, provided under s. 16 of the *Saskatchewan Act* for the general continuation of pre-existing laws except in so far as those laws were inconsistent with the *Saskatchewan Act*, or in so far as the Act contained provisions as a substitute therefor. Since Parliament did not expect these laws to continue forever, it empowered the appropriate legislature, in accordance with the division of legislative power, to repeal or amend such laws. Section 110 of *The North-West Territories Act* was a law existing at the establishment of the province. Since no provision of the *Saskatchewan Act* was inconsistent with s. 110 or was intended as a substitute for it, and since there was no amendment of the provisions of that section with respect to the language of the statutes and of the proceedings in the courts, it follows that s. 110 continues in effect for that purpose and that the statutes of Saskatchewan must be enacted, printed and published in English and French and that both languages may be used in the Saskatchewan courts.

The view that s. 16 did not operate to continue the provisions of s. 110 relating to the Territorial Assembly involves a misunderstanding of the nature of provisions for the continuation of laws. In according rights to persons to speak English or French in the North-West Territories in 1877, the legislation necessarily had to be addressed to the then existing institutions—the Territorial Assembly and courts. To continue the laws establishing these rights, which s. 16 generally purports to do, it was obviously necessary to apply them to the successor institutions. In any event, the broad wording used in s. 14 of the *Saskatchewan Act* was intended to cover in a general and comprehensive way the laws governing the operation of the legislature. Thus the *Saskatchewan Act*, either by virtue of s. 14 alone or read in conjunction with s. 16, provided for the continuance of all laws governing the legislature that were not inconsistent with the Act.

satisfaisait pas aux exigences de l'art. 110 et qu'il lui était impossible de se défendre sans pouvoir consulter les lois pertinentes imprimées en français. L'appelant a été déclaré coupable et son appel par voie d'exposé de cause à la Cour d'appel a été rejeté.

Arrêt (les juges Estey et McIntyre sont dissidents): Le pourvoi est accueilli.

Le juge en chef Dickson et les juges Beetz, Lamer, Wilson, Le Dain et La Forest: Le Parlement, en créant

- b la province de la Saskatchewan à partir des territoires du Nord-Ouest, a prévu aux termes de l'art. 16 de la Loi sur la Saskatchewan le maintien général des lois préexistantes sauf dans la mesure où elles dérogent à la Loi sur la Saskatchewan ou dans la mesure où cette loi contient des dispositions destinées à leur être substituées. Étant donné que le Parlement ne pouvait s'attendre à ce que ces lois s'appliquent toujours, il a accordé à la législature compétente, conformément au partage du pouvoir législatif, le pouvoir d'abroger ou de modifier ces lois. L'article 110 de l'Acte des territoires du Nord-Ouest faisait partie du droit au moment de la création de la province. Étant donné qu'aucune disposition de la Loi sur la Saskatchewan n'était incompatible avec l'art. 110 ou n'était destinée à le remplacer et comme il n'y a pas eu de modification des dispositions de cet article concernant la langue des lois et des procédures devant les tribunaux, il en découle que l'art. 110 continue d'être en vigueur à cette fin et que les lois de la Saskatchewan doivent être adoptées, imprimées et publiées en français et en anglais et que ces deux langues peuvent être utilisées devant les tribunaux de la Saskatchewan.*

L'opinion selon laquelle l'art. 16 n'a pas eu pour effet de maintenir en vigueur les dispositions de l'art. 110 qui se rapportaient à l'Assemblée territoriale comporte une

- g erreur quant à la nature des dispositions relatives au maintien des lois. En accordant en 1877 des droits permettant aux personnes de parler le français ou l'anglais dans les territoires du Nord-Ouest, la mesure législative devait nécessairement viser les institutions qui existaient à l'époque, savoir l'Assemblée territoriale et les tribunaux des Territoires. Afin de maintenir en vigueur les lois établissant ces droits, ce que l'art. 16 est d'une manière générale censé faire, il était de toute évidence nécessaire de les appliquer aux institutions qui leur ont succédé. De toute façon, les termes généraux utilisés dans l'art. 14 de la Loi sur la Saskatchewan étaient destinés à viser d'une manière générale et complète les lois régissant le fonctionnement de l'Assemblée législative. Par conséquent, en vertu de l'art. 14 pris isolément ou conjointement avec l'art. 16, la Loi sur la Saskatchewan prévoyait le maintien de toutes les lois régissant l'Assemblée législative qui ne dérogeaient pas à la Loi.*

[1988] 1 R.C.S.

R. C. MERCURE

237

The English language did not become the language of the courts of the North-West Territories, and later of the Saskatchewan courts, by virtue of the English statute of 1731, which prescribed that all proceedings in the courts be in English only. The 1886 amendment to *The North-West Territories Act* providing for the reception date of English law as of 1870 never had the effect of incorporating this statute as part of the law of the Territories because any existing law on the language of the courts was impliedly repealed by s. 110 which fully covered the subject-matter. There was, therefore, no law regarding the language of the courts to be continued in Saskatchewan other than s. 110. The section was not repealed as no mention whatsoever was made of language in the various Acts that restructured the Saskatchewan judicial system. In particular, s. 110 was not impliedly repealed merely because certain rules of court and court forms were written on the assumption that the judicial system would operate in English.

While s. 110 governs procedural matters, it does not serve merely procedural ends. It embodies procedural rules that give rights to individuals. The courts have treated laws giving expression to human rights as being of an almost constitutional nature. Repeal of such laws requires "clear legislative pronouncement". Language rights are a well-known species of human rights and should be approached accordingly.

Section 110 was not entrenched after the *Saskatchewan Act* was passed. The express words of ss. 14 and 16(1) of the *Saskatchewan Act* clearly provide that the laws continued under the Act are subject to repeal by the appropriate legislature. Not only is the province empowered to legislate respecting procedure in the courts under s. 92(14) of the *Constitution Act, 1867*, it is also given power to amend its constitution under s. 45 of the *Constitution Act, 1982*.

The language rights accorded by s. 110 of *The North-West Territories Act* are substantially the same as those accorded under s. 133 of the *Constitution Act, 1867*, s. 23 of the *Manitoba Act, 1870* and ss. 16 to 18 of the *Canadian Charter of Rights and Freedoms*. Under s. 110, an accused is constitutionally entitled to speak French before the courts in Saskatchewan, but has no right to be understood in that language. The judge and all court officials can use English or French as they wish, both in oral and in written communication. The

L'anglais n'est pas devenu la langue des tribunaux des territoires du Nord-Ouest et par la suite des tribunaux de la Saskatchewan en vertu de la Loi anglaise de 1731 qui prévoyait que toutes les procédures devant les tribunaux devaient être en anglais seulement. La modification de l'*Acte des territoires du Nord-Ouest* en 1886 prévoyant l'entrée en vigueur du droit anglais tel qu'il existait en 1870 n'a jamais eu pour effet d'incorporer cette loi dans le droit territorial parce que toute loi existante portant sur la langue des tribunaux a été implicitement abrogée par l'art. 110 qui réglait complètement la question. Par conséquent, outre l'art. 110, il n'y avait aucune mesure législative concernant la langue des tribunaux qui pouvait être maintenue en vigueur en Saskatchewan. L'article n'a pas été abrogé, car les diverses lois qui ont restructuré le système judiciaire de la Saskatchewan ne mentionnent nullement la question de la langue. En particulier, l'art. 110 n'a pas été abrogé de manière implicite simplement parce que certaines règles et certains formulaires judiciaires ont été rédigés en fonction de l'hypothèse que le système judiciaire fonctionnerait en anglais.

Bien que l'art. 110 régisse des questions de procédure, il ne vise pas seulement des fins procédurales. Il consacre des règles de procédure qui donnent des droits aux particuliers. Les tribunaux ont traité les lois qui formulent des droits de la personne comme étant de nature quasi constitutionnelle. L'abrogation de telles lois exige une «déclaration législative claire». Les droits linguistiques sont un genre bien connu de droits de la personne et doivent être abordés en conséquence.

L'article 110 n'a pas été enraciné après l'adoption de la *Loi sur la Saskatchewan*. Les termes exprès de l'art. 14 et du par. 16(1) de la *Loi sur la Saskatchewan* prévoient clairement que les lois dont l'existence est maintenue aux termes de la Loi peuvent être abrogées par le législateur compétent. Non seulement la province est habilitée à légiférer relativement à la procédure devant les tribunaux aux termes du par. 92(14) de la *Loi constitutionnelle de 1867*, mais elle a également le pouvoir de modifier sa constitution en vertu de l'art. 45 de la *Loi constitutionnelle de 1982*.

Les droits linguistiques qu'accorde l'art. 110 de l'*Acte des territoires du Nord-Ouest* sont essentiellement les mêmes que ceux accordés aux termes de l'art. 133 de la *Loi constitutionnelle de 1867*, l'art. 23 de la *Loi de 1870 sur le Manitoba* et les art. 16 à 18 de la *Charte canadienne des droits et libertés*. Aux termes de l'art. 110, un accusé a constitutionnellement le droit de parler français devant les tribunaux en Saskatchewan, mais n'a pas le droit d'être compris dans cette langue. Le juge et tous les officiers de justice peuvent utiliser à leur gré le

accused has no right to a translator, except as required for a fair trial either at common law or under ss. 7 and 14 of the *Charter*. The right to be understood is not a language right but one arising out of the requirements of due process. Finally, when proceedings are required by law to be recorded, a person using one or the other official language has the right to have his remarks recorded in that language. Accordingly, in this case, appellant was entitled to use French in the Provincial Court, but he could not require the others to do so. As there was no evidence to indicate that he needed the services of a translator to understand the proceedings, a fair trial could be conducted without making a translation available from English to French.

As to appellant's request that a French version of the relevant statutes be produced, it was obvious that he sought valid statutes, not mere unofficial translations. The statutes of Saskatchewan must, by virtue of the province's constituent statute, the *Saskatchewan Act*, be enacted, printed and published in English and French. Since the statutes of Saskatchewan were not enacted in the manner and form required by its constituent statute, it follows that they are invalid. The principle of the rule of law and the *de facto* doctrine, however, will keep the existing laws temporarily in effect for the minimum time necessary for the statutes to be translated, re-enacted, printed and published in French or for the legislature to amend its constitution by enacting a bilingual statute removing the restrictions imposed on it by s. 110 and then declaring all existing laws valid notwithstanding that they were enacted, printed and published in English only. The principle of the rule of law would have also preserved the enforceability of appellant's conviction. But, in this case, the trial judge's failure to comply with appellant's request to have his plea entered in French vitiated the trial. He sought to use French, and had a right to have his plea entered in that language. His subsequent refusal to enter a plea was consequential to this. The conviction should be quashed.

Per Estey and McIntyre JJ. (dissenting): Parliament made provision in the *Saskatchewan Act* for a new legislature and courts in the new province. In doing so, Parliament, pursuant to s. 16(1) of the Act, incorporated by reference the laws of the North-West Territo-

français ou l'anglais dans les communications verbales et écrites. L'accusé n'a pas le droit à un interprète, à l'exception de ce qui est nécessaire pour avoir un procès équitable en *common law* ou en vertu des art. 7 et 14 de la *Charte*. Le droit d'être compris n'est pas un droit linguistique, mais un droit qui découle des exigences de l'application régulière de la loi. Enfin, lorsque les procédures doivent en vertu de la loi être consignées, une personne qui utilise l'une ou l'autre langue officielle a droit à ce que ses observations soient consignées dans cette langue. Par conséquent, en l'espèce, l'appelant avait le droit d'utiliser le français devant la Cour provinciale mais ne pouvait exiger que d'autres personnes l'utilisent. Étant donné qu'il n'y a aucun élément de preuve qui indique qu'il avait besoin des services d'un traducteur pour comprendre les procédures, un procès équitable aurait pu être tenu sans offrir une traduction de l'anglais au français.

En ce qui a trait à la demande de l'appelant relative à la production d'une version française des lois, il est évident qu'il cherchait à obtenir des lois valides et non simplement des traductions officieuses. Les lois de la Saskatchewan, en vertu de la loi constitutive de la province, la *Loi sur la Saskatchewan*, doivent être adoptées, imprimées et publiées en français et en anglais. Étant donné que les lois de la Saskatchewan n'ont pas été adoptées suivant le mode et la forme requis par sa loi constitutive, il s'ensuit qu'elles ne sont pas valides. Toutefois, le principe de la primauté du droit et de la validité *de facto* permet de maintenir les lois existantes temporairement en vigueur jusqu'à l'expiration du délai minimum requis pour les traduire, les adopter de nouveau, les imprimer et les publier en français ou pour que l'Assemblée législative modifie sa constitution par l'adoption d'une loi bilingue abrogeant les restrictions que lui impose l'art. 110 et déclare alors toutes les lois existantes valides bien qu'elles aient été adoptées, imprimées et publiées en anglais seulement. Le principe de la primauté du droit a pour effet de préserver le caractère exécutoire de la déclaration de culpabilité de l'appelant. Toutefois, en l'espèce, le défaut du juge du procès d'accéder à la demande de l'appelant que son plaidoyer soit enregistré en français entache le procès de nullité. Il a cherché à utiliser le français et avait donc droit à ce que son plaidoyer soit inscrit dans cette langue. Son refus d'inscrire un plaidoyer en découlle. La déclaration de culpabilité doit être annulée.

Les juges Estey et McIntyre (dissidents): Dans la *Loi sur la Saskatchewan*, le Parlement a prévu une nouvelle législature et des tribunaux pour la nouvelle province. Ce faisant, en vertu du par. 16(1) de la Loi, le Parlement a introduit par renvoi les lois des territoires du

ries into the laws of Saskatchewan except where the Territories' laws were inconsistent with the Act or where there was a substitute in the Act. Parliament, in so exercising its authority under the *Constitution Act, 1871*, refrained from establishing any language rights in the new province. Indeed, unlike the situation resulting from the presence of s. 23 in the *Manitoba Act, 1870*, there was no constitutional impediment or restriction on the exercise by the new province of its free legislative will under s. 92 of the *Constitution Act, 1867* as regards the use of language in the legislature and the courts. In these circumstances, it would be unusual to find that s. 110 of *The North-West Territories Act* was introduced into the Constitution of Saskatchewan by an indirect and convoluted process so as to achieve the Manitoba result.

Section 16(1) of the *Saskatchewan Act* did not incorporate s. 110 into the laws of Saskatchewan. Section 3 of the *Saskatchewan Act* provided that the "provisions of the *Constitution Acts, 1867 to 1886* shall apply to the province of Saskatchewan", except the provisions, like s. 133 of the *Constitution Act, 1867*, which are "specially applicable to . . . one or more and not the whole of the said provinces". Section 3 gave the new province full plenary powers to establish its courts and legislature as it saw fit, free from the restrictions in s. 133. Section 16(1) of the *Saskatchewan Act* could not therefore indirectly repeal s. 3 by requiring the new legislature established in Saskatchewan to operate under the regime of s. 133.

Further, the courts established in Saskatchewan by Parliament acting under s. 2 of the *Constitution Act, 1871* were substitutes for the courts described in the laws of the North-West Territories and accordingly those laws relating to courts of the Territories were not, by the terms of s. 16(1), brought into the new province. These new 'courts of Saskatchewan' were put in place to carry on a function under s. 92(14) of the *Constitution Act, 1867*. Section 110, which was either a precautionary recognition of s. 133 of the *Constitution Act, 1867* or a part of the federal administration of those territories lying outside any province under s. 4 of the *Constitution Act, 1871*, was never intended to apply to courts not within federal jurisdiction. It follows that s. 110 was only intended to apply to the courts of the North-West Territories and to no successor courts. It also follows that the provisions in that section relating to the printing of laws in French applied only to the Legislative Assembly of the North-West Territories. The Legisla-

Nord-Ouest dans les lois de la Saskatchewan, sauf lorsque les lois des Territoires dérogeaient à la Loi ou qu'on trouvait des dispositions pour les remplacer dans la Loi. En exerçant son pouvoir en vertu de la *Loi constitutionnelle de 1871*, le Parlement s'est abstenu de créer des droits linguistiques dans la nouvelle province. Contrairement à la situation résultant de l'art. 23 dans la *Loi de 1870 sur le Manitoba*, aucune restriction ni aucun obstacle constitutionnels ne venaient empêcher la nouvelle province d'exercer librement sa volonté législative aux termes de l'art. 92 de la *Loi constitutionnelle de 1867* en ce qui a trait à la langue à utiliser à la législature et devant les tribunaux. Dans les circonstances, il serait anormal de conclure que l'art. 110 de l'*Acte des territoires du Nord-Ouest* a, par un moyen indirect et détourné, été inséré dans la Constitution de la Saskatchewan, de façon à obtenir le même résultat qu'au Manitoba.

Le paragraphe 16(1) de la *Loi sur la Saskatchewan* d n'a pas incorporé l'art. 110 dans le droit de la Saskatchewan. L'article 3 de la *Loi sur la Saskatchewan* prévoit que les «dispositions des *Lois constitutionnelles de 1867 à 1886* s'appliquent à la province de la Saskatchewan», excepté les dispositions, comme l'art. e 133 de la *Loi constitutionnelle de 1867*, qui sont «expressément applicables [...] à une ou plusieurs et non à la totalité des dites provinces». L'article 3 accorde à la nouvelle province les pleins pouvoirs pour établir ses tribunaux et sa législature comme elle l'entend, sans aucune des restrictions de l'art. 133. Le paragraphe f 16(1) de la *Loi sur la Saskatchewan* ne pouvait donc pas abroger indirectement l'art. 3 en imposant à la nouvelle législature créée en Saskatchewan le régime de l'art. 133.

En outre, les tribunaux créés par le Parlement en g vertu de l'art. 2 de la *Loi constitutionnelle de 1871* remplacent les tribunaux décrits dans les lois des territoires du Nord-Ouest et, par conséquent, les lois qui se rapportent aux tribunaux des Territoires ne sont pas, en vertu du par. 16(1), introduites dans la nouvelle province. Ces nouveaux «tribunaux de la Saskatchewan» ont été instaurés pour exercer une fonction aux termes du par. 92(14) de la *Loi constitutionnelle de 1867*. L'article 110, qui constituait soit une reconnaissance, par mesure de précaution, de l'art. 133 soit une partie de l'administration fédérale de ces territoires à l'extérieur d'une province au sens de l'art. 4 de la *Loi constitutionnelle de 1871*, n'a jamais été destiné à s'appliquer aux tribunaux qui ne relevaient pas de la compétence fédérale. Il s'ensuit que l'art. 110 n'était destiné à s'appliquer qu'aux tribunaux des territoires du Nord-Ouest et non aux tribunaux qui leur ont succédé. Il s'ensuit également que les dispositions de cet article relatives à l'impression

j

ture of Saskatchewan established by ss. 12 to 15 of the *Saskatchewan Act* was a completely new institution and the laws relating thereto were in substitution for the laws relating to the legislature in the North-West Territories prior to 1905. This conclusion is supported by s. 14 of the *Saskatchewan Act* which provides that the laws of the North-West Territories relating to the "constitution" and the "election of members" of the Legislature of the North-West Territories shall apply to the Legislative Assembly of Saskatchewan. This section would be unnecessary if s. 16(1) of the *Saskatchewan Act* carried forward all the laws of the North-West Territories, including s. 110, into Saskatchewan. Also, section 14 did not incorporate s. 110 into the laws of Saskatchewan for s. 110 was not a provision of a North-West Territories' law relating to the "constitution" of the Legislature of the Territories.

By the terms of s. 16(1) itself, s. 110 did not qualify for incorporation by reference into the laws of the new province. As there was nothing in the *Saskatchewan Act* addressing the use of language in the province's courts or legislature, the exclusive provincial legislative sovereignty under the Constitution remained untrammelled by any provisions of the *Saskatchewan Act*. The application of s. 110 would be a curtailment of the institutions created and the authority granted to the legislature of the new province by the *Saskatchewan Act* and, accordingly, was inconsistent with the Act.

In short, the language guarantees found in s. 110 were specific to the Legislature and the courts of the North-West Territories. Saskatchewan, like all provinces, acquired the power to establish its institutions when it was created, including the power to specify the language to be used in their proceedings. Section 110 of *The North-West Territories Act* cannot reasonably be read as having the effect of altering by inference the constitutional division of powers provided for in both the *Constitution Act, 1867* and the *Saskatchewan Act*.

Finally, even assuming that s. 110 was incorporated into the laws of Saskatchewan, the section would still have no application to the proceedings of that province's courts and legislature. Indeed, if s. 110 became part of Saskatchewan law, it did so instantaneously with the termination of the existence of the only two institutions to which it applied. The Legislature of the North-West Territories was replaced under s. 12 of the *Saskatche-*

des lois en français ne s'appliquaient qu'à l'Assemblée législative des territoires du Nord-Ouest. La législature de la Saskatchewan créée par les art. 12 à 15 de la Loi sur la Saskatchewan est une institution totalement nouvelle et les lois qui s'y rapportent sont substituées aux lois relatives à la législature des territoires du Nord-Ouest antérieures à 1905. Cette conclusion est appuyée par l'art. 14 de la Loi sur la Saskatchewan qui prévoit que les lois des territoires du Nord-Ouest relatives à la «constitution» et à «l'élection des membres» de l'Assemblée législative des territoires du Nord-Ouest s'appliquent à l'Assemblée législative de la Saskatchewan. Cet article serait inutile si, en vertu du par. 16(1) de la Loi sur la Saskatchewan, toutes les lois des territoires du Nord-Ouest, y compris l'art. 110, avaient été incorporées en Saskatchewan. De plus, l'art. 14 n'a pas incorporé l'art. 110 dans le droit de la Saskatchewan, car l'art. 110 n'était pas une disposition d'une loi des territoires du Nord-Ouest relative à la «constitution» de l'Assemblée législative des Territoires.

d De par le texte même du par. 16(1), l'art. 110 n'est pas susceptible d'être incorporé par renvoi dans le droit de la nouvelle province. Comme il n'y a rien dans la Loi sur la Saskatchewan qui porte sur la langue à utiliser devant les tribunaux ou à l'Assemblée législative de la province, la souveraineté législative exclusive de la province en vertu de la Constitution n'a pas été limitée par les dispositions de la Loi sur la Saskatchewan. L'application de l'art. 110 entraînerait un amoindrissement des institutions établies et du pouvoir accordé à la législature de la nouvelle province par la Loi sur la Saskatchewan, et, par conséquent, déroge à cette loi.

En résumé, les garanties linguistiques prévues à l'art. 110 étaient propres à la législature et aux tribunaux des territoires du Nord-Ouest. La Saskatchewan, comme toutes les provinces, a obtenu au moment de sa création le pouvoir d'établir ses propres institutions, y compris le pouvoir de spécifier la langue devant être employée dans leurs débats. L'article 110 de l'Acte des territoires du Nord-Ouest ne peut être raisonnablement interprété de manière à avoir pour effet de modifier implicitement le partage constitutionnel des pouvoirs prévus à la fois par la Loi constitutionnelle de 1867 et par la Loi sur la Saskatchewan.

i Enfin, même si l'on présume que l'art. 110 est incorporé dans le droit de la Saskatchewan, cet article ne s'appliquerait toujours pas aux procédures devant les tribunaux de la province ni aux débats de la législature. En effet, si l'art. 110 a été incorporé au droit de la Saskatchewan, cela s'est produit instantanément lorsque les deux seules institutions qu'il visait ont cessé d'exister. L'Assemblée législative des territoires du Nord-Ouest a

wan Act and the courts were replaced under s. 16 of the same Act. Thus section 110 became simultaneously spent as regards the legislature and the courts of Saskatchewan with its introduction into Saskatchewan law. Furthermore, Parliament also simultaneously "disestablished" the Supreme Court of the North-West Territories even as it applied to the Territories.

Cases Cited

By La Forest J.

Overturned: *Strachan v. Lamont* (1906), 4 W.L.R. 411; **applied:** *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460; *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549; *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; **referred to:** *Bilodeau v. Attorney General of Manitoba*, [1986] 1 S.C.R. 449; *R. v. Lefebvre* (1982), 21 Alta. L.R. (2d) 65 (Q.B.), aff'd (1986), 48 Alta. L.R. (2d) 124 (C.A.); *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182; *R. v. Tremblay* (1985), 20 C.C.C. (3d) 454; *Paquette v. R. in Right of Canada* (1985), 40 Alta. L.R. (2d) 38 (Q.B.), aff'd (1987), 55 Alta. L.R. (2d) 1 (C.A.); **Reference re French Language Rights of Accused in Saskatchewan Criminal Proceedings**, [1987] 5 W.W.R. 577; *R. v. Murphy* (1968), 69 D.L.R. (2d) 530; *Re Poulin* (1968), 64 W.W.R. 705; *Toll v. Canadian Pacific Railway Co.* (1908), 8 W.L.R. 795; *Schultz v. Wolske* (1966), 75 W.W.R. 411; *Stevens v. Quinney* (1979), 101 D.L.R. (3d) 289; *The India* (1865), 12 L.T.N.S. 316; *Seward v. The "Vera Cruz"* (1884), 10 App. Cas. 59; *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150; *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124; *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2; **Attorney General of Canada v. Canadian National Transportation, Ltd.**, [1983] 2 S.C.R. 206; *Hoskyn v. Metropolitan Police Commissioner*, [1979] A.C. 474; *Bribery Commissioner v. Ranasinghe*, [1965] A.C. 172; **Attorney-General for New South Wales v. Trethowan**, [1932] A.C. 526; *Harris v. Minister of the Interior*, [1952] 2 S.A.L.R. (N.S.) 428.

By Estey J. (dissenting)

Strachan v. Lamont (1906), 4 W.L.R. 411; *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549; *Jones v. Attorney General of New Bruns-*

été remplacée aux termes de l'art. 12 de la *Loi sur la Saskatchewan* et les tribunaux ont été remplacés aux termes de l'art. 16 de cette même loi. En conséquence, au moment même de son incorporation dans le droit de la Saskatchewan, l'art. 110 est devenu inopérant à l'égard de la législature et des tribunaux de cette province. En outre, le Parlement a simultanément aussi «abolis» la Cour suprême des territoires du Nord-Ouest, même en tant que tribunal des Territoires.

b Jurisprudence

Citée par le juge La Forest

Arrêt écarté: *Strachan v. Lamont* (1906), 4 W.L.R. 411; **arrêts appliqués:** *MacDonald c. Ville de Montréal*, [1986] 1 R.C.S. 460; *Société des Acadiens du Nouveau-Brunswick Inc. c. Association of Parents for Fairness in Education*, [1986] 1 R.C.S. 549; *Procureur général du Québec c. Blaikie*, [1979] 2 R.C.S. 1016; *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721; **arrêts mentionnés:** *Bilodeau c. Procureur général du Manitoba*, [1986] 1 R.C.S. 449; *R. v. Lefebvre* (1982), 21 Alta. L.R. (2d) 65 (B.R.), conf. (1986), 48 Alta. L.R. (2d) 124 (C.A.); *Jones c. Procureur général du Nouveau-Brunswick*, [1975] 2 R.C.S. 182; *R. v. Tremblay* (1985), 20 C.C.C. (3d) 454; *Paquette v. R. in Right of Canada* (1985), 40 Alta. L.R. (2d) 38 (B.R.), conf. (1987), 55 Alta. L.R. (2d) 1 (C.A.); **Reference re French Language Rights of Accused in Saskatchewan Criminal Proceedings**, [1987] 5 W.W.R. 577; *R. v. Murphy* (1968), 69 D.L.R. (2d) 530; *Re Poulin* (1968), 64 W.W.R. 705; *Toll v. Canadian Pacific Railway Co.* (1908), 8 W.L.R. 795; *Schultz v. Wolske* (1966), 75 W.W.R. 411; *Stevens v. Quinney* (1979), 101 D.L.R. (3d) 289; *The India* (1865), 12 L.T.N.S. 316; *Seward v. The "Vera Cruz"* (1884), 10 App. Cas. 59; *Winnipeg School Division No. 1 c. Craton*, [1985] 2 R.C.S. 150; *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] R.C.S. 629; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124; *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *SEFPO c. Ontario (Procureur général)*, [1987] 2 R.C.S. 2; **Procureur général du Canada c. Transports Nationaux du Canada, Ltée**, [1983] 2 R.C.S. 206; *Hoskyn v. Metropolitan Police Commissioner*, [1979] A.C. 474; *Bribery Commissioner v. Ranasinghe*, [1965] A.C. 172; **Attorney-General for New South Wales v. Trethowan**, [1932] A.C. 526; *Harris v. Minister of the Interior*, [1952] 2 S.A.L.R. (N.S.) 428.

Citée par le juge Estey (dissident)

Strachan v. Lamont (1906), 4 W.L.R. 411; *Société des Acadiens du Nouveau-Brunswick Inc. c. Association of Parents for Fairness in Education*, [1986] 1 R.C.S. 549; *Jones c. Procureur général du Nouveau-*

wick, [1975] 2 S.C.R. 182; *R. v. Lefebvre* (1982), 21 Alta. L.R. (2d) 65 (Q.B.), aff'd (1986), 48 Alta. L.R. (2d) 124 (C.A.); *Attorney General of Manitoba v. Forest*, [1979] 2 S.C.R. 1032; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460.

Statutes and Regulations Cited

- Act further to amend the law respecting the North-West Territories*, S.C. 1886, c. 25, s. 3.
- Act that all Proceedings in Courts of Justice within that Part of Great Britain called England, and in the Court of Exchequer in Scotland, shall be in the English Language*, 4 Geo. 2, c. 26 (G.B.)
- Act to amend Schedule A to the Revised Statutes*, 1906, S.C. 1907, c. 44.
- Act to amend the Acts respecting the North-West Territories*, S.C. 1891, c. 22, s. 18.
- Alberta Act*, S.C. 1905, c. 3 [reprinted in R.S.C. 1970, App. II, No. 19], s. 16.
- Canadian Charter of Rights and Freedoms*, ss. 7, 14, 16, 17, 18, 19, 20.
- Colonial Laws Validity Act*, 1865 (U.K.), 28 & 29 Vict., c. 63, s. 5.
- Constitution Act*, 1867, ss. 92(14), 93, 101, 129, 133, 146.
- Constitution Act*, 1871 (U.K.), 34 & 35 Vict., c. 28 [reprinted in R.S.C. 1970, App. II, No. 11], ss. 2, 4, 5, 6.
- Constitution Act*, 1982, ss. 43, 45.
- Court of Appeal Act*, S.S. 1915, c. 9.
- District Courts Act*, S.S. 1907, c. 9.
- International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966), art. 27.
- Interpretation Act*, R.S.S. 1978, c. I-11.
- Judicature Act*, S.S. 1907, c. 8, ss. 3, 4.
- King's Bench Act*, S.S. 1915, c. 10.
- Legislative Assembly Act*, S.S. 1906, c. 4.
- Magistrates Act*, S.S. 1906, c. 19.
- Manitoba Act*, 1870, S.C. 1870, c. 3 [reprinted in R.S.C. 1970, App. II, No. 8], s. 23.
- Manitoba Boundaries Extension Act*, 1912, S.C. 1912, c. 32.
- North-West Territories Act*, 1875, S.C. 1875, c. 49, ss. 13, 59.
- North-West Territories Act*, 1877, S.C. 1877, c. 7, s. 11.
- North-West Territories Act*, 1880, S.C. 1880, c. 25, s. 94.
- North-West Territories Act*, R.S.C. 1886, c. 50, s. 110 [rep. & subs. 1891, c. 22, s. 18].
- North-west Territories Amendment Act*, 1905, S.C. 1905, c. 27, ss. 2, 6, 8.
- Official Languages of New Brunswick Act*, R.S.N.B. 1973, c. O-1, s. 13(1).

Brunswick, [1975] 2 R.C.S. 182; *R. v. Lefebvre* (1982), 21 Alta. L.R. (2d) 65 (B.R.), conf. (1986), 48 Alta. L.R. (2d) 124 (C.A.); *Procureur général du Manitoba c. Forest*, [1979] 2 R.C.S. 1032; *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721; *MacDonald c. Ville de Montréal*, [1986] 1 R.C.S. 460.

Lois et règlements cités

- Act that all Proceedings in Courts of Justice within that Part of Great Britain called England, and in the Court of Exchequer in Scotland, shall be in the English Language*, 4 Geo. 2, chap. 26 (G.-B.)
- Acte concernant le gouvernement provisoire de la Terre de Rupert*, 1869, S.C. 1869, chap 3 [reproduit S.R.C. 1970, app. II, n° 7].
- Acte de la Terre de Rupert*, 1868 (R.-U.), 31 & 32 Vict., chap. 105 [reproduit S.R.C. 1970, app. II, n° 6].
- Acte des Statuts révisés du Canada*, 1906, S.C. 1907, chap. 43.
- Acte des Territoires du Nord-Ouest*, 1875, S.C. 1875, chap. 49, art. 13, 59.
- Acte des Territoires du Nord-Ouest*, 1877, S.C. 1877, chap. 7, art. 11.
- Acte des Territoires du Nord-Ouest*, 1880, S.C. 1880, chap. 25, art. 94.
- Acte des territoires du Nord-Ouest*, S.R.C. 1886, chap. 50, art. 110 [abr. et rempl. 1891, chap. 22, art. 18].
- Acte modifiant de nouveau la loi concernant les territoires du Nord-Ouest*, S.C. 1886, chap. 25, art. 3.
- Acte modifiant les actes concernant les territoires du Nord-Ouest*, S.C. 1891, chap. 22, art. 18.
- Acte modifiantif de l'Acte des territoires du Nord-Ouest*, 1905, S.C. 1905, chap. 27, art. 2, 6, 8.
- Charte canadienne des droits et libertés*, art. 7, 14, 16, 17, 18, 19, 20.
- Colonial Laws Validity Act*, 1865 (R.-U.), 28 & 29 Vict., chap. 63, art. 5.
- Court of Appeal Act*, S.S. 1915, chap. 9.
- Décret en conseil sur la terre de Rupert et le territoire du Nord-Ouest*, le 23 juin 1870, S.R.C. 1970, app. II, n° 9.
- District Courts Act*, S.S. 1907, chap. 9.
- Interpretation Act*, R.S.S. 1978, chap. I-11.
- Judicature Act*, S.S. 1907, chap. 8, art. 3, 4.
- King's Bench Act*, S.S. 1915, chap. 10.
- Legislative Assembly Act*, S.S. 1906, chap. 4.
- Loi constitutionnelle de 1867*, art. 92(14), 93, 101, 129, 133, 146.
- Loi constitutionnelle de 1871* (R.-U.), 34 & 35 Vict., chap. 28 [reproduite S.R.C. 1970, app. II, n° 11], art. 2, 4, 5, 6.
- Loi constitutionnelle de 1982*, art. 43, 45.
- Loi de l'extension des frontières du Manitoba*, 1912, S.C. 1912, chap. 32.

- Ordinances of the Northwest Territories*, 1905-1930.
Parliament Act, 1911 (U.K.), 1 & 2 Geo. 5, c. 13.
Police Magistrates' Act, S.S. 1907, c. 14.
Provincial Court Act, 1978, S.S. 1978, c. 42 [now R.S.S. 1978 (Supp.), c. P-30.1].
Revised Statutes of Canada, 1906, *Act*, S.C. 1907, c. 43.
Rupert's Land Act, 1868 (U.K.), 31 & 32 Vict., c. 105 [reprinted in R.S.C. 1970, App. II, No. 6].
Rupert's Land and North-Western Territory Order, June 23, 1870, R.S.C. 1970, App. II, No. 9.
Saskatchewan Act, S.C. 1905, c. 42 [reprinted in R.S.C. 1970, App. II, No. 20], ss. 3, 10, 12, 13, 14, 15, 16, 17, 18, 20.
Saskatchewan Evidence Act, R.S.S. 1978, c. S-16.
Summary Offences Procedure Act, R.S.S. 1978, c. S-63.
Surrogate Courts Act, S.S. 1907, c. 10.
Temporary Government of Rupert's Land Act, 1869, S.C. 1869, c. 3 [reprinted in R.S.C. 1970, App. II, No. 7].
Vehicles Act, R.S.S. 1978, c. V-3, s. 139(4).
- Loi de 1870 sur le Manitoba*, S.C. 1870, chap. 3 [reproduite S.R.C. 1970, app. II, no 8], s. 23.
Loi modifiant l'annexe A des Statuts révisés, 1906, S.C. 1907, chap. 44.
Loi sur l'Alberta, S.C. 1905, chap. 3 [reproduite S.R.C. 1970, app. II, no 19], art. 16.
^a *Loi sur la Saskatchewan*, S.C. 1905, chap. 42 [reproduite S.R.C. 1970, app. II, no 20], art. 3, 10, 12, 13, 14, 15, 16, 17, 18, 20.
Loi sur les langues officielles du Nouveau-Brunswick, L.R.N.-B. 1973, chap. O-1, art. 13(1).
^b *Magistrates Act*, S.S. 1906, chap. 19.
Ordinances of the Northwest Territories, 1905-1930.
Pacte international relatif aux droits civils et politiques, A.G. Rés. 2200A (XXI), 21 N.U. GAOR, Supp. (no 16) 52, Doc. A/6316 N.U. (1966), art. 27.
^c *Parliament Act*, 1911 (R.-U.), 1 & 2 Geo. 5, chap. 13.
Police Magistrates' Act, S.S. 1907, chap. 14.
Provincial Court Act, 1978, S.S. 1978, chap. 42 [mantenant R.S.S. 1978 (Supp.), chap. P-30.1].
Saskatchewan Evidence Act, R.S.S. 1978, chap. S-16.
^d *Summary Offences Procedure Act*, R.S.S. 1978, chap. S-63.
Surrogate Courts Act, S.S. 1907, chap. 10.
Vehicles Act, R.S.S. 1978, chap. V-3, art. 139(4).

Authors Cited

- Canada. *Canada Year Book 1912*. Ottawa: King's Printer, 1913.
- Canada. Statistics Canada. *Canada Year Book 1988*. Ottawa: Supply and Services Canada, 1987.
- Debates of the House of Commons*, 4th Sess., 3rd Parl., 40 Vict., 1877, p. 1872.
- Debates of the House of Commons*, 4th Sess., 6th Parl., 53 Vict., 1890, pp. 756, 857, 1002.
- Debates of the House of Commons*, 1st Sess., 10th Parl., 5 Edw. VII, 1905, pp. 8240, 8242, 8530 et seq., 8548, 8554, 8571, 8572, 8576, 8577, 8579, 8580, 8607, 8608, 8610, 8843, 8850, 8851.
- Debates of the Senate*, 4th Sess., 3rd Parl., 40 Vict., 1877, p. 319.
- Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.
- Driedger, Elmer A. *The Composition of Legislation*, 2nd ed. rev. Ottawa: Department of Justice, 1976.
- Hogg, Peter W. *Constitutional Law of Canada*, 2nd ed. Toronto: Carswells, 1985.
- Jennings, Sir William Ivor. *The Law and the Constitution*, 3rd ed. London: University of London Press, 1943.
- Kerr, Robert W. "Regina v. Murphy and Language Rights Legislation" (1970), 20 U.N.B.L.J. 35.
- Sheppard, Claude-Armand. *The Law of Languages in Canada*. Ottawa: Information Canada, 1971.
- Silver, Arthur I. *The French-Canadian Idea of Confederation, 1864-1900*. Toronto: University of Toronto Press, 1982.
- Doctrine citée*
- ^e Canada. *Annuaire du Canada 1912*. Ottawa: Imprimeur du Roi, 1914.
- Canada. Statistique Canada. *Annuaire du Canada 1988*. Ottawa: Approvisionnements et Services Canada, 1987.
- ^f *Débats de la Chambre des communes*, 4^e Sess., 3^e Parl., 40 Vict., 1877, p. 1875.
- Débats de la Chambre des communes*, 4^e Sess., 6^e Parl., 53 Vict., 1890, pp. 775, 879, 880, 1025, 1026.
- Débats de la Chambre des communes*, 1^e Sess., 10^e Parl., 5 Edw. VII, 1905, pp. 8434, 8780, 8814, 8734, 8735 et suiv., 8775, 8776, 8780, 8781, 8783, 8784, 8785, 8815, 9064, 9065.
- Débats du Sénat*, 4^e Sess., 3^e Parl., 40 Vict., 1877, p. 319.
- ^h Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.
- Driedger, Elmer A. *The Composition of Legislation*, 2nd ed. rev. Ottawa: Department of Justice, 1976.
- Hogg, Peter W. *Constitutional Law of Canada*, 2nd ed. Toronto: Carswells, 1985.
- ⁱ Jennings, Sir William Ivor. *The Law and the Constitution*, 3rd ed. London: University of London Press, 1943.
- Kerr, Robert W. "Regina v. Murphy and Language Rights Legislation" (1970), 20 U.N.B.L.J. 35.
- ^j Sheppard, Claude-Armand. *The Law of Languages in Canada*. Ottawa: Information Canada, 1971.
- Silver, Arthur I. *The French-Canadian Idea of Confederation, 1864-1900*. Toronto: University of

Tabory, Mala. "Language Rights as Human Rights" (1980), 10 *Israel Y.B. on Human Rights* 167.

Wade, Mason. *The French Canadians 1760-1967*, vol. 1. Toronto: MacMillan, 1968.

Wheare, Kenneth Clinton. *The Statute of Westminster and Dominion Status*, 5th ed. London: Oxford University Press, 1953.

APPEAL from a judgment of the Saskatchewan Court of Appeal (1985), 44 Sask. R. 22, 24 D.L.R. (4th) 193, 23 C.C.C. (3d) 140, [1986] 2 W.W.R. 1, upholding a judgment of the Provincial Court (1981), 44 Sask. R. 43, [1981] 4 W.W.R. 435. Appeal allowed, Estey and McIntyre JJ. dissenting.

Michel Bastarache and Roger Lepage, for the appellant and the interveners (principal parties).

Robert G. Richards and Cheryl Crane, for the respondent.

Peter T. Costigan and J. Robert Black, for the intervener the Attorney General for Alberta.

Joseph Eliot Magnet, for the intervenor the Freedom of Choice Movement.

The judgment of Dickson C.J. and Beetz, Lamer, Wilson, Le Dain and La Forest JJ. was delivered by

La Forest J.—This case raises several important questions: whether a French-speaking person accused of a provincial quasi-criminal offence under a Saskatchewan statute has the right to use French at his trial; whether he has the right to have the trial conducted in that language; whether the statutes of that province are required to be published in both English and French; whether such rights are constitutionally entrenched; and the content of any such rights.

Background

The case arises out of the following facts. The appellant, Father Mercure, was charged with speeding contrary to s. 139(4) of *The Vehicles Act*, R.S.S. 1978, c. V-3, and was issued a summons under the provisions of *The Summary Offences Procedure Act*, R.S.S. 1978, c. S-63. On his appearance in the Provincial Court, his counsel applied for permission to enter a plea to the charge

Tabory, Mala. «Language Rights as Human Rights» (1980), 10 *Israel Y.B. on Human Rights* 167.

Wade, Mason. *The French Canadians 1760-1967*, vol. 1. Toronto: MacMillan, 1968.

^a Wheare, Kenneth Clinton. *The Statute of Westminster and Dominion Status*, 5th ed. London: Oxford University Press, 1953.

POURVOI contre un arrêt de la Cour d'appel b de la Saskatchewan (1985), 44 Sask. R. 22, 24 D.L.R. (4th) 193, 23 C.C.C. (3d) 140, [1986] 2 W.W.R. 1, qui a confirmé un jugement de la Cour provinciale (1981), 44 Sask. R. 43, [1981] 4 W.W.R. 435. Pourvoi accueilli, les juges Estey et c McIntyre sont dissidents.

Michel Bastarache et Roger Lepage, pour l'appelant et les intervenantes (parties principales).

^d *Robert G. Richards et Cheryl Crane*, pour l'intimé.

Peter T. Costigan et J. Robert Black, pour l'intervenant le procureur général de l'Alberta.

^e *Joseph Eliot Magnet*, pour l'intervenant le Mouvement de la liberté de choix.

Le jugement du juge en chef Dickson et des juges Beetz, Lamer, Wilson, Le Dain et La Forest f a été rendu par

LE JUGE LA FOREST—Le présent pourvoi soulève plusieurs questions importantes: un francophone accusé d'une infraction quasi criminelle provinciale aux termes d'une loi de la Saskatchewan g a-t-il le droit d'utiliser le français à son procès? A-t-il droit à un procès dans cette langue? Les lois de cette province doivent-elles être publiées en français et en anglais? Ces droits sont-ils enracinés h dans la Constitution? Et enfin, quel est le contenu de ces droits?

Historique

Cette affaire découle des faits suivants. L'appellant, le père Mercure, a été accusé d'avoir commis un excès de vitesse contrairement au par. 139(4) de *The Vehicles Act*, R.S.S. 1978, chap. V-3, et a été cité à comparaître en vertu des dispositions de *j The Summary Offences Procedure Act*, R.S.S. 1978, chap. S-63. Lors de sa comparution devant la Cour provinciale, son avocat a demandé la

in the French language, to have his trial proceeded with in that language, and to have the hearing of the charge delayed until such time as the Clerk of the Legislative Assembly for the province of Saskatchewan could produce the relevant statutes printed in the French language.

There is no law of the provincial legislature dealing with these issues; nor is there any express provision in the province's constituent Act, the *Saskatchewan Act*, S.C. 1905, c. 42, regarding the matter. Saskatchewan, however, was not created in a legal vacuum. Before its establishment it formed part of the North-West Territories, the constituent Act of which, *The North-West Territories Act*, R.S.C. 1886, c. 50, as amended, contained a provision, s. 110, rather similar to s. 133 of the *Constitution Act, 1867*, which provided for the use of English and French in proceedings before the Territorial Assembly and the courts and requiring the use of both languages in the Assembly's records and journals as well as the printing of its laws in those languages. The provision was re-enacted in 1891 (S.C. 1891, c. 22, s. 18), and as so framed was in effect at the establishment of the province. It reads as follows:

110. Either the English or the French language may be used by any person in the debates of the Legislative Assembly of the Territories and in the proceedings before the courts; and both those languages shall be used in the records and journals of such Assembly; and all ordinances made under this Act shall be printed in both those languages: Provided, however, that after the next general election of the Legislative Assembly, such Assembly may, by ordinance or otherwise, regulate its proceedings, and the manner of recording and publishing the same; and the regulations so made shall be embodied in a proclamation which shall be forthwith made and published by the Lieutenant Governor in conformity with the law, and thereafter shall have full force and effect. [Emphasis added.]

Counsel for the appellant maintained that this provision applies to the courts and the Legislature of Saskatchewan by virtue of s. 16 of the *Saskatchewan Act* which (like s. 129 of the *Constitu-*

permission d'inscrire un plaidoyer en français relativement à l'accusation, que son procès se déroule dans cette langue et qu'il soit retardé jusqu'à ce que le greffier de l'Assemblée législative de la Saskatchewan puisse produire les lois pertinentes imprimées en français.

Il n'y a aucune loi de l'Assemblée législative de la province qui traite de ces questions; il n'y a pas non plus de dispositions expresses à ce sujet dans la loi constitutive de la province, la *Loi sur la Saskatchewan*, S.C. 1905, chap. 42. Toutefois, la Saskatchewan n'a pas été créée dans un vide juridique. Lors de sa création, elle faisait partie des territoires du Nord-Ouest, dont la loi constitutive, l'*Acte des territoires du Nord-Ouest*, S.R.C. 1886, chap. 50 et ses modifications, contenait une disposition, l'art. 110, assez semblable à l'art. 133 de la *Loi constitutionnelle de 1867*, qui prévoyait l'utilisation du français et de l'anglais dans les procédures devant l'Assemblée territoriale ainsi que devant les cours de justice et exigeait l'utilisation de ces deux langues dans les procès-verbaux et les journaux de l'Assemblée de même que l'impression de ses lois dans les deux langues. La disposition a été édictée de nouveau en 1891 (S.C. 1891, chap. 22, art. 18), et c'est ce texte qui était en vigueur au moment de la création de la province. Cette disposition est la suivante:

110. Toute personne pourra faire usage soit de la langue anglaise, soit de la langue française, dans les débats de l'Assemblée législative des territoires, ainsi que dans les procédures devant les cours de justice; et ces deux langues seront employées pour la rédaction des procès-verbaux et journaux de l'Assemblée; et toutes les ordonnances rendues sous l'empire du présent acte seront imprimées dans ces deux langues; néanmoins, après la prochaine élection générale de l'Assemblée législative, cette Assemblée pourra, par ordonnance ou autrement, réglementer ses délibérations et la manière d'en tenir procès-verbal et de les publier; et les règlements ainsi faits seront incorporés dans une proclamation qui sera immédiatement promulguée et publiée par le lieutenant-gouverneur en conformité de la loi, et ils auront ensuite plein effet et vigueur. [Je souligne.]

L'avocat de l'appelant a soutenu que cette disposition s'applique aux tribunaux et à l'Assemblée législative de la Saskatchewan en vertu de l'art. 16 de la *Loi sur la Saskatchewan* qui (à l'instar de

making of a plea and the giving of evidence by the appellant.

In my view, the appellant's right or power to use French would be seriously truncated if recorded in another language. For his use of the language goes beyond the immediate forum. The proceedings, for example, may continue in the Court of Appeal where the judges may quite properly wish to refer to the exact words used by a person at trial, words that person has a right to use. Absent valid legislation requiring the recording of the appellant's statements in one language only, and none was brought to our attention, the appellant would seem to me to have a right to have his statements recorded in the French language. His situation, of course, differs from that of a person who uses a language other than English or French whose rights to translation derive solely from the requirements of due process.

langue. Toutefois, comme je l'ai déjà mentionné, cette question est soulevée en l'espèce en ce qui a trait à la fois à l'inscription du plaidoyer et au témoignage de l'appellant.

^a À mon avis, le droit ou le pouvoir de l'appellant d'utiliser le français serait gravement diminué si ses propos étaient consignés dans une autre langue. En effet, l'utilisation qu'il fait de la langue s'applique au-delà de la tribune devant laquelle il comparaît alors. Par exemple, les procédures peuvent être poursuivies en Cour d'appel où les juges peuvent, à bon droit, vouloir se référer aux termes exacts utilisés par une personne au procès, des termes que cette personne a le droit d'utiliser. En l'absence de mesures législatives valides exigeant que les déclarations de l'appellant soient consignées dans une seule langue, et aucune n'a été portée à notre attention, il me semble que l'appellant a le droit de faire consigner ces déclarations en français. Il va sans dire que sa situation est différente de celle d'une personne qui utilise une langue autre que le français ou l'anglais et dont le droit à la traduction découle uniquement des exigences de l'application régulière de la loi.

The Rights Under Section 110—The Legislature

I now turn to the appellant's request that the hearing be delayed until the Clerk of the Legislative Assembly produce before the court the relevant statutes printed in the French language. By the manner in which this request was made, it is obvious that he sought valid statutes, not mere unofficial translations. On the basis of *Attorney General of Quebec v. Blaikie, supra*, it is clear that for the statutes to be valid they must have been enacted, printed and published in English and French. Since the relevant statutes have not been enacted, printed and published in English and French, it follows that they are invalid, unless a distinction can be drawn between the present case and *Blaikie*.

There is, of course, the difference that in *Blaikie*, the Court was dealing with an entrenched constitutional provision. But, in my view, while this difference is critically important in relation to

^f J'examine maintenant la demande de l'appellant que le procès soit retardé jusqu'à ce que le greffier de l'Assemblée législative produise devant la cour les lois pertinentes imprimées en français. À en juger par la manière dont cette demande a été faite, il est évident qu'il cherchait à obtenir des lois valides et non simplement des traductions officieuses. Selon l'arrêt *Procureur général du Québec c. Blaikie*, précité, il est clair que pour que les lois soient valides, elles doivent avoir été adoptées, imprimées et publiées en français et en anglais. Étant donné que les lois pertinentes n'ont pas été adoptées, imprimées et publiées en français et en anglais, il s'ensuit qu'elles sont invalides, à moins que l'on puisse établir une distinction entre l'espèce et l'affaire *Blaikie*.

^j Il y a, bien entendu, cette différence que dans l'affaire *Blaikie*, la Cour était saisie d'une disposition enracinée dans la Constitution. Mais, à mon avis, si cette différence revêt une importance déci-

the manner in which the legislature can alter the law, until it is altered, the legal situation is the same as under *Blaikie*. It is inconceivable to me that when s. 110 was enacted by Parliament, the Territorial Assembly could validly have ignored a provision in its constituent statute regarding the manner and form in which its laws must be enacted. An Ordinance enacted in violation of its requirement would clearly be invalid. That provision as to the manner and form of enactments was, we saw, continued in respect of the provincial legislature by ss. 14 and 16 of the *Saskatchewan Act*, the constituent Act of the province. A basic provision regarding the manner in which a legislature must enact laws cannot be ignored. I cannot accept that such a provision can be impliedly repealed by statutes enacted in a manner contrary to its requirements, particularly one that is aimed at an accommodation of an historically sensitive matter like the use of the English and French languages in this country. Since the manner and form of enactment (in English and French) was not entrenched, however, the provision may be modified or repealed, but such repeal or modification must be made in the manner and form required by law at the time of the amendment.

The law on this point was clearly stated by the Privy Council in *Bribery Commissioner v. Ranasinghe*, [1965] A.C. 172, in the following terms, at pp. 197-98:

[A] legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question whether the legislature is sovereign, as is the legislature of Ceylon, or whether the Constitution is "uncontrolled," as the Board held the Constitution of Queensland to be. Such a Constitution can, indeed, be altered or amended by the legislature, if the regulating instrument so provides and if the terms of those provisions are complied with; and the alteration or amendment may include the change or abolition of those very provisions. But the proposition which is not acceptable is that a legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the

sive quant à la manière dont l'Assemblée législative peut modifier la loi, aussi longtemps qu'elle n'est pas modifiée, la situation juridique est la même que dans l'affaire *Blaikie*. Il me paraît inconcevable que, lorsque le Parlement a adopté l'art. 110, l'Assemblée territoriale ait pu valablement passer outre à une disposition de sa loi constitutive concernant le mode et la forme d'adoption de ses lois. Une ordonnance adoptée contrairement à ses exigences serait manifestement invalide. Cette disposition, relative au mode et à la forme de l'adoption des textes législatifs, a été, nous l'avons vu, maintenue à l'égard de la législature provinciale par les art. 14 et 16 de la *Loi sur la Saskatchewan*, la loi constitutive de cette province. Une disposition fondamentale portant sur la manière suivant laquelle une assemblée législative doit adopter ses lois ne saurait être passée sous silence. Je ne puis accepter qu'une disposition de ce genre puisse être abrogée implicitement par des lois adoptées d'une manière contraire à ce qu'elle exige, surtout une disposition qui vise à réaliser un compromis dans un domaine aussi historiquement délicat que l'usage des langues française et anglaise au pays. Toutefois, comme le mode et la forme d'adoption (en français et en anglais) n'ont pas été enchaînés, la disposition peut être changée ou abrogée, mais cette abrogation ou ce changement doit se faire suivant le mode et la forme requis par la loi au moment de la modification.

Le droit applicable sur ce point a clairement été exposé en ces termes par le Conseil privé dans l'arrêt *Bribery Commissioner v. Ranasinghe*, [1965] A.C. 172, aux pp. 197 et 198:

[TRADUCTION] ... une législature n'a pas le pouvoir de laisser de côté les conditions d'exercice du pouvoir législatif qui lui sont imposées par l'instrument même qui règle son pouvoir de faire des lois. Cette restriction existe indépendamment de la question de savoir si la législature est souveraine, comme l'est celle de Ceylan, ou si la Constitution peut être modifiée sans formalités, comme la chambre l'a décidé pour la Constitution du Queensland. Une telle constitution peut, en effet, être modifiée ou amendée par la législature si l'instrument qui la régit comporte des dispositions à cet effet et si ces dispositions sont respectées; la modification ou l'amendement peut viser ces dispositions mêmes. Mais la proposition suivante est inacceptable: qu'une législature, une fois établie, ait quelque pouvoir inhérent provenant

resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different type of majority or by a different legislative process. And this is the proposition which is in reality involved in the argument.

That case involved the obvious situation where the law provided for a two-thirds majority, but the Board chose to use general words because the principle goes well beyond the confines of that case. Sir Ivor Jennings, one of the great constitutional lawyers of this century, thought it applied even to the United Kingdom Parliament. For him, Parliament's power to enact any law it wishes is conditioned upon its doing so in the manner and form provided by law; see *The Law and the Constitution* (3rd ed. 1943), at pp. 138-45. It may alter that manner and form, as it did, for example, when it reduced the powers of the House of Lords to that of delay only, see the *Parliament Act*, 1911 (U.K.), 1 & 2 Geo. 5, c. 13, but it is not without interest that the House of Lords joined in enacting this statute. Jennings says, at pp. 144-45:

The powers of Parliament are not expressed in an Act of Parliament. Nevertheless it is admitted, as Dicey admits, that the powers do come from the law. The law is that Parliament may make any law in the manner and form provided by the law. That manner and form is provided, at present, either by the common law or by the Parliament Act of 1911. But Parliament may, if it pleases, provide another manner and form. Suppose, for instance, that the present Parliament enacted that the House of Lords should not be abolished except after a majority of electors had expressly agreed to it, and that no Act repealing that Act should be passed except after a similar referendum. There is no law to appeal to except that Act. The Act provides a new manner and form which must be followed unless it can be said that at the time of its passing that Act was void or of no effect.

In this country, a similar view has been espoused by Professor Peter W. Hogg, *Constitutional Law of Canada* (2nd ed. 1985), at pp. 262-64.

de sa simple institution de faire à la majorité simple une loi valide lorsque l'instrument qui la constitue prévoit qu'une telle loi ne peut être valide que si elle est adoptée par un type différent de majorité ou par un processus législatif différent. Et c'est cette proposition qui est au cœur de l'argument qu'on nous propose.

Cette affaire mettait en cause le cas évident où la loi prévoyait une majorité des deux tiers, mais le b Conseil a choisi d'utiliser des termes généraux parce que le principe s'étend bien au-delà des limites de cette affaire. Sir Ivor Jennings, l'un des plus grands constitutionnalistes de ce siècle, estimait qu'il s'appliquait même au Parlement du Royaume-Uni. Pour lui, le pouvoir du Parlement d'adopter toutes les lois qu'il veut est assujetti à la condition qu'il le fasse suivant le mode et la forme prescrits par la loi; voir *The Law and the Constitution* (3rd ed. 1943), aux pp. 138 à 145. Il peut modifier cette manière et cette forme, comme il l'a fait par exemple, lorsqu'il a réduit le pouvoir de la Chambre des lords à un pouvoir de surseoir uniquement, voir *Parliament Act*, 1911 (R.-U.), 1 & e 2 Geo. 5, chap. 13, mais il est intéressant de noter que la Chambre des lords a participé à l'adoption de cette loi. Jennings affirme, aux pp. 144 et 145:

[TRADUCTION] Les pouvoirs du Parlement ne sont exprimés dans aucune loi du Parlement. Néanmoins il est admis, comme le reconnaît Dicey, que ces pouvoirs découlent de la loi. La loi porte que le Parlement peut adopter toute loi suivant le mode et la forme prescrits par la loi. Le mode et la forme de l'adoption sont prescrits, actuellement, soit par la *common law* soit par la Loi de 1911 sur le Parlement. Mais le Parlement peut, si cela lui plaît, édicter un autre mode et une autre forme. Supposons, par exemple, que l'actuel Parlement ait édicté que la Chambre des lords ne saurait être abolie si ce n'est après qu'une majorité d'électeurs en auront expressément convenu, et qu'aucune loi abolissant cette loi ne peut être adoptée qu'après avoir tenu un référendum semblable. Il n'y a aucune loi à laquelle on puisse recourir si ce n'est cette loi. La loi prescrit un nouveau mode et une nouvelle forme qui doivent être respectés à moins que l'on puisse dire qu'au moment où elle a été adoptée elle était nulle et sans effet.

Dans notre pays, un point de vue semblable a été adopté par le professeur Peter W. Hogg dans *Constitutional Law of Canada* (2nd ed. 1985), aux pp. 262 à 264.

For my part, I cannot accept that in a nation founded on the rule of law, a legislature is free to ignore the law in its constituent instrument prescribing the manner and form in which legislation must be enacted. That has always been the law in this country and in the Commonwealth generally. This was, it is true, usually justified under s. 5 of the *Colonial Laws Validity Act*, 1865 (U.K.), 28 & 29 Vict., c. 63; see, for example, *Attorney-General for New South Wales v. Trethewan*, [1932] A.C. 526 (P.C.) That provision empowered colonial legislatures to make laws respecting the constitution, powers and procedure of such legislatures, but to this was added a proviso "that such Laws shall have been passed in such Manner and Form as may from Time to Time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the Time being in force in the said Colony". It should be observed, however, that that statute, as the name implies, was enabling; it was aimed at validating colonial laws, not invalidating them. Parliament had deemed it wise to enact the statute because of a restrictive judicial interpretation of colonial legislative power in Australia; for the history of the Act, see K. C. Wheare, *The Statute of Westminster and Dominion Status* (5th ed. 1953), at pp. 74-79. Thus, the proviso was simply intended to ensure that power given by the operative part of s. 5 did not interfere with provisions regarding "manner and form" in the various legislative instruments governing colonial legislation; see, in this context, *Harris v. Minister of the Interior*, [1952] 2 S.A.L.R. (N.S.) 428 (Sth. Afr. App. Div.) where manner and form restrictions previously protected by the *Colonial Laws Validity Act*, were held to continue to apply to the Parliament of South Africa notwithstanding the attainment of that country to sovereignty and the consequent repeal of that Act in its application there.

As I see it, the statutes of Saskatchewan are invalid as not having been enacted in the manner and form required by its constituent statute. That being so, Saskatchewan finds itself in a position similar to that of Manitoba as declared in the

Pour ma part, je ne puis accepter que dans un État qui repose sur la primauté du droit, une législature soit libre de passer outre à la loi, exprimée dans l'instrument qui la constitue, qui prescrit le mode et la forme d'adoption des lois. Cela a toujours été la loi dans notre pays et dans le Commonwealth en général. Cela était, il est vrai, habituellement justifié par l'art. 5 de la *Colonial Laws Validity Act*, 1865 (R.-U.), 28 & 29 Vict., chap. 63; voir, par exemple, *Attorney-General for New South Wales v. Trethewan*, [1932] A.C. 526 (C.P.). Cette disposition habitait les législatures coloniales à légitérer relativement à leur constitution, à leurs pouvoirs et à la procédure régissant leurs délibérations, mais à cela était ajouté la réserve suivante: [TRADUCTION] «pourvu que ces lois soient adoptées suivant le mode et la forme qui peuvent être exigés par quelque acte du Parlement, lettres patentes, arrêté en conseil ou loi coloniale alors en vigueur dans ladite colonie». Il faut faire observer, cependant, que cette loi, comme le sous-entend son nom, était habitante; elle avait pour but de valider les lois coloniales et non de les invalider. Le Parlement avait jugé sage d'adopter la Loi en raison d'une interprétation judiciaire restrictive du pouvoir législatif colonial en Australie; pour un historique de la Loi, voir K. C. Wheare, *The Statute of Westminster and Dominion Status* (5th ed. 1953), aux pp. 74 à 79. Ainsi la réserve visait simplement à assurer que le pouvoir conféré par le dispositif de l'art. 5 ne portait pas atteinte aux dispositions concernant "le mode et la forme", que l'on trouvait dans les divers textes législatifs régissant la législation coloniale; voir, dans ce contexte, l'arrêt *Harris v. Minister of the Interior*, [1952] 2 S.A.L.R. (N.S.) 428 (Sth. Afr. App. Div.), où on a jugé que le mode et la forme des restrictions antérieurement protégées par la *Colonial Laws Validity Act* continuaient de s'appliquer au Parlement de l'Afrique du Sud malgré l'accession de cet État à la souveraineté et l'abrogation consécutive de cette loi pour ce qui est de son application là-bas.

À mon avis, les lois de la Saskatchewan sont invalides pour le motif qu'elles n'ont pas été adoptées suivant le mode et la forme requis par sa loi constitutive. Cela étant, la Saskatchewan se trouve dans une situation semblable à celle que le *Renvoi*

Reference re Manitoba Language Rights case, *supra*. In that case, it was held that the unilingual Acts of the Legislature of Manitoba were invalid. The result of this, it was further held, is that, without more, there would be a legal vacuum with consequent legal chaos in the province (pp. 747-48). This would mean that in Saskatchewan the courts and all other institutions created by law under those statutes would be acting without legal authority in so far as they purport to exercise powers conferred by Saskatchewan statutes or Territorial Ordinances that, after 1877, were not enacted in English and French. Indeed as the Court in the *Reference re Manitoba Language Rights*, *supra*, further observed, questions regarding the validity of the present composition of the legislature might also be raised (p. 748).

In the *Reference re Manitoba Language Rights*, the Court, by resort to the principle of the rule of law and the *de facto* doctrine, found means to keep the existing laws temporarily in effect for the minimum period of time necessary for the statutes to be translated, re-enacted, printed and published in French. These matters are fully explained in that case and it is unnecessary for me to go into them except to say that the law enunciated in that case would generally apply to the present situation. Conforming to the procedure required for Manitoba would, of course, remedy the situation in Saskatchewan. There is, however, the important difference that s. 110, unlike s. 23 of the *Manitoba Act, 1870*, is not constitutionally entrenched, so re-enacting, printing and publishing all the provincial statutes or resorting to s. 43 of the *Constitution Act, 1982* are not the only available solutions. The legislature has the power to amend its constitution by an ordinary statute, but in enacting such amending statute it must do so in the manner and form required by the law for the time being in force. This, we saw, requires that such statute be enacted, printed and published in the English and French languages. Accordingly, the legislature may resort to the obvious, if ironic, expedient of enacting a bilingual statute removing the restrictions imposed on it by s. 110 and then declaring all existing provincial statutes valid notwithstanding

relatif aux droits linguistiques au Manitoba, précité, a déclaré être applicable au Manitoba. Dans ce renvoi, on a jugé que les lois unilingues de l'Assemblée législative du Manitoba étaient invalides. On a en outre conclu que cette situation engendrerait, sans plus, un vide juridique qui entraînerait le chaos en la matière dans la province (pp. 747 et 748). Cela signifierait qu'en Saskatchewan les tribunaux et toutes les autres institutions créées aux termes de ces lois agiraient illégalement dans la mesure où ils sont censés exercer des pouvoirs conférés par des lois de la Saskatchewan ou des ordonnances territoriales qui, après 1877, n'ont pas été adoptées en français et en anglais. En fait, comme la Cour l'a par ailleurs fait remarquer dans le *Renvoi relatif aux droits linguistiques au Manitoba*, précité, on pourrait également mettre en doute la validité de la composition actuelle de l'Assemblée législative (p. 748).

Dans le *Renvoi relatif aux droits linguistiques au Manitoba*, la Cour, en recourant aux principes de la primauté du droit et de la validité *de facto*, a trouvé le moyen de maintenir les lois existantes temporairement en vigueur jusqu'à l'expiration du délai minimum requis pour les traduire, les adopter de nouveau, les imprimer et les publier en français. Ces questions sont expliquées en détail dans ce renvoi et il ne m'est pas nécessaire de les aborder si ce n'est pour dire que, d'une manière générale, la règle énoncée dans ce renvoi s'appliquerait à l'espèce. L'adoption de la procédure exigée dans le cas du Manitoba aurait, évidemment, pour effet de remédier à la situation en Saskatchewan. En l'espèce toutefois, il y a cette différence importante que l'art. 110, contrairement à l'art. 23 de la *Loi de 1870 sur le Manitoba*, n'est pas enraciné dans la Constitution, de manière que la nouvelle adoption, l'impression et la publication de toutes les lois provinciales ou le recours à l'art. 43 de la *Loi constitutionnelle de 1982* ne constituent pas les seules solutions possibles. L'Assemblée législative a le pouvoir de modifier sa constitution par voie législative ordinaire, mais ce faisant elle doit respecter le mode et la forme requis par la loi qui est, pour le moment, en vigueur. Cela requiert, nous l'avons vu, que cette loi soit adoptée, imprimée et publiée en français et en anglais. Par conséquent, l'Assemblée législative peut avoir

that they were enacted, printed and published in English only. Whichever option the legislature adopts, it must, consistent with the *Reference re Manitoba Language Rights*, act within a reasonable time. If it opts for translation, it must do so within the minimum period required. If it adopts the route of statutory repeal or modification, it must, having regard to the rule of law, undertake that step as soon as possible. It follows that the decision regarding the option it will take must also be made expeditiously.

Disposition

As I noted earlier, the appellant's requests at trial were three in number: that he be allowed to enter a plea in the French language, to have the trial proceeded with in that language, and to have the hearing delayed until the relevant statutes were produced in the French language. Since the law regarding the second and third requests have already been dealt with by this Court, I shall deal with these first.

It seems to me that many of the issues surrounding the second issue have already been dealt with in the *Société des Acadiens* case. The appellant was entitled only to use French, not to require others to do so. As to the request that a French version of the statutes be produced, this appears to be covered by the similar case of *Bilodeau v. Attorney General of Manitoba, supra*, in relation to s. 23 of the *Manitoba Act, 1870*. The majority of the Court there held that the principle of the rule of law would preserve the enforceability of the conviction of the appellant there, and if that were all I would be prepared to follow a similar course here.

There is, however, the additional point in the present case that the appellant requested to have his plea entered in French. This, as I have explained, he had a right to demand and failure to

recours à l'expédient manifeste, voire même ironique, de l'adoption d'une loi bilingue abrogeant les restrictions que lui impose l'art. 110, puis déclarant valides toutes les lois provinciales nonobstant le fait qu'elles aient été adoptées, imprimées et publiées en anglais uniquement. Quelle que soit l'option retenue par l'Assemblée législative, elle doit, conformément au *Renvoi sur les droits linguistiques au Manitoba*, agir dans un délai raisonnable. Si elle opte pour la traduction, elle devra veiller à ce que ce soit fait dans le délai minimum requis. Si elle emprunte la voie de l'abrogation ou de la modification législatives, elle doit, compte tenu du principe de la primauté du droit, agir aussitôt que possible. Il s'ensuit que ce choix de l'option à retenir doit aussi être fait rapidement.

Dispositif

^d Comme je l'ai mentionné précédemment, l'appellant a présenté trois demandes au procès: l'autorisation d'inscrire un plaidoyer en français, la tenue du procès dans cette langue et le report de l'audience jusqu'à ce que les lois pertinentes aient été produites en français. Puisque cette Cour a déjà traité du droit relatif aux deuxième et troisième demandes, j'aborderai celles-ci en premier.

^f Il me semble qu'un grand nombre des problèmes entourant le deuxième point ont déjà été traités dans l'arrêt *Société des Acadiens*. L'appellant n'avait que le droit d'utiliser le français et non celui d'exiger que d'autres personnes utilisent cette langue. La demande relative à la production d'une version française des lois paraît être réglée par l'arrêt semblable *Bilodeau c. Procureur général du Manitoba*, précité, en ce qui a trait à l'art. 23 de la ^g *Loi de 1870 sur le Manitoba*. Dans cet arrêt, la Cour à la majorité a jugé que le principe de la primauté du droit avait pour effet de préserver le caractère exécutoire de la déclaration de culpabilité de l'appellant et, en l'absence d'autres considérations, je serais prêt à adopter une position semblable en l'espèce.

Toutefois, un autre point est soulevé en l'espèce, l'appellant a demandé que son plaidoyer soit inscrit en français. Comme je l'ai expliqué, il avait le droit de l'exiger et, à mon avis, le défaut d'accéder

Onglet 85

R. c. Drybones, [1970] R.C.S. 282

282

THE QUEEN v. DRYBONES

[1970] S.C.R.

Her Majesty The Queen *Appellant*;

and

Joseph Drybones *Respondent*.

1968: October 28; 1969: November 20.

Present: Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

ON APPEAL FROM THE COURT OF APPEAL
FOR THE NORTHWEST TERRITORIES

Civil rights—Indians—Criminal law—Intoxicated off a reserve—No reserve in Northwest Territories—Whether relevant—Whether offence in s. 94(b) of Indian Act a discrimination against Indians under the Canadian Bill of Rights—Whether s. 94(b) rendered inoperative by the Canadian Bill of Rights—Indian Act, R.S.C. 1952, c. 149, s. 94(b)—Canadian Bill of Rights, 1960 (Can.), c. 44, ss. 1(b), 2.

The respondent, an Indian, was convicted by a magistrate of being intoxicated off a reserve in the Northwest Territories, contrary to s. 94(b) of the *Indian Act*, R.S.C. 1952, c. 149. There is no reserve in the Northwest Territories. On an appeal by way of trial *de novo* to the Territorial Court, the respondent was acquitted on the ground that s. 94(b) of the *Indian Act* has been rendered inoperative by the *Canadian Bill of Rights*, 1960 (Can.), c. 44, because it infringes the right of the respondent to equality before the law. Section 94(b) renders the respondent guilty of a punishable offence by reason of conduct which would not have been punishable if indulged in by any person who was not an Indian. The Court of Appeal for the Northwest Territories affirmed the acquittal. The Crown was granted leave to appeal to this Court.

Held (Cartwright C.J. and Abbott and Pigeon JJ. dissenting): The appeal should be dismissed.

Per Fauteux, Martland, Judson, Ritchie, Hall and Spence JJ.: The opening words of s. 2 of the *Canadian Bill of Rights* afford the clearest indication that the section is intended to mean and does mean that if a law of Canada cannot be “sensibly construed and applied” so that it does not abrogate, abridge or infringe one of the rights and freedoms recognized and declared by the Bill, then such law is

Sa Majesté la Reine *Appelante*;

et

Joseph Drybones *Intimé*.

1968: le 28 octobre; 1969: le 20 novembre.

Présents: Le Juge en Chef Cartwright et les Juges Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence et Pigeon.

EN APPEL DE LA COUR D'APPEL
DES TERRITOIRES DU NORD-OUEST

Droits civils—Indiens—Droit criminel—Ivresse hors d'une réserve—Aucune réserve dans les Territoires du Nord-Ouest—Aucune importance—Infraction prévue à l'art. 94(b) de la Loi sur les Indiens constitue-t-elle une discrimination envers les Indiens selon la Déclaration canadienne des droits—L'article est-il rendu inopérant par l'art. 2 de ladite Déclaration—Loi sur les Indiens, S.R.C. 1952, c. 149, art. 94(b)—Déclaration canadienne des droits, 1960 (Can.), c. 44, art. 1(b), 2.

L'intimé qui est un Indien a été déclaré coupable par un magistrat de l'inculpation d'avoir été ivre hors d'une réserve dans les Territoires du Nord-Ouest, en contravention de l'art. 94(b) de la *Loi sur les Indiens*, S.R.C. 1952, c. 149. Il n'y a pas de réserve dans les Territoires du Nord-Ouest. Sur appel par procès *de novo* à la Cour territoriale, il a été acquitté pour le motif que l'art. 94(b) de la *Loi sur les Indiens* a été rendu inopérant par la *Déclaration canadienne des droits*, 1960 (Can.), c. 44, parce qu'il enfreint le droit de l'intimé à l'égalité devant la Loi. Le texte de l'article rend l'intimé coupable d'une infraction en raison d'une façon d'agir qui ne donnerait lieu à aucune sanction pour tout autre qu'un Indien. La Cour d'appel des Territoires du Nord-Ouest a confirmé l'accusation. La Couronne a obtenu la permission d'en appeler à cette Cour.

Arrêt: L'appel doit être rejeté, le Juge en Chef Cartwright et les Juges Abbott et Pigeon étant dissidents.

Les Juges Fauteux, Martland, Judson, Ritchie, Hall et Spence: Les mots au début de l'art. 2 de la *Déclaration canadienne des droits* indiquent très clairement que l'article veut dire, et signifie effectivement que, si une loi du Canada ne peut être «raisonnablement interprétée et appliquée» sans supprimer, restreindre ou enfreindre un des droits ou libertés reconnus et proclamés dans la *Déclaration*, une telle

[1970] R.C.S.

LA REINE C. DRYBONES

283

inoperative "unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*". A declaration by the Courts that a section or a portion of a section of a statute is inoperative is to be distinguished from the repeal of such a section and is to be confined to the particular circumstances of the case in which the declaration is made. The word "law" as used in s. 1(b) of the *Canadian Bill of Rights* is to be construed as meaning "the law of Canada". An individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty. Section 94(b) of the *Indian Act* is a law of Canada which creates such an offence and it can only be construed in such manner that its application would operate so as to abrogate, abridge or infringe one of the rights declared and recognized by the *Canadian Bill of Rights*. Section 94(b) is therefore inoperative.

The fact that there are no reserves in the Territories is quite irrelevant.

Per Hall J.: The concept that the *Canadian Bill of Rights* is operative in the face of a law of Canada only when that law does not give equality to all persons within the class to whom that particular law extends or relates, is to be rejected. The *Canadian Bill of Rights* can have validity and meaning only when subject to the single exception set out in s. 2 it is seen to repudiate discrimination in every law of Canada by reason of race, national origin, colour, religion or sex in respect of the human rights and fundamental freedoms set out in s. 1 in whatever way that discrimination may manifest itself not only as between Indian and Indian but as between all Canadians whether Indian or non-Indian.

Per Cartwright C.J., dissenting: Section 94(b) of the *Indian Act* is not rendered inoperative by the terms of the *Canadian Bill of Rights*. The section is expressed in plain and unequivocal words and must be given effect according to its plain meaning. Parliament did not have the intention to confer the power and impose the responsibility upon the Courts of declaring inoperative any provision in a statute of Canada although expressed in clear and unequivocal terms, the meaning of which after calling in aid every rule of construction including that prescribed by s. 2 of the Bill is perfectly plain, if in

loi est inopérante «à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*». Il y a une distinction à faire entre une déclaration des tribunaux à l'effet qu'un article ou une partie d'un article d'une loi est inopérant et l'abrogation d'un tel article, et il faut restreindre la déclaration aux circonstances de l'affaire où elle est faite. Le mot «loi» dans l'art. 1(b) de la *Déclaration canadienne des droits* doit s'interpréter comme signifiant une «loi du Canada». Une personne est privée de l'égalité devant la loi, si pour elle, à cause de sa race, un acte qui, pour ses concitoyens canadiens, n'est pas une infraction et n'appelle aucune sanction devient une infraction punissable en justice. L'article 94(b) de la *Loi sur les Indiens*, qui est une loi du Canada, crée une telle infraction et en l'interprétant on ne peut que conclure que son application supprime, restreint ou enfreint l'un des droits déclarés et reconnus dans la *Déclaration canadienne des droits*. L'article est donc inopérant.

Le fait qu'il n'existe pas de réserve dans les Territoires n'a rien à voir avec la question.

Le Juge Hall: Le concept selon lequel la *Déclaration canadienne des droits* ne prend effet vis-à-vis d'une loi du Canada que lorsque cette loi n'accorde pas l'égalité à toutes les personnes de la classe visée ou touchée par cette loi particulière, doit être rejeté. La *Déclaration canadienne des droits* n'a de valeur et n'a de sens que lorsque, sous réserve de l'unique exception énoncée à l'art. 2, elle répudie dans chaque loi du Canada la discrimination en raison de la race, de l'origine nationale, de la couleur, de la religion ou du sexe à l'égard des droits de l'homme et des libertés fondamentales énoncés à l'art. 1, de quelque façon que cette discrimination puisse se manifester, non seulement entre Indiens et Indiens, mais entre tous les Canadiens qu'ils soient Indiens ou non-Indiens.

Le Jugé en Chef Cartwright, dissident: L'article 94(b) de la *Loi sur les Indiens* n'est pas rendu inopérant par la *Déclaration canadienne des droits*. L'article est rédigé en termes clairs et non équivoques, et on doit l'appliquer suivant son sens clair. Le Parlement n'a pas eu l'intention de conférer aux tribunaux le pouvoir et de leur imposer la responsabilité de déclarer inopérante toute disposition d'une loi du Canada si le tribunal est d'avis qu'elle enfreint l'un des droits ou libertés énoncés à l'art. 1 de la *Déclaration*, quoique cette disposition soit exprimée en termes clairs et non équivoques et que le sens,

the view of the Court it infringes any of the rights or freedoms declared by s. 1 of the Bill. The *Canadian Bill of Rights* directs the Courts to apply the laws of Canada not to refuse to apply them.

Per Abbott J., dissenting: It would require the plainest words to impute to Parliament an intention that the Courts should engage in judicial legislation as the interpretation of the *Canadian Bill of Rights* adopted by the Courts below necessarily implies. No such intention is expressed in s. 2 of the *Canadian Bill of Rights*. On the contrary, with respect to existing legislation, the section provides merely a canon or rule of interpretation for such legislation.

Per Pigeon J., dissenting: In respect of existing federal legislation, s. 2 of the *Canadian Bill of Rights* enacts a canon of construction and does not cast upon the Courts the task of removing therefrom, whenever the question is raised, every provision that may be considered as being in conflict with the enumerated rights and freedoms. Equality before the law in the sense in which it was understood in the Courts below would require the Indians to be subject in every province to the same rules of law as all others in every particular not merely on the question of drunkenness.

If one of the effects of the *Canadian Bill of Rights* is to render inoperative all legal provisions whereby Indians as such are not dealt with in the same way as the general public, the conclusion is inescapable that Parliament, by the enactment of the *Canadian Bill of Rights*, has not only fundamentally altered the status of the Indians in that indirect fashion but has also made any future use of federal legislative authority over them subject to the requirement of expressly declaring every time "that the law shall operate notwithstanding the *Canadian Bill of Rights*". It is very difficult to believe that Parliament so intended when enacting the *Canadian Bill of Rights*. Of themselves, the words in s. 2 "be so construed and applied as not to abrogate, abridge or infringe" do not enact something more than a rule of construction.

On the whole, one cannot find in the *Canadian Bill of Rights* anything clearly showing that Parliament intended to establish concerning human rights and fundamental freedoms some overriding general principles to be enforced by the Courts against the clearly expressed will of Parliament in statutes existing at the time. Parliament did nothing more than

après avoir fait appel à toutes les règles d'interprétation y compris celle de l'art. 2 de la *Déclaration*, demeure parfaitement clair. La *Déclaration canadienne des droits* enjoint aux tribunaux d'appliquer les lois du Canada et non de refuser de les appliquer.

Le Juge Abbott, dissident: Il faudrait que les termes employés soient des plus clairs pour prêter au Parlement l'intention que les tribunaux légifèrent par le processus judiciaire, ainsi que l'interprétation de la *Déclaration canadienne des droits* qu'ont adoptée les tribunaux des Territoires implique nécessairement. L'article 2 de la *Déclaration canadienne des droits* n'exprime pas cette intention. Au contraire, à l'égard de la législation antérieure l'article ne donne qu'une simple règle d'interprétation.

Le Juge Pigeon, dissident: A l'égard de la législation fédérale existante, l'art. 2 de la *Déclaration canadienne des droits* édicte une règle d'interprétation et n'impose pas aux tribunaux la tâche de retrancher de cette législation, chaque fois que la question est soulevée, toute disposition qui peut être considérée en conflit avec les droits et libertés énumérés. L'égalité devant la loi, au sens que lui ont donné les Cours des Territoires, exigerait que dans chaque province les Indiens soient soumis aux mêmes règles juridiques que les autres, sous tout rapport et non seulement en matière d'ébriété.

' Si l'un des effets de la *Déclaration canadienne des droits* est de rendre inopérantes toutes les dispositions en vertu desquelles les Indiens en tant que tels ne sont pas traités de la même façon que le grand public, on doit inévitablement conclure que le Parlement, en édictant la *Déclaration canadienne des droits*, n'a pas seulement modifié fondamentalement le statut des Indiens par ce procédé indirect, mais aussi qu'il a assujetti l'exercice futur de l'autorité législative fédérale sur les Indiens à l'exigence d'une déclaration expresse «que la loi s'appliquera nonobstant la *Déclaration canadienne des droits*». Il est difficile de croire que le Parlement avait cette intention lorsqu'il a édicté la *Déclaration canadienne des droits*. Pris à la lettre, les mots à l'art. 2 «doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre» n'édictent pas plus qu'une règle d'interprétation.'

En définitive, on ne peut rien trouver dans la *Déclaration canadienne des droits* qui démontre clairement que le Parlement avait l'intention d'établir à l'égard des droits de l'homme et des libertés fondamentales des principes primordiaux d'ordre général, que les tribunaux devraient appliquer à l'encontre de la volonté clairement exprimée du

[1970] R.C.S.

LA REINE C. DRYBONES *Le Juge en Chef*

285

instruct the Courts to construe and apply those laws in accordance with the principles enunciated in the *Canadian Bill of Rights* on the basis that the recognized rights and freedoms did exist, not that they were to be brought into existence by the Courts.

APPEAL from a judgment of the Court of Appeal for the Northwest Territories¹, affirming the acquittal of the respondent on a charge of being unlawfully intoxicated off a reserve. Appeal dismissed, Cartwright C.J. and Abbott and Pigeon JJ. dissenting.

D. H. Christie, Q.C., and C. D. MacKinnon, for the appellant.

G. Brian Purdy, for the respondent.

THE CHIEF JUSTICE (*dissenting*)—The relevant facts, which are undisputed, and the course of the proceedings in the Courts below are set out in the reasons of my brothers Ritchie and Pigeon which I have had the advantage of reading.

There is no doubt that on the facts, the respondent was guilty of a breach of s. 94(b) of the *Indian Act* and the question to be decided is whether that provision is rendered inoperative by the terms of the *Canadian Bill of Rights*, Statutes of Canada 8-9 Eliz. II, c. 44, hereinafter referred to as the *Bill*.

In approaching this question I will assume the correctness of the view that s. 94(b) infringes the right of the respondent to equality before the law declared by clause (b) of s. 1 of the *Bill*, in that because he is an Indian it renders him guilty of a punishable offence by reason of conduct which would not have been punishable if indulged in by any person who was not an Indian.

This is, I believe, the first occasion on which it has become necessary for this Court to decide this question. In *Robertson and Rosetanni v. Her Majesty the Queen*², the majority were of the view that the impugned provisions of *The Lord's Day Act* did not infringe the right to freedom

Parlement dans les lois existant à cette époque. Le Parlement n'a fait rien de plus que de prescrire aux tribunaux d'interpréter et d'appliquer ces lois conformément aux principes énoncés dans la *Déclaration canadienne des droits*, en considérant que les droits et libertés reconnus existaient alors et non pas qu'ils seraient établis par les tribunaux.

APPEL d'un jugement de la Cour d'appel des Territoires du Nord-Ouest¹, confirmant un jugement acquittant l'intimé de l'inculpation d'avoir été ivre hors d'une réserve. Appel rejeté, le Juge en Chef Cartwright et les Juges Abbott et Pigeon étant dissidents.

D. H. Christie, c.r., et C. D. MacKinnon, pour l'appelante.

G. Brian Purdy, pour l'intimé.

LE JUGE EN CHEF (*dissident*)—Les faits pertinents, qui ne sont pas contestés, et la marche des procédures dans les cours des Territoires sont relatés dans les motifs de mes collègues les Juges Ritchie et Pigeon, que j'ai eu le privilège de lire.

En fait l'intimé est indubitablement coupable d'avoir enfreint l'art. 94 (b) de la *Loi sur les Indiens*. Il s'agit de décider si cette disposition est rendue inopérante par la *Déclaration canadienne des droits*, Statuts du Canada 8-9 Éliz. II, c. 44, que j'appellerai ci-après la *Déclaration*.

En abordant cette question, je vais présumer que l'art. 94 (b) enfreint réellement le droit de l'intimé à l'égalité devant la loi, tel qu'énoncé à l'alinéa (b) de l'art. 1 de la *Déclaration*, du fait que, parce qu'il est un Indien, ce texte le rend coupable d'une infraction en raison d'une façon d'agir qui ne donnerait lieu à aucune sanction pour tout autre qu'un Indien.

C'est, je crois, la première fois que cette Cour est appelée à trancher cette question. Dans *Robertson et Rosetanni c. La Reine*², la majorité a jugé que les dispositions contestées de la *Loi sur le dimanche* n'enfreignaient pas le droit à la liberté de religion énoncé à l'alinéa (c) de l'art. 1

¹ (1967), 61 W.W.R. 370, [1968] 2 C.C.C. 69, 64 D.L.R. (2d) 260.

² [1963] S.C.R. 651, 41 C.R. 392, [1964] 1 C.C.C. 1, 41 D.L.R. (2d) 485.

¹ (1967), 61 W.W.R. 370, [1968] 2 C.C.C. 69, 64 D.L.R. (2d) 260.

² [1963] R.C.S. 651, 41 C.R. 392, [1964] 1 C.C.C. 1, 41 D.L.R. (2d) 485.

286

THE QUEEN v. DRYBONES *The Chief Justice*

[1970] S.C.R.

of religion declared by clause (c) of s. 1 of the *Bill*, and consequently did not deal with the opinion which I expressed in my dissenting reasons as to the effect of the *Bill* on a provision of an Act of Parliament which does infringe one of the declared rights.

In the case at bar s. 94(b) of the *Indian Act* is expressed in plain and unequivocal words. It is not possible by the application of any rule of construction to give it a meaning other than that an Indian who is intoxicated off a reserve is guilty of an offence.

In these circumstances the choice open to us is to give effect to the section according to its plain meaning or to declare it inoperative, that is to say, to declare that the *Indian Act* is *pro tanto* repealed by the *Bill*.

In *Robertson and Rosetanni v. The Queen, supra*, I had to deal with a similar question as in my view *The Lord's Day Act* did infringe the freedom of religion. At pages 661 and 662 I used the following words:

It remains to consider the reasons for judgment of Davey J.A. in *Regina v. Gonzales* (1962) 37 C.R. 56, 37 W.W.R. 257, 132 C.C.C. 237, 32 D.L.R. (2d) 290. At page 239 of the C.C.C. Reports the learned Justice of Appeal says:

In so far as existing legislation does not offend against any of the matters specifically mentioned in clauses (a) to (g) of s. 2, but is said to otherwise infringe upon some of the human rights and fundamental freedoms declared in s. 1, in my opinion the section does not repeal such legislation either expressly or by implication. On the contrary, it expressly recognizes the continued existence of such legislation, but provides that it shall be construed and applied so as not to derogate from those rights and freedoms. By that it seems merely to provide a canon or rule of interpretation for such legislation. The very language of s. 2, "be so construed and applied as not to abrogate" assumes that the prior Act may be sensibly construed and applied in a way that will avoid derogating from the rights and freedoms declared in s. 1. If the prior legislation cannot be so construed and applied sensibly, then the effect of s. 2 is exhausted, and the prior legislation must prevail according to its plain meaning.

With the greatest respect I find myself unable to agree with this view. The imperative words of s. 2

de la *Déclaration*, elle n'a donc pas statué sur l'opinion que j'ai exprimée dans mes motifs de dissidence quant à l'effet de la *Déclaration* sur une disposition d'une loi du Parlement qui enfreint l'un des droits énoncés.

Dans la présente cause, l'art. 94(b) de la *Loi sur les Indiens* est rédigé en termes clairs et non équivoques. Aucune règle d'interprétation ne permet de lui donner un sens autre que celui-ci, savoir: un Indien qui est ivre hors d'une réserve est coupable d'une infraction.

Dans les circonstances, le seul choix que nous ayons est soit d'appliquer l'article suivant son sens clair, soit de le déclarer inopérant, c'est-à-dire, de déclarer que la *Loi sur les Indiens* est, *pro tanto*, abrogée par la *Déclaration*.

Dans *Robertson et Rosetanni c. La Reine* (déjà citée) j'avais à examiner une question semblable, vu qu'à mon avis la *Loi sur le dimanche* enfreignait la liberté de religion. Je me suis exprimé comme suit, aux pages 661 et 662:

[TRADUCTION] Il reste à considérer les motifs de jugement du Juge d'appel Davey dans *Regina v. Gonzales* (1962) 37 C.R. 56, 37 W.W.R. 257, 132 C.C.C. 237, 32 D.L.R. (2d) 290. A la page 239 des C.C.C. Reports, le savant Juge d'appel dit:

[TRADUCTION] Dans le cas où une loi existante ne va pas à l'encontre de ce que mentionnent expressément les alinéas a) à g) de l'article 2, mais on prétend qu'elle enfreint autrement certains des droits de l'homme et des libertés fondamentales énoncés à l'article 1, j'estime que l'article ne l'abroge ni expressément ni implicitement. Au contraire, il reconnaît expressément le maintien en existence de cette loi tout en prévoyant qu'elle doit être interprétée et appliquée de façon à ne pas porter atteinte à ces droits et libertés. Il semble ainsi simplement fournir une règle, un critère d'interprétation de cette loi. Le libellé même de l'art. 2 «... soit interprétée et appliquée de façon à ne pas abroger...» implique que la loi antérieure peut être raisonnablement interprétée et appliquée de façon à éviter de porter atteinte aux droits et libertés énoncés à l'art. 1. Si la loi antérieure ne peut être ainsi interprétée et appliquée, alors l'art. 2 est sans effet et la loi antérieure doit l'emporter conformément à son sens clair.

En toute déférence, je ne puis accepter ce point de vue. A mon avis, les termes impératifs de l'article

[1970] R.C.S.

LA REINE C. DRYBONES *Le Juge en Chef*

287

of the *Canadian Bills of Rights*, quoted above, appear to me to require the courts to refuse to apply any law, coming within the legislative authority of Parliament, which infringes freedom of religion unless it is expressly declared by an Act of Parliament that the law which does so infringe shall operate notwithstanding the *Canadian Bill of Rights*. As already pointed out s. 5(2), quoted above, makes it plain that the *Canadian Bill of Rights* is to apply to all laws of Canada already in existence at the time it came into force as well as to those thereafter enacted. In my opinion where there is irreconcilable conflict between another Act of Parliament and the *Canadian Bill of Rights* the latter must prevail.

Whether the imposition, under penal sanctions, of a certain standard of religious conduct on the whole population is desirable is, of course, a question for Parliament to decide. But in enacting the *Canadian Bill of Rights* Parliament has thrown upon the courts the responsibility of deciding, in each case in which the question arises, whether such an imposition infringes the freedom of religion in Canada. In the case at bar I have reached the conclusion that s. 4 of the *Lord's Day Act* does infringe the freedom of religion declared and preserved in the *Canadian Bill of Rights* and must therefore be treated as inoperative.

After a most anxious reconsideration of the whole question, in the light of the able arguments addressed to us by counsel, I have reached the conclusion that the view expressed by Davey J.A., as he then was, in the words quoted above is the better one.

The question is whether or not it is the intention of Parliament to confer the power and impose the responsibility upon the courts of declaring inoperative any provision in a Statute of Canada although expressed in clear and unequivocal terms, the meaning of which after calling in aid every rule of construction including that prescribed by s. 2 of the *Bill* is perfectly plain, if in the view of the court it infringes any of the rights or freedoms declared by s. 1 of the *Bill*.

In approaching this question it must not be forgotten that the responsibility mentioned above, if imposed at all, is imposed upon every justice

2 de la *Déclaration canadienne des droits*, cité plus haut, exigent des tribunaux qu'ils refusent d'appliquer toute loi de la compétence législative du Parlement, qui enfreint la liberté de religion, à moins qu'une loi du Parlement ne déclare expressément que la première doit s'appliquer nonobstant la *Déclaration canadienne des droits*. Comme on l'a déjà vu, l'art. 5(2) cité plus haut montre bien que la *Déclaration canadienne des droits* doit s'appliquer à toutes les lois du Canada existant au moment où elle est entrée en vigueur de même qu'à celles qui sont promulguées par la suite. A mon sens, lorsqu'il y a contradiction irréductible entre une autre loi du Parlement et la *Déclaration canadienne des droits*, cette dernière doit prévaloir.

C'est évidemment au Parlement qu'il appartient de décider s'il y a lieu d'imposer, sous peine de sanctions pénales, certaines normes de conduite religieuse à toute la population. Mais en édictant la *Déclaration canadienne des droits*, il a transmis aux tribunaux la responsabilité de décider, chaque fois que la question se pose, si cela enfreint la liberté de religion au Canada. Dans la présente cause, j'en suis venu à la conclusion que l'art. 4 de la *Loi sur le dimanche* enfreint la liberté de religion déclarée et garantie par la *Déclaration canadienne des droits* et que, par conséquent, il doit être déclaré inopérant.

Après avoir reconcidéré toute la question avec beaucoup de soin, à la lumière des arguments très sérieux que nous ont présentés les avocats, j'en suis venu à la conclusion que l'opinion exprimée par le Juge Davey, alors Juge d'appel, dans les motifs cités ci-haut, est celle qu'il faut retenir.

La question est la suivante: Est-ce l'intention du Parlement de conférer aux tribunaux le pouvoir et de leur imposer la responsabilité de déclarer inopérante toute disposition d'une loi du Canada si le tribunal est d'avis qu'elle enfreint l'un des droits ou libertés énoncés à l'art. 1 de la *Déclaration*, quoique cette disposition soit exprimée en termes clairs et non équivoques et que le sens, après avoir fait appel à toutes les règles d'interprétation y compris celle de l'art. 2 de la *Déclaration*, demeure parfaitement clair.

En abordant cette question, il ne faut pas oublier que la responsabilité ci-haut mentionnée, si elle existe vraiment, est imposée à tous les

of the peace, magistrate and judge of any court in the country who is called upon to apply a Statute of Canada or any order, rule or regulation made thereunder.

If it were intended that the question should be answered in the affirmative there would, in my opinion, have been added after the word "declared" in the seventh line of the opening paragraph of s. 2 of the *Bill* some such words as the following "and if any law of Canada cannot be so construed and applied it shall be regarded as inoperative or *pro tanto* repealed".

What now appears to me to have been the error in my reasoning in the passage from *Robertson and Rosetanni v. The Queen* quoted above is found in the statement that the *Bill* requires the courts to refuse to apply any law of Canada which is successfully impugned as infringing one of the declared rights or freedoms whereas on the contrary, as Davey J.A. had pointed out, the *Bill* directs the courts to apply such a law not to refuse to apply it.

For these reasons I would dispose of the appeal as proposed by my brother Pigeon.

The judgment of Fauteux, Martland, Judson, Ritchie and Spence JJ. was delivered by

RITCHIE J.—This is an appeal brought with leave of this Court from a judgment of the Court of Appeal for the Northwest Territories³ dismissing an appeal by the Crown from a judgment of Mr. Justice W. G. Morrow of the Territorial Court of the Northwest Territories by which he had acquitted Joseph Drybones of being "unlawfully intoxicated off a reserve" contrary to s. 94(b) of the *Indian Act*, R.S.C. 1952, c. 149, after having heard an appeal by way of trial *de novo* from a judgment of Magistrate Anderson-Thompson who had convicted the respondent of this offence and sentenced him to be fined \$10 and costs and in default to spend three days in custody. The full charge against Drybones was that he,

On or about the 8th of April, 1967 at Yellowknife in the Northwest Territories, being an Indian, was

³ (1967), 61 W.W.R. 370, [1968] 2 C.C.C. 69, 64 D.L.R. (2d) 260.

Juges de paix, Magistrats, et Juges de n'importe quel tribunal au pays appelés à appliquer une loi du Canada ou une ordonnance, une règle ou un règlement établis en vertu d'une telle loi.

Si l'on avait voulu que la réponse à cette question soit affirmative, on aurait, à mon avis, ajouté à l'art. 2 de la *Déclaration*, quelque chose comme: «et si une loi du Canada ne peut être ainsi interprétée et appliquée, elle sera considérée comme inopérante ou abrogée, *pro tanto*».

Je crois que dans le passage précité de mes motifs dans *Robertson et Rosetanni c. La Reine* mon erreur a été de dire que la *Déclaration* exige des tribunaux qu'ils refusent d'appliquer toute loi du Canada qui enfreint effectivement un des droits ou libertés énoncés alors qu'au contraire, comme le Juge d'appel Davey l'a signalé, la *Déclaration* enjoint aux tribunaux d'appliquer une telle loi et non de refuser de l'appliquer.

Pour ces motifs, je disposerais de ce pourvoi comme le propose mon collègue, le Juge Pigeon.

Le jugement des Juges Fauteux, Martland, Judson, Ritchie et Spence a été rendu par

LE JUGE RITCHIE—Le pourvoi, que cette Cour a autorisé, est à l'encontre d'un arrêt de la Cour d'appel des Territoires du Nord-Ouest³. Cet arrêt a rejeté l'appel de la Couronne à l'encontre d'un jugement du Juge W. G. Morrow, de la Cour territoriale des Territoires du Nord-Ouest acquittant Joseph Drybones, de l'inculpation d'avoir été ivre hors d'une réserve, illégalement, en contravention des dispositions de l'art. 94(b) de la *Loi sur les Indiens*, S.R.C. 1952, c. 149. La décision du Juge Morrow faisait suite à un appel par procès *de novo* du jugement du Magistrat Anderson-Thompson qui avait déclaré l'intimé coupable de cette infraction et l'avait condamné à payer \$10 d'amende et les frais ou, à défaut, à trois jours de détention. L'inculpation de Drybones tenait dans le texte suivant:

[TRADUCTION] Le 8 avril 1967, ou vers cette date, à Yellowknife, dans les Territoires du Nord-Ouest,

³ (1967), 61 W.W.R. 370, [1968] 2 C.C.C. 69, 64 D.L.R. (2d) 260.

[1970] R.C.S.

LA REINE C. DRYBONES *Le Juge Ritchie*

289

unlawfully intoxicated off a reserve, contrary to s. 94(b) of the Indian Act.

The respondent is an Indian and he was indeed intoxicated on the evening of April 8, 1967, on the premises of the Old Stop Hotel in Yellowknife in the Northwest Territories where there is no "reserve" within the meaning of the *Indian Act*.

When he was first arraigned before Magistrate Anderson-Thompson, Drybones, who spoke no English, pleaded guilty to this offence, but on appeal to the Territorial Court, Mr. Justice Morrow found that there was some serious doubt as to whether he fully appreciated his plea in the lower court and he was allowed to withdraw that plea whereafter the appeal proceeded as a trial *de novo* with a plea of not guilty. Section 94 of the *Indian Act* reads as follows:

94. An Indian who

- (a) has intoxicants in his possession,
- (b) is intoxicated, or
- (c) makes or manufactures intoxicants off a reserve, is guilty of an offence and is liable on summary conviction to a fine of not less than ten dollars and not more than fifty dollars or to imprisonment for a term not exceeding three months or to both fine and imprisonment.

I agree with the Court of Appeal that the use of the words "off a reserve" creates

. . . an essential element to be proved in any charge laid under section 94. But once it is proved, as it was in the present case, that the offence was not committed upon a reserve, the requirement of the section was satisfied. The fact that there are no reserves in the Territories is quite irrelevant.

The important question raised by this appeal has its origin in the fact that in the Northwest Territories it is not an offence for anyone except an Indian to be intoxicated otherwise than in a public place. The Liquor Ordinance which is of general application in the Territories, (R.O.N.W.T. 1957, c. 60, s. 19(1)) provides that:

No person shall be in an intoxicated condition in a public place . . .

étant un Indien, il était ivre hors d'une réserve, illégalement, en contravention des dispositions de l'article 94(b) de la *Loi sur les Indiens*.

L'intimé est Indien et il était réellement ivre, le soir du 8 avril 1967, à l'hôtel *Old Stop*, à Yellowknife, dans les Territoires du Nord-Ouest, où il n'y a pas de «réserve» au sens que donne à ce mot la *Loi sur les Indiens*.

Traduit devant le Magistrat Anderson-Thompson, Drybones, qui ne parlait pas l'anglais, s'avoua coupable de l'infraction précitée. Lors de l'appel, en Cour territoriale, le Juge Morrow doutant beaucoup que Drybones ait bien compris le sens de son plaidoyer devant le Magistrat, lui permit de le rétracter et l'appel se poursuivit comme procès *de novo*, sur plaidoyer de non-culpabilité. L'article 94 de la *Loi sur les Indiens* se lit comme suit:

94. Un Indien qui

- (a) a des spiritueux en sa possession;
- (b) est ivre; ou
- (c) fait ou fabrique des spiritueux hors d'une réserve, est coupable d'une infraction et passible, sur déclaration sommaire de culpabilité, d'une amende d'au moins dix dollars et d'au plus cinquante dollars ou d'un emprisonnement n'excédant pas trois mois, ou de l'amende et de l'emprisonnement à la fois.

Je conviens avec la Cour d'appel que les mots «hors d'une réserve» constituent

[TRADUCTION] . . . un élément essentiel qui doit être prouvé dans toute accusation portée en vertu de l'article 94. Cependant, une fois qu'il est prouvé, comme dans l'affaire qui nous intéresse, que l'infraction n'a pas été commise sur une réserve, l'exigence de l'article est satisfaite. Le fait qu'il n'existe pas de réserve dans les Territoires n'a rien à voir avec la question.

La question importante dans le présent appel tient à ce que dans les Territoires du Nord-Ouest le fait d'être ivre, ailleurs que dans un lieu public, ne constitue une infraction pour personne autre qu'un Indien. L'ordonnance intitulée *The Liquor Ordinance*, (R.O.N.W.T.) 1957, c. 60, art. 19 (1) qui y est d'application générale, édicte que:

[TRADUCTION] Nul ne doit se trouver en état d'ébriété dans un lieu public . . .

but unlike s. 94 of the *Indian Act*, there is no provision for a minimum fine and the maximum term of imprisonment is only 30 days as opposed to 3 months under the *Indian Act*.

The result is that an Indian who is intoxicated in his own home "off a reserve" is guilty of an offence and subject to a minimum fine of not less than \$10 or a term of imprisonment not exceeding 3 months or both, whereas all other citizens in the Territories may, if they see fit, become intoxicated otherwise than in a public place without committing any offence at all. And even if any such other citizen is convicted of being intoxicated in a public place, the only penalty provided by the Ordinance is "a fine not exceeding \$50 or . . . imprisonment for a term not exceeding 30 days or . . . both fine and imprisonment."

The argument which was successfully advanced by the respondent before Mr. Justice Morrow and before the Court of Appeal was that because of this legislation, Indians in the Northwest Territories, by reason of their race, are denied "equality before the law" with their fellow Canadians, and that s. 94(b) of the *Indian Act* therefore authorizes the abrogation, abridgement or infringement of one of the human rights and fundamental freedoms recognized and declared as existing in Canada without discrimination by reason of race, pursuant to the provisions of the *Canadian Bill of Rights*, Statutes of Canada 8-9 Eliz. II, c. 44 (hereinafter sometimes referred to as "The Bill of Rights" or "The Bill") which provides, *inter alia*:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

* * *

(b) the right of the individual to equality before the law and the protection of the law;

* * *

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe, or to authorize the abro-

mais à la différence de l'art. 94 de la *Loi sur les Indiens* elle ne prescrit pas une amende minimum et la peine maximum d'emprisonnement y est de 30 jours alors qu'elle est de 3 mois en vertu de la *Loi sur les Indiens*.

Il s'ensuit donc qu'un Indien qui est ivre chez lui, mais hors d'une réserve, est coupable d'une infraction et passible d'une amende d'au moins \$10 ou d'un emprisonnement n'excédant pas 3 mois ou des deux peines à la fois, alors que n'importe quel autre citoyen des Territoires peut, à sa guise, s'enivrer ailleurs que dans un lieu public, sans commettre une infraction. Et même si cet autre citoyen est déclaré coupable de se trouver en état d'ivresse dans un lieu public, la seule peine que prévoit l'ordonnance est: [TRADUCTION] «une amende d'au plus \$50. ou . . . un emprisonnement n'excédant pas 30 jours ou . . . les deux peines à la fois.»

L'intimé a fait valoir avec succès devant le Juge Morrow et la Cour d'appel qu'en raison de cette loi, les Indiens des Territoires du Nord-Ouest sont, à cause de leur race, privés de «l'égalité devant la loi» dont jouissent les autres Canadiens et qu'en conséquence l'art. 94(b) de la *Loi sur les Indiens* autorise la suppression, la diminution ou la transgression de l'un des droits de l'homme et libertés fondamentales reconnus et déclarés comme existant au Canada pour tout individu, quelle que soit sa race, par les dispositions de la *Déclaration canadienne des droits*, Statuts du Canada, 8-9 Eliz. II, c. 44 (ci-après appelée la «Déclaration des droits» ou la «Déclaration».) Celle-ci décrète, notamment:

1. Il est par les présentes reconnu et déclaré que les droits de l'homme et les libertés fondamentales ci-après énoncés ont existé et continueront à exister pour tout individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe:

* * *

(b) le droit de l'individu à l'égalité devant la loi et à la protection de la loi;

* * *

2. Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre

[1970] R.C.S.

LA REINE C. DRYBONES *Le Juge Ritchie*

291

tion, abridgement or infringement of any of the rights or freedoms herein recognized and declared

* * *

5. (2) The expression 'law of Canada' in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

The Court of Appeal agreed with Mr. Justice Morrow that s. 94(b) of the *Indian Act* is rendered inoperative by reason of this legislation and the Notice to appeal to this Court is limited to the single ground

That the Court of Appeal in the Northwest Territories in upholding the decision of the Territorial Court of the Northwest Territories erred in acquitting the respondent of "an offence contrary to s. 94 (b) of the Indian Act, R.S.C. 1952 Ch. 149 on the ground that s. 94 of the Indian Act is rendered inoperative by reason of the Canadian Bill of Rights, Stat. Can. 1960 Ch. 44."

It was contended on behalf of the appellant that the reasoning and conclusion of the courts below make the question of whether s. 94 has been rendered inoperative by the *Bill of Rights* dependent upon whether or not the law of any province or territory makes it an offence to be intoxicated otherwise than in a public place and that its operation could therefore not only vary from place to place in Canada but also from time to time, depending upon amendments which might be made to the provincial or territorial legislation. I can, however, find no room for the application of this argument in the present case as the ordinance in question is a law of Canada within the meaning of s. 5(2) of the *Bill of Rights* (see *Northwest Territories Act*, R.S.C. 1952, c. 195, s. 17), and it is a law of general application in the Territories, whereas the *Indian Act* is, of course, also a law of Canada although it has special application to Indians alone.

l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme

* * *

5. (2) L'expression «loi du Canada» à la Partie I, désigne une loi du Parlement du Canada, édictée avant ou après la mise en vigueur de la présente loi, ou toute ordonnance, règle ou règlement établi sous son régime, et toute loi exécutoire au Canada ou dans une partie du Canada lors de l'entrée en application de la présente loi, qui est susceptible d'abrogation, d'abolition ou de modification par le Parlement du Canada.

La Cour d'appel a été d'accord avec le Juge Morrow que l'art. 94(b) de la *Loi sur les Indiens* est inopérant par suite de l'adoption de la *Déclaration des droits*. Aussi, l'avis d'appel à cette Cour se limite-t-il au seul motif suivant:

[TRADUCTION] Que la Cour d'appel des Territoires du Nord-Ouest, en confirmant la décision de la Cour territoriale des Territoires du Nord-Ouest, a fait erreur en acquittant l'intimé d'une infraction à l'article 94(b) de la *Loi sur les Indiens*, S.R.C. 1952, ch. 149, pour le motif que l'art. 94 de la *Loi sur les Indiens* est rendu inopérant en raison de la *Déclaration canadienne des droits*, S.C. 1960, ch. 44.

On a prétendu au nom de l'appelante que d'après le raisonnement et la conclusion des cours des Territoires la *Déclaration des droits* rendrait l'art. 94 inopérant pour autant que les législations provinciales ou territoriales feraient une infraction de l'état d'ébriété ailleurs que dans un lieu public; que l'application de cet article varierait donc non seulement d'un endroit à l'autre au Canada, mais aussi d'une époque à l'autre, suivant les modifications que les provinces ou territoires pourraient apporter à leurs lois. Je ne vois pas comment ce raisonnement s'appliquerait à la présente affaire. L'ordonnance dont il est question est une loi du Canada au sens où l'entend l'art. 5(2) de la *Déclaration des droits* (voir la *Loi sur les Territoires du Nord-Ouest*, S.R.C. 1952, c. 195, art. 17), et c'est une loi d'application générale dans les Territoires, tandis que la *Loi sur les Indiens*, bien qu'étant aussi une loi du Canada s'applique aux Indiens seulement.

292

THE QUEEN V. DRYBONES *Ritchie J.*

[1970] S.C.R.

The question of whether s. 94 of the *Indian Act* is rendered inoperative by reason of the provisions of the *Bill of Rights* on the ground that it abrogates, abridges or infringes the right of Canadians of the Indian race to "equality before the law" was considered by the Court of Appeal of British Columbia in *Regina v. Gonzales*⁴, where Tysoe J.A., speaking for the majority of the Court, concluded that:

Sec. 94(a) of the *Indian Act* does not abrogate or infringe the right of the appellant to 'equality before the law' as I understand it. Sec. 2 of the *Canadian Bill of Rights* does not therefore affect it.

In reaching the same conclusion, Davey J.A., (as he then was) who wrote separate reasons for judgment from the other two members of the Court, took the view that s. 1 of the *Bill of Rights* should be treated as merely providing a canon of construction for the interpretation of legislation existing at the time when the statute was enacted. The learned judge said:

In so far as existing legislation does not offend against any of the matters specifically mentioned in clauses (a) to (g) of sec. 2, but is said to otherwise infringe upon some of the human rights and fundamental freedoms declared in sec. 1, in my opinion the section does not repeal such legislation either expressly or by implication. On the contrary, it expressly recognizes the continued existence of such legislation, but provides that it shall be construed and applied so as not to derogate from those rights and freedoms. By that it seems merely to provide a canon or rule of interpretation for such legislation. The very language of sec. 2, ". . . be so construed and applied as not to abrogate . . ." assumes that the prior Act may be sensibly construed and applied in a way that will avoid derogating from the rights and freedoms declared in sec. 1. If the prior legislation cannot be so construed and applied sensibly, then the effect of sec. 2 is exhausted, and the prior legislation must prevail according to its plain meaning.

The application of that rule of construction to existing legislation may require a change in the judicial interpretation of some statutes where the language permits and thus change the law.

La Cour d'appel de la Colombie-Britannique a déjà examiné, dans l'affaire *Regina v. Gonzales*⁴, la question de savoir si la *Déclaration des droits* rend inopérant l'art. 94 de la *Loi sur les Indiens* du fait qu'il supprime, restreint ou enfreint le droit des Canadiens de race indienne à l'«égalité devant la loi». Dans cette affaire-là, le Juge d'appel Tysoe a conclu de la façon suivante, au nom de la majorité:

[TRADUCTION] L'art. 94(a) de la *Loi sur les Indiens* ne supprime ni n'enfreint le droit de l'appelant à l'«égalité devant la loi» comme je l'entends. En conséquence, l'art. 2 de la *Déclaration canadienne des droits* ne l'infirme pas.

Tout en arrivant à la même conclusion, le Juge Davey, alors Juge d'appel, qui a donné des motifs différents de ceux de ses deux collègues, considéra qu'il ne faut voir dans l'art. 1 de la *Déclaration des droits* qu'une règle d'interprétation des lois en vigueur lors de l'adoption de la *Déclaration*. Ce savant Juge a dit:

[TRADUCTION] Dans le cas où une loi existante ne va pas à l'encontre de ce que mentionnent expressément les alinéas (a) à (g) de l'art. 2 mais on prétend qu'elle enfreint autrement certains des droits de l'homme et libertés fondamentales énoncés à l'art. 1, j'estime que l'article ne l'abroge ni expressément ni implicitement. Au contraire, il reconnaît expressément le maintien en existence de cette loi tout en prévoyant qu'elle doit être interprétée et appliquée de façon à ne pas porter atteinte à ces droits et libertés. Il semble ainsi simplement fournir une règle, un critère d'interprétation de cette loi. Le libellé même de l'art. 2 «. . . soit interprétée et appliquée de façon à ne pas abroger . . .» implique que la loi antérieure peut être raisonnablement interprétée et appliquée de façon à éviter de porter atteinte aux droits et libertés énoncés à l'art. 1. Si la loi antérieure ne peut être ainsi raisonnablement interprétée et appliquée, alors l'art. 2 est sans effet et la loi antérieure doit l'emporter conformément à son sens clair.

Il se peut que l'application de cette règle d'interprétation aux lois existantes nécessite un changement dans l'interprétation judiciaire de certaines lois dont la rédaction le permet et qu'elle modifie ainsi le droit.

⁴ (1962), 37 W.W.R. 257, 37 C.R. 56, 132 C.C.C. 237, 32 D.L.R. (2d) 290.

⁴ (1962), 37 W.W.R. 257, 37 C.R. 56, 132 C.C.C. 237, 32 D.L.R. (2d) 290.

[1970] R.C.S.

LA REINE C. DRYBONES *Le Juge Ritchie*

293

The difficulty with sec. 94(a) of the *Indian Act* is that it admits of no construction or application that would avoid conflict with sec. 1(b) of the *Canadian Bill of Rights* as appellant's counsel interprets it. Since the effect of the *Canadian Bill of Rights* is not to repeal such legislation, it is the duty of the courts to apply sec. 94(a) in the only way its plain language permits, and that the learned magistrate did when he convicted.

This proposition appears to me to strike at the very foundations of the *Bill of Rights* and to convert it from its apparent character as a statutory declaration of the fundamental human rights and freedoms which it recognizes, into being little more than a rule for the construction of federal statutes, but as this approach has found favour with some eminent legal commentators, it seems to me to be important that priority should be given to a consideration of it.

I will hereafter refer to the case of *Robertson and Rosetanni v. The Queen*⁵, but in the present context I mention it only to say that like the courts below I agree with what was said by the present Chief Justice in his dissenting reasons for judgment when commenting on the above view expressed by Mr. Justice Davey. He there said, at page 662:

With the greatest respect I find myself unable to agree with this view. The imperative words of s. 2 of the *Canadian Bill of Rights*, quoted above, appear to me to require the courts to refuse to apply any law, coming within the legislative authority of Parliament, which infringes freedom of religion unless it is expressly declared by an Act of Parliament that the law which does so infringe shall operate notwithstanding the *Canadian Bill of Rights*. As already pointed out s. 5(2), quoted above, makes it plain that the *Canadian Bill of Rights* is to apply to all laws of Canada already in existence at the time it came into force as well as to those thereafter enacted. In my opinion where there is irreconcilable conflict between another Act of Parliament and the *Canadian Bill of Rights* the latter must prevail.

I do not find that this expression of opinion in any way conflicts with the reasoning of the majority of this Court in *Robertson and Rosetanni*

⁵ [1963] S.C.R. 651, 41 C.R. 392, [1964] 1 C.C.C. 1, 41 D.L.R. (2d.) 485.

La difficulté quant à l'art. 94(a) de la *Loi sur les Indiens* c'est qu'il ne permet aucune interprétation qui l'empêche d'aller à l'encontre de l'art. 1(b) de la *Déclaration canadienne des droits* comme l'interprète l'avocat de l'appelant. La *Déclaration canadienne des droits* n'ayant pas pour effet d'abroger une telle loi, il incombe aux tribunaux d'appliquer l'art. 94(a) de la seule façon possible d'après ses termes clairs, et c'est ce qu'a fait le savant Magistrat lorsqu'il a prononcé la condamnation.

Cette affirmation me paraît saper la base même de la *Déclaration des droits*, méconnaître son caractère manifeste de déclaration statutaire des droits de l'homme et des libertés fondamentales qu'elle reconnaît, pour la réduire à n'être guère plus qu'une règle d'interprétation des lois fédérales. Toutefois, comme cette manière de voir a reçu un accueil favorable auprès d'éminents commentateurs, il me semble important de l'examiner en premier lieu.

Je citerai plus loin l'affaire *Robertson et Rosetanni c. La Reine*⁵, ici je n'en parlerai que pour dire qu'à l'instar des tribunaux des Territoires, je partage l'avis exprimé par le Juge en chef actuel, dans ses motifs de dissidence, au sujet de l'opinion précitée du Juge Davey. Voici ce qu'il dit, à la page 662:

[TRADUCTION] En toute déférence, je ne puis accepter ce point de vue. A mon avis, les termes impératifs de l'art. 2 de la *Déclaration canadienne des droits*, cité plus haut, exigent des tribunaux qu'ils refusent d'appliquer toute loi de la compétence législative du Parlement, qui enfreint la liberté de religion, à moins qu'une loi du Parlement ne déclare expressément que la première doit s'appliquer nonobstant la *Déclaration canadienne des droits*. montre bien que la *Déclaration canadienne des droits* Comme on l'a déjà vu, l'art. 5(2) cité plus haut doit s'appliquer à toutes les lois du Canada existant au moment où elle est entrée en vigueur de même qu'à celles qui sont promulguées par la suite. A mon sens, lorsqu'il y a contradiction irréductible entre une autre loi du Parlement et la *Déclaration canadienne des droits*, cette dernière doit prévaloir.

Je ne trouve pas que cette opinion contredise de quelque façon l'avis de la majorité de cette Cour dans l'affaire *Robertson et Rosetanni c. La*

⁵ [1963] R.C.S. 651, 41 C.R. 392, [1964] 1 C.C.C. 1, 41 D.L.R. (2d.) 485.

v. *The Queen, supra*, which held that there was no conflict between the impugned section of the *Lord's Day Act* and the *Bill of Rights*.

I am, however, with respect, of the opinion that Mr. Justice Davey's reasoning is untenable on another ground. The result of that reasoning is to conclude that any law of Canada which can only be "construed and applied sensibly" so that it offends against the *Bill of Rights*, is to operate notwithstanding the provisions of that Bill. I am unable to reconcile this interpretation with the opening words of s. 2 where it is provided that:

Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate . . .

(The italics are my own.)

If Mr. Justice Davey's reasoning were correct and the *Bill of Rights* were to be construed as meaning that all laws of Canada which clearly offend the Bill were to operate notwithstanding its provisions, then the words which I have italicized in s. 2 would be superfluous unless it be suggested that Parliament intended to reserve unto itself the right to exclude from the effect of the *Bill of Rights* only such statutes as are unclear in their meaning.

It seems to me that a more realistic meaning must be given to the words in question and they afford, in my view, the clearest indication that s. 2 is intended to mean and does mean that if a law of Canada cannot be "sensibly construed and applied" so that it does not abrogate, abridge or infringe one of the rights and freedoms recognized and declared by the Bill, then such law is inoperative "unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*".

I think a declaration by the courts that a section or portion of a section of a statute is inoperative is to be distinguished from the repeal of such a section and is to be confined to the particular circumstances of the case in which the declaration is made. The situation appears to me to be somewhat analogous to a case where valid pro-

Reine (précitée) à l'effet que l'article contesté de la *Loi sur le dimanche* ne vient pas en conflit avec la *Déclaration des droits*.

Cependant, avec déférence, je suis d'avis que, pour un autre motif, le raisonnement du Juge Davey est insoutenable. La conséquence de ce raisonnement c'est que toute loi du Canada qui ne peut être «raisonnablement interprétée et appliquée» sans enfreindre la *Déclaration de droits* doit avoir effet nonobstant les dispositions de la *Déclaration*. Je ne puis concilier cette interprétation avec le début de l'art. 2 où il est décreté que:

Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*, doit s'interpréter et s'appliquer de manière à ne pas supprimer . . .

(Les italiques sont de moi.)

Si le raisonnement du Juge Davey était juste et s'il fallait interpréter la *Déclaration des droits* comme signifiant que toutes les lois du Canada qui l'enfreignent nettement doivent avoir effet nonobstant ses dispositions, les mots de l'art. 2 que j'ai soulignés seraient inutiles, à moins qu'on ne suppose que le Parlement a voulu se réservrer le droit de n'exclure de l'application de la *Déclaration des droits* que les lois dont le sens est obscur.

Il me semble qu'il faut donner à ces mots un sens plus réaliste; à mon avis, ils indiquent très clairement que l'art. 2 veut dire, et signifie effectivement que, si une loi du Canada ne peut être «raisonnablement interprétée et appliquée» sans supprimer, restreindre ou enfreindre un des droits ou libertés reconnus et proclamés dans la *Déclaration*, une telle loi est inopérante «à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*».

Je crois qu'il y a une distinction à faire entre une déclaration des tribunaux à l'effet qu'un article ou une partie d'un article d'une loi est inopérant et l'abrogation d'un tel article et qu'il faut restreindre la déclaration aux circonstances de l'affaire où elle est faite. La situation me paraît analogue à celle d'une loi provinciale valide dans

[1970] R.C.S.

LA REINE C. DRYBONES *Le Juge Ritchie*

295

vincial legislation in an otherwise unoccupied field ceases to be operative by reason of conflicting federal legislation.

I think it is desirable at this stage to deal with the submission made on behalf of the appellant to the effect that the rights and freedoms recognized and declared by the *Bill of Rights* must have reference to *and be circumscribed by* the laws of Canada as they existed on the 10th of August, 1960, when the Bill was passed, which laws included s. 94 of the *Indian Act*. This submission is based in large measure on the following paragraph from the reasons for judgment of this Court in *Robertson and Rosetanni v. The Queen, supra*, where it was said:

It is to be noted at the outset that the *Canadian Bill of Rights* is not concerned with 'human rights and fundamental freedoms' in any abstract sense but rather with such rights and freedoms as existed in Canada immediately before the statute was enacted (see also s. 5(1)). It is therefore the 'religious freedom' then existing in this country that is safeguarded by the provisions of s. 2 . . .

What was at issue in that case was whether the *Lord's Day Act*, in providing that "it shall be unlawful for any person on the Lord's Day . . . to carry on or transact any business of his ordinary calling . . ." abrogated, abridged or infringed the right to "freedom of religion", and it was contended on behalf of the appellant that the phrase "freedom of religion" as used in the *Bill of Rights* meant "freedom to enjoy the freedom which my own religion allows without being confined by restrictions imposed by Parliament for the purpose of enforcing the tenets of a faith to which I do not subscribe". In considering this contention, it became necessary to examine the decided cases in order to determine what was the accepted meaning of "freedom of religion" as it existed in Canada immediately before the *Bill of Rights* was enacted and the last-quoted excerpt from the reasons for judgment must, in my view, be read in this sense. This appears to me to be confirmed by the succeeding paragraph of these reasons where it is said:

It is accordingly of first importance to understand the concept of religious freedom which was recognized in this country before the enactment of the

un champ autrement inoccupé qui devient inopérante par suite d'une loi fédérale en conflit.

Il convient maintenant, je pense, d'étudier la théorie avancée de la part de l'appelante à l'effet que les droits et libertés reconnus et déclarés dans la *Déclaration des droits* doivent être en relation avec les lois du Canada en vigueur le 10 août 1960, date de la sanction de la *Déclaration* et être délimités par ces lois, qui comprennent l'art. 94 de la *Loi sur les Indiens*. Cette théorie s'appuie principalement sur l'alinéa suivant des motifs de jugement de cette Cour dans l'affaire *Robertson et Rosetanni c. La Reine*, (précitée):

[TRADUCTION] Il faut remarquer tout d'abord que la *Déclaration canadienne des droits* ne s'intéresse pas aux «droits de l'homme et aux libertés fondamentales» dans un sens abstrait mais à ces droits et libertés qui existaient au Canada juste avant la promulgation de la loi (voir également l'art. 5(1)). C'est donc la «liberté de religion» alors existante dans ce pays qui est sauvegardée par les dispositions de l'art. 2 . . .

La question dans cette affaire-là était de savoir si la *Loi sur le dimanche*, en prescrivant que «nul ne peut légalement le dimanche . . . exercer ou poursuivre une besogne de son état ordinaire . . .» supprime, restreint ou enfreint le droit à la «liberté de religion». On soutenait de la part de l'appelante que, l'expression «liberté de religion» dans la *Déclaration des droits*, signifie [TRADUCTION] «la faculté de jouir de la liberté que m'accorde ma propre religion, sans être astreint aux restrictions qu'impose le Parlement pour faire observer la doctrine d'une foi à laquelle je n'adhère pas». Pour examiner cette prétention, il a fallu étudier les décisions antérieures et déterminer quelle était la définition reconnue de la «liberté de religion» comme elle existait au Canada juste avant la promulgation de la *Déclaration des droits* et c'est dans ce sens, je crois, qu'il faut lire l'extrait des motifs de jugement que je viens de citer. L'alinéa suivant de ces motifs me paraît le confirmer. Il se lit comme suit:

[TRADUCTION] Il est donc très important de bien comprendre le concept de liberté de religion qui était reconnu dans ce pays avant la promulgation de

296

THE QUEEN v. DRYBONES *Ritchie J.*

[1970] S.C.R.

Bill of Rights and after the enactment of the *Lord's Day Act* in its present form.

If it had been accepted that the right to "freedom of religion" as declared in the *Bill of Rights* was circumscribed by the provisions of the Canadian statutes in force at the date of its enactment, there would have been no need, in determining the validity of the *Lord's Day Act* to consider the authorities in order to examine the situation in light of the concept of religious freedom which was recognized in Canada at the time of the enactment of the *Bill of Rights*. It would have been enough to say that "freedom of religion" as used in the Bill must mean freedom of religion subject to the provisions of the *Lord's Day Act*. This construction would, however, have run contrary to the provisions of s. 5(2) of the Bill which makes it applicable to every "Act of the Parliament of Canada enacted before or after the coming into force of this Act."

In any event, it was not necessary to decide this question in *Robertson and Rosetanni* because it was found that the impugned provisions of the *Lord's Day Act* and the *Bill of Rights* were not in conflict, and I accordingly do not consider that case to be any authority for the suggestion that the *Bill of Rights* is to be treated as being subject to federal legislation existing at the time of its enactment, and more particularly I do not consider that the provisions of s. 1(b) of the *Bill of Rights* are to be treated as being in any way limited or affected by the terms of s. 94(b) of the *Indian Act*.

The right which is here at issue is "the right of the individual to equality before the law and the protection of the law". Mr. Justice Tysoe, who wrote the reasons for judgment on behalf of the majority of the Court of Appeal of British Columbia in the *Gonzales* case, *supra*, expressed the opinion that as these words occur in the *Bill of Rights* they mean

A right of every person to whom a particular law relates or extends, no matter what may be a person's race, national origin, colour, religion or sex, to stand on an equal footing with every other person to whom a particular law relates or extends and a right to the protection of the law.

(The italics are Mr. Justice Tysoe's)

la *Déclaration des droits* et après la promulgation de la *Loi sur le dimanche* sous sa forme actuelle.

Si l'on avait admis que les lois du Canada en vigueur au moment de l'adoption de la *Déclaration des droits* délimitent le droit à la «liberté de religion» y mentionné, il n'eût pas été nécessaire, pour décider de la validité de la *Loi sur le dimanche* de se reporter aux précédents pour y étudier la situation à la lumière de l'idée que l'on se faisait au Canada de la «liberté de religion» au moment de l'adoption de la *Déclaration des droits*. Il eût suffi de dire que l'expression «liberté de religion» au sens que lui donne la *Déclaration des droits* signifie la liberté de religion sous réserve des dispositions de la *Loi sur le dimanche*. Cette interprétation aurait cependant été contraire aux dispositions de l'art. 5(2) de la *Déclaration*, dispositions qui la rendent applicable à toute «loi du Parlement du Canada édictée avant ou après la mise en vigueur de la présente loi.»

De toute façon, il n'était pas nécessaire de statuer sur cette question dans l'affaire *Robertson et Rosetanni* parce qu'on a jugé que la disposition contestée de la *Loi sur le dimanche* n'est pas en conflit avec la *Déclaration des droits*. Aussi, je ne considère pas que cette décision-là permette de soutenir que la *Déclaration des droits* doit être considérée comme subordonnée aux lois fédérales en vigueur au moment de son adoption. En particulier, je n'estime pas que le libellé de l'art. 94(b) de la *Loi sur les Indiens* limite ou modifie de quelque façon les dispositions de l'art. 1(b) de la *Déclaration des droits*.

Le droit dont il est question ici est celui «de l'individu à l'égalité devant la loi et à la protection de la loi». Le Juge Tysoe, qui a rédigé les motifs du jugement au nom de la majorité en Cour d'appel de la Colombie-Britannique dans l'affaire *Gonzales* (précitée) exprime l'opinion que ces termes, dans la *Déclaration des droits*, veulent dire:

[TRADUCTION] Le droit qu'a toute personne touchée ou visée par une loi particulière, quelle que soit sa race, son origine nationale, sa couleur, sa religion ou son sexe, d'être sur un pied d'égalité avec toute autre personne touchée ou visée par une loi particulière, et le droit à la protection de la loi.

(Les italiques sont du Juge Tysoe dans le texte original)

Like the members of the courts below, I cannot agree with this interpretation pursuant to which it seems to me that the most glaring discriminatory legislation against a racial group would have to be construed as recognizing the right of each of its individual members "to equality before the law", so long as all the other members are being discriminated against in the same way.

I think that the word "law" as used in s. 1(b) of the *Bill of Rights* is to be construed as meaning "the law of Canada" as defined in s. 5(2) (i.e. Acts of the Parliament of Canada and any orders, rules or regulations thereunder) and without attempting any exhaustive definition of "equality before the law" I think that s. 1(b) means at least that no individual or group of individuals is to be treated more harshly than another under that law, and I am therefore of opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.

It is only necessary for the purpose of deciding this case for me to say that in my opinion s. 94(b) of the *Indian Act* is a law of Canada which creates such an offence and that it can only be construed in such manner that its application would operate so as to abrogate, abridge or infringe one of the rights declared and recognized by the *Bill of Rights*. For the reasons which I have indicated, I am therefore of opinion that s. 94(b) is inoperative.

For the purpose of determining the issue raised by this appeal it is unnecessary to express any opinion respecting the operation of any other section of the *Indian Act*.

For all the above reasons I would dismiss this appeal.

Since writing the above I have had the advantage of reading the reasons for judgment prepared by the Chief Justice and by Mr. Justice Pigeon which, when read together, appear to me to lead to the conclusion that, even on the assumption that the application of the provisions of prior federal legislation has the effect of denying equality before the law, and thus dis-

Tout comme les juges des Cours des Territoires, je ne puis admettre cette interprétation. Elle aurait pour conséquence, il me semble, qu'il faudrait considérer que la loi la plus manifestement discriminatoire envers un groupe ethnique reconnaît à chacun des membres de ce groupe «l'égalité devant la loi» si elle est également discriminatoire à l'égard de tous les autres membres du même groupe.

Je pense que le mot «loi» dans l'art. 1(b) de la *Déclaration des droits* doit s'interpréter comme signifiant une «loi du Canada» au sens de la définition à l'art. 5(2) (c'est-à-dire, une loi du Parlement du Canada, ou une ordonnance, une règle ou un règlement établis sous son régime). Sans rechercher une définition complète de l'expression «égalité devant la loi», je pense que l'art. 1(b) signifie au moins qu'un individu ou un groupe d'individus ne doit pas être traité plus durement qu'un autre en vertu de la loi. J'en conclus donc qu'une personne est privée de l'égalité devant la loi, si pour elle, à cause de sa race, un acte qui, pour ses concitoyens canadiens, n'est pas une infraction et n'appelle aucune sanction devient une infraction punissable en justice.

Pour décider la présente affaire, il me suffit de dire qu'à mon avis l'art. 94(b) de la *Loi sur les Indiens*, qui est une loi du Canada, crée une telle infraction et qu'en l'interprétant on ne peut que conclure que son application supprime, restreint ou enfreint l'un des droits déclarés et reconnus dans la *Déclaration des droits*. Pour les motifs que je viens d'indiquer, je suis donc d'avis que l'art. 94(b) est inopérant.

Pour décider la question soulevée par le pourvoi, il n'est pas nécessaire d'exprimer une opinion sur l'application d'aucun autre article de la *Loi sur les Indiens*.

Pour les motifs ci-dessus, je suis d'avis de rejeter le pourvoi.

Depuis la rédaction de ce qui précède, j'ai eu le privilège de lire les motifs du Juge en chef et du Juge Pigeon. D'après ces motifs considérés comme un tout, il faut à mon sens conclure que, même en présumant que l'application des dispositions d'une loi fédérale antérieure à la *Déclaration des droits* prive une catégorie de citoyens du droit à l'égalité devant la loi à cause

criminating against, a sector of the population "by reason of race", they must nevertheless be given full effect notwithstanding the provisions of the *Bill of Rights*. In view of this conclusion, I find it necessary to restate the position which I take in the matter.

I am in full agreement with the Chief Justice that the question here raised was not decided in the case of *Robertson and Rosetanni v. Her Majesty the Queen, supra*, and that this is the first occasion on which it has become necessary for this Court to decide it.

In my view under the provisions of s. 1 of the *Bill of Rights* "the right of the individual to equality before the law" "without discrimination by reason of race" is recognized as a right which exists in Canada, and by ss. 2 and 5 of that Bill it is provided that every law of Canada enacted before or after the coming into force of the Bill, unless Parliament makes an express declaration to the contrary, is to be "so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement" of any of the rights so recognized and declared.

It may well be that the implementation of the *Canadian Bill of Rights* by the courts can give rise to great difficulties, but in my view full effect must be given to the terms of s. 2 thereof.

The present case discloses laws of Canada which abrogate, abridge and infringe the right of an individual Indian to equality before the law and in my opinion if those laws are to be applied in accordance with the express language used by Parliament in s. 2 of the *Bill of Rights*, then s. 94(b) of the *Indian Act* must be declared to be inoperative.

It appears to me to be desirable to make it plain that these reasons for judgment are limited to a situation in which, under the laws of Canada, it is made an offence punishable at law on account of race, for a person to do something which all Canadians who are not members of that race may do with impunity; in my opinion the same considerations do not by any means apply to all the provisions of the *Indian Act*.

de leur origine raciale et est ainsi discriminatoire à leur égard, il faut appliquer ces dispositions nonobstant celles de la *Déclaration des droits*. Ces opinions de mes collègues m'obligent à réaffirmer mon point de vue à ce sujet.

Je suis tout à fait d'accord avec le Juge en chef que le problème soulevé ici n'a pas été résolu dans l'affaire *Robertson et Rosetanni c. La Reine* (précitée) et que c'est la première fois que cette Cour se trouve obligée de le résoudre.

A mon avis, en vertu des dispositions de l'art. 1 de la *Déclaration des droits* «le droit de l'individu à l'égalité devant la loi» «quelle que soit sa race» est reconnu comme un droit qui existe au Canada et les art. 2 et 5 de la *Déclaration* décrètent que toute loi du Canada édictée avant ou après la mise en vigueur de la *Déclaration* doit, à moins que le Parlement ne déclare expressément le contraire, «s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre» l'un quelconque des droits ainsi reconnus ni à en «autoriser la suppression, la diminution ou la transgression».

Il est bien possible que l'application judiciaire de la *Déclaration canadienne des droits* donne lieu à de grandes difficultés mais, à mon avis, il faut donner leur plein effet aux dispositions de l'art. 2.

L'affaire présentement devant nous démontre qu'il existe des lois du Canada qui suppriment, restreignent et enfreignent le droit d'un Indien à l'égalité devant la loi et, à mon avis, afin d'appliquer ces lois en se conformant aux termes explicites employés par le Parlement à l'art. 2 de la *Déclaration des droits* il faut déclarer que l'art. 94(b) de la *Loi sur les Indiens* est inopérant.

Je crois utile d'affirmer clairement que ces motifs s'appliquent seulement à un cas où, en vertu des lois du Canada, est réputé infraction punissable en droit, pour une personne, à cause de sa race, un acte que ses concitoyens canadiens qui ne sont pas de cette race peuvent poser sans encourrir aucune sanction. A mon avis, cela est bien loin d'être applicable à toutes les dispositions de la *Loi sur les Indiens*.

[1970] R.C.S.

LA REINE C. DRYBONES *Le Juge Abbott*

299

ABBOTT J. (*dissenting*)—The relevant facts, which are undisputed, are set out in the reasons of my brothers Ritchie and Pigeon which I have had the advantage of reading.

The interpretation of the *Bill of Rights*, adopted by the courts below, necessarily implies a wide delegation of the legislative authority of Parliament to the courts. The power to make such a delegation cannot be questioned but, in my view, it would require the plainest words to impute to Parliament an intention to extend to the courts, such an invitation to engage in judicial legislation. I cannot find that intention expressed in s. 2 of the *Bill*. On the contrary, I share the opinion expressed by the Chief Justice, by my brother Pigeon and by Davey J.A., as he then was, in the *Gonzales* case that, with respect to existing legislation, the section provides merely a canon or rule of interpretation for such legislation.

I would dispose of the appeal as proposed by my brother Pigeon.

HALL J.—I agree with the reasons of my brother Ritchie and wish only to add some observations regarding the decision in *Regina v. Gonzales*⁶.

The concept that the Canadian Bill of Rights is operative in the face of a law of Canada only when that law does not give equality to all persons within the class to whom that particular law extends or relates, as it was expressed by Tysoe J.A. at p. 264:

Coming now to sec. 1(b) of the *Canadian Bill of Rights*. The meaning of the word "equality" is well known. In my opinion, the word "before" in the expression "equality before the law," in the sense in which that expression is used in sec. 1(b) means "in the presence of." It seems to me this is the key to the correct interpretation of the expression and makes it clear that "equality before the law" has nothing to do with the application of the law equally to everyone and equal laws for everyone in the sense for which appellant's counsel contends, namely, the same laws for all persons, but to the position occupied by persons to whom a law relates or

LE JUGE ABBOTT (*dissident*)—Les faits pertinents, qui ne sont pas contestés, sont relatés dans les motifs de mes collègues les Juges Ritchie et Pigeon, que j'ai eu le privilège de lire.

L'interprétation de la *Déclaration des droits* qu'ont adoptée les tribunaux des Territoires implique nécessairement que le Parlement a délégué une partie importante de sa compétence législative aux tribunaux. Son pouvoir de le faire est incontestable mais, à mon avis, il faudrait que les termes employés soient des plus clairs pour prêter au Parlement l'intention d'adresser aux tribunaux une telle invitation à légitérer par le processus judiciaire. Je ne trouve pas que l'art. 2 de la *Déclaration des droits* exprime cette intention. Au contraire, je partage l'opinion exprimée par le Juge en chef, par mon collègue le Juge Pigeon et par le Juge Davey, alors Juge d'appel, dans l'affaire *Gonzales*, à l'effet qu'à l'égard de la législation antérieure l'article ne donne qu'une simple règle d'interprétation.

Je disposerais du pourvoi de la même façon que mon collègue le Juge Pigeon.

LE JUGE HALL—Je suis d'accord avec les motifs de mon collègue le Juge Ritchie et voudrais seulement ajouter certaines observations concernant la décision dans *Regina v. Gonzales*⁶.

Le concept selon lequel la *Déclaration canadienne des droits* ne prend effet vis-à-vis d'une loi du Canada que lorsque cette loi n'accorde pas l'égalité à toutes les personnes de la classe visée ou touchée par cette loi particulière, comme l'a exprimé le Juge Tysoe de la Cour d'appel, à la page 264:

[TRADUCTION] Venons-en maintenant à l'article 1(b) de la *Déclaration canadienne des droits*. Le sens du mot «égalité» est bien connu. À mon avis, le mot «devant» dans l'expression «égalité devant la loi», au sens qui lui est donné à l'article 1(b), signifie «en présence de». D'après moi, c'est là l'interprétation correcte de l'expression et il en ressort que «égalité devant la loi» n'a rien à voir avec l'application de la loi également pour tous et de lois égales pour tous comme le soutient l'avocat de l'appelant, c'est-à-dire les mêmes lois pour tous, mais avec la situation des personnes visées ou touchées par une loi. Elles ont le droit de se voir appliquer la loi telle

⁶ (1962), 37 W.W.R. 257, 37 C.R. 56, 132 C.C.C. 237, 32 D.L.R. (2d) 290.

⁶ (1962), 37 W.W.R. 257, 37 C.R. 56, 132 C.C.C. 237, 32 D.L.R. (2d) 290.

extends. They shall be entitled to have the law as it exists applied equally and without fear or favour to all persons to whom it relates or extends.

is analogous to the position taken by the Supreme Court of the United States in *Plessy v. Ferguson*⁷ and which was wholly rejected by the same Court in its historic desegregation judgment *Brown v. Board of Education*⁸.

In *Plessy v. Ferguson*, the Court had held that under the "separate but equal" doctrine equality of treatment is accorded when the races are provided substantially equal facilities even though these facilities be separate. In *Brown v. Board of Education*, the Court held the "separate but equal" doctrine to be totally invalid.

The social situations in *Brown v. Board of Education* and in the instant case are, of course, very different, but the basic philosophic concept is the same. The Canadian Bill of Rights is not fulfilled if it merely equates Indians with Indians in terms of equality before the law, but can have validity and meaning only when subject to the single exception set out in s. 2 it is seen to repudiate discrimination in every law of Canada by reason of race, national origin, colour, religion or sex in respect of the human rights and fundamental freedoms set out in s. 1 in whatever way that discrimination may manifest itself not only as between Indian and Indian but as between all Canadians whether Indian or non-Indian.

PIGEON J. (*dissenting*)—The respondent is an Indian and the following charge was made against him before a magistrate in the Northwest Territories, namely that he,

On or about the 8th of April, 1967 at Yellowknife in the Northwest Territories, being an Indian, was unlawfully intoxicated off a reserve, contrary to s. 94(b) of the Indian Act.

Respondent pleaded guilty and was sentenced to a fine of \$10 and costs. On his appeal to the Territorial Court, he was allowed to withdraw

qu'elle existe, sur un plan d'égalité, sans distinction de personnes,

est analogue à la position prise par la Cour Suprême des États-Unis dans *Plessy v. Ferguson*⁷, qui a été rejetée en totalité par la même Cour dans son jugement historique sur la dé-ségrégation, *Brown v. Board of Education*⁸.

Dans *Plessy v. Ferguson* la Cour a jugé qu'en vertu de la doctrine «distinct mais égal» les différentes races se voient accorder l'égalité de traitement lorsqu'on leur fournit des services sensiblement égaux bien que distincts. Dans *Brown v. Board of Education* la Cour a décidé que la doctrine «distinct mais égal» était entièrement erronée.

Les situations sociales considérées dans *Brown v. Board of Education* et dans la présente cause sont, bien entendu, très différentes, mais le concept philosophique fondamental est le même. La *Déclaration canadienne des droits* n'atteint pas son but si pour l'égalité devant la loi elle ne fait qu'établir un rapport d'égalité entre Indiens et Indiens; elle n'a de valeur et n'a de sens que lorsque, sous réserve de l'unique exception énoncée à l'art. 2, elle répudie dans chaque loi du Canada la discrimination en raison de la race, de l'origine nationale, de la couleur, de la religion ou du sexe à l'égard des droits de l'homme et des libertés fondamentales énoncés à l'art. 1, de quelque façon que cette discrimination puisse se manifester, non seulement entre Indiens et Indiens, mais entre tous les Canadiens qu'ils soient Indiens ou non-Indiens.

LE JUGE PIGEON (*dissident*)—L'intimé est un Indien et l'accusation suivante a été portée contre lui devant un Magistrat des Territoires du Nord-Ouest, savoir que,

Le 8 avril 1967, ou vers cette date, à Yellowknife, dans les Territoires du Nord-Ouest, étant un Indien, il était ivre hors d'une réserve, illégalement, en contravention des dispositions de l'article 94(b) de la *Loi sur les Indiens*.

L'intimé a plaidé coupable et a été condamné à une amende de \$10 et aux frais. A l'occasion de son appel à la Cour Territoriale, on lui a

⁷ (1896), 163 U.S. 537.

⁸ (1953), 347 U.S. 483.

⁷ (1896), 163 U.S. 537.

⁸ (1953), 347 U.S. 483.

his plea of guilty. Having then pleaded not guilty, he raised the contention that s. 94(b) of the *Indian Act* has been rendered inoperative by the *Canadian Bill of Rights* (8-9 Eliz. II, c. 44, hereinafter called the "Bill"). This contention was accepted by the Mr. Justice Morrow and the charge dismissed.

On appeal by the Crown to the Court of Appeal for the Northwest Territories⁹, that Court refused to follow the contrary decision of the Court of Appeal of British Columbia in *Regina v. Gonzales*¹⁰ and affirmed the acquittal.

The Crown now appeals to this Court by special leave.

The question before us is essentially whether, in respect of existing federal legislation, Section 2 of the *Bill* enacts a canon of construction or casts upon the courts the task of removing therefrom, whenever the question is raised, every provision that may be considered as being in conflict with the enumerated rights and freedoms. In thus stating the question I am not unmindful of the fact that, due to the definition in Section 5.2 of the expression "law of Canada", Section 2 applies to subsequent federal statutes equally as to existing legislation. However, because different considerations may conceivably apply in the case of subsequent statutes, I find it desirable to go no further than necessary for the decision of the case at hand which has to do with existing legislation.

Before considering any enacting clause I must note that the *Bill* is prefaced by a preamble, as follows:

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law:

⁹ (1967), 61 W.W.R. 370, [1968] 2 C.C.C. 69, 64 D.L.R. (2d) 260.

¹⁰ (1962), 37 W.W.R. 257, 37 C.R. 56, 132 C.C.C. 237, 32 D.L.R. (2d) 290.

permis de rétracter son plaidoyer de culpabilité. Ayant plaidé non coupable, l'intimé a soutenu que l'art. 94(b) de la *Loi sur les Indiens* avait été rendu inopérant par la *Déclaration canadienne des droits* (8-9 Eliz. II, c. 44, que j'appellerai ci-après la «Déclaration»). Cet argument a été accueilli par le Juge Morrow et l'accusation a été rejetée.

La Couronne en a appelé à la Cour d'appel des Territoires du Nord-Ouest⁹. Cette Cour a refusé de suivre la décision contraire de la Cour d'appel de la Colombie-Britannique dans *Regina v. Gonzales*¹⁰ et elle a confirmé l'acquittement.

La Couronne en appelle maintenant à notre Cour, en vertu d'une permission spéciale.

La question dont nous sommes saisis est de savoir si, à l'égard de la législation fédérale existante, l'art. 2 de la *Déclaration* édicte une règle d'interprétation ou impose aux tribunaux la tâche de retrancher de cette législation, chaque fois que la question est soulevée, toute disposition qui peut être considérée en conflit avec les droits et libertés énumérés. En énonçant ainsi la question, je n'oublie pas que, du fait de la définition de l'expression «loi du Canada» à l'art. 5(2), l'art. 2 s'applique aux lois fédérales à venir aussi bien qu'à la législation existante. Toutefois, parce qu'il n'est pas impossible que d'autres considérations entrent en jeu lorsqu'il s'agira des lois à venir, il me semble opportun de ne pas aller plus loin qu'il est nécessaire pour en arriver à une décision dans cette affaire, qui ne concerne que la législation existante.

Avant d'en considérer les dispositions, je dois noter que la *Déclaration* comporte un préambule, qui se lit comme suit:

Le Parlement du Canada proclame que la nation canadienne repose sur des principes qui reconnaissent la suprématie de Dieu, la dignité et la valeur de la personne humaine ainsi que le rôle de la famille dans une société d'hommes libres et d'institutions libres;

Il proclame en outre que les hommes et les institutions ne demeurent libres que dans la mesure où la liberté s'inspire du respect des valeurs morales et spirituelles et du règne du droit;

⁹ (1967), 61 W.W.R. 370, [1968] 2 C.C.C. 69, 64 D.L.R. (2d) 260.

¹⁰ (1962), 37 W.W.R. 257, 37 C.R. 56, 132 C.C.C. 237, 32 D.L.R. (2d) 290.

·And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:

Then, after the enacting formula and the title "Part I— Bill of Rights", s. 1 is in the following terms:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
- (b) the right of the individual to equality before the law and the protection of the law;
- (c) freedom of religion;
- (d) freedom of speech;
- (e) freedom of assembly and association; and
- (f) freedom of the press.

In considering the provisions just quoted, one must observe that the *Bill* itself begins by a solemn declaration by Parliament in the form of an enactment that, in Canada, the enumerated rights and freedoms "have existed and shall continue to exist . . . ". This statement is the essential element of the very first provision of the *Bill* and it is absolutely unqualified. It is the starting point of that legislation and I have great difficulty in reconciling it with the contention that in fact those rights and freedoms were not wholly and completely existing but were restricted by any number of statutory and other provisions infringing thereon.

There can be no doubt that in enacting legislation Parliament is presumed to be aware of the state of the law (*Walker v. The King*¹¹). *A fortiori* must it be so when the enactment itself has reference thereto. Where is the extent of existing human rights and fundamental freedoms to be ascertained if not by reference to the statute books and other legislative instruments as well as to the decisions of the courts?

Et afin d'expliciter ces principes ainsi que les droits de l'homme et les libertés fondamentales qui en découlent, dans une Déclaration de droits qui respecte la compétence législative du Parlement du Canada et qui assure à sa population la protection de ces droits et de ces libertés;

Ensuite, après la formule de promulgation et le titre «Partie I—Déclaration des Droits», l'art. 1 est énoncé dans les termes suivants:

1. Il est par les présentes reconnu et déclaré que les droits de l'homme et les libertés fondamentales ci-après énoncés ont existé et continueront à exister pour tout individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe:

- (a) le droit de l'individu à la vie, à la liberté, à la sécurité de la personne ainsi qu'à la jouissance de ses biens, et le droit de ne s'en voir privé que par l'application régulière de la loi;
- (b) le droit de l'individu à l'égalité devant la loi et à la protection de la loi;
- (c) la liberté de religion;
- (d) la liberté de parole;
- (e) la liberté de réunion et d'association, et
- (f) la liberté de la presse.

En considérant les dispositions que je viens de citer, il faut observer que la *Déclaration* elle-même débute par une déclaration solennelle du Parlement, sous forme de loi portant que, au Canada, les droits et libertés énumérés «ont existé et continueront à exister . . . ». Cette déclaration est l'élément essentiel de la première disposition de la *Déclaration* et elle n'est assortie d'aucune réserve. Elle est le point de départ de cette loi et il n'est pas facile de la concilier avec la prétention qu'en fait ces droits et libertés n'étaient pas entièrement et complètement existants, mais étaient restreints par un nombre indéterminé de dispositions, statutaires et autres, à l'encontre.

Il ne fait pas de doute que lorsqu'il édicte des lois le Parlement est présumé au courant de l'état du droit (*Walker c. Le Roi*¹¹). *A fortiori*, doit-il en être ainsi lorsque le texte même de la loi y fait allusion. Comment peut-on déterminer la portée des droits de l'homme et des libertés fondamentales existants si ce n'est en se reportant au texte des lois et autres actes législatifs, ainsi qu'aux décisions des tribunaux?

¹¹ [1939] S.C.R. 214, 71 C.C.C. 305, [1939] 2 D.L.R. 353.

[1939] R.C.S. 214, 71 C.C.C. 305, [1939] 2 D.L.R. 353.

R. c. Drybones, [1970] R.C.S. 282

[1970] R.C.S.

LA REINE C. DRYBONES *Le Juge Pigeon*

303

It must also be considered that the rights and freedoms enumerated in s. 1 are not legal concepts of precise and invariable content. If those words were to be taken by themselves, a great deal would be left undefined. However, by declaring those rights and freedoms as they existed a large measure of precision was supplied. Is this not an important purpose of s. 1 and a very effective way of defining some key words of the enactment?

In the instant case, the question whether all existing legislation should be considered as in accordance with the non-discrimination principle cannot fail to come immediately to mind seeing that it arises directly out of head 24 of s. 91 of the *B.N.A. Act* whereby Parliament has exclusive legislative authority over "Indians, and Lands reserved for the Indians". As was pointed out by Riddell J. in *Rex v. Martin*¹², this provision confers legislative authority over the Indians *quâ* Indians and not otherwise. Its very object in so far as it relates to Indians, as opposed to Lands reserved for the Indians, is to enable the Parliament of Canada to make legislation applicable only to Indians as such and therefore not applicable to Canadian citizens generally. This legislative authority is obviously intended to be exercised over matters that are, as regards persons other than Indians, within the exclusive legislative authority of the Provinces. Complete uniformity in provincial legislation is clearly not to be expected, not to mention the fact that further diversity must also result from special legislation for the territories. Equality before the law in the sense in which it was understood in the Courts below would require the Indians to be subject in every province to the same rules of law as all others in every particular not merely on the question of drunkenness. Outside the territories, provincial jurisdiction over education and health facilities would make it very difficult for federal authorities to provide such facilities to Indians without "discrimination" as understood in the Courts below.

Il faut aussi tenir compte du fait que les droits et libertés énumérés à l'article 1 ne sont pas des concepts juridiques ayant un contenu précis et invariable. S'il fallait les considérer isolément, beaucoup resterait à définir. Toutefois, en déclarant ces droits et libertés comme ils existaient, on les a grandement précisés. N'est-ce pas là un but important de l'article 1 et une façon très efficace de définir certains mots clés de la Déclaration?

Dans la présente cause, la question de savoir si toute la législation existante doit être considérée conforme au principe de non-discrimination ne peut manquer de venir immédiatement à l'esprit vu qu'elle découle directement du chef 24 de l'art. 91 de l'*Acte de l'Amérique du Nord britannique*, en vertu duquel le Parlement a l'autorité législative exclusive sur «Les Indiens et les terres réservées pour les Indiens». Comme l'a souligné le Juge Riddell, dans *Rex v. Martin*¹², cette disposition confère l'autorité législative sur les Indiens en tant qu'Indiens et non autrement. Son objet même, en ce qui concerne les Indiens par opposition aux terres réservées pour les Indiens, est de permettre au Parlement du Canada d'édicter des lois qui ne s'appliquent qu'aux Indiens comme tels et qui, par conséquent, ne s'appliquent pas aux citoyens canadiens en général. Cette autorité législative est évidemment destinée à être exercée sur des matières qui, à l'égard de personnes autres que les Indiens, relèvent de l'autorité législative exclusive des provinces. On ne peut certainement pas s'attendre à une uniformité complète dans la législation provinciale, sans compter qu'une diversité additionnelle résulte des lois particulières pour les Territoires. L'égalité devant la loi, au sens que lui ont donné les cours des Territoires, exigerait que dans chaque province les Indiens soient soumis aux mêmes règles juridiques que les autres, sous tout rapport et non seulement en matière d'ébriété. En dehors des Territoires, vu la compétence provinciale sur l'éducation et la santé, les autorités fédérales ne pourraient pas facilement fournir ces services sans «discrimination» au sens des cours des Territoires.

¹² (1917), 29 C.C.C. 189 at 192, 41 O.L.R. 79, 39 D.L.R. 635.

¹² (1917), 29 C.C.C. 189 à 192, 41 O.L.R. 79, 39 D.L.R. 635.

If one of the effects of the *Canadian Bill of Rights* is to render inoperative all legal provisions whereby Indians as such are not dealt with in the same way as the general public, the conclusion is inescapable that Parliament, by the enactment of the *Bill*, has not only fundamentally altered the status of the Indians in that indirect fashion but has also made any future use of federal legislative authority over them subject to the requirement of expressly declaring every time "that the law shall operate notwithstanding the *Canadian Bill of Rights*". I find it very difficult to believe that Parliament so intended when enacting the *Bill*. If a virtual suppression of federal legislation over Indians as such was meant, one would have expected this important change to be made explicitly not surreptitiously so to speak.

In s. 2, the crucial words are that every law of Canada shall, subject to the exception just noted, "be so construed and applied as not to abrogate, abridge or infringe" any of the rights and freedoms recognized and declared in the *Bill*. The question is whether those words enact something more than a rule of construction. Of themselves, it seems to me that they do not. Certainly the word "construed" implies nothing else. Does the word "applied" express a different intention? I do not think so and, even if this may appear a trite saying, I must point out that what respondent asks the Court to do and what the Courts below have effectively done is not to apply the statute, the *Indian Act*, but to decline to apply it.

The strongest argument against viewing s. 2 as a canon of construction is undoubtedly that the exception "unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*" is thereby deprived of any practical meaning. It cannot be denied that the operation of a rule of construction is not normally subject to such a qualification. On the contrary, the principle is that it has no effect against the clearly expressed will of Parliament in whatever form it is put.

Si l'un des effets de la *Déclaration canadienne des droits* est de rendre inopérantes toutes les dispositions en vertu desquelles les Indiens en tant que tels ne sont pas traités de la même façon que le grand public, on doit inévitablement conclure que le Parlement, en édictant la *Déclaration*, n'a pas seulement modifié fondamentalement le statut des Indiens par ce procédé indirect, mais aussi qu'il a assujetti l'exercice futur de l'autorité législative fédérale sur les Indiens à l'exigence d'une déclaration expresse «que la loi s'appliquera nonobstant la *Déclaration canadienne des droits*». J'ai peine à croire que le Parlement avait cette intention lorsqu'il a édicté la *Déclaration*. Si l'on entendait supprimer pratiquement la législation fédérale sur les Indiens, on devrait s'attendre à ce que ce changement important soit fait explicitement et non subrepticement, pour ainsi dire.

A l'article 2, les mots essentiels sont que toute loi du Canada, sous réserve de l'exception citée plus haut, «doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre» l'un quelconque des droits ou des libertés reconnus et déclarés dans la *Déclaration*. Il s'agit de décider si ces mots édictent plus qu'une règle d'interprétation. Pris à la lettre, je ne le crois pas. «S'interpréter» ne comporte certainement rien d'autre. «S'appliquer» exprime-t-il une intention différente? Je ne le pense pas. Même si cela peut sembler un truisme, je dois souligner que ce que l'intimé demande à cette Cour de faire et ce que les cours des Territoires ont effectivement fait, ce n'est pas appliquer la *Loi sur les Indiens*, mais bien refuser de l'appliquer.

L'argument le plus fort contre cette manière de voir dans l'art. 2 une règle d'interprétation c'est indubitablement que par là l'exception «à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*» perd tout sens pratique. On ne peut nier que l'application d'une règle d'interprétation n'est pas normalement soumise à une telle réserve. Au contraire, le principe est qu'elle n'a aucun effet à l'encontre de la volonté clairement exprimée du Parlement, sous quelque forme que ce soit.

[1970] R.C.S.

LA REINE C. DRYBONES *Le Juge Pigeon*

305

On the other hand, in seeking to give effect to some words in s. 2 that cannot for obvious reasons be applicable to any existing law, one must always bear in mind the very starting point of the *Bill*, namely that the rights and freedoms therein recognized are declared as existing, not as being introduced or expanded. If in s. 1 the act means what it says and recognizes and declares *existing* rights and freedoms only, nothing more than proper construction of existing laws in accordance with the *Bill* is required to accomplish the intended result. There can never be any necessity for declaring any of them inoperative as coming in conflict with the rights and freedoms defined in the *Bill* seeing that these are declared as existing in them. Thus, it appears to me that s. 2 cannot be construed as suggested by respondent without coming in conflict with s. 1.

If, with respect to existing legislation, we had to choose between reading s. 1 as written and failing to adopt a construction of s. 2 that gives some meaningful effect to the exception, it seems to me that the choice should be in favour of giving paramount effect to s. 1. It is the provision establishing the principle on which the whole act rests.

Another compelling reason is the presumption against implicit alteration of the law. Parliament must not be presumed to have intended to depart from the existing law any further than expressly stated (Maxwell, *On Interpretation of Statutes*, 9th ed., p. 84, cited in *Duchesneau v. Cook*¹³). In the present case, the judgments below hold in effect that Parliament in enacting the *Bill* has implicitly repealed not only a large part of the *Indian Act* but also the fundamental principle that the duty of the courts is to apply the law as written and they are in no case authorized to fail to give effect to the clearly expressed will of Parliament. It would be a radical departure from this basic British constitutional rule to enact that henceforth the courts are to declare inoperative all enactments that are considered as not in conformity with some legal principles stated in very

D'autre part, en cherchant à donner un effet à certains mots de l'art. 2 qui, pour des raisons évidentes, ne sauraient s'appliquer à aucune loi existante, il ne faut jamais oublier le point de départ de la *Déclaration*, c'est-à-dire que l'on y déclare des droits et libertés reconnus comme existants et non pas qu'on les introduit ou élargit. Si, à l'art. 1, la loi signifie ce qu'elle exprime et ne reconnaît et déclare que des droits et libertés *existants*, jamais rien de plus qu'une interprétation juste des lois existantes conformément à la *Déclaration* ne peut être nécessaire pour atteindre le but visé. Il ne peut jamais être nécessaire d'en déclarer aucune inopérante en raison d'un conflit avec les droits et libertés énoncés dans la *Déclaration*, vu que ceux-ci sont déclarés comme ils y existent. Il me paraît donc que l'art. 2 ne peut pas être interprété comme le veut l'intimé sans venir en conflit avec l'art. 1.

Si, en ce qui concerne la législation existante, il fallait choisir entre donner effet à l'art. 1 tel qu'écrit et refuser d'interpréter l'art. 2 de façon à donner un effet à l'exception, il me semble que le choix devrait donner la prépondérance à l'art. 1. C'est la disposition qui établit le principe sur lequel toute la loi se fonde.

Une autre raison qui s'impose c'est la présomption contre toute modification implicite du droit. On ne peut présumer que le Parlement a l'intention de déroger au droit existant plus qu'il ne le déclare expressément (Maxwell, *On Interpretation of Statutes*, 9^e ed., p. 84, cité dans *Duchesneau c. Cook*¹³). Dans la présente affaire, les jugements des tribunaux des Territoires démontrent en fait que le Parlement, en édictant la *Déclaration*, a implicitement abrogé non seulement une grande partie de la *Loi sur les Indiens*, mais aussi le principe fondamental que c'est le devoir des tribunaux d'appliquer la loi telle que rédigée, n'étant jamais autorisés à ne pas donner effet à la volonté clairement exprimée du Parlement. Cela aurait été une déviation radicale de cette importante règle constitutionnelle britannique que d'édicter que dorénavant les tribunaux

¹³ [1955] S.C.R. 207 at 215.

306

THE QUEEN v. DRYBONES Pigeon J.

[1970] S.C.R.

general language, or rather merely enumerated without any definition.

The meaning of such expressions as "due process of law", "equality before the law", "freedom of religion", "freedom of speech", is in truth largely unlimited and undefined. According to individual views and the evolution of current ideas, the actual content of such legal concepts is apt to expand and to vary as is strikingly apparent in other countries. In the traditional British system that is our own by virtue of the *B.N.A. Act*, the responsibility for updating the statutes in this changing world rests exclusively upon Parliament. If the Parliament of Canada intended to depart from that principle in enacting the *Bill*, one would expect to find clear language expressing that intention. On the contrary, what do we find in s. 1 but an apparent desire to adhere to the traditional principle and to avoid the uncertainties inherent in broadly worded enactments by tying the broad words to the large body of existing law and in effect declaring the recognized human rights and fundamental freedoms to be as existing in the laws of Canada.

I fail to see how it can be considered that by taking this to be the fundamental intention, the apparent character of the *Bill* is not fully recognized. I also fail to see how it can be said that to read s. 2 as little more than a rule of construction is to fail to give effect to the *Bill*. On what basis is it assumed that anything else was intended in an act that is not of a constitutional character?

That canons of construction are of less importance than constitutional rules does not mean that they are of minimal importance. For instance, in our legal system, the rule against retrospective operation of enactments as well as the principle that a criminal offence requires *means rea* are nothing more than canons of construction. It certainly does not mean that they are of secondary importance. Decisions such as *Beaver v. The*

douvent déclarer inopérante toute législation qu'ils considèrent non conforme à certains principes juridiques énoncés en termes très généraux, ou plutôt, simplement énumérés sans définition.

En vérité, le sens d'expressions telles que «l'application régulière de la loi», «l'égalité devant la loi», «la liberté de religion», «la liberté de parole», est largement indéfini et presque illimité. Selon les opinions individuelles et l'évolution des idées courantes, le contenu actuel de tels concepts juridiques est susceptible d'extension et de variation, comme on peut le voir de façon frappante dans d'autres pays. Dans le système britannique traditionnel qui est le nôtre en vertu de l'*Acte de l'Amérique du Nord britannique*, c'est le Parlement qui est exclusivement responsable de la mise à jour de la législation dans notre monde en évolution. Si le Parlement du Canada avait eu l'intention de déroger à ce principe en édictant la *Déclaration*, on serait en droit de s'attendre à y trouver cette intention clairement exprimée. Au contraire, ce que l'on trouve à l'article 1 c'est la volonté manifeste de maintenir le principe traditionnel et d'éviter l'incertitude inhérente aux lois rédigées en termes généraux, en rattachant ces termes généraux à l'ensemble du droit existant et, en fait, en déclarant les droits de l'homme et libertés fondamentales reconnus comme ils existaient alors dans les lois du Canada.

Je ne vois pas comment on peut considérer que, prendre cela pour l'intention fondamentale, c'est méconnaître le caractère manifeste de la *Déclaration*. Je ne vois pas non plus comment on peut dire que, considérer l'article 2 comme rien de plus qu'une règle d'interprétation, c'est ne pas donner effet à la *Déclaration*. Sur quoi se fonde-t-on pour présumer que l'on a voulu faire autre chose dans une loi qui n'a pas de caractère constitutionnel?

Que les règles d'interprétation soient de moindre importance que les règles constitutionnelles ne signifie pas qu'elles sont sans importance. Par exemple, dans notre système juridique, la non-rétroactivité des lois, de même que le principe qu'il n'y a pas de crime sans intention coupable, ne sont rien de plus que des règles d'interprétation. Cela ne veut certainement pas dire qu'elles sont d'importance secondaire. Des

R. c. Drybones, [1970] R.C.S. 282

[1970] R.C.S.

LA REINE C. DRYBONES *Le Juge Pigeon*

307

*Queen*¹⁴, *The Queen v. King*¹⁵ clearly show how far-reaching such principles are. If the Canadian Parliament should consider it desirable to enshrine them in a statute, would it be contended that those who subsequently read it as not altering their fundamental nature and letting them remain canons of construction are failing to give it effect?

On the whole, I cannot find in the *Canadian Bill of Rights* anything clearly showing that Parliament intended to establish concerning human rights and fundamental freedoms some overriding general principles to be enforced by the courts against the clearly expressed will of Parliament in statutes existing at the time. In my opinion, Parliament did nothing more than instruct the courts to construe and apply those laws in accordance with the principles enunciated in the *Bill* on the basis that the recognized rights and freedoms did exist, not that they were to be brought into existence by the courts.

For those reasons I would allow the appeal, reverse the judgments of the Court of Appeal and of the Territorial Court of the Northwest Territories, and re-establish the conviction and sentence. In view of the terms of the order granting leave to appeal, it is presumed that suitable arrangements have been made for the costs of representation of the respondent and therefore, no order requires to be made in that regard.

Since writing the above I have had the advantage of reading the reasons of the Chief Justice and I wish to add that I agree with his observations entirely.

Appeal dismissed, Cartwright C.J. and Abbott and Pigeon JJ. dissenting.

Solicitor for the appellant: D. S. Maxwell, Ottawa.

Solicitor for the respondent: G. B. Purdy, Yellowknife.

arrêts comme *Beaver c. La Reine*¹⁴ et *La Reine c. King*¹⁵ montrent clairement à quel point ces principes sont féconds. Si le Parlement canadien trouvait opportun de les consacrer dans une loi, prétendrait-on que ceux qui par la suite diraient que leur nature fondamentale est inchangée et qu'elles demeurent des règles d'interprétation, ne donnent pas à cette loi-là son plein effet?

En définitive, je ne trouve rien dans la *Déclaration canadienne des droits* qui démontre clairement que le Parlement avait l'intention d'établir à l'égard des droits de l'homme et des libertés fondamentales des principes primordiaux d'ordre général, que les tribunaux devraient appliquer à l'encontre de la volonté clairement exprimée du Parlement dans les lois existant à cette époque. A mon avis, le Parlement n'a fait rien de plus que de prescrire aux tribunaux d'interpréter et d'appliquer ces lois conformément aux principes énoncés dans la *Déclaration*, en considérant que les droits et libertés reconnus existaient alors et non pas qu'ils seraient établis par les tribunaux.

Pour ces motifs, j'accueillerais le pourvoi, j'infirmerais larrêt de la Cour d'appel et le jugement de la Cour territoriale des Territoires du Nord-Ouest, et je rétablirais la condamnation et la sentence. Vu les conditions de l'ordonnance accordant la permission d'en appeler, je présume qu'un arrangement satisfaisant a été conclu pour les frais d'avocat de l'intimé et qu'aucune directive n'est nécessaire à ce sujet.

Depuis que j'ai écrit ce qui précède, j'ai eu le privilège de lire les motifs du Juge en chef et je désire ajouter que je suis entièrement d'accord avec lui.

Appel rejeté, LE JUGE EN CHEF CARTWRIGHT et LES JUGES ABBOTT et PIGEON étant dissidents.

Procureur de l'appelante: D. S. Maxwell, Ottawa.

Procureur de l'intimé: G. B. Purdy, Yellowknife.

¹⁴ [1957] S.C.R. 531, 26 C.R. 193, 118 C.C.C. 129.

¹⁵ [1962] S.C.R. 746, 38 C.R. 52, 133 C.C.C. 1, 35 D.L.R. (2d) 386.

92632-64

¹⁴ [1957] R.C.S. 531, 26 C.R. 193, 118 C.C.C. 129.

¹⁵ [1962] R.C.S. 746, 38 C.R. 52, 133 C.C.C. 1, 35 D.L.R. (2d) 386.

Onglet 86

Bribery Commissioner c. Ranasinghe, [1965] A.C. 172 (C.P.)

172

HOUSE OF LORDS

[1965]

A

P. C.* THE BRIBERY COMMISSIONER . . . APPELLANT;
1964 AND
May 5. PEDRICK RANASINGHE . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

B

Ceylon — Parliament — Constitution — Amendment — Bribery Tribunal — Personnel, constitutional validity of—Appointed under Bribery Amendment Act—Judicial officers—Conflict of appointing authority between Act and Constitution—Act not passed in compliance with constitutional legislative procedure—Invalid and ultra vires—Orders of tribunal null and inoperative—Bribery (Amendment) Act, No. 40 of 1958, ss. 41, 42—Ceylon (Constitution) Order in Council, 1946, ss. 29 (1) (4), 55.

C

Statute — Parliament — Sovereignty — Mode of enactment — Non-compliance with constitutional legislative procedure—Ultra vires—Ceylon.

D

By section 29 of the Ceylon (Constitution) Order in Council, 1946: "(1) Subject to the provisions of this Order, Parliament " shall have power to make laws for the peace, order and good " government of the Island. . . . (4) In the exercise of its powers " under this section, Parliament may amend or repeal any of the " provisions of this Order . . . in its application to the Island: " Provided that no Bill for the amendment or repeal of any of the " provisions of this Order shall be presented for the Royal Assent " unless it has endorsed on it a certificate under the hand of the " Speaker that the number of votes cast in favour thereof in the " House of Representatives amounted to not less than two-thirds of " the whole number of members of the House (including those not " present). Every certificate of the Speaker . . . shall be conclusive " for all purposes and shall not be questioned in any court of law."

E

Members of the panel from which the personnel of Bribery Tribunals in Ceylon are to be selected hold, when sitting in the tribunal, judicial office and the provision in section 41 of the Bribery Amendment Act, 1958, for their appointment by the Governor-General on the advice of the Minister of Justice is in plain conflict with the requirement in section 55 of the Ceylon (Constitution) Order in Council, 1946, that "the appointment . . . of judicial officers is hereby vested in the Judicial Service Commission." Once it is shown that an Act conflicts with a provision in the Constitution the certificate of the Speaker under the proviso to section 29 (4) of the Constitution is an essential part of the legislative process. There was no such certificate in the case of the Bill of 1958 (post, pp. 192, 193, 194).

F

A legislature has no power to ignore the conditions of law-

G

* Present: VISCOUNT RADCLIFFE, LORD EVERSHED, LORD MORRIS OF BORTH-Y-GEST, LORD HODSON and LORD PEARCE.

A.C.	AND PRIVY COUNCIL.	173
A	making that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question whether the legislature is sovereign, as is that of Ceylon. Such a Constitution can be altered or amended by the legislature if the regulating instrument so provides and if the terms of those provisions are complied with, and the alteration or amendment may include the change or abolition of those very provisions.	P. C. 1964 —
B	A legislature has not, however, some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constitutional instrument has said shall not be valid unless made by a different type of majority or by a different legislative process (pp. 197-198).	BRIBERY COMR. v. RANASINGHE. —
C	Alterations of the constitutional provisions about the appointment of judicial officers can only be made by laws which comply with the special legislative procedure laid down in section 29 (4) of the Constitution; the Ceylon legislature has not got the general power to legislate so as to amend its Constitution by ordinary majority resolutions (post, p. 198).	
D	Accordingly, in the case of amendment or repeal of the Constitution the Speaker's certificate is a necessary part of the legislative process and any Bill which does not comply with the condition precedent of the proviso to section 29 (4)—as the Bill of 1958 did not—is and remains, even though it receives the Royal Assent, invalid and ultra vires. Where invalid parts of the statute which are ultra vires can be severed from the rest which is intra vires it is they alone which should be held invalid (post, p. 200).	
E	Accordingly, orders made against the respondent, who had been tried before a Bribery Tribunal on a charge of bribery were null and inoperative since the persons composing the tribunal were not validly appointed to the tribunal—having been appointed pursuant to the ultra vires provisions of the Act of 1958 and not by the Judicial Service Commission in accordance with section 55 of the Constitution (post, p. 200).	
F	<i>McCawley v. The King</i> [1920] A.C. 691; 36 T.L.R. 387, P.C. distinguished. <i>Attorney-General for New South Wales v. Trethowan</i> [1932] A.C. 526; 48 T.L.R. 514, P.C., and <i>Thambiyah v. Kulasingham</i> (1948) 50 N.L.R. 25 considered.	
G	Judgment and order of the Supreme Court of Ceylon (1962) 64 N.L.R. 449 affirmed.	
	APPEAL (No. 20 of 1963), by special leave, from a judgment and order of the Supreme Court of Ceylon (H. N. G. Fernando and L. B. de Silva JJ.) (December 20, 1962) allowing the present respondent's appeal against a decision of the Bribery Tribunal (constituted under the Bribery Act, 1954, as amended to Act No. 40 of 1958) (October 18, 1961) whereby the respondent after a trial before the tribunal on two counts relating to a charge of bribery was found guilty on both counts and sentenced, on each	

Bribery Commissioner c. Ranasinghe, [1965] A.C. 172 (C.P.)

174

HOUSE OF LORDS

[1965]

P. C.

1964

BRIBERY
COMR.
v.
RANASINGHE.

count, to rigorous imprisonment for a term of six weeks, the sentences to run concurrently, and, in addition, to pay a penalty of Rs.50.

A

In allowing the appeal, the Supreme Court held that the conviction and the orders made against the respondent were null and inoperative on the ground that in trying and sentencing him for bribery members of the Bribery Tribunal, not having been appointed by the Judicial Service Commission in accordance with section 55 of the Ceylon (Constitution) Order in Council, 1946, were not lawfully appointed and had unlawfully exercised judicial powers.

B

The relevant terms of the Bribery Amendment Act, 1958, and of the Ceylon Constitution appear from the judgment of the Judicial Committee.

C

1964. March 10, 11, 12, 16 and 17. *Neil Lawson Q.C., Victor Tennekoon, R. K. Handoo, Ralph Millner and V. S. A. Pullenayegum* for the appellant, the Bribery Commissioner. The Supreme Court held that the conviction of and sentence on the respondent were null and inoperative on the ground that the relevant provisions of the Bribery Act, 1954, of Ceylon, as amended in 1956 and 1958, relating to the appointment of the members of the Bribery Tribunal were contrary to the provisions of the Constitution of Ceylon so that the tribunal could not lawfully try, convict or sentence the respondent. The members of the Bribery Tribunal are nominated from a panel appointed (section 41 of the Act of 1958) by the Governor-General on the advice of the Minister of Justice. What the Supreme Court have held is that since members of the Bribery Tribunal were appointed by the Governor-General on the advice of the Minister of Justice it was a non-judicial tribunal because appointments to the Bribery Tribunal should, under section 55 of the Constitution, be made by the Judicial Service Commission in Ceylon. There is thus a conflict between the Bribery Act and the Constitution which comes into the forefront of this case.

D

Of the relevant provisions of the Ceylon (Constitution) Order in Council, 1946, as amended in 1947, section 39 is the only limiting provision on the full legislative powers of the Ceylon Parliament. It is important to observe that the Order in Council does not establish a judiciary for Ceylon: see Part VI. Section 55—the vital section here—provides by subsection (1) that “The appointment, transfer, dismissal and disciplinary control of judicial officers is hereby vested in the Judicial Service Com-

E

F

G

A.C.

AND PRIVY COUNCIL.

175

- A** "mission," and in subsection (5) "'Judicial officer' means the holder of any judicial office but does not include a judge of the Supreme Court or a Commissioner of Assize." In section 3—the interpretation section of the Constitution—"Judicial office" means any paid judicial office. One of the questions to be considered is what is the real effect of section 29 (4) of the Order in Council. What was said was that the Bribery Amendment Act of 1958 did not get the Speaker's certificate under the proviso to section 29 (4) and therefore was ineffective. This non-compliance with section 29 (4) is, of course, vital in the decision of the Supreme Court.

- The main submissions are, first, that in exercising under section 29 (1) of the Constitution the power to make laws for the peace, order and good government of Ceylon the Parliament of Ceylon can set up tribunals, including Bribery Tribunals, for the exercise of judicial powers in specific cases outside the courts established for the ordinary administration of justice. Secondly, the members of the Bribery Tribunal constituted under the amendment Act of 1958 are not "judicial officers" within the meaning of section 55 of the Ceylon Constitution. Thirdly, in any case the courts in Ceylon cannot inquire into the constitutional validity of the Bribery Act as amended in 1958 for two reasons: (i) the Act having received the Royal Assent the courts in Ceylon cannot inquire into procedural questions affecting its progress prior to its presentation for receiving the Royal Assent; (ii) since the Bribery Act of 1954 did have prior to presentation the Speaker's certificate, the 1954 certificate carries the 1958 amendment. Further, section 5 (4) of the Interpretation Ordinance provides that "Every amending Ordinance or Act shall "be read as one with the principal Ordinance, enactment or Act. "to which it relates."

- [Counsel then referred to the historical sequence of the constitutional events in Ceylon, to the recommendations of the Soulbury Commission appointed in 1944, and to the constitutional instruments which brought about independence—the 1946 Order in Council; the 1947 Independence Order in Council; the Royal Letters Patent, c. 388 of the 1956 Revision of the Legislative Enactments of Ceylon; the Royal Instructions, c. 389, and the Ceylon Independence Act, 1947.]

The position of the judiciary in Ceylon is that since the 1833 Charter of Justice no Constitution Act of Ceylon has ever done anything by way of establishing or conferring jurisdiction or vesting functions in courts, and the Charter of 1833 continued to have

P. C.

1964

BRIBERY
COMR.
v.
RANASINGHE.

Bribery Commissioner c. Ranasinghe, [1965] A.C. 172 (C.P.)

176

HOUSE OF LORDS

[1965]

P. C.
1961
BRIBERY
COMR.
v.
RANASINGHE.

effect until 1889 when the Courts Ordinance, now c. 6 of the Revised Laws of 1956, was enacted. It is a basic law dealing with the courts—section 3 is the important one—and is setting up the courts for the ordinary administration of justice in Ceylon. It is submitted that when the Constitution Order in Council of 1946 is talking about judicial office and the appointment of judicial officers it is talking about appointments below the Supreme Court. Section 52 of the Courts Ordinance is talking about appointments to the District Court, Courts of Request and Magistrates' Courts. The Bribery Tribunal is a special tribunal constituted for special purposes. The basic structure of the Ceylon courts is to be found in the Courts Ordinance and the Rural Courts Ordinance, c. 8 of the 1956 Revision. [Reference was made to *Attorney-General of Ceylon v. De Livera*¹ and *Ibralebbe v. The Queen*.²]

Before February 4, 1948—when the present Constitution came into force—the legislature of Ceylon from time to time enacted laws conferring on tribunals, operating in particular spheres, powers of a judicial character. Those laws are preserved and subsequently appeared in the 1956 Revision of the Legislative Enactments, and the powers under them are exercised by persons who are appointed otherwise than by the Judicial Service Commission. Instances of such tribunals are: Registrars of Kandyan Marriages, under the Kandyan Marriage and Divorce Act, c. 113; Quazis and Boards of Quazis, under the Muslim Marriage and Divorce Act, c. 115; Commissioners for Workmen's Compensation, under the Workmen's Compensation Ordinance, c. 139; Debt Conciliation Boards, under the Debt Conciliation Ordinance, c. 81; Boards of Review, under the Income Tax Ordinance, c. 242. None of those tribunals impinged on the criminal law, but on civil rights and civil obligations. In *Shell Co. v. Federal Commissioner of Taxation*³ the Board held that the Board of Review under the Australian income tax legislation, which is similar to the Ceylon Board, was not a judicial body but an administrative one. That the above-mentioned Ceylon laws survived independence appears, firstly, as a matter of principle in constitutional law, that is, that a change of status did not automatically bring them to an end; and, secondly, under the 1946 Order in Council it is clear that pre-existing laws survived independence—notwithstanding the provision made in Part VI of the Constitution Order

¹ [1963] A.C. 103; [1962] 3 W.L.R. 1413; [1962] 3 All E.R. 1066, P.C.

² [1964] A.C. 900; [1964] 2 W.L.R. 76; [1964] 1 All E.R. 251, P.C.

³ [1931] A.C. 275.

A

B

C

D

E

F

G

Bribery Commissioner c. Ranasinghe, [1965] A.C. 172 (C.P.)

A.C.

AND PRIVY COUNCIL.

177

- A in Council of 1946 the Ceylon Parliament has reproduced these particular enactments since independence. That supports the submission that "judicial office" where it is used in section 55 of the Constitution refers to the position of judges of the ordinary courts in Ceylon and is not used to extend to persons exercising judicial powers who are in fact functioning as special tribunals
- B exercising jurisdiction in special cases under laws which are made for the peace, order and good government of Ceylon. This is in line with the Soulbury Commission report, and is in line with the provisions of the Constitution read together with the Courts Ordinance, as, of course, they must be.

- C The Bribery Act of 1954 provided for the automatic termination of office in the public service of any public servant who was found to have been guilty of taking a bribe. The provisions of the Act of 1954 differ very little in all respects from those which set up the Bribery Tribunal in 1958, except that under the Act of 1958 there is jurisdiction over all persons, whether public servants or not, in bribery cases. The difference between the two Acts is not a difference of kind but of degree. There was no challenge to the validity of this bribery legislation until the end of 1961, when the Supreme Court gave judgment in *Senadhira v. Bribery Commissioner*.⁴ Next followed *Don Anthony v. Bribery Commissioner*,⁵ *Piyadasa v. Bribery Commissioner*⁶ and *Jailabdeen v. Danina Umma*,⁷ and finally, on December 20, 1962, the decision in the present case. The earlier cases, which form the background of the decision of the Supreme Court in the present case, were given on very different grounds and on very different approaches to the problem.
- D
- E

- F The legislature, by enacting the Bribery Act as amended, as a necessary measure for the maintenance of peace, order and good government, cannot, by any reasonable interpretation of the Act, be said to have "taken away" any judicial power in whomsoever previously vested even if it did confer judicial power on the Bribery Tribunal, newly created for a specific purpose. The Supreme Court never dealt with the appeal on the merits. They were wrong in holding that membership of the Bribery Tribunal was a judicial office within the meaning of section 55 of the Constitution Order in Council. They were wrong in taking the view that appointment to a special tribunal would be unconstitutional unless it were provided that the appointment should be by the Judicial Service Commission. They were wrong in
- G

P. C.

1964

BRIBERY
COMR.
v.
RANASINGHE.

⁴ (1961) 63 N.L.R. 313.

⁶ (1962) 64 N.L.R. 385.

⁵ (1962) 64 N.L.R. 93.

⁷ (1962) 64 N.L.R. 419.

Bribery Commissioner c. Ranasinghe, [1965] A.C. 172 (C.P.)

178

HOUSE OF LORDS

[1965]

P. C.
1964

BRIBERY
COMR.
v.
RANASINGHE

taking the view that section 29 (4) imposed a limitation on the legislative competence of the Ceylon Parliament. They were wrong in taking the view that they were entitled to look behind the Act as it existed in 1954 and as amended to 1958 in order to determine whether or not the procedure prescribed by the proviso to section 29 (4) of the Constitution had been gone through prior to the Royal Assent. The explanation of the proviso is really in the Australian case of *Attorney-General for New South Wales v. Trethowan*.⁸

A

B

6

1

12

The members of the Bribery Tribunal appointed under the Act as amended to 1958 are not "judicial officers" within the meaning of section 55 of the Constitution. That is put under two heads: (i) section 55 applies only to the office of judge of the subordinate courts forming part of the existing system for the general administration of justice in the Island, that is to say, District Judges, commissioners of requests, magistrates and presidents of rural courts. That submission is directly in line with the Soulbury Commission Report, and so limited also links up with the provisions of the Courts Ordinance, s. 3. The context in which the words "judicial officer" appear is the context of Part VI, which is headed and deals with "The Judiciary." Section 55 is intended to deal with the broad structure of judicial officers within the judicature. As to "judicature," see s. 2 of c. 12 of the 1956 Revision of the Legislative Enactments (Adoption of Roman-Dutch law). The final point on the first branch of this submission is that reliance is placed on the pre-independence group of Ordinances referred to above and their continuance after independence and their publication in the Revised Laws of 1956.

The second branch of this submission is that members of the Bribery Tribunal do not hold paid judicial office. No definition of "office" is given in the interpretation section; it is submitted that "office" means something which exists apart from the holder and which has a permanency apart from the holder; see the dicta in *Great Western Railway Co. v. Bater*.⁹ In section 55 the impression is created very strongly that what is being thought about are posts which have a permanent existence apart from the holders rather than ad hoc posts which have functions attached to them. See, also, *McMillan v. Guest*.¹⁰ If it is right that

F

G

⁸ [1932] A.C. 526; 48 T.L.R. 514. ¹⁰ [1942] A.C. 561, 564, 566, 570; [1942] 1 All E.R. 606, H.L.(E.).

⁹ [1922] 2 A.C. 1, 15; 38 T.L.R. 488, H.L.(E.).

A.C.

AND PRIVY COUNCIL.

179

- A "office" where used in section 55 is contemplating an office which is something existing, and which has permanency, apart from the holder, one cannot fit the position of a member of the Bribery Tribunal into that particular definition. One might be able to fit a member of the panel into that definition, because there is a panel created by section 41. It is conceded that membership of the panel is an office—he is the holder of a paid office—but it is not a judicial office. Payment does not attach to membership of the tribunal, but to membership of the panel. Admittedly this is a very fine point, but it has considerable force.
- The second main submission is that under the power to make laws for the peace, order and good government the Ceylon Parliament can set up tribunals, including Bribery Tribunals, for special cases, outside the courts established by law for the ordinary administration of justice. The first point on this is that the Ceylon Constitution has no supreme law clause. Importance is attached to this because it has two implications; (1) it enables one to say that, subject to certain qualifications, the legislative competence of the Ceylon Parliament is sovereign. The limitation on the sovereign legislative competence is section 29 (2)—apart from that there are no supreme law clauses in the Ceylon Constitution. (2) With the exception of the powers of disallowance in section 39 there is no body of persons and no persons outside Parliament who can control the exercise of the legislative power, subject only to section 29 (2) and (3). Therefore it is not right to say that the Constitution of Ceylon falls into the category of a controlled constitution. It is an uncontrolled constitution subject only to section 29 (2). This matter was discussed in *McCauley v. The King*.¹¹ The point is that with the qualification of section 29 (2) and (3) the legislative power of the Ceylon Parliament is a sovereign power; that the fetters which formerly existed were swept away so far as competence was concerned. [Reference was made to *Krause v. Commissioner for Inland Revenue*.¹²] *Trethowan's case*¹³ has an impact on this matter: there are two points on that case, first, it was on section 1 of the Colonial Laws Validity Act, the legislature of New South Wales being a subordinate legislature; and secondly, the effect of the 1929 amendment in section 7A was to introduce an outside body as a constitutional element in the legislative process. That case is basically distinguished on the ground that at that time the

¹¹ [1920] A.C. 691, 703, 704-714, P.C.

¹³ [1932] A.C. 526, 534 et seq.; 48 T.L.R. 514, P.C.

¹² [1929] S.A.L.R., A.D. 286, 290.

P. C.

1964

BRIBERY
COMR.

v.

RANASINGHE.

Bribery Commissioner c. Ranasinghe, [1965] A.C. 172 (C.P.)

180

HOUSE OF LORDS

[1965]

P. C.
1964
—
BRIBERY
COMR.
v.
RANASINGHE
—

legislature of New South Wales was still subject to the Colonial Laws Validity Act, and that, of course, prevented the subordinate legislature from passing a law for the amendment of its own Constitution. Section 29 (4) of the Ceylon Constitution was drafted as it is because the draftsman obviously had in contemplation the *Trethewan case*.¹³

A

In *Harris v. Minister of the Interior*¹⁴—the unanimous decision of a very strong court—there are very important questions; (1) the Act as passed shows on its face that it had not been passed in accordance with the provisions of section 152; (2) the court there were concerned with the aspect that section 35 was designed for the purpose of protecting minority rights—one can see a parallel with section 29 (2) of the Ceylon Constitution; (3) the court was concerned to consider what effect the Statute of Westminster had on the South African Act of 1909. The basis of that decision is quite clearly that the passing of the Statute of Westminster in 1931 had no effect on the entrenching clauses of the South Africa Act. That conclusion, it is submitted, is wrong.

B

The next point on this head is that there is no question of vesting of judicial power by the Constitution, nor by the Ceylon Constitution is any judicial system established. In *Attorney-General for Australia v. The Queen*¹⁵ the point was that the Federal Parliament could establish a court with judicial powers, but could not establish, what it purported to do, a court vested with partly judicial powers and partly non-judicial powers. That case raises quite a different sort of problem from the present.

C

The next submission is that section 29 (4) of the Constitution does not constitute a limitation on the legislative powers of Parliament; and secondly, the courts in Ceylon cannot examine every Act of the Ceylon Parliament beneath the magnifying glass of the Constitution. Section 29 (4) in itself is limited to certain categories of Bills. *Thambyayah v. Kulasingham*¹⁶ is authority for the proposition that if a Ceylon Act is in conflict with a provision of the Constitution then, according to that decision, it is a void law unless presumably it has the sanction of section 29 (4) behind it; that is not accepted as a valid decision. For the purpose of this argument the court can go behind the Royal Assent.

D

The "pith and substance" test is a useful test to determine

E

¹³ [1932] A.C. 526.

¹⁵ [1957] A.C. 288, 313, 315;

¹⁴ [1952] 2 S.A.L.R. 428, 455 et seq.

[1957] 2 W.L.R. 607; [1957] 2 All E.R. 45, P.C.

F

¹⁶ (1948) 50 N.L.R. 25.

G

Bribery Commissioner c. Ranasinghe, [1965] A.C. 172 (C.P.)

A.C.

AND PRIVY COUNCIL.

181

- A whether or not a Bill falls within the expression "for the amendment or repeal." In *Gallagher v. Lynn*¹⁷ the impugned law was held to be one for the peace, order and good government. If it can be said that the intention of the Bribery Act was to make an amendment of the Constitution that would be a case of a direct conflict. But, assuming that the intention behind the Act was
- B not to make a constitutional amendment, but the effect on the Constitution is an indirect consequence, then the test to apply is, was the real object of the Bill to effect a constitutional amendment under the guise of something else, or was the Constitution changed as a result of the Bill? If the "pith and substance" test is applied, it can be seen that the legislature in 1958 were
- C not intending to treat the tribunal as a court, but merely as a special tribunal having certain powers analogous to those of a court. The legislature by the Courts Ordinance was contemplating legislation under which special officers or tribunal could be legally constituted for special purposes or to try special cases or classes of cases outside the framework of the ordinary courts
- D of justice. The Bribery Tribunal was something which came within the proviso to section 3 of the Courts Ordinance.

- The next point on section 29 (4) is that the proviso is so drawn with an eye on the *Trethewan* decision.¹⁸ Lastly on this point of the construction of section 29 (4), if it had been the intention of the legislature that a law which did not comply with the proviso to section 29 (4) should be void one would have expected the subsection to say so—the legislature knew quite clearly what had to be done if it wanted to strike down a law for conflict with the Constitutional provisions: s. 29 (3). It is submitted that the sort of restriction contained in the proviso to section 29 (4), however appropriate it was when the Colonial Laws Validity Act had effect, ceased to impose any fetter on the legislative competence of the Ceylon Parliament. Had it been the intention of the legislature to entrench on the safeguards of the Constitution then that would have been done either by using a supreme law clause or by using a clause which would say that no Act for the amendment or repeal of the provisions of this Order shall be valid unless, and so on, and would have said that any Act which had not gone through this process shall be void.

In summary on this point: (1) The Ceylon Parliament is a sovereign Parliament, the only limitation on whose competence is section 29 (2). (2) The courts, except in the case provided for

¹⁷ [1937] A.C. 863; 53 T.L.R. 929; ¹⁸ [1932] A.C. 526.
[1937] 3 All E.R. 598, H.L.(N.I.).

P. C.
1964
—
BRIBERY
COMR.
v.
RANASINGHE.
—

Bribery Commissioner c. Ranasinghe, [1965] A.C. 172 (C.P.)

182

HOUSE OF LORDS

[1965]

P. C. in section 29 (3), cannot inquire into the validity of an Act of the
 1964 Ceylon Parliament. (3) Qualified by section 29 (2) and (3), the
 ——————
 BRIBERY Constitution of Ceylon, since the abolition of the application of
 COMB. the Colonial Laws Validity Act to Ceylon, is to be looked at as
 v. an ordinary legislative Act which can in fact be affected by any
 RANASINGHE. subsequent legislative Act. [*Ibralebbe v. The Queen*¹⁹ was
 ——————
 referred to.]

A

The third main submission is that in any case the Ceylon courts cannot inquire into the validity of the Bribery Act as amended, and for three reasons: (1) There is no provision of the Constitution which directly or indirectly enables the court to inquire into the validity of an Act, unless it is a section 29 (3) case. (2) Once the Royal Assent is given and the law is enacted, the court cannot go behind it but must take it as a law: *Harris v. Minister of the Interior*²⁰; *Edinburgh Railway Co. v. Wauchope*.²¹ Those cases are illustrative of the general proposition. Also as part of the argument on this point, see Halsbury's Laws of England, 3rd ed., Vol. 36, p. 378, para. 560. See also Craies on Statute Law, 6th ed., p. 38; 5th ed., pp. 33 and 527; 6th ed., p. 559. [*P. S. Bus Co. Ltd. v. Members and Secretary of Ceylon Transport Board*²² was also referred to.] (3) The Act of 1954 having been certified carried the Act of 1958 on its back. The appellant is entitled to rely on the maxim *omnia praesumuntur rite esse acta*. It is of course appreciated that if the court cannot go behind the Act of 1958 it cannot take notice of the fact that the Act of 1954 was in fact certified. The question of the court going behind an Act of Parliament is referred to in *Ellen Street Estates Ltd. v. Minister of Health*,²³ which also impinges on the power of Parliament to bind its successors. The principle that one cannot go behind an Act of Parliament does not apply to cases where there is a supreme law clause, or to cases in Ceylon where entrenchment on section 29 (2) is invalid. Further, the principle does not apply where, as in the Australian Constitution, there is a vesting of judicial power clause. And it does not apply where the legislative competence is vested in a body other than Parliament normally constituted: *Harris's case*.²⁴

B

C

D

E

F

G

On an appeal to the Supreme Court brought under section 69A of the Bribery Act of 1958 it is not competent for the appellant to object and/or for the Supreme Court to entertain, or *suo motu*

¹⁹ [1961] A.C. 900; [1964] 2 W.L.R. 76, 88; [1964] 1 All E.R.

251, P.C.

²⁰ [1952] 2 S.A.L.R. 428, 469.

²¹ (1842) 8 Cl. & F. 710, 725.

²² (1958) 61 N.L.R. 491, 493.

²³ [1931] 1 K.B. 590, 595, 597, C.A.

²⁴ [1952] 2 S.A.L.R. 428.

Bribery Commissioner c. Ranasinghe, [1965] A.C. 172 (C.P.)

A.C.

AND PRIVY COUNCIL.

183

- A raise, the objection that the provisions of the Act under which members of the Bribery Tribunal have purported to exercise judicial powers are unlawful, being in contravention of section 55 (1) of the Constitution, and the conviction therefore void; for the statutory right of appeal given exclusively by section 69A is concerned only with the correctness or otherwise of the conviction by a tribunal constituted under the Bribery Act and cannot be extended to include the competency of its members to adjudicate. See *Senadhira v. Bribery Commissioner*,²⁵ *Don Anthony v. Bribery Commissioner*,²⁶ *Piyadasa v. Bribery Commissioner*²⁷ and *Jailabdeen v. Danina Umma*.²⁸ [Reference was also made to *King-Emperor v. Benoari Lal Sarma*.²⁹] The courts below have disregarded the language of section 69A which gives a right of appeal based on specific matters; they have ignored the fact that this right of appeal is given against a conviction by the Bribery Tribunal, which presupposes that the tribunal is a body having jurisdiction to convict; and they have taken the view that the members are invalidly appointed, and if that is a valid objection it goes to the root.

- In summary: the first main submission is that the fact of being selected to make up a Bribery Tribunal for the trial of a specific case does not constitute the persons selected as having judicial office under section 55 of the Constitution—Part VI of the Constitution really relates only to subordinate courts forming part of the ordinary system of the administration of justice in Ceylon: and membership of a Bribery Tribunal is not a paid office. The second main submission is that, subject to section 29 (2) and (3) of the Constitution, the Ceylon Parliament can enact laws, first, setting up special tribunals, including Bribery Tribunals, appointment to which is not by the Judicial Service Commission, in the exercise of their power under section 29 (1); and secondly, laws in fact conflicting, otherwise than under section 29 (2), with the provisions of the Ceylon Constitution. The third main submission is that the Ceylon courts cannot go behind the Bribery Act of 1958 to examine a section 29 (4) question, and for two reasons, (i) because the courts in Ceylon cannot, except under section 29 (3), examine the constitutional validity of any Act of the Ceylon Parliament, and (ii) the Act of 1958, being an amending Act, is carried by the Act of 1954.

²⁵ 63 N.L.R. 313, 314-315.

²⁶ 61 N.L.R. 93, 94.

²⁷ 61 N.L.R. 385, 386, 394.

²⁸ 61 N.L.R. 419.

²⁹ [1945] A.C. 14, 20, 27; 61

T.L.R. 51; [1945] 1 All E.R. 210.

P.C.

P. C.
1964
BRIBERY
COMR.
v.
RANASINGHE.

Bribery Commissioner c. Ranasinghe, [1965] A.C. 172 (C.P.)

184

HOUSE OF LORDS

[1965]

P. C.

1964

BRIBERY
COMR.

v.

RANASINGHE.

Applying the pith and substance test, is the change any more than a change in degree of something which was authorised by the Act of 1954? Lastly, it was not competent for this point to be raised on appeal.

A

E. F. N. Gratiaen Q.C., Montague Solomon and E. Cotram for the respondent. On the main question, it is submitted that the chairman and the two members of the tribunal who purported to try, convict and sentence the respondent were paid judicial officers within the meaning of section 55 of the Constitution, and having been appointed by some executive officer other than the Judicial Service Commission their orders were nullities, and, indeed, the amending Act of 1958, in so far as it purported to empower the Governor-General on the advice of the Minister of Justice to appoint members of the Panel for the purpose of exercising strictly judicial functions under the Act, was ultra vires. The relevant provisions of the amended Act were correctly summarised by Sansoni J. in *Senadhira v. Bribery Commissioner*.³⁰ An examination of the provisions of the Bribery Act as amended shows that Bribery Tribunals have so many of the attributes which one would normally associate with a court of record, and really lack none of those attributes, that it should not be sought to distinguish them from ordinary courts of criminal jurisdiction by the mere fact that they deal only with bribery offences. Here, in the place of an established court of criminal judicature, is a new institution with a permanent existence and paid judges with power to sentence to seven years' imprisonment and to fine up to Rs.5,000, and it is linked with the highest Court of Appeal by section 69, which gives the accused person the right to appeal from a conviction. There are not only the traditional attributes of a court of criminal jurisdiction, but the members of the tribunal are paid because they are members of a Panel, and they hold "office"—there are many sections which expressly say that they are paid so long as they hold "office." They are paid for exercising the powers of a criminal court and for nothing else. That complies with the test in *Great Western Railway Co. v. Bater*,³¹ which was followed in *McMillan v. Guest*.³² Prima facie, the words "judicial officer" in section 55 of the Constitution cover these new institutions as well as the persons who are vested from time to time with strictly judicial functions in relation to the powers conferred by Parliament on

B

C

D

E

F

G

³⁰ 63 N.L.R. 313, 316.³² [1942] A.C. 561; [1942] 1 All³¹ [1922] 2 A.C. 1; 38 T.L.R. 448. E.R. 606. H.L.(E.).
H.L.(E.).

Bribery Commissioner c. Ranasinghe, [1965] A.C. 172 (C.P.)

A.C.

AND PRIVY COUNCIL.

185

- A new judicial bodies. The only limitation on the words "judicial officer" is the requirement in the interpretation section, section 3, for payment. There is no warrant for limiting the meaning of "judicial officer" or "judicial appointment" to cases which come in under the main section 3 of the Courts Ordinance and not the proviso. There is nothing in the language of the Constitution which limits "judicial officer." So long as section 55 of the Constitution remained unrepealed or unamended, there can be no doubt that when the Parliament of Ceylon decided in 1958 to vest jurisdiction of a strictly criminal nature in these tribunals, then section 55 was the proper provision regulating methods of appointment.
- B It is conceded that Parliament had power to establish Bribery Tribunals. It is also conceded that the Constitution does not by any express separate formula declare that the Constitution is the paramount law, and that as the Colonial Laws Validity Act did not apply to Ceylon at the relevant time it was not therefore available by itself to control the legislative power. The power to pass the Bribery Act was, it is submitted, derived from the Constitution itself; the true position is that the legislative power of the Ceylon Parliament is restricted within a certain area, although outside that area it is unrestricted. Section 29 (1) of the Constitution provides that the legislative power is expressly made "Subject to the provisions of this Order." Section 18 makes it clear that in matters invoked by section 29 (4) Parliament's legislative power is quite unrestricted by that majority and the exception is in regard to amendments of the Constitution itself. It is conceded that generally in any case where Parliament's competence is to make laws by a bare majority the mere fact that the Royal Assent has been granted would preclude a court of law from exercising a jurisdiction in regard to matters of parliamentary procedure, for instance, whether there was a majority or not. It is conceded also that in so far as there are no fetters, other than under section 29 (4), on the legislative power to pass an Act by a bare majority, then one can necessarily have repeal by implication of that Parliament's former laws because there is nothing in the Constitution which empowers a bare majority of Parliament to fetter future bare majorities in regard to the same subject-matter.

The type of limitation imposed by the proviso to section 29 (4), however, is not a mere matter of the internal machinery of Parliament, but is intended to give substantive rights to the people of Ceylon, and the courts, without in any way seeking to

P. C.

1964

BRIBERY
COMR.
v.
RANASINGHE.

186

HOUSE OF LORDS

[1965]

P. C.
1964
—
BRIBERY
COMR.
v.
RANASINGHE
—

investigate matters of mere internal machinery, have not only the power but a duty to see whether the conditions precedent laid down by the Constitution for a valid enactment in a particular limited area of legislation have been satisfied or not. Looking at section 29 (4) and section 18, in every case affecting an amendment of the Constitution the conditions must be satisfied as laid down in the Constitution. The only kind of Bill which can become an Act under section 29 (4) is a Bill with an indorsement on it showing that the limitation laid down in section 18 has been borne in mind and that the condition in section 29 (4) has been satisfied. Section 18 clearly says in effect that a bare majority is sufficient for ordinary legislation, but a two-thirds majority, taking into account those not present, is essential for a valid amendment or repeal of the Constitution. It is not a mere question of procedure. A Royal Assent can only be validly given to a duly indorsed Bill. It was said in *McCawley v. The King*³³ that "confronted with the objections by which they are met in this appeal, they would have no difficulty in pointing to specific articles in the legislative instrument or instruments which created the Constitution, prescribing with meticulous precision the methods by which, and by which alone, it could be altered." That applies completely to the present case; what was true of section 9 in Queensland is true of all the provisions of the Constitution in this case.

The words in section 29 (1) of the Ceylon Constitution, "Subject to the provisions of this Order," mean not merely subject to the provisions of section 29 (2) and (3), but to all relevant provisions of the Order relevant to the legislative function, and therefore they catch up limitations which appear in sections 18 and 29 (4). In *Thambiayah v. Kulasingham*³⁴ it was expressly ruled that no amendment to the Constitution could be validly made unless there was a two-thirds majority, and that decision has never been challenged in Ceylon, nor was it the basis of any argument on behalf of the Crown in the four bribery cases cited by Mr. Lawson.³⁵ This matter, which raises a pure question of law, is of vital importance to all the people of Ceylon, and this Board would hesitate long before taking a view different from that in *Thambiayah's* case³⁶ on so fundamental a matter unless driven to the conclusion that Parliament now has power, notwithstanding section 29 (4), to amend any part of the Constitution

³³ [1920] A.C. 691, 705, P.C.

³⁴ (1948) 50 N.L.R. 25.

³⁵ Ante, p. 177.

³⁶ 50 N.L.R. 25.

A

B

C

D

E

F

G

A.C.

AND PRIVY COUNCIL.

187

- A** by a bare majority. There is no limitation at the moment on the right of amendment or repeal except the requirement of the requisite majority. There is nothing to prevent by an appropriate enactment a deletion of the words in section 18 "Save as otherwise provided in subsection (4) of section 29," which would then empower Parliament in future to decide any matter and pass any legislation by a bare majority. If the indorsement appears it is conclusive, so far as the court is concerned, that the two-thirds majority did operate in the House.

P. C.
1964
BRIBERY
COMR.
v.
RANASINGHE

- C** language of the Ceylon Constitution the position is that where a Bill receives the Royal Assent without an indorsement on the face of it it must be treated as a Bill passed by a bare majority; but if a certificate is a condition precedent to the valid passing of a section 29 (4) Bill and there is no such certificate then an essential condition to the validity of legislation amending or repealing the Constitution is lacking. [Reference was also made to *Minister of the Interior v. Harris*.³⁶] It was said in *Attorney-General for New South Wales v. Trethowan*³⁷ that "A Bill, 'within the scope of subsection (6) of section 7A, which received 'the Royal Assent without having been approved by the electors 'in accordance with that section, would not be a valid Act of 'the legislature.' Similarly here, if without compliance with the essential requirements of the proviso to section 29 (4) a Bill does receive the Royal Assent, it would not be a valid Act of the legislature. There was nothing in the Bribery Act of 1954 which required a section 29 (4) certificate. Where the Interpretation Act says that the amending Act must be read as one with the principal Act, that presupposes that the former was a valid Act and that life has been breathed into it by a proper and valid legislative enactment.

- G** As to the "pith and substance" argument, the pith and substance of the 1958 amending Act, in so far as it is sought to have it declared invalid, is that section 41 in terms provides for a method of appointment which is the direct opposite of what is required in section 55 of the Constitution; that is the pith and substance of a fundamental feature of the personnel whom Parliament intended to exercise purely judicial functions in this very

³⁶ 50 N.L.R. 25.

³⁸ [1952] 1 S.A.L.R. 769.

³⁷ [1952] 2 S.A.L.R. 428.

³⁹ [1932] A.C. 526, 540, P.C.

Bribery Commissioner c. Ranasinghe, [1965] A.C. 172 (C.P.)

188

HOUSE OF LORDS

[1965]

P. C.
1964BRIBERY
COMR.
v.
RANASINGHE
—

important field of criminal jurisdiction. [*Attorney-General for Ontario v. Attorney-General for Canada*⁴⁰ was referred to.]

H. N. G. Fernando J. was right in this case in saying that there was severability and that all that was really invalidated was the appointing power.

Assuming that the Board is of opinion that the appointing power in section 41 of the Act of 1958 was a violation of the Constitution and that the grant of the Royal Assent did not give validity to what is in fact invalid legislation, the appeal should be dismissed whether or not there was a technical question as to the right of appeal. It is clear that under the Courts Ordinance the court has a very wide supervisory jurisdiction under section 42 by which, if there was a question of a technical objection to the right of appeal, the court would have power and, indeed, the duty, to stay the proceedings and see that all the matters were before the court.

Lawson Q.C. in reply. It is wrong to suggest that the effect of the Bribery Act as amended is to exclude the jurisdiction of the ordinary courts in bribery cases. It does no such thing. The Act as amended is setting up special tribunals having concurrent jurisdiction—there is a sort of parallel procedure. As to the first main point—whether or not the members of the tribunal hold "office" within the meaning of section 55 of the Constitution—one gets guidance as to the true meaning of "judicial office" in section 55 by bearing in mind that the expression is used in the context of Part VI of the Constitution Order in Council; if Mr. Gratiaen is right there seems to be no limitation placed on the words "judicial office" in section 55. In the context of Part VI of the Constitution a special tribunal established for special purposes is not a judicial office. The right to remuneration attaches not to membership of the Bribery Tribunal but to membership of the Panel; membership of the latter may be an "office," but not of the former—admittedly that is a fine point.

On the broad constitutional point, the submission Mr. Gratiaen makes is very wide; he said that an uncertified Bill which in fact passed into law which repeals any provision of the Constitution is a mere nullity. If that is correct it would seem to follow that in the case of any Act of the Ceylon Parliament passed since independence the court can at any time examine the purpose of the legislation, and if it comes to the conclusion that there is something in it which in fact impinges on the Constitution then, unless whoever is seeking to support the legislation produces the

A

B

C

D

E

F

G

⁴⁰ [1925] A.C. 750, P.C.

Bribery Commissioner c. Ranasinghe, [1965] A.C. 172 (C.P.)

A.C.

AND PRIVY COUNCIL.

189

- A Speaker's certificate, it seems to follow that the whole legislation is struck down, not merely that part which impinges on the Constitution. That is a very far-reaching contention. *Thambiyah's case*⁴¹ is distinguishable, because there was there something which amounted to a direct amendment of the provisions of the Constitution Order in Council. It is further submitted that *Thambiyah's case*⁴¹ was in fact wrongly decided, because the question whether or not section 29 (4) had imposed a limitation on the competence of the Ceylon Parliament was never discussed in that case, nor was the point that one cannot go behind the enacting words once a law has been passed to determine what procedural steps have been taken. *P.S. Bus Company Ltd. v. Ceylon Transport Board*⁴² does support the appellant here to the extent that it shows that the courts in Ceylon themselves have recognised that there are certain procedural matters which the courts will not investigate, and one of them is the constitution of the House of Representatives itself. [*McCawley's case*⁴³ was referred to.] The *Trethewan* case⁴⁴ is very important from the appellant's point of view, because it does explain the meaning and purpose of section 29 (4)—the answer is to give an opportunity to attack a Bill before it is passed into law. *Trethewan*⁴⁴ has a substantial link up with the *Harris cases*⁴⁵ in South Africa. [*Attorney-General for Ontario v. Attorney-General for Canada*⁴⁶ was also referred to.] Section 29 (4) is clearly only a procedural requirement in relation to the exercise of the legislative power. It is not a requirement which affects legislative competence. Once a Bill has received the Royal Assent it is no longer competent to the courts—it not being a section 29 (2) or (3) case—to go behind the question of the assent given.
- F May 5. The judgment of their Lordships was delivered by LORD PEARCE. The appellant is the Bribery Commissioner of Ceylon on whom lies the duty of bringing prosecutions before the Bribery Tribunal which was created by the Bribery Amendment Act, 1958. The respondent was prosecuted for a bribery offence before that tribunal. It convicted and sentenced him to a term of imprisonment and a fine. On appeal the Supreme Court declared the conviction and orders made against him null and inoperative on the ground that the persons composing the Bribery
- G

P. C.

1964

—
BRIBERY
COMR.
v.
RANASINGHE.
—

⁴¹ 50 N.L.R. 25.

⁴² (1958) 61 N.L.R. 491.

⁴³ [1920] A.C. 691.

⁴⁴ [1932] A.C. 526.

⁴⁵ [1952] 2 S.A.L.R. 428; [1952] 4

S.A.L.R. 769.

⁴⁶ [1925] A.C. 750.

190

HOUSE OF LORDS

[1965]

- P. C. Tribunal which tried him were not lawfully appointed to the
1964 tribunal. In the present case, as in some earlier reported cases,
—
BRIBERY the court took the view that the method of appointing persons
COMR. to the panel from which the tribunal is drawn offends against an
v. important safeguard in the Constitution of Ceylon.
RANASINGHE. The Constitution is contained in the Ceylon (Constitution)
—
Orders in Council, 1946 and 1947. There is no need to refer in
detail to the various Acts and Orders that established the inde-
pendence of Ceylon. Viscount Radcliffe in *Attorney-General of*
*Ceylon v. de Livera*¹ said of the Constitution, " although there
" are many variations in matters of detail, its general concep-
" tions are seen at once to be those of a parliamentary democracy
" founded on the pattern of the constitutional system of the
" United Kingdom."
- The Constitution does not specifically deal with the judicial
system which was established in Ceylon by the Charter of Justice
of 1833 and is dealt with in certain Ordinances, the principal
being the Courts Ordinance, cap. 6. The power and jurisdiction
of the courts are therefore not expressly protected by the Con-
stitution. But the importance of securing the independence of
judges and of maintaining the dividing line between the judiciary
and the executive was appreciated by those who framed the
Constitution. See the Ceylon Report of the Soulbury Commis-
sion on Constitutional Reform. Appendix I (I), paragraphs 27 and
28, and Appendix I (II), sections 68 and 69. Part 5 of the Consti-
tution is headed " The Executive " and Part 6 " The Judicature."
Part 6 deals with the appointment and dismissal of judges. The
judges of the Supreme Court are not removable except by the
Governor-General on an address of the Senate and the House of
Representatives (section 52). So far as concerns the judges of
lesser rank, section 55 provided that " The appointment, transfer,
" dismissal and disciplinary control of judicial officers is hereby
" vested in the Judicial Service Commission." The Commission
consists of the Chief Justice as chairman and a judge of the
Supreme Court and " one other person who shall be, or shall
" have been, a Judge of the Supreme Court" (section 53 (1)),
and no Senator or Member of Parliament shall be appointed.
Thus there is secured a freedom from political control, and it is
a punishable offence to attempt directly or indirectly to influence
any decision of the Commission (section 56).

The questions before their Lordships are whether the statutory
provisions for the appointment of members of the panel of the

¹ [1963] A.C. 103, 118; [1962] 3 W.L.R. 1413; [1962] 3 All E.R. 1066. P.C.

A.C.

AND PRIVY COUNCIL.

191

- A** Bribery Tribunal otherwise than by the Judicial Service Commission conflict with section 55 of the Constitution, and, if so, whether those provisions are valid.

P. C.
1964

BRIBERY
COM.
v.
RANASINGHE.

- In 1954 the Bribery Act was passed in order to meet a social need. It gave to the Attorney-General or officers authorised by him power to direct and conduct the investigation of any allegation of bribery, and certain powers for securing information and assistance. If there was a *prima facie* case, he was empowered to indict offenders who were not public servants before the ordinary courts. Offenders who were public servants might either be so indicted or be arraigned before a Board of Inquiry constituted from certain panels to which members were appointed by the Governor-General on the advice of the Prime Minister. It had to decide whether the accused was guilty and it could order the guilty to pay the amount of the bribe as a penalty. A finding of guilt resulted in automatic dismissal and certain disqualifications and incapacities.

- The Bribery Act of 1954 was treated by the legislature as coming within section 29 (4) of the Constitution, which deals with any amendments to the Constitution, and there was endorsed on the bill, when it was presented for the Royal Assent, the necessary certificate of the Speaker. That Act also contained a section as follows: "2. (1) Every provision of this Act which may be in conflict or inconsistent with anything in the Ceylon (Constitution) Order in Council, 1946, shall for all purposes and in all respects be as valid and effectual as though that provision were in an Act for the amendment of that Order in Council enacted by Parliament after compliance with the requirement imposed by the proviso of subsection (4) of section 29 of that Order in Council. (2) Where the provisions of this Act are in conflict or are inconsistent with any other written law, this Act shall prevail."

- In 1958 radical changes were made. The Bribery Amendment Act, 1958, swept away the Boards of Inquiry which dealt with public servants and created Bribery Tribunals for the trial of persons prosecuted for bribery with power to hear, try, and determine any prosecution for bribery made against any person before the tribunal. The Bribery Commissioner was brought into being and was empowered to prosecute persons before the tribunal. All the offences of bribery specified in Part II of the Act, punishable with rigorous imprisonment for a term not exceeding seven years or a fine not exceeding Rs.5000 or both became triable by the tribunal. Whether the effect was that the offences of

192

HOUSE OF LORDS

[1965]

P. C. bribery under Part 2 of the Act " were no longer triable by the
 1964 " courts " as was said by Sansoni J. in *Senadhira v. Bribery
 COMR. Commissioner*² or that, as is contended by Mr. Lawson on behalf
 RANASINGHE. of the Bribery Commissioner, the courts and the tribunal have
 v. concurrent powers, is immaterial. No doubt, even if Mr. Lawson's
 — contention on his behalf be correct, the practical effect would be
 — to supersede the court's jurisdiction in bribery cases to a large
 extent.

A

B

C

D

E

F

G

A bribery tribunal, of which there may be any number, is composed of three members selected from a panel (section 42). The panel is composed of not more than 15 persons who are appointed by the Governor-General on the advice of the Minister of Justice (section 41). The members of the panel are paid remuneration (section 45).

Mr. Lawson on behalf of the Bribery Commissioner argues that the members of the tribunal are not " judicial officers " and that therefore their appointment by the executive does not conflict with the constitutional provision that the appointment of judicial officers is vested in the Judicial Service Commission. He bases the contention on two main grounds.

First he argues that the words " judicial officers " only apply to judges of the ordinary courts referred to in the Courts Ordinance, Cap. 6, section 3, and do not apply to those excluded from the operation of the section by the proviso which sets out various other or lesser tribunals, ending with the words " or of any " special officer or tribunal legally constituted to try any special " case or class of cases." If that argument were sound it might be open to the executive to appoint whom they chose to sit on any number of newly created tribunals which might deal with various aspects of the jurisdiction of the ordinary courts and thus, by eroding the courts' jurisdiction, render section 55 valueless.

Section 55 (subsection 5) defines the expression " judicial " officer " as meaning " the holder of any judicial office but " does not include a Judge of the Supreme Court or a Commissioner " of Assize." By section 3 (1) of the Constitution " judicial " office " means any paid judicial office. Membership of the panels from which the Bribery Tribunals are constituted is expressly referred to in section 41 of the Bribery Amendment Act, 1958, as an " office." " Each member of the panel shall, unless " he vacates office earlier . . ." [Section 41 (2).] Vacating " office " is also referred to in subsections 41 (4) and 41 (6).

² (1961) 63 N.L.R. 313, 314.

A.C.

AND PRIVY COUNCIL.

193

- A Both according to the ordinary meaning of words and according to the more precise tests applied by the House of Lords in *Great Western Railway Co. v. Bater*³ membership of the panel is an office. Their Lordships are unable to draw any inferences from the Courts Ordinance which would affect the plain meaning of section 55 of the Constitution.
- B Mr. Lawson's second argument is that although membership of the panel is an office, it is not a "judicial" office, since the members are paid to be on the panel and are not paid as members of the tribunal. The Supreme Court rightly rejected this distinction. Clearly the members have the paid office of being on the panel, the functions of the office being the performance of the judicial duties of the Bribery Tribunal as and when they are asked to sit.

- C There is, therefore, a plain conflict between section 55 of the Constitution and section 41 of the Bribery Amendment Act under which the panel is appointed. What is the effect of this conflict? The Supreme Court has held that it renders section 41 invalid.
- D Mr. Lawson, however, contends on behalf of the Bribery Commissioner that, since the Act has been passed by both Houses and received the Royal Assent, it is a valid enactment and has the full force of law, amending the Constitution if and in so far as necessary. If, he argues, there has been a defect in procedure, that does not make the Act invalid, since the Ceylon Parliament is sovereign and had the power to pass it. Nor are the courts able to look behind the Act to see if it was validly passed.

The voting and legislative power of the Ceylon Parliament are dealt with in sections 18 and 29 of the Constitution.

- " 18. Save as otherwise provided in subsection (4) of section
 " 29, any question proposed for decision by either Chamber shall
 F " be determined by a majority of votes of the Senators or Mem-
 " bers, as the case may be, present and voting"

- " 29—(1) Subject to the provisions of this Order, Parliament
 " shall have power to make laws for the peace, order and good
 " government of the Island.

- G " (2) No such law shall—(a) prohibit or restrict the free exer-
 " cise of any religion;"

There follow (b), (c) and (d), which set out further entrenched religious and racial matters, which shall not be the subject of legislation. They represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter-

P. C.

1964

 BRIBERY
 COMR.
 v.
 RANASINGHE.

³ [1922] 2 A.C. 1, 15; 38 T.L.R. 448, H.L.(E.).

194

HOUSE OF LORDS

[1965]

P. C. se they accepted the Constitution; and these are therefore unalterable under the Constitution.

A

1964 " (3) Any law made in contravention of subsection (2) of this section shall, to the extent of such contravention, be void.

BRIBERY COMR. " (4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order, or of any other Order of Her Majesty in Council in its application to the Island:

B

" Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of Members of the House (including those not present).

C

" Every certificate of the Speaker under this subsection shall be conclusive for all purposes and shall not be questioned in any court of law."

D

The Bribery Amendment Act, 1958, contained no section similar to section 2 of the Act of 1954, nor did the Bill bear a certificate of the Speaker. There is nothing to show that it was passed by the necessary two-thirds majority. If the presence of the certificate is conclusive in favour of such a majority, there is force in the argument that its absence is conclusive against such a majority. Moreover, where an Act involves a conflict with the Constitution, the certificate is a necessary part of the Act-making process and its existence must be made apparent.

E

The fact that the 1958 Bill did not have a certificate and was not passed by the necessary majority was not really disputed in the Supreme Court or before their Lordships' Board, but it has been argued that the court, when faced with an official copy of an Act of Parliament, cannot inquire into any procedural matter and cannot now properly consider whether a certificate was endorsed on the Bill. That argument seems to their Lordships unsubstantial, and it was rightly rejected by the Supreme Court. Once it is shown that an Act conflicts with a provision in the Constitution, the certificate is an essential part of the legislative process. The court has a duty to see that the Constitution is not infringed and to preserve it inviolate. Unless, therefore, there is some very cogent reason for doing so, the court must not decline to open its eyes to the truth. Their Lordships were informed by counsel that there were two duplicate original Bills and that after the Royal Assent was added one original was filed

F

G

A.C.

AND PRIVY COUNCIL.

195

- A in the Registry where it was available to the court. It was therefore easy for the court, without seeking to invade the mysteries of parliamentary practice, to ascertain that the Bill was not endorsed with the Speaker's certificate.

- The English authorities have taken a narrow view of the court's power to look behind an authentic copy of the Act. But B in the Constitution of the United Kingdom there is no governing instrument which prescribes the law-making powers and the forms which are essential to those powers. There was, therefore, never such a necessity as arises in the present case for the court to take any close cognisance of the process of law-making. In *Edinburgh Railway Co. v. Wauchope*,⁴ however, Lord Campbell said: "All that a court of justice can do is to look to the Parliamentary roll." There seems no reason to doubt that in early times, if such a point could have arisen as arises in the present case, the court would have taken the sensible step of inspecting the original.

- In the South African case of *Harris v. Minister of the Interior*,⁵ D where a similar point arose, it appears that the court itself looked at the Bill. "The original," said Centlivres C.J., "which was signed by the Governor-General and filed with the Registrar of this Court bears the following endorsement by the Speaker: 'certified correct as passed by the joint sitting of both Houses of Parliament . . .'" Moreover, the point on which Fernando J. relied in the Supreme Court seems to their Lordships unanswerable. When the Constitution lays down that the Speaker's certificate shall be conclusive for all purposes and shall not be questioned in any court of law, it is clearly intending that courts of law shall look to the certificate but shall look no further. The courts therefore have a duty to look for the certificate in order E to ascertain whether the Constitution has been validly amended. Where the certificate is not apparent, there is lacking an essential part of the process necessary for amendment.

- The argument that by virtue of certain statutory provisions G the subsequent reprint of an Act can validate an invalid Act cannot be sound. If Parliament could not make a bill valid by purporting to enact it, it certainly could not do so by reprinting it, however august the blessing that it gives to the reprint.

Mr. Lawson further contended that since the original Bribery Act of 1954 had on it a certificate, any amendment of that Act was automatically franked and did not need a certificate. The

P. C.

1964

BRIBERY
COMR.
v.
RANASINGHE.⁴ 1842] 8 Cl. & F. 710, 725.⁵ 1952] 2 S.A.L.R. 428, 469.

196

HOUSE OF LORDS

[1965]

P. C.
1964 effect of that argument would be that serious inroads into the
 —————
 BRIBERY
COMR.
v.
RANASINGHE Constitution could be made without the necessary majority
 —————
 provided that they were framed as amendments to some quite
 innocuous Act which had borne a certificate. No authority was
 cited on this point. Their Lordships feel no doubt that every
 amendment of the Constitution, in whatever form it may be
 presented, needs a certificate under section 29 (4). A

There remains the point which is the real substance of this appeal. When a sovereign Parliament has purported to enact a bill and it has received the Royal Assent, is it a valid Act in the course of whose passing there was a procedural defect, or is it an invalid Act which Parliament had no power to pass in that manner? B

The strongest argument in favour of the appellant's contention is the fact that section 29 (3) expressly makes void any act passed in respect of the matters entrenched on and prohibited by section 29 (2), whereas section 29 (4) makes no such provision, but merely couches the prohibition in procedural terms. C

The appellant's argument placed much reliance on the opinion of this Board in *McCawley v. The King*.⁶ Just as in that case the legislature of the then Colony of Queensland was held to have power by a mere majority vote to pass an Act that was inconsistent with the provisions of the existing Constitution of the Colony as to the tenure of judicial office, so, it was said, the legislature of Ceylon had no less a power to depart from the requirements of a section such as section 55 of the Order in Council, notwithstanding the wording of section 18 and section 29 (4). Their Lordships are satisfied that the attempted analogy between the two cases is delusive and that *McCawley's* case,⁶ so far as it is material, is in fact opposed to the appellant's reasoning. In view of the importance of the matter it is desirable to deal with this argument in some detail. D

In 1859 Queensland had been granted a Constitution in the terms of an Order in Council made on June 6 of that year under powers derived by Her Majesty from the Imperial Statute, 18 & 19 Vict. c. 54. The Order in Council had set up a legislature for the territory, consisting of the Queen, a Legislative Council and a Legislative Assembly, and the law-making power was vested in Her Majesty acting with the advice and consent of the Council and Assembly. Any laws could be made for the "peace, welfare "and good government of the Colony," the phrase habitually employed to denote the plenitude of sovereign legislative power. E

F

G

⁶ [1920] A.C. 691; 36 T.L.R. 387, P.C.

A.C.	AND PRIVY COUNCIL.	197
A	even though that power be confined to certain subjects or within certain reservations. The Constitution thus established placed no restrictions on the manner in which or the extent to which the law-making power could be exercised, either generally or for particular purposes, except for the provisions then customary as to reservation and disallowance of bills and a special provision as to	P. C. 1961
B	the reservation of any bill which proposed the introduction of the elective principle into the make-up of the Legislative Council. Subject to this the legislature was expressly given full power and authority to alter or repeal the provisions of the Order in Council "in the same manner as any other laws for the good government "of the Colony."	BRIBERY COMR. v. RANASINGHE.
C	The legislature exercised this power in 1867 and passed what was called the Constitution Act of that year. By section 2 of the Act the legislative body, again the Queen acting with the advice and consent of the Council and Assembly, was given or declared to have power to make laws for the peace, welfare and good government of the Colony in all cases whatsoever. The only	
D	express restriction on this comprehensive power was contained in a later section, section 9, which required a two-thirds majority of the Council and of the Assembly as a condition precedent to the validity of legislation altering the constitution of the Council. As to this Lord Birkenhead L.C., delivering the Board's opinion, remarked ⁷ : "We observe, therefore, the Legislature in this iso-	
E	"lated instance carefully selecting one special and individual case "in which limitations are imposed upon the power of the Parliament of Queensland to express and carry out its purpose in the "ordinary way, by a bare majority." This observation was coupled with the summary statement ⁸ : "The Legislature of "Queensland is the master of its own household, except in so	
F	"far as its powers have in special cases been restricted. No "such restriction has been established, and none in fact exists, "in such a case as is raised in the issues now under appeal."	
G	These passages show clearly that the Board in <i>McCawley's</i> case ⁹ took the view, which commends itself to the Board in the present case, that a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question whether the legislature is sovereign, as is the legislature of Ceylon, or whether the Constitution is "uncontrolled," as the Board held the Constitution of	

⁷ [1920] A.C. 691, 712.⁸ *Ibid.* 714.⁹ [1920] A.C. 691.

198

HOUSE OF LORDS

[1965]

P. C.
1964
—
BRIBERY
COMR.
v.
RANASINGHE
—

Queensland to be. Such a Constitution can, indeed, be altered or amended by the legislature, if the regulating instrument so provides and if the terms of those provisions are complied with: and the alteration or amendment may include the change or abolition of those very provisions. But the proposition which is not acceptable is that a legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different type of majority or by a different legislative process. And this is the proposition which is in reality involved in the argument.

It is possible now to state summarily what is the essential difference between the *McCawley* case⁹ and this case. There the legislature, having full power to make laws by a majority, except upon one subject that was not in question, passed a law which conflicted with one of the existing terms of its Constitution Act. It was held that this was valid legislation, since it must be treated as pro tanto an alteration of the Constitution, which was neither fundamental in the sense of being beyond change nor so constructed as to require any special legislative process to pass upon the topic dealt with. In the present case, on the other hand, the legislature has purported to pass a law which, being in conflict with section 55 of the Order in Council, must be treated, if it is to be valid, as an implied alteration of the Constitutional provisions about the appointment of judicial officers. Since such alterations, even if express, can only be made by laws which comply with the special legislative procedure laid down in section 29 (4), the Ceylon legislature has not got the general power to legislate so as to amend its Constitution by ordinary majority resolutions, such as the Queensland legislature was found to have under section 2 of its Constitution Act, but is rather in the position, for effecting such amendments, that that legislature was held to be in by virtue of its section 9, namely, compelled to operate a special procedure in order to achieve the desired result.

The case of *The Attorney-General for New South Wales v. Trethowan*¹⁰ also needs to be considered. The Constitution Act, 1902, of New South Wales was amended in 1929 by adding section 7A to the effect that no bill for abolishing the Legislative Council (or repealing section 7A) should be presented for the Royal Assent until it had been approved by a majority of electors voting on a

⁹ [1920] A.C. 691.

¹⁰ [1932] A.C. 526; 48 T.L.R. 514,
P.C.

A.C.

AND PRIVY COUNCIL.

199

- A submission to them made in accordance with the section. Since both the Acts of 1902 and 1929 were Acts of the local legislature they were confined, so far as legislative power was concerned, by the Colonial Laws Validity Act, 1865. Without complying with the requirements of section 7A both Houses passed Bills respectively repealing section 7A and abolishing the Legislative Council.
- B The appeal was limited to the questions¹¹ "whether the Parliament of New South Wales has power to abolish the Legislative Council of the State, or to alter its constitution or powers, or to repeal section 7A of the Constitution Act, 1902, except in the manner provided by the said section 7A." In holding that Bills could not lawfully be presented until the requirements of section 7A had been complied with, the Board relied on section 5 of the Colonial Laws Validity Act, 1865. That section provided that "every representative legislature shall, in respect of the colony under its jurisdiction, have . . . full power to make laws respecting the constitution, powers and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony." The effect of section 5 of the Colonial Laws Validity Act, which is framed in a manner somewhat similar to section 29 (4) of the Ceylon Constitution was that where a legislative power is given subject to certain manner and form, that power does not exist unless and until the manner and form is complied with. Lord Sankey L.C. said¹²: "A Bill, within the scope of subsection (6) of section 7A, which received the Royal Assent without having been approved by the electors in accordance with that section, would not be a valid Act of the legislature. It would be ultra vires section 5 of the Act of 1865."

The careful judgment of Centlivres C.J., with which the four other members of the Appellate Division of South Africa concurred, in the case of *Harris v. Minister of the Interior*¹³ expresses the same point of view.

- G The legislative power of the Ceylon Parliament is derived from section 18 and section 29 of its Constitution. Section 18 expressly says "save as otherwise ordered in subsection (4) of section 29." Section 29 (1) is expressed to be "subject to the provisions of this Order." And any power under section 29 (4) is expressly subject to its proviso. Therefore in the case of

¹¹ [1932] A.C. 526, 528.

¹² *Ibid.* 541.

P. C.

1964

 BRIBERY
COMR.
v.
RANASINGHE.
—

¹³ [1952] 2 S.A.L.R. 428.

Bribery Commissioner c. Ranasinghe, [1965] A.C. 172 (C.P.)

200

HOUSE OF LORDS

[1965]

P. C.

1964

BRIBERY
COMR.

v.

RANASINGHE.

amendment and repeal of the Constitution the Speaker's certificate is a necessary part of the legislative process and any Bill which does not comply with the condition precedent of the proviso, is and remains, even though it receives the Royal Assent, invalid and ultra vires.

A

No question of sovereignty arises. A Parliament does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority, e.g., when in the case of ordinary legislation the voting is evenly divided or when in the case of legislation to amend the Constitution there is only a bare majority if the Constitution requires something more. The minority are entitled under the Constitution of Ceylon to have no amendment of it which is not passed by a two-thirds majority. The limitation thus imposed on some lesser majority of members does not limit the sovereign powers of Parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority.

B

The case of *Thambiayah v. Kulasingham*¹⁴ is authority for the view that where invalid parts of the statute which are ultra vires can be severed from the rest which is intra vires it is they alone which should be held invalid.

C

Their Lordships therefore are in accord with the view so clearly expressed by the Supreme Court "that the orders made "against the respondent are null and inoperative on the grounds "that the persons composing the Bribery Tribunal which tried "him were not lawfully appointed to the Tribunal." They will accordingly humbly advise Her Majesty to dismiss this appeal. In accordance with the agreement between the parties the appellant will pay the costs of the respondent.

D

Solicitors: *T. L. Wilson & Co.; Hatchett Jones & Co.*

F

C. C.

¹⁴ (1948) 50 N.L.R. 25, 37.

G

Onglet 87

A.G. New South Wales c. Trethewan, [1932] A.C. 526 (C.P.)

526

HOUSE OF LORDS

[1932]

[PRIVY COUNCIL.]

J. C.* ATTORNEY - GENERAL FOR NEW } APPELLANTS ;
 1932 SOUTH WALES AND OTHERS . . . }
May 21. AND
 TRETHOWAN AND OTHERS RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

New South Wales—Constitution—Abolition of Legislative Council—Act requiring Referendum—Act not to be repealed without Referendum—Powers of Legislature of State—“Manner and Form”—Constitution Act, 1902 (No. 32 of 1902—No. 28 of 1929; N.S.W.), s. 7A—Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), s. 5.

The Constitution Act, 1902, enacted by the legislature of New South Wales, was amended in 1929 by adding s. 7A, which provided that no Bill for abolishing the Legislative Council should be presented to the Governor for His Majesty's assent until it had been approved by a majority of the electors voting upon a submission to them made in accordance with the section; and that the same provision was to apply to a Bill to repeal the section. In 1930 both houses of the legislature passed two Bills, one to repeal s. 7A and the other to abolish the Legislative Council.

By s. 5 of the Colonial Laws Validity Act, 1865, the legislature of the State had full power to make laws respecting the constitution, powers and procedure of the legislature, provided that the laws should have been passed in such “manner and form” as might from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law in force in the colony:—

Held, that the whole of s. 7A of the Constitution Act, 1902, was within the competence of the legislature of the State under s. 5 of the Colonial Laws Validity Act, 1865, that the provision that Bills of the nature stated must be approved by the electors before being presented was a provision as to “manner and form” within the meaning of the proviso; and accordingly that the Bills could not lawfully be presented unless and until they had been approved by a majority of the electors voting.

Judgment of the High Court of Australia, 44 C. L. R. 394, affirmed.

APPEAL (No. 68 of 1931) by special leave from a judgment of the High Court of Australia (March 16, 1931) affirming a judgment of the Supreme Court of New South Wales (December 23, 1930).

* Present: LORD SANKEY L.C., LORD BLAINESBURGH, LORD HANWORTH M.R., LORD ATKIN, and LORD RUSSELL OF KILLOWEN.

A. C.	AND PRIVY COUNCIL.	527
--------------	---------------------------	------------

The Constitution Act, 1902 (No. 32 of 1902; N. S. W.), enacted by the legislature of New South Wales consolidating and amending the constitution of that State, was amended by the Constitution (Legislative Council) Amendment Act, 1929 (No. 28 of 1929; N. S. W.), by the insertion of s. 7A. That section provided, shortly stated, that no Bill to abolish the Legislative Council should be presented to the Governor for His Majesty's assent until it had been approved by a majority of the electors voting upon a submission to them in accordance with the section; further (by sub-s. 6) that the same provision was to apply to any Bill for the repeal or amendment of the section.

In 1930 both houses of the legislature passed two Bills, one repealing s. 7A above referred to, and the other abolishing the Legislative Council. Neither of the two Bills had been approved in accordance with s. 7A.

Sect. 7A, and the provisions of the New South Wales Constitution Act, 1855 (18 & 19 Vict. c. 54), and the Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), material to powers of the legislature of the State, are set out in the judgment of the Judicial Committee.

On December 10, 1930, the first two respondents, members of the Legislative Council suing on behalf of themselves and all other members who were not defendants, brought a suit in the Supreme Court of New South Wales (in Equity) against the present appellants and the respondent Sir John Peden, the President of the Legislative Council, claiming a declaration that the two Bills could not lawfully be presented to the Governor for assent until approved by the electors in accordance with s. 7A of the Constitution Act, 1902, as amended, and for injunctions restraining the presentation of the Bills.

Upon an ex parte motion interim injunctions were granted, and the matter was adjourned for hearing by the full Court.

Upon the hearing of the motion, it was demurred to by the defendants upon the grounds (1.) that s. 7A, sub-s. 6, of the Constitution Act, 1902, was invalid; (2.) that no facts were alleged which gave the plaintiffs any ground for equitable

J. C.
1932
ATTORNEY-
GENERAL
FOR
NEW SOUTH
WALES
v.
TRETHEWAN.

528

HOUSE OF LORDS

[1932]

J. C. relief ; (3.) that having regard to the object of the suit it was
 1932 not competent.

ATTORNEY-
GENERAL
FOR
NEW SOUTH
WALES
v.
TRETHOWAN.

The full Court (Street C.J. and Ferguson, James and Owen JJ.; Long Innes J. dissenting) overruled the demurrers, and granted the declaration and injunctions prayed. The proceedings are reported at 31 S. R. (N. S. W.) 183.

The present appellants obtained leave to appeal to the High Court of Australia; the appeal was limited by the order to the questions "whether the Parliament of New South Wales has power to abolish the Legislative Council of the State, or to alter its constitution or powers, or to repeal s. 7A of the Constitution Act, 1902, except in the manner provided by the said s. 7A."

The High Court of Australia (Rich, Starke, and Dixon JJ.; Gavan Duffy C.J. and McTiernan J. dissenting) dismissed the appeal. The appeal is reported at 44 C. L. R. 394.

The grant of special leave to appeal to His Majesty in Council was limited to the questions above mentioned as being the subject of the appeal to the High Court of Australia.

1932. April 12, 14, 15, 18, 19, 21, 22, 25. *Sir Stafford Cripps K.C. and Pritt K.C.* (with them *A. C. Nesbitt*) for the appellants. The legislature of New South Wales had power to repeal s. 7A, added in 1929 to the Constitution Act, 1902, without a reference to the electors, although sub-s. 6 purported to require that there should be a reference. The sub-section was void and inoperative under s. 2 of the Colonial Laws Validity Act, 1865, as it was repugnant to the powers conferred on the legislature of the State by s. 4 of the New South Wales Constitution Act, 1855, and s. 5 of the Colonial Laws Validity Act, 1865. The legislative powers so conferred were plenary powers and, within the limits prescribed, of the same force and nature as the powers of the Imperial legislature itself: *Reg. v. Burah* (1); *Hodge v. The Queen* (2); *Powell v. Apollo Candle Co.* (3). It is said that the full power which the State legislature had by s. 4 of the Act of 1855 to alter or repeal

(1) (1878) 3 App. Cas. 889, 904. (2) (1883) 9 App. Cas. 117, 132.
 (3) (1885) 10 App. Cas. 282, 285.

A.G. New South Wales c. Trethewan, [1932] A.C. 526 (C.P.)

A. C.

AND PRIVY COUNCIL.

529

the provisions of its constitution was exhausted when a new constitution was enacted by the State legislature in 1902, and that s. 7A, sub-s. 6, was a provision as to "manner and form" within the proviso to s. 5 of the Act of 1865. The appellants dispute both these propositions. The terms of s. 4 of the Act of 1855, and the definition of "legislature" in s. 9, indicate that the powers then conferred were to apply to any substituted constitution. The Act of 1855 specifically dealt with New South Wales; the Act of 1865 was general to colonial legislatures and did not in terms limit the powers conferred in 1855. As stated in *McCawley v. The King* (1) the Act of 1865 was "explanatory legislation." The powers granted in 1855 could exist side by side with the powers granted in 1865: *Taylor v. Att.-Gen. of Queensland*. (2) The words "manner and form" in the proviso to s. 5 of the Act of 1865 therefore should not be given an effect which would diminish or fetter the powers granted by s. 4 of the Act of 1855 and confirmed by the substantive provision of s. 5 of the Act of 1865. By s. 7A, sub-s. 6, enacted in 1929, the legislature purported to "abdicate" part of the powers granted by the Imperial parliament, and the provision was consequently void for repugnancy: see dissenting judgment of Isaacs and Rich JJ. in *McCawley v. The King* (3) approved by the Privy Council upon appeal. (4) The words "manner and form" refer only to matters of procedure internal to the legislature itself; that view is supported by the use of the word "passed" not the word "made" or "enacted." The words do not include a provision making the volition of the legislature subject to the veto of a body outside the legislature. Sect. 7A cannot be regarded as making the electors part of the legislature; the definition of "legislature" in s. 1 of the Act of 1865 is not consistent with there being more than one legislature, however composed, for every kind of legislation. Further, it is a well settled principle of the constitution of the United Kingdom that parliament cannot bind its successors. That principle having been attributed to the sovereign power

(1) [1920] A.C. 691, 709.

(3) (1918) 26 C.L.R. 9, 57, 64.

(2) (1917) 23 C.L.R. 457, 475, 476.

(4) [1920] A.C. 691, 714.

J. C.

1932

ATTORNEY-
GENERAL
FOR
NEW SOUTH
WALES
v.
TRETHOWAN.

A.G. New South Wales c. Trethewan, [1932] A.C. 526 (C.P.)

530

HOUSE OF LORDS

[1932]

J. C.
1932
ATTORNEY-
GENERAL
FOR
NEW SOUTH
WALES
v.
TRETHOWAN.

of the legislature (Dicey's Law of the Constitution, 8th ed., p. 62) was held to be inapplicable. Having regard, however, to the force and nature of the legislative powers of the State, as appearing from *Reg. v. Burah* (1), and the other cases already referred to, it is submitted that the principle applies in this case. The plenary powers which enabled the legislature of the State in 1929 to enact s. 7A enabled it in 1930 to repeal the section, and any fetter purporting to be placed upon the exercise of that power was inoperative.

W. A. Greene K.C. and *Maughan K.C.* (with them *Wilfrid Barton* and *Baillieu*) for the plaintiff-respondents. The argument for the appellants in reality is not for maintaining but for cutting down the legislative powers of a self-governing State. The question is whether s. 7A of the Act of 1902 was intra vires the legislature; no question of repugnancy arises. Under Imperial legislation the legislature of New South Wales had the same power to make laws altering the constitution of the State as to make other laws; that is to say the constitution was "flexible" not "rigid." The power of the State legislature in 1929 was derived immediately from the Constitution Act, 1902, the validity of which is undoubted. Sect. 7 of that Act specifically authorized the making of laws "concerning the Legislative Council." By s. 5 of the Colonial Laws Validity Act, 1865, the legislature had "full power to make laws respecting the constitution, powers and procedure of such legislature." Sect. 7A altered the constitution of the legislature by making the electors upon a referendum an integral element of it. They became part of the "authority competent to make laws" within the definition of "legislature" in s. 1 of the Act of 1865; that definition makes no reference to "house" or "houses." The legislative part played by a referendum is recognized in Bryce's American Constitution, 1912 ed., p. 467. If s. 7A did not alter the constitution of the legislature it altered its powers by imposing a condition to their exercise in relation to a specified matter; that was equally within s. 5 of the Act of 1865. Even if s. 7A, sub-s. 6, is not to be regarded as a valid alteration of

(1) (1878) 3 App. Cas. 889, 904.

A. C.

AND PRIVY COUNCIL.

531

the constitution or powers of the legislature it was a provision as to "manner and form" within the proviso to s. 5 of the Act of 1865, and the observance of its provisions was necessary therefore to a repeal of the section. The Act of 1855 does not affect that question. When the constitution to which it related was repealed by the Act of 1902 its operative effect was exhausted. Even if the Act is still operative at all, it must be read subject to the explanation afforded by s. 5 of the Act of 1865. The words "manner and form" in the proviso are not limited to matters of internal procedure such as are contained in standing orders; the words which follow are not consistent with that view. The section closely follows the language of 26 & 27 Vict. c. 84, s. 2, which uses the words "formalities and conditions." The word "passed" in the proviso is used, as it frequently is, as equivalent to "enacted": e.g., 26 & 27 Vict. c. 84, preamble, and s. 2; see also Todd's Parliament Government in the Colonies, 1894, p. 688. Every provision as to "manner and form" necessarily fetters the power of the legislature. The proviso relates to the whole process of turning a proposed law into a legislative enactment, and requires the fulfilment of every condition imposed by existing legislation. It applies to a law as to "manner and form" equally with any other law: *Taylor v. Att.-Gen. of Queensland*. (1) A referendum, either as a step in legislation or as a "manner and form" of enacting a law, was no innovation in Australia. Provision had been made for it in statutes of the various States enabling federation, and in s. 128 of the Federal constitution (which refers to it as the "manner" of altering the constitution); also in other State enactments. The exercise of legislative powers in a particular matter not infrequently has been made subject to a condition the performance of which is outside the power of the legislature itself: e.g., 9 Geo. 4, c. 83, s. 22; 15 & 16 Vict. c. 72, s. 78; 24 & 25 Vict. c. 67, s. 29. The judgment of the Board in *McCawley v. The King* (2) recognized that under s. 5 of the Act of 1865 a flexible constitution could by appropriate

J. C.
1932
ATTORNEY-
GENERAL
FOR
NEW SOUTH
WALES
v.
TRETHOWAN.
—

(1) 23 C. L. R. 457, 479.

(2) [1920] A. C. 691.

532

HOUSE OF LORDS

[1932]

J. C. legislation be made rigid pro tanto. The constitutional principle that parliament cannot bind its successor has never been applied to a legislature which has not sovereign but derived powers. Where a legislature of that kind purports to pass an Act having that effect, the validity of the Act depends upon the statutory powers under which it operates, not upon general principle. The object of the Colonial Laws Validity Act, 1865, was to enable representative legislatures overseas to make constitutional alterations without invoking the aid of the Imperial parliament; if s. 7A of the Act of 1902 is invalid there is a hiatus in the powers intended to be given. [Reference was made also to Jenkyns' British Rule and Jurisdiction Beyond the Seas, p. 75; Keith's Imperial Unity and the Dominions, pp. 389, 390; Keith's Sovereignty of the British Dominions, pp. 46, 47; Anson, Law Quarterly Review, vol. ii., pp. 427, 435.]

Latham K.C., Attorney-General for Australia (with him *Fullager*), intervener, supported the validity of s. 7A, including sub-s. 6, of the Constitution Act, 1902.

Sir Thomas Inskip A.-G. (with him *Wilfrid Lewis*), intervener, also supported the validity of that enactment; he deprecated the State invoking the aid of the Imperial parliament.

Pritt K.C. in reply. Sect. 7A of the Constitution Act, 1902, did not make the electors part of the legislature. If it did so a variety of legislatures could be created in the State each for a particular class of matter. The contention is inconsistent with the judgment of the Board *In re Initiative and Referendum Act* (1), as well as with the definition of legislature in s. 2 of the Act of 1865. Although the legislature could alter its powers, it could not abrogate them, wholly or in part. It is true that every provision as to "manner and form" fetters pro tanto the legislative powers, but there is a vital distinction between a provision as to the mode in which the legislature must exercise its power and a provision which deprives it of power to give effect to its intention unless an extraneous body approves.

(1) [1919] A. C. 935.

A. C.	AND PRIVY COUNCIL.	533
--------------	---------------------------	------------

May 31. The judgment of their Lordships was delivered by **J. C.**
LORD SANKEY L.C. This is an appeal by special leave from
a judgment of the High Court of Australia, dated March 16,
1931, affirming by a majority of three judges to two (Rich,
Starke and Dixon JJ. on the one hand; Gavan Duffy C.J.
and McTiernan J. dissenting) a decree made by the Supreme
Court of New South Wales, dated December 23, 1930, whereby
it was declared that a Bill to abolish the Legislative Council,
or to repeal or amend the provisions of s. 7A of the Constitution
Act, 1902, could not be presented to His Excellency the
Governor for the Royal assent until approved by the electors
in accordance with that section, and whereby several
injunctions were granted to restrain the presentation of two
Bills framed and designed to effect the above purposes until
the same had respectively been approved by the electors in
accordance with the said section.

The plaintiffs in the action are members of the Legislative
Council of New South Wales, and have sued upon behalf of
themselves and all other the members of the Legislative
Council who are not defendants. The defendants in the
action, other than Sir John Beverley Peden, are the Ministers
of the Crown of New South Wales. The said Sir John
Beverley Peden is the President of the Legislative Council,
and was a defendant in the action and is a respondent on
appeal.

The Attorney-General for England and the Attorney-
General for the Commonwealth obtained leave to intervene,
and their Lordships had the advantage of hearing their
arguments.

The question to be determined is in substance whether the
legislature of the State of New South Wales has power to
abolish the Legislative Council of the State or to alter its
constitution or powers without first taking a referendum of
the electors upon the matter. This question depends upon
the true construction and effect of certain statutes, both
Imperial and local, and, before dealing with it, it is necessary
for the sake of clearness to set out such portions of the said
statutes as are material to the present matter.

1932
ATTORNEY-
GENERAL
FOR
NEW SOUTH
WALES
v.
TRETHEWAN.

534

HOUSE OF LORDS

[1932]

J. C. The history of the legislation is concisely set out in the judgment of Dixon J. In 1853 the then Legislative Council of New South Wales, purporting to exercise a power which it possessed to establish in its stead a bicameral parliament and to confer upon it the powers and functions of that Council, passed a Bill for a Constitution Act which was reserved for the Queen's assent. That Bill contained provisions which it was beyond the powers of the Council to enact, and provisions which the Imperial authorities thought should be omitted. In 1855, an Imperial Act (18 & 19 Vict. c. 54) (1), called in New South Wales, "The Constitution Statute," was therefore passed for the purpose of enabling Her Majesty the Queen to assent to the Bill so reserved as amended by the hands of the Imperial authorities.

The Constitution Statute itself contained, amongst others, the two following sections :—

"Section 4.—It shall be lawful for the legislature of New South Wales to make laws altering or repealing all or any of the provisions of the said reserved Bill, in the same manner as any other laws for the good government of the said colony, subject, however, to the conditions imposed by the said reserved Bill on the alteration of the provisions thereof in certain particulars, until and unless the said conditions shall be repealed or altered by the authority of the said legislature.

"Section 9.—In the construction of this Act the term 'Governor' shall mean the person for the time being lawfully administering the government of New South Wales ; and the word 'legislature' shall include as well the legislature to be constituted under the said reserved Bill and this Act, as any future legislature which may be established in the said colony under the powers in the said reserved Bill and this Act contained."

The Bill so amended was annexed in a schedule to the Constitution Statute, and in that statute was described as "the said reserved Bill," but it was known for many years in New South Wales as the "Constitution Act." It empowered

(1) The Short Titles Act, 1896, assigns the statute the title "the New South Wales Constitution Act, 1855."

A. C.	AND PRIVY COUNCIL.	535
--------------	--------------------	------------

the new legislature to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever, and expressly authorized it, subject to the conditions as to majorities contained in s. 36, to alter the constitution of the second chamber. From this date, therefore, the parliament of New South Wales consisted of two chambers—a Legislative Council and a Legislative Assembly—and within the colony Her Majesty had power by and with the advice and consent of the said Council and Assembly to make such laws.

By an Act in 1857 (20 Vict. No. 10) the New South Wales legislature repealed s. 36, which prescribed the majorities necessary for such alteration of the Constitution as was therein mentioned, and that Act, after being reserved for Her Majesty, received the Royal assent.

By the Colonial Laws Validity Act, 1865, which applied generally to the colonies, and therefore to New South Wales, "a representative legislature" was defined as follows: "representative legislature shall signify any colonial legislature which shall comprise a legislative body of which one-half are elected by inhabitants of the colony." The legislature of New South Wales has always been a representative legislature within this definition. Sects. 5 and 6 of the Act are as follows:—

"Section 5.—Every colonial legislature shall have and be deemed at all times to have had full power within its jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of parliament, letters patent, Order in Council, or colonial law, for the time being in force in the said colony.

"Section 6.—The certificate of the clerk or other proper officer of a legislative body in any colony to the effect that the document to which it is attached is a true copy of any colonial

J. C.
1932
ATTORNEY-
GENERAL
FOR
NEW SOUTH
WALES
v.
TRETHOWAN.
—

536

HOUSE OF LORDS

[1932]

J. C. law assented to by the Governor of such colony, or of any Bill
 1932 reserved for the signification of Her Majesty's pleasure by the
 ATTORNEY. said Governor, shall be prima facie evidence that the document
 GENERAL FOR so certified is a true copy of such law or bill, and, as the case
 NEW SOUTH may be, that such law has been duly and properly passed and
 WALES assented to, or that such Bill has been duly and properly
 v. passed and presented to the Governor; and any proclamation
 TRETHOWAN. purporting to be published by authority of the Governor in
 any newspaper in the colony to which such law or Bill shall
 relate, and signifying Her Majesty's disallowance of any such
 colonial law, or Her Majesty's assent to any such reserved
 Bill as aforesaid, shall be prima facie evidence of such
 disallowance or assent."

In the year 1902, New South Wales, by an Act, No. 32 of that year, altered its constitution, and its new constitution was defined by the new Act. "The legislature" was defined as meaning "His Majesty the King, with the advice and consent of the Legislative Council and Legislative Assembly." The powers of the legislature were set out in s. 5 of the Act, and such portion of the Constitution Act of 1855 as still remained was repealed.

It should be stated here, although perhaps rather interrupting the narrative, that it was contended on behalf of the present respondents that the effect of the 1902 Act repealing the Constitution Act of 1855 was entirely to put an end to the 1855 Act, and that therefore the purposes of s. 4 of the Constitution Statute of the same year became exhausted.

In 1929 the New South Wales Legislature enacted (Act No. 28 of that year) a new Constitution Act which subsequently received the assent of His Majesty, and is known as the Constitution (Legislative Council) Amendment Act, 1929 (New South Wales). Sect. 2 is as follows:—

"The Constitution Act, 1902, as amended by subsequent Acts, is amended by inserting next after s. 7 the following new section:—

7A.—(1.) The Legislative Council shall not be abolished nor, subject to the provisions of sub-s. 6 of this section, shall its constitution or powers be altered except in the manner

A. C.

AND PRIVY COUNCIL.

537

provided in this section. (2.) A Bill for any purpose within sub-s. 1 of this section shall not be presented to the Governor for His Majesty's assent until the Bill has been approved by the electors in accordance with this section. (3.) On a day not sooner than two months after the passage of the Bill through both houses of the legislature, the Bill shall be submitted to the electors qualified to vote for the election of members of the Legislative Assembly. Such day shall be appointed by the legislature. (4.) When the Bill is submitted to the electors the vote shall be taken in such manner as the legislature prescribes. (5.) If a majority of the electors voting approve the Bill, it shall be presented to the Governor for His Majesty's assent. (6.) The provisions of this section shall extend to any Bill for the repeal or amendment of this section, but shall not apply to any Bill for the repeal or amendment of any of the following sections of this Act, namely, ss. 13, 14, 15, 18, 19, 20, 21 and 22."

Towards the end of 1930 the Government then in power were anxious to get rid of this legislation, and they promoted two Bills for this object, both of which passed both houses of the legislature. The first Bill enacted that s. 7A above referred to was repealed, and the second Bill enacted by clause 2, sub-s. 1 : "The Legislative Council of New South Wales is abolished."

It is in respect of these two Bills that an injunction was granted restraining them from being presented to the Governor-General until they had been submitted to the electors and a majority of the electors voting had approved them.

It is now possible to state the contentions on either side.

The appellants urge : (1.) That the King, with the advice and consent of the Legislative Council and the Legislative Assembly, had full power to enact a Bill repealing s. 7A.

(2.) That sub-s. 6 of s. 7A of the Constitution Act is void, because : (a) The New South Wales legislature has no power to shackle or control its successors, the New South Wales constitution being in substance an uncontrolled constitution; (b) It is repugnant to s. 4 of the Constitution Statute of 1855;

J. C.
1932
ATTORNEY-
GENERAL
FOR
NEW SOUTH
WALES
v.
TRETHOWAN.

538

HOUSE OF LORDS

[1932]

- J. C. (c) It is repugnant to s. 5 of the Colonial Laws Validity Act,
 1932 1865.
- ATTORNEY-GENERAL FOR NEW SOUTH WALES v. TRETHOWAN.** — For the respondents it was contended : (1.) That s. 7A was a valid amendment of the constitution of New South Wales, validly enacted in the manner prescribed, and was legally binding in New South Wales.
- (2.) That the legislature of New South Wales was given by Imperial statutes plenary power to alter the constitution, powers and procedure of such legislature.
- (3.) That when once the legislature had altered either the constitution or powers and procedure, then the constitution and powers and procedure as they previously existed ceased to exist, and were replaced by the new constitution and powers.
- (4.) That the only possible limitations of this plenary power were : (a) it must be exercised according to the manner and form prescribed by any Imperial or colonial law, and (b) the legislature must continue a representative legislature according to the definition of the Colonial Laws Validity Act, 1865.
- (5.) That the addition of s. 7A to the Constitution had the effect of : (a) making the legislative body consist thereafter of the King, the Legislative Council, the Assembly and the people for the purpose of the constitutional enactments therein described, or (b) imposing a manner and form of legislation in reference to these constitutional enactments which thereafter became binding on the legislature by virtue of the Colonial Laws Validity Act, 1865, until repealed in the manner and mode prescribed.
- (6.) That the power of altering the constitution conferred by s. 4 of the Constitution Statute, 1855, must be read subject to the Colonial Laws Validity Act, 1865, and that in particular the limitation as to manner and form prescribed by the 1865 Act must be governed by subsequent amendments to the constitution, whether purporting to be made in the earlier Act or not.
- Such are the facts and such the contentions of the parties. It is obvious that these varying contentions overlap and impinge upon one another, and, indeed, each party claimed

A. C.**AND PRIVY COUNCIL.****539**

to be the protector of the rights and powers of the parliament of New South Wales, and asserted that it was his opponent who was seeking to fetter or restrict them. Many hypothetical cases were put before their Lordships, and the Board were invited to express an opinion upon many different situations which might arise, but they do not conceive it to be their duty to go outside the point involved in the case, which is really a short one—namely, whether the legislature of the State of New South Wales has power to abolish the Legislative Council of the said State, or to repeal s. 7A of the Constitution Act, 1902, except in the manner provided by the said s. 7A. It will be sufficient for this Board to decide any other question if, and when, it arises.

The answer depends in their Lordships' view entirely upon a consideration of the meaning and effect of s. 5 of the Act of 1865, read in conjunction with s. 4 of the Constitution Statute, assuming that latter section still to possess some operative effect. Whatever operative effect it may still possess must, however, be governed by and be subject to such conditions as are to be found in s. 5 of the Act of 1865 in regard to the particular kind of laws within the purview of that section. Sect. 5 is therefore the master section to consider for the purpose here in hand. It will be observed that the second sentence of the section contains an enacting part with a proviso, and it was vehemently contended by the appellants that the effect of the proviso was not to cut down the operative part of the sentence, and that any construction of the words "manner and form," which are contained in the proviso, which cut down the powers previously granted was repugnant to the power so granted. In their Lordships' opinion it is impossible to read the section as if it were contained in watertight compartments. It must be read as a whole, and read as a whole the effect of the proviso is to qualify the words which immediately precede it. The powers are granted sub modo. Reading the section as a whole, it gives to the legislature of New South Wales certain powers, subject to this, that in respect of certain laws they can only become effectual provided they have been passed

J. C.
1932
ATTORNEY-
GENERAL
FOR
NEW SOUTH
WALES
v.
TRETHOWAN.

540

HOUSE OF LORDS

[1932]

J. C. in such manner and form as may from time to time be
 required by any Act still on the statute book. Beyond that,
 the words "manner and form" are amply wide enough to
 cover an enactment providing that a Bill is to be submitted
 to the electors and that unless and until a majority of the
 electors voting approve the Bill it shall not be presented to
 the Governor for His Majesty's assent.

1932
ATTORNEY-
GENERAL
FOR
NEW SOUTH
WALES
v.
TRETHOWAN.

In their Lordships' opinion the legislature of New South Wales had power under s. 5 of the Act of 1865 to enact the Constitution (Legislative Council) Amendment Act, 1929, and thereby to introduce s. 7A into the Constitution Act, 1902. In other words, the legislature had power to alter the constitution of New South Wales by enacting that Bills relating to specified kind or kinds of legislation (e.g., abolishing the Legislative Council or altering its constitution or powers, or repealing or amending that enactment) should not be presented for the Royal assent until approved by the electors in a prescribed manner. There is here no question of repugnancy. The enactment of the Act of 1929 was simply an exercise by the legislature of New South Wales of its power (adopting the words of s. 5 of the Act of 1865) to make laws respecting the constitution, powers and procedure of the authority competent to make the laws for New South Wales.

The whole of s. 7A was competently enacted. It was intra vires s. 5 of the Act of 1865, and was (again adopting the words of s. 5) a colonial law for the time being in force when the Bill to repeal s. 7A was introduced in the Legislative Council.

The question then arises, could *that* Bill, a repealing Bill, after its passage through both chambers, be lawfully presented for the Royal assent without having first received the approval of the electors in the prescribed manner? In their Lordships' opinion, the Bill could not lawfully be so presented. The proviso in the second sentence of s. 5 of the Act of 1865 states a condition which must be fulfilled before the legislature can validly exercise its power to make the kind of laws which are referred to in that sentence. In order

A. C.

AND PRIVY COUNCIL.

541

that s. 7A may be repealed (in other words, in order that *that* particular law " respecting the constitution, powers and procedure " of the legislature may be validly made) the law for that purpose must have been passed in the manner required by s. 7A, a colonial law for the time being in force in New South Wales. An attempt was made to draw some distinction between a Bill to repeal a statute and a Bill for other purposes and between " making " laws and the word in the proviso, " passed." Their Lordships feel unable to draw any such distinctions. As to the proviso they agree with the views expressed by Rich J. in the following words : " I take the word ' passed ' to be equivalent to ' enacted.' The proviso is not dealing with narrow questions of parliamentary procedure " ; and later in his judgment : " In my opinion the proviso to s. 5 relates to the entire process of turning a proposed law into a legislative enactment, and was intended to enjoin fulfilment of every condition and compliance with every requirement which existing legislation imposed upon the process of law making."

Again, no question of repugnancy here arises. It is only a question whether the proposed enactment is *intra vires* or *ultra vires* s. 5. A Bill, within the scope of sub-s. 6 of s. 7A, which received the Royal assent without having been approved by the electors in accordance with that section, would not be a valid Act of the legislature. It would be *ultra vires* s. 5 of the Act of 1865. Indeed, the presentation of the Bill to the Governor without such approval would be the commission of an unlawful act.

In the result, their Lordships are of opinion that s. 7A of the Constitution Act, 1902, was valid and was in force when the two Bills under consideration were passed through the Legislative Council and the Legislative Assembly. Therefore these Bills could not be presented to the Governor for His Majesty's assent unless and until a majority of the electors voting had approved them.

For these reasons, their Lordships are of opinion that the judgment of the High Court dismissing the appeal from the decree of the Supreme Court of New South Wales was right

J. C.
1932
ATTORNEY-
GENERAL
FOR
NEW SOUTH
WALES
v.
TRETHOWAN.

A.G. New South Wales c. Trethewan, [1932] A.C. 526 (C.P.)

542

HOUSE OF LORDS

[1932]

J. C. and that this appeal should be dismissed with costs. In
 1932 accordance with the usual practice the interveners will not
 ATTORNEY- receive any costs. They will humbly advise His Majesty
 GENERAL accordingly.
 FOR
 NEW SOUTH
 WALES

v. Solicitors for appellants : *Light & Fulton.*
 TRETHOWAN. Solicitors for respondents : *Halsey, Lightly & Helmsley.*
 —————
 Solicitors for interveners : *Treasury Solicitors ; Coward,
 Chance & Co.*

[PRIVY COUNCIL.]

J. C.* JAMES APPELLANT ;
 1932 AND
 June 21. COWAN AND OTHERS RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—Freedom of inter-State Trade—Compulsory Acquisition of Dried Fruit in South Australia—Privy Council—Competence of Appeal—Limits inter se of Constitutional Powers—Dried Fruits Act, 1924 (No. 1657 of 1924 ; South Australia), ss. 20, 28—Commonwealth of Australia Constitution Act (63 & 64 Vict. c. 12) Constitution, ss. 74, 92.

Sect. 28 of the Dried Fruits Act, 1924, of South Australia, does not authorize the Minister of Agriculture to make orders for the compulsory acquisition of dried fruits with the object of forcing the surplus of dried fruits off the Australian market, as that object involves directly, and not merely incidentally, an interference with the freedom of inter-State trade contrary to s. 92 of the Commonwealth Constitution, to which section the powers given by s. 28 of the Dried Fruits Acts are expressly subject.

James v. State of South Australia (1927) 40 C. L. R. 1 approved.

State of New South Wales v. The Commonwealth (1915) 20 C. L. R. 54 discussed.

The decision of the High Court of Australia as to the validity of the orders was not a decision as to the limits inter se of the constitutional powers of the Commonwealth and of any State or States within the meaning of s. 74 of the Commonwealth Constitution so as to render an appeal to the Privy Council incompetent in the absence of a certificate by the High Court ; that was so whether or not s. 92 of the Constitution bound the Commonwealth as well as individual States.

Jones v. Commonwealth Court of Conciliation and Arbitration [1917] A. C. 528 distinguished.

Judgment of the High Court of Australia, 43 C. L. R. 386, reversed.

* Present : LORD SANKEY L.C., LORD BLAINESBURGH, LORD HANWORTH M.R.,
 LORD ATKIN, and LORD RUSSELL OF KILLOWEN.

Onglet 88

Canada (Procureur général) c. Friends of the Canadian Wheat Board, 2012 CAF 183

Cour d'appel fédérale



Federal Court of Appeal

Date : 20120618

Dossiers : A-470-11
A-471-11

Référence : 2012 CAF 183

CORAM : LA JUGE SHARLOW
LA JUGE TRUDEL
LE JUGE MAINVILLE

Dossier : A-470-11

ENTRE :

PROCUREUR GÉNÉRAL DU CANADA, LE MINISTRE DE
L'AGRICULTURE ET DE L'AGROALIMENTAIRE, EN SA QUALITÉ
DE MINISTRE RESPONSABLE DE LA
COMMISSION CANADIENNE DU BLÉ

appelants

et

FRIENDS OF THE CANADIAN WHEAT BOARD, HAROLD BELL,
DANIEL GAUTHIER, KEN ESHPETER, TERRY BOEHM,
LYLE SIMONSON, LYNN JACOBSON, ROBERT HORNE,
WILF HARDER, LAURENCE NICHOLSON, LARRY BOHDANOVICH,
KEITH RYAN, ANDY BAKER, NORBERT VAN DEYNZE,
WILLIAM ACHESON, LUC LABOSSIÈRE, WILLIAM NICHOLSON,
RENE SAQUET et LA COMMISSION CANADIENNE DU BLÉ

intimés

et

LE CONSEIL DES CANADIENS, ETC GROUP (ACTION GROUP ON
EROSION, TECHNOLOGY AND CONCENTRATION), L'ALLIANCE DE
LA FONCTION PUBLIQUE DU CANADA et SÉCURITÉ ALIMENTAIRE
CANADA

intervenants

Canada (Procureur général) c. Friends of the Canadian Wheat Board, 2012 CAF 183

Page : 2

Dossier : A-471-11

ENTRE :

**LE MINISTRE DE L'AGRICULTURE ET DE L'AGROALIMENTAIRE,
EN SA QUALITÉ DE MINISTRE RESPONSABLE DE
LA COMMISSION CANADIENNE DU BLÉ**

appelant

et

**LA COMMISSION CANADIENNE DU BLÉ, ALLEN OBERG,
ROD FLAMAN, CAM GOFF, KYLE KORNEYCHUK,
JOHN SANDBORN, BILL TOEWS, STEWART WELLS et BILL WOODS**

intimés

et

**LE CONSEIL DES CANADIENS, ETC GROUP (ACTION GROUP ON
EROSION, TECHNOLOGY AND CONCENTRATION), L'ALLIANCE DE
LA FONCTION PUBLIQUE DU CANADA et SÉCURITÉ ALIMENTAIRE
CANADA**

intervenants

Audience tenue à Ottawa (Ontario), le 23 mai 2012.

Jugement rendu à Ottawa (Ontario), le 18 juin 2012.

MOTIFS DU JUGEMENT DE LA COUR :

LE JUGE MAINVILLE

Y ONT SOUSCRIT :

LA JUGE SHARLOW
LA JUGE TRUDEL

Canada (Procureur général) c. Friends of the Canadian Wheat Board, 2012 CAF 183

Cour d'appel fédérale



Federal Court of Appeal

Date : 20120618

Dossiers : A-470-11
A-471-11

Référence : 2012 CAF 183

CORAM : LA JUGE SHARLOW
LA JUGE TRUDEL
LE JUGE MAINVILLE

Dossier : A-470-11

ENTRE :

PROCUREUR GÉNÉRAL DU CANADA, LE MINISTRE DE
L'AGRICULTURE ET DE L'AGROALIMENTAIRE, EN SA QUALITÉ
DE MINISTRE RESPONSABLE DE LA
COMMISSION CANADIENNE DU BLÉ

appelants

et

FRIENDS OF THE CANADIAN WHEAT BOARD, HAROLD BELL,
DANIEL GAUTHIER, KEN ESHPETER, TERRY BOEHM,
LYLE SIMONSON, LYNN JACOBSON, ROBERT HORNE,
WILF HARDER, LAURENCE NICHOLSON, LARRY BOHDANOVICH,
KEITH RYAN, ANDY BAKER, NORBERT VAN DEYNZE,
WILLIAM ACHESON, LUC LABOSSIÈRE, WILLIAM NICHOLSON,
RENE SAQUET et LA COMMISSION CANADIENNE DU BLÉ

intimés

et

LE CONSEIL DES CANADIENS, ETC GROUP (ACTION GROUP ON
EROSION, TECHNOLOGY AND CONCENTRATION), L'ALLIANCE DE
LA FONCTION PUBLIQUE DU CANADA et SÉCURITÉ ALIMENTAIRE
CANADA

intervenants

Canada (Procureur général) c. Friends of the Canadian Wheat Board, 2012 CAF 183

Page : 2

Dossier : A-471-11

ENTRE :

**LE MINISTRE DE L'AGRICULTURE ET DE L'AGROALIMENTAIRE,
EN SA QUALITÉ DE MINISTRE RESPONSABLE DE
LA COMMISSION CANADIENNE DU BLÉ**

appellant

et

**LA COMMISSION CANADIENNE DU BLÉ, ALLEN OBERG,
ROD FLAMAN, CAM GOFF, KYLE KORNEYCHUK,
JOHN SANDBORN, BILL TOEWS, STEWART WELLS et BILL WOODS**

intimés

et

**LE CONSEIL DES CANADIENS, ETC GROUP (ACTION GROUP ON
EROSION, TECHNOLOGY AND CONCENTRATION), L'ALLIANCE DE
LA FONCTION PUBLIQUE DU CANADA et SÉCURITÉ ALIMENTAIRE
CANADA**

intervenants

MOTIFS DU JUGEMENT

LE JUGE MAINVILLE

[1] Les présents appels ont trait aux ordonnances datées du 7 décembre 2011 par lesquelles le juge Campbell de la Cour fédérale (le juge de la Cour fédérale) a déclaré, pour les motifs publiés sous la référence 2011 CF 1432 (les motifs), que le ministre de l'Agriculture et de l'Agroalimentaire (le ministre) avait violé l'obligation que lui imposait l'article 47.1 de la *Loi sur la Commission canadienne du blé*, L.R.C. 1985, ch. C-24 (la Loi sur la CCB), soit de consulter la Commission canadienne du blé (la CCB) et d'obtenir le consentement des producteurs de blé et d'orge au moyen d'un scrutin avant de présenter au Parlement le projet de

loi C-18, qui s'était soldé par l'adoption de la *Loi sur le libre choix des producteurs de grains en matière de commercialisation*, L.C. 2011, ch. 25.

[2] Les présents appels ont été regroupés et ont fait l'objet d'une audition accélérée à la suite d'ordonnances du juge en chef datées respectivement du 14 et du 17 février 2012. La CCB n'a pas pris part aux appels. Les intervenants ont obtenu l'autorisation d'intervenir dans le cadre de deux questions par ordonnance de notre Cour datée du 16 avril 2012. Des requêtes en annulation ou, subsidiairement, en suspension, ont été rejetées à l'audience avant l'audition des appels, le 23 mai 2012. Les présents motifs du jugement de la Cour portent sur les deux appels, et une copie sera versée dans chacun des dossiers de la Cour et y tiendra lieu de motifs.

[3] Les présents appels s'inscrivent dans le cadre d'une série d'instances contestant la *Loi sur le libre choix des producteurs de grains en matière de commercialisation*.

[4] La première instance a été engagée par les Amis de la Commission canadienne du blé et un certain nombre d'individus producteurs de blé et d'orge qui ont présenté une demande de contrôle judiciaire devant la Cour fédérale en juin 2011, sous le numéro de dossier T-1057-11. La CCB et certains de ses administrateurs ont présenté eux aussi une demande de contrôle judiciaire distincte en octobre 2011, sous le numéro de dossier T-1735-11. Même si la formulation était légèrement différente dans chaque demande, les jugements déclaratoires que sollicitaient tous les demandeurs étaient essentiellement les mêmes :

- a) un jugement déclarant que le ministre a violé l'obligation, imposée par l'article 47.1 de la Loi sur la CCB, de consulter la CCB et d'obtenir le consentement des producteurs de blé et d'orge par la voie d'un scrutin tenu avant de déposer au Parlement le projet de loi C-18;
- b) un jugement déclarant que le ministre a agi contrairement aux attentes légitimes de la CCB et des producteurs de blé et d'orge, ainsi qu'au devoir d'équité procédurale, en déposant ce projet de loi au Parlement sans avoir préalablement consulté la CCB et tenu un scrutin parmi les producteurs de blé et d'orge.

Ces demandes de contrôle judiciaire ont été entendues et tranchées ensemble par le juge de la Cour fédérale, et ce sont les ordonnances rendues par la suite qui font maintenant l'objet du présent appel.

[5] Se fondant sur les jugements que le juge de la Cour fédérale a rendus à la suite de ces deux demandes de contrôle judiciaire, un certain nombre d'anciens administrateurs de la CCB ont déposé une déclaration à la Cour du Banc de la Reine du Manitoba en vue d'obtenir des jugements déclaratoires portant que la *Loi sur le libre choix des producteurs de grains en matière de commercialisation* était invalide et portait atteinte au principe de la primauté du droit, à la *Loi constitutionnelle de 1867* ainsi qu'à la *Loi constitutionnelle de 1982*, au motif que cette nouvelle loi découlait d'actes illégaux de la part du ministre.

[6] Dans le cadre de l'instance engagée au Manitoba, une ordonnance interlocutoire a également été demandée en vue de faire suspendre rétroactivement l'application et la mise en œuvre de la *Loi sur le libre choix des producteurs de grains en matière de commercialisation* à compter de la date de la sanction royale, en attendant qu'une décision soit rendue sur la validité de cette loi. Le juge Perlmutter a refusé d'accorder une telle ordonnance et les motifs de cette

décision, datée du 24 février 2012, sont publiés sous la référence *Oberg et al. c. Canada (Attorney General)*, 2012 MBQB 64. Ce jugement est actuellement en appel devant la Cour d'appel du Manitoba.

[7] Également dans la foulée des jugements déclaratoires du juge de la Cour fédérale, un recours collectif envisagé a été déposé en février 2012 auprès de la Cour fédérale (T-356-12) pour le compte de producteurs de grains qui vendaient leurs produits par l'entremise de la CCB en vue d'obtenir : a) une ordonnance suspendant rétroactivement l'application et la mise en œuvre de la *Loi sur le libre choix des producteurs de grains en matière de commercialisation* à compter de la date de la sanction royale; b) un jugement déclarant que le fait que le ministre a omis de consulter les producteurs de grains et de tenir parmi eux un scrutin avant de déposer le projet de loi au Parlement violait l'alinéa 2b) (liberté de penser, de croyance, d'opinion et d'expression) et l'alinéa 2d) (liberté d'association) de la *Charte canadienne des droits et libertés* (la Charte); et c) des dommages-intérêts substantiels de la Couronne fédérale. Cette action est en instance elle aussi.

[8] C'est donc dans cette conjoncture hautement litigieuse qu'il faut trancher le présent appel.

Le contexte de la présente instance

[9] La commercialisation du grain de blé de l'Ouest canadien a un historique long et tumultueux, caractérisé par de vives tensions entre les tenants des libres marchés, des syndicats

de mise en marché collective volontaire et du rôle que joue la CCB en tant qu'office de commercialisation obligatoire. Pour un compte rendu détaillé de cet historique, on peut consulter les ouvrages suivants : F. Wilson, *A Century of Canadian Grain, Government Policy to 1951* (Western Producer Prairie Books, Saskatoon, 1978), Vernon C. Fowke, *The National Policy and the Wheat Economy* (University of Toronto Press, Toronto, 1957), et Vernon C. Fowke, *Canadian Agricultural Policy, The Historical Pattern* (University of Toronto Press, 1946, ouvrage réédité en 1978).

[10] La CCB a été créée en 1935 par une loi du Parlement, la *Loi pourvoyant à la constitution et aux attributions de la Commission canadienne du blé*, 25-26 George V, ch. 53. Les pouvoirs et le mandat de la CCB ont nettement évolué depuis cette époque grâce à de nombreuses modifications législatives ainsi qu'à maints règlements et décrets.

[11] De nos jours, les activités de la CCB concernent principalement le blé et l'orge produits dans une « région désignée » qui, d'après la définition qui en est donnée au paragraphe 2(1) de la Loi sur la CCB, englobe le Manitoba, la Saskatchewan et l'Alberta ainsi que la partie de la province de la Colombie-Britannique connue sous le nom de district de Peace River.

[12] Les activités de la CCB ont été régies, pendant la majeure partie de son histoire, par quatre principes fondamentaux :

- a) le monopole de la commercialisation des grains : sous réserve de certaines exceptions réglementaires, comme les grains entrant dans la fabrication d'aliments pour animaux, la partie IV de la Loi sur la CCB interdit à quiconque, autre que la CCB, de se livrer à la vente du blé et d'autres

grains désignés qui sont destinés à être exportés à l'étranger ou consommés au Canada;

- b) la mise en commun obligatoire des prix : les producteurs de grains livrent leurs récoltes à la Commission par l'entremise de « points de mise en commun », conformément à la partie III de la Loi sur la CCB; dans le cadre du système de mise en commun, chaque producteur reçoit un versement intérimaire (fondé sur les rendements estimatifs du marché) pour les mêmes grains livrés, quel que soit le moment de la livraison, et il a droit, pour ces grains, à un versement final fondé sur les prix réels que la CCB a obtenus pendant toute l'année de mise en commun, déduction faite des dépenses connexes;
- c) les garanties financières du gouvernement fédéral : y compris : (i) les garanties contre les pertes subies par la CCB dans le cas des opérations visées à la partie III de la Loi sur la CCB, relativement à toute période de mise en commun, ainsi que d'autres opérations au cours de n'importe quelle campagne agricole (paragraphe 7(3) de la Loi sur la CCB), et (ii) des garanties d'emprunt (paragraphe 19(5) de la Loi sur la CCB);
- d) le contrôle exercé par le gouvernement fédéral : depuis sa création, et jusqu'en 1998, la CCB a été soumise au contrôle de commissaires nommés par le gouverneur en conseil; elle agissait comme mandataire de la Couronne et était liée par les instructions que lui donnait le cabinet fédéral.

[13] L'effet combiné du monopole de commercialisation des grains de la CCB et du système de mise en commun obligatoire des prix est appelé dans le langage courant, ainsi que dans les présents motifs, le « guichet unique ».

[14] En 1998, le Parlement a délégué une partie du contrôle de la CCB aux producteurs de grains conformément à la *Loi modifiant la Loi sur la Commission canadienne du blé et d'autres lois en conséquence*, L.C. 1998, ch. 17 (les modifications de 1998). Dans la même foulée, le conseil d'administration de la CCB a été élargi en vue d'inclure quatre administrateurs et un président nommés par le gouverneur en conseil, de même que dix autres administrateurs élus par

les producteurs en fonction de la représentation géographique : les articles 3.01, 3.02, 3.06 et 3.07 de la Loi sur la CCB, intégrés dans cette loi par l'article 3 des modifications de 1998. La CCB a ensuite cessé d'être un mandataire de la Couronne et il a été déclaré qu'elle n'était pas une société d'État : le paragraphe 4(2) de la Loi sur la CCB, remplacé par l'article 4 des modifications de 1998. Elle a continué d'être soumise aux instructions du cabinet fédéral, mais les administrateurs n'étaient pas responsables des conséquences de leur mise en œuvre : l'article 18 de la Loi sur la CCB, modifié par l'article 10 des modifications de 1998.

[15] Le paragraphe 24(1) et l'article 25 des modifications de 1998 ont également remplacé les dispositions antérieures de la Loi sur la CCB concernant l'exclusion de certains types et grades de blé et d'orge du monopole de commercialisation des grains. Ils ont été remplacés par une nouvelle disposition, l'article 47.1 de la Loi sur la CCB, qui crée une obligation de consulter la CCB et d'obtenir le vote favorable des producteurs avant qu'un projet de loi proposant une telle exclusion puisse être déposé au Parlement. Cette disposition est au cœur du présent appel et fait ci-après l'objet d'une analyse détaillée.

[16] Ces dernières années, la controverse régnant chez les producteurs de grains de l'Ouest canadien à propos du mandat et des pouvoirs de la CCB s'est intensifiée. De nombreux producteurs sont à la recherche d'une solution qui leur permettrait de vendre leurs grains de blé et d'orge sur le marché libre. S'opposent vivement à ce changement les tenants du guichet unique, dont font partie de nombreux administrateurs de la CCB et plusieurs producteurs de grains. En 2006, la situation était telle que le gouverneur en conseil a donné instruction à la CCB de ne pas engager de fonds pour prôner le maintien de ses pouvoirs monopolistiques :

DORS/2006-247 (examiné par notre Cour dans l'arrêt *Canada (Commission canadienne du blé) c. Canada (Procureur général)*, 2009 CAF 214, [2010] 3 R.C.F. 374).

[17] L'actuel gouvernement fédéral favorise lui aussi un marché libre pour la commercialisation des grains. Peu après la dernière élection générale fédérale, tenue le 2 mai 2011, le ministre a publiquement annoncé que le gouvernement réélu irait rapidement de l'avant pour permettre aux producteurs de grains de l'Ouest de commercialiser librement leurs grains. Dans le discours du Trône prononcé devant le Parlement le 3 juin 2011, le gouvernement a officiellement annoncé que l'on présenterait au cours de la session parlementaire un projet de loi qui « donnera aux producteurs de l'Ouest canadien la liberté de vendre leurs récoltes de blé et d'orge sur le marché libre » (dossier d'appel, à la page 516).

[18] De nombreux producteurs de grains, et un certain nombre d'administrateurs de la CCB, se sont opposés au projet de loi et ont fait publiquement part de leur désaccord. Même si ce sont des aspects d'ordre financier et économique qui se situent au cœur du présent litige, les tenants du guichet unique ont rapidement mis l'accent sur la question de la consultation et du consentement. S'appuyant sur leur interprétation de l'article 47.1 de la Loi sur la CCB, ils ont soutenu que le ministre ne pouvait pas présenter le projet de loi au Parlement sans obtenir au préalable, par voie de scrutin, le consentement des producteurs de grains. Le ministre a exprimé l'avis qu'il n'était pas légalement obligé de tenir un tel scrutin et qu'il ne soumettrait pas la loi envisagée à un tel plébiscite.

[19] Un scrutin des producteurs a néanmoins été organisé au cours de l'été de 2011 sous les auspices de la CCB qui, semble-t-il, était alors soumise au contrôle des administrateurs opposés à la nouvelle loi. Les moyens utilisés pour organiser le plébiscite ont été critiqués, et la légitimité et l'équité du scrutin ont été mises en doute par ceux appuyant l'initiative gouvernementale. Les résultats du scrutin ont été annoncés le 12 septembre 2011. La participation avait été de 56 % et, parmi ceux qui avaient voté, 62 % des producteurs de blé et 51 % des producteurs d'orge avaient opté pour le maintien du guichet unique, tandis que 38 % des producteurs de blé et 49 % des producteurs d'orge avaient opté pour un système de libre marché. Le ministre a refusé de reconnaître que les résultats du plébiscite étaient contraignants.

[20] Le 18 octobre 2011, le ministre a présenté au Parlement le projet de loi C-18, qui a mené à l'adoption éventuelle de la *Loi sur le libre choix des producteurs de grains en matière de commercialisation*. Le projet de loi a été débattu à la Chambre des communes et au Sénat, et il a finalement été adopté par les deux chambres. Il a obtenu la sanction royale le 15 décembre 2011.

La Loi sur le libre choix des producteurs de grains en matière de commercialisation

[21] La *Loi sur le libre choix des producteurs de grains en matière de commercialisation* modifie dans une large mesure le contexte législatif de la commercialisation du blé et de l'orge de l'Ouest, mais il le fait en trois phases distinctes.

[22] Au cours de la première phase, qui s'étend depuis la date de la sanction royale (le 18 octobre 2011) jusqu'au 1^{er} août 2012, le guichet unique et la plupart des dispositions de la Loi sur la CCB sont maintenus, sous réserve des changements suivants :

- a) les producteurs sont en mesure de conclure des contrats de vente de blé et d'orge à terme pour livraison après le 1^{er} août 2012 : article 11 de la *Loi sur le libre choix des producteurs de grains en matière de commercialisation* ajoutant le paragraphe 42(2) à la Loi sur la CCB;
- b) le contrôle de la CCB est confié à un nouveau conseil formé de cinq administrateurs nommés par le gouverneur en conseil : articles 2 à 6, 10 et 12 de la *Loi sur le libre choix des producteurs de grains en matière de commercialisation*.

[23] La deuxième phase comprendra la période de cinq ans s'étendant du 1^{er} août 2012 au 1^{er} août 2017. Le 1^{er} août 2012, la Loi sur la CCB sera abrogée : articles 39 et 40 de la *Loi sur le libre choix des producteurs de grains en matière de commercialisation*. Dans sa foulée, entrera en vigueur la *Loi sur la Commission canadienne du blé (activités en période intérimaire)* : articles 14 et 40 de la *Loi sur le libre choix des producteurs de grains en matière de commercialisation*, et TR/2011-120. La *Loi sur la Commission canadienne du blé (activités en période intérimaire)* est une loi temporaire qui sera pleinement en vigueur pendant une période maximale de cinq ans : articles 42, 45, 46, 55, 56 et 64 de la *Loi sur le libre choix des producteurs de grains en matière de commercialisation*.

[24] Durant les cinq années que durera la deuxième phase, la CCB continuera d'être soumise à la gouvernance de cinq administrateurs nommés par le gouverneur en conseil, ce qui ramène donc la CCB à un contrôle gouvernemental complet : articles 8, 9, 13 et 25 de la *Loi sur la Commission canadienne du blé (activités en période intérimaire)*. Les activités de la CCB seront

également substantiellement modifiées. Elle continuera de bénéficier des garanties gouvernementales durant la période intérimaire : paragraphes 19(3), 26(5) et 26(6) de la *Loi sur la Commission canadienne du blé (activités en période intérimaire)*, et elle recourra encore au système de mise en commun des prix, même si ces mises en commun ne seront plus obligatoires pour les producteurs : articles 28, 29 et 33 de la *Loi sur la Commission canadienne du blé (activités en période intérimaire)*. Par ailleurs, le monopole du commerce interprovincial et d'exportation qu'exerçait la CCB cessera d'exister. De ce fait, les producteurs de blé et d'orge pourront vendre et livrer leurs grains à n'importe quel acheteur intérieur ou exportateur selon le principe du libre marché. En conséquence, même si la CCB continuera d'exister, elle exercera ses activités dans un contexte de marché et agira à titre d'organisme de commercialisation et de mise en marché volontaire pour les producteurs qui souhaiteront continuer de commercialiser leurs produits par son intermédiaire.

[25] La troisième phase est la période qui suit le 1^{er} août 2017. À cette date, la CCB sera soit maintenue sous la forme d'une société privatisée, soit liquidée. Il lui faudra présenter au ministre avant le 1^{er} août 2016 une demande de prorogation en vertu de l'une des trois lois suivantes : la *Loi canadienne sur les sociétés par actions*, L.R.C. 1985, ch. C-44, la *Loi canadienne sur les coopératives*, L.C. 1998, ch. 1, ou la *Loi canadienne sur les organisations à but non lucratif*, L.C. 2009, ch. 23. Cette demande sera vraisemblablement assortie d'un nouveau plan de mise en marché et de commercialisation pour ses activités à venir. Si cette demande est approuvée par le ministre, la CCB pourra continuer d'exister sous le régime de l'une de ces trois lois à titre d'entité privatisée. À défaut de cette approbation et de cette prorogation, la CCB sera liquidée :

articles 42 et 45 à 55 de la *Loi sur le libre choix des producteurs de grains en matière de commercialisation*.

La question de fond

[26] La question de fond que soulève le présent appel consiste à savoir si le ministre était légalement tenu par l'article 47.1 de la Loi sur la CCB de consulter la CCB et d'obtenir par voie de scrutin le consentement des producteurs de grains de blé et d'orge avant de déposer au Parlement le projet de loi C-18, intitulé *Loi sur le libre choix des producteurs de grains en matière de commercialisation*. Nul ne conteste que la norme de contrôle en fonction de laquelle cette question doit être tranchée est celle de la décision correcte.

[27] Le texte de l'article 47.1 de la Loi sur la CCB est le suivant :

47.1 Il ne peut être déposé au Parlement, à l'initiative du ministre, aucun projet de loi ayant pour effet, soit de soustraire quelque type, catégorie ou grade de blé ou d'orge, ou le blé ou l'orge produit dans telle région du Canada, à l'application de la partie IV, que ce soit totalement ou partiellement, de façon générale ou pour une période déterminée, soit d'étendre l'application des parties III et IV, ou de l'une d'elles, à un autre grain, à moins que les conditions suivantes soient réunies :

a) il a consulté le conseil au sujet de la mesure;

47.1 The Minister shall not cause to be introduced in Parliament a bill that would exclude any kind, type, class or grade of wheat or barley, or wheat or barley produced in any area in Canada, from the provisions of Part IV, either in whole or in part, or generally, or for any period, or that would extend the application of Part III or Part IV or both Parts III and IV to any other grain, unless

(a) the Minister has consulted with the board about the exclusion or extension; and

b) les producteurs de ce grain ont voté – suivant les modalités fixées par le ministre – en faveur de la mesure.

(b) the producers of the grain have voted in favour of the exclusion or extension, the voting process having been determined by the Minister.

[28] Les appellants soutiennent que l'article 47.1 ne s'applique qu'aux cas où il est question d'étendre l'application des parties III ou IV à des grains en particulier ou de soustraire certains grains à l'application de ces parties, et non aux initiatives législatives abrogeant le guichet unique ou la Loi sur la CCB dans son intégralité, comme le fait la *Loi sur le libre choix des producteurs de grains en matière de commercialisation*. Ils ajoutent que, en tout état de cause, l'article 47.1 n'est pas comme tel une disposition « de forme » qui assortit d'exigences procédurales la capacité du Parlement d'adopter une loi, et qu'il ne peut donc pas être appliqué par les tribunaux en raison du principe de la souveraineté du Parlement qui est reflété au paragraphe 2(2) de la *Loi sur les Cours fédérales*, L.R.C. 1985, ch. F-7.

[29] En revanche, les intimés, avec le soutien des intervenants, font valoir que cette disposition – introduite dans la Loi sur la CCB dans le cadre des réformes législatives de 1998 – s'applique à toutes les lois susceptibles de mener, directement ou indirectement, à l'exclusion du blé ou de l'orge du guichet unique, ce qui inclut les initiatives législatives telles que la *Loi sur le libre choix des producteurs de grains en matière de commercialisation*, qui mettent fin au guichet unique ou abrogent dans son intégralité la Loi sur la CCB.

[30] Je signale que, à titre d'argument subsidiaire, les intimés ont également fait valoir devant la Cour fédérale que le ministre était tenu, en vertu du principe des attentes légitimes, de

consulter la CCB et les producteurs de grains avant de déposer la *Loi sur le libre choix des producteurs de grains en matière de commercialisation*. Le juge de la Cour fédérale n'a accordé aucun redressement à cet égard et les intimés n'ont pas soulevé ce point dans le présent appel. Les appétants ont demandé à la Cour de trancher la question des attentes légitimes, mais les intimés nous ont avisés par l'entremise de leur avocat, lors de l'audition du présent appel, qu'ils n'avaient plus aucun argument à présenter à ce sujet. J'ai de sérieuses réserves quant à l'applicabilité du principe des attentes légitimes aux processus parlementaires, compte tenu des observations du juge Sopinka, s'exprimant au nom de la Cour suprême du Canada dans l'arrêt *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525, aux pages 558 à 560. Cependant, comme les intimés ont laissé tomber la question, il n'est pas nécessaire pour la Cour de l'examiner.

Les motifs du juge de la Cour fédérale

[31] Le juge de la Cour fédérale a refusé de prendre en considération l'argument du ministre selon lequel l'article 47.1 de la Loi sur la CCB ne répondait pas aux critères d'une disposition « de forme ». Selon lui, la question ne pouvait être tranchée en l'absence d'un avis de question constitutionnelle contestant la validité constitutionnelle, l'applicabilité ou l'effet de cet article. De ce fait, il a tranché les demandes de contrôle judiciaire dont il était saisi en tenant pour acquis que l'article 47.1 était une disposition « de forme » valide : paragraphes 9 et 10 des motifs.

[32] Le juge de la Cour fédérale semble avoir implicitement reconnu que le texte de l'article 47.1, interprété de façon littérale, n'envisage que les cas où il est question d'étendre

Page : 16

l'application de certains aspects du régime de commercialisation de la CCB à un type ou grade de grain particulier ou bien de soustraire un type ou grade de grain particulier à ce régime. Cependant, s'appuyant sur « une approche historique et contextuelle de la nature démocratique unique de la CCB et de l'importance de cet organisme » (paragraphe 27 des motifs) et « accord[ant] du poids à l'argument du Conseil voulant que l'article 47.1 s'applique au changement de la structure de la CCB, parce que l'aspect démocratique de cette structure revêt une importance dans le contexte des obligations en matière de commerce international du Canada au titre de l'ALÉNA » (paragraphe 28 des motifs), le juge de la Cour fédérale a tiré la conclusion suivante :

[30] En retenant une interprétation libérale de la Loi qui est compatible avec (*sic*) réalisation de son objet, je conclus que la Loi visait à exiger du ministre qu'il procède à une consultation et qu'il obtienne le consentement des producteurs dans les cas où il envisage l'inclusion ou l'exclusion de grains ou de types de grain au régime de commercialisation, ainsi que la modification à la structure démocratique de la CCB. Conformément à ce que prétendent les demandeurs, il est déraisonnable d'interpréter la Loi de manière à conclure que, bien que le ministre doive consulter et obtenir le consentement des producteurs lorsqu'il exclut ou inclut un grain, ce dernier n'a pas une telle obligation à l'égard du démantèlement de la CCB. Voici l'argument en ce sens :

[TRADUCTION] [...] Selon l'interprétation que le ministre donne à l'article 47.1, les agriculteurs n'auraient pas le droit de vote « dans le cas où ce vote est le plus nécessaire », soit dans des circonstances où le pouvoir exclusif de la CCB en matière de commercialisation serait aboli. Non seulement cette interprétation est incompatible avec le principe que les mots d'une disposition doivent être remis dans leur contexte, mais elle va à l'encontre du bon sens.

(Mémoire des faits et du droit des demandeurs au dossier T-1735-11, paragraphe 52.)

[Non souligné dans l'original.]

[31] L'article 39 du projet de loi C-18 propose de remplacer l'ensemble du régime de commercialisation du blé au Canada par l'abrogation de la Loi, après une période de transition. À mon avis, le législateur voulait (*sic*), en présentant l'article 47.1, empêcher qu'une telle situation se produise si l'on n'avait pas au préalable tenu une consultation et obtenu le consentement des (*sic*) producteurs.

[Souligné dans l'original.]

Analyse

[33] Se fondant sur le sens ordinaire de la Loi sur la CCB, le juge Perlmutter de la Cour du Banc de la Reine du Manitoba a conclu que l'article 47.1 ne portait que sur la question d'étendre l'application des parties III ou IV de cette loi à certains grains, ou de soustraire certains grains à l'application de ces parties, et qu'il n'obligeait donc pas le ministre à consulter la CCB ou à tenir un scrutin parmi les producteurs de grains avant de déposer au Parlement un projet de loi qui change fondamentalement la structure de gouvernance ou le mandat de la CCB, ou qui abroge la Loi sur la CCB dans son ensemble : *Oberg et al. c. Canada (Attorney General)*, précité, au paragraphe 15. La question dont la Cour est saisie consiste à savoir s'il convient d'aller au-delà de cette simple lecture de la disposition et de souscrire au sens élargi que lui a donné le juge de la Cour fédérale, de façon à garantir que les producteurs de blé et d'orge exercent un contrôle sur tous les changements législatifs fondamentaux que l'on apporte à la Loi sur la CCB.

[34] Adoptant à cette fin les arguments des intimés, le juge de la Cour fédérale a exprimé l'avis qu'il convenait d'interpréter de manière aussi large l'article 47.1 en raison : a) de son historique législatif; b) des commentaires faits par le ministre fédéral précédent à l'époque où les modifications de 1998 étaient envisagées; c) de la nécessité de promouvoir le contrôle démocratique des producteurs de grains sur la CCB; et d) de l'importance de la structure

Page : 18

démocratique de la CCB pour les obligations en matière de commerce international du Canada sous le régime de l'ALENA. Les intervenants ajoutent dans le présent appel un cinquième aspect, soit : e) la promotion de la capacité des producteurs de grains d'agir collectivement sur le plan de la commercialisation des grains, compte tenu de la liberté d'association que leur garantit l'alinéa 2d) de la Charte.

[35] Après avoir examiné avec soin l'historique législatif de l'article 47.1 et le contexte dans lequel il a été adopté, je suis d'avis qu'aucun des arguments des intimés ou des intervenants ne peut soutenir une interprétation qui empêcherait le ministre de présenter au Parlement un projet de loi qui modifierait fondamentalement le mandat de la CCB ou qui mènerait à l'abrogation de la Loi sur la CCB. J'arrive à cette conclusion en appliquant la méthode moderne d'interprétation législative, et après avoir examiné et rejeté les arguments invoqués en faveur d'une interprétation large de l'article 47.1.

La méthode moderne d'interprétation législative

[36] La méthode moderne d'interprétation législative a été exprimée en ces termes par le juge Iacobucci dans l'arrêt *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, au paragraphe 21 :

Bien que l'interprétation législative ait fait couler beaucoup d'encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3^e éd. 1994) (ci-après « *Construction of Statutes* »); Pierre-André Côté, *Interprétation des lois* (2^e éd. 1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2^e éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

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

Parmi les arrêts récents qui ont cité le passage ci-dessus en l’approuvant, mentionnons : *R. c. Hydro-Québec*, [1997] 3 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

[37] La juge en chef McLachlin et le juge Major ont repris cette méthode dans l’arrêt *Hypothèques Trustco Canada c. Canada*, [2005] 2 R.C.S. 601, 2005 CSC 54, au paragraphe 10 :

Il est depuis longtemps établi en matière d’interprétation des lois qu’« il faut lire les termes d’une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s’harmonise avec l’esprit de la loi, l’objet de la loi et l’intention du législateur » : voir *65302 British Columbia Ltd. c. Canada*, [1999] 3 R.C.S. 804, par. 50. L’interprétation d’une disposition législative doit être fondée sur une analyse textuelle, contextuelle et téléologique destinée à dégager un sens qui s’harmonise avec la Loi dans son ensemble. Lorsque le libellé d’une disposition est précis et non équivoque, le sens ordinaire des mots joue un rôle primordial dans le processus d’interprétation. Par contre, lorsque les mots utilisés peuvent avoir plus d’un sens raisonnable, leur sens ordinaire joue un rôle moins important. L’incidence relative du sens ordinaire, du contexte et de l’objet sur le processus d’interprétation peut varier, mais les tribunaux doivent, dans tous les cas, chercher à interpréter les dispositions d’une loi comme formant un tout harmonieux.

[38] C’est donc dire que, selon la méthode contextuelle moderne d’interprétation législative, le sens grammatical et ordinaire d’une disposition n’en détermine pas forcément le sens. Il faut tenir compte non seulement du sens ordinaire et naturel des mots, mais aussi du contexte dans lequel ceux-ci sont employés et de l’objet de la disposition considérée comme un tout dans le régime législatif dont elle fait partie : *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42, au paragraphe 27. L’élément le plus important de cette

analyse est la détermination de l'intention du législateur : *R. c. Monney*, [1999] 1 R.C.S. 652, au paragraphe 26.

[39] Notre Cour a expliqué comme suit le concept de l'intention du législateur dans l'arrêt *Felipa c. Canada (Citoyenneté et Immigration)*, 2011 CAF 272, [2012] 1 R.C.F 3, au paragraphe 31, citant en y souscrivant, à cette fin, lord Nicholls dans l'arrêt *Regina v. Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd.*, [2001] 2 A.C. 349 (H.L.), à la page 396 :

[TRADUCTION] Les tribunaux, lorsqu'ils interprètent les lois, doivent cerner le sens des mots en cause en tenant compte du contexte. Il a souvent été répété qu'il incombe alors aux tribunaux d'établir l'intention du législateur exprimée dans le libellé en cause. C'est juste et cela peut se révéler utile tant et aussi longtemps que l'on garde à l'esprit que « l'intention du législateur » est une notion objective et non subjective. Cette expression renvoie en peu de mots à l'intention que les tribunaux peuvent raisonnablement imputer au législateur compte tenu du libellé employé. Il ne s'agit pas de l'intention subjective du ministre ou des autres personnes qui ont milité en faveur de la loi. Il ne s'agit pas non plus de l'intention subjective du rédacteur ni de celle d'un membre ou d'une majorité de membres de l'une ou l'autre des chambres. Ces personnes ont bien souvent des intentions très différentes. Leur compréhension de la loi et des mots employés peut être excellente ou terriblement déficiente. Par conséquent, lorsque les tribunaux affirment que tel sens « ne peut pas représenter l'intention du législateur », tout ce qu'ils veulent dire c'est que le législateur ne peut pas raisonnablement avoir utilisé les mots en cause dans ce sens. Comme lord Reid l'a affirmé dans l'arrêt *Black-Clawson International Ltd c. Papierwerke Waldhof-Aschaffenburg A G* [1975] A.C. 591, 613 :

Nous affirmons souvent que nous tentons d'établir l'intention du législateur, mais ce n'est pas tout à fait exact. Nous tentons plutôt d'établir le sens des mots employés par le législateur.

[Non souligné dans l'original]

[40] Pour déterminer l'intention du législateur, le tribunal doit prendre en considération le contexte tout entier de la disposition à interpréter, même si, après une première lecture faite isolément, le sens de son libellé peut sembler évident. Il importe toutefois de garder à l'esprit qu'il existe une ligne entre l'interprétation judiciaire et la rédaction législative et que cette ligne ne doit pas être franchie : *Felipa c. Canada (Citoyenneté et Immigration)*, précité, au paragraphe 32, faisant référence à l'arrêt *ATCO Gas & Pipelines Ltd. c. Alberta (Energy & Utilities Board)*, [2006] 1 R.C.S. 140, 2006 CSC 4, au paragraphe 51.

L'historique législatif

[41] Les intimés proposent une analyse de l'historique législatif de l'article 47.1 de la Loi sur la CCB qui débute et prend fin avec la réforme législative de 1998. Cependant, un examen des dispositions que cet article a remplacées jette un éclairage important sur la portée de ce dernier.

[42] La *Loi modifiant la Loi sur la Commission canadienne du blé*, 1935, 11 Geo. VI, ch. 15, art. 5, sanctionnée le 14 mai 1947 (la Loi de 1947), a intégré à la Loi sur la CCB la partie IV concernant la « réglementation du commerce interprovincial et de l'exportation du blé ». En vertu de cette partie IV, le législateur a confié à la CCB un monopole de commercialisation sur le commerce international et interprovincial du blé. En 1994, le monopole que la CCB exerçait sur le commerce international du blé a été réduit à un monopole sur les exportations de blé du Canada de façon à respecter et à mettre en œuvre l'accord conclu au terme des négociations commerciales multilatérales du Cycle d'Uruguay menées sous les auspices de

l'Organisation mondiale du commerce : *Loi de mise en œuvre de l'Accord sur l'Organisation mondiale du commerce*, S.C. 1994, ch. 47, article 48.

[43] Depuis sa création, ce monopole de commercialisation a toutefois été l'objet d'exclusions réglementaires visant certains types et grades désignés de blé, ou le blé produit dans certaines régions du Canada. Ces exclusions ont d'abord été énoncées à l'alinéa 28b) de la Loi sur la CCB, introduit dans cette dernière par la Loi de 1947 (et légèrement modifié en 1950 par 14 Geo. VI, ch. 31, art. 6). Ce pouvoir réglementaire d'exclure des types et des grades désignés de blé a été repris dans chacune des versions de la Loi sur la CCB, jusqu'aux modifications de 1998. La dernière version du pouvoir réglementaire figurait à l'alinéa 46b) de la Loi sur la CCB qui s'appliquait juste avant les modifications de 1998 :

46. Le gouverneur en conseil peut, par règlement :

[...]

b) soustraire tout type ou grade de blé, ou le blé produit dans une région donnée du Canada, à l'application de la présente partie, totalement ou partiellement, de façon générale, ou pour une période déterminée;

46. The Governor in Council may make regulations

...

(b) to exclude any kind of wheat, or any grade thereof, or wheat produced in any area of Canada, from the provisions of this Part, either in whole or in part, or generally, or for any period;

C'est donc dire que des types ou grades particuliers de blé, ou le blé produit dans une région donnée du Canada, pouvaient être exclus du monopole de la CCB en matière de commercialisation pour des périodes déterminées ou de façon générale.

[44] Dans le même ordre d'idées, en 1948, Loi sur la CCB a été modifiée par l'ajout d'une nouvelle partie (aujourd'hui la partie V) habilitant le gouverneur en conseil à étendre

l'application de la partie III (concernant le système de mise en commun obligatoire des prix) ou de la partie IV (concernant le monopole de commercialisation de la CCB sur le commerce international et interprovincial) à l'avoine et à l'orge : *Loi modifiant la Loi sur la Commission canadienne du blé*, 1935, 11 Geo. VI, ch. 4, article 5, sanctionnée le 24 mars 1948. Ces dispositions sont demeurées essentiellement les mêmes au fil des ans, et leur version la plus récente figure maintenant à l'article 47 de la Loi sur la CCB, dont le texte est le suivant :

47. (1) Le gouverneur en conseil peut, par règlement, étendre l'application de la partie III ou de la partie IV, ou des deux, à l'avoine et à l'orge, ou à l'un des deux.

(2) En cas d'application du paragraphe (1), les dispositions de la partie en cause sont réputées édictées de nouveau dans la présente partie, sous réserve de ce qui suit :

a) le terme « avoine » ou « orge », selon le cas, est substitué au terme « blé »;

b) le terme « produits de l'avoine » ou « produits de l'orge », selon le cas, est substitué au terme « produits du blé »;

c) [Abrogé, 1995, ch. 31, art. 4]

d) le paragraphe 40(2) ne s'applique pas.

(3) L'extension du champ d'application de la partie III ne peut entrer en vigueur qu'au début d'une campagne agricole.

47. (1) The Governor in Council may, by regulation, extend the application of Part III or of Part IV or of both Parts III and IV to oats or to barley or to both oats and barley.

(2) Where the Governor in Council has extended the application of any Part under subsection (1), the provisions of that Part shall be deemed to be re-enacted in this Part, subject to the following :

(a) the word “oats” or “barley”, as the case may be, shall be substituted for the word “wheat”;

(b) the expression “oat products” or “barley products”, as the case may be, shall be substituted for the expression “wheat products”; and

(c) [Repealed, 1995, c. 31, s. 4]

(d) subsection 40(2) is not applicable.

(3) An extension of the application of Part III shall come into force only at the beginning of a crop year.

(4) Pour l'application du présent article, « produit de l'avoine » ou « produit de l'orge », selon le cas, s'entend de la substance obtenue par la transformation ou la préparation industrielle du grain en cause, seul ou mélangé à d'autres substances et que le gouverneur en conseil désigne, par règlement, comme produit de ce grain pour l'application de la présente partie.

(4) For the purposes of this section, “product”, in relation to any grain referred to in subsection (1), means any substance produced by processing or manufacturing that grain, alone or together with any other material or substance, designated by the Governor in Council by regulation as a product of that grain for the purposes of this Part.

[45] Notre Cour a conclu que parmi les pouvoirs que lui confère cet article, le gouverneur en conseil possède celui de soustraire, par règlement, l'avoine et l'orge à l'application des parties III ou IV de la Loi sur la CCB : *Saskatchewan Wheat Pool c. Canada (Procureur général)* (1993), 67 F.T.R. 98, 107 D.L.R. (4th) 190, aux paragraphes 35-36.

[46] Les modifications de 1998 touchaient au paragraphe 47(1) en restreignant son application à l'orge et en ajoutant un nouveau paragraphe 47(5), faisant en sorte que l'adoption du règlement envisagé par le paragraphe 47(1) soit soumise à une consultation préalable de la CCB et à un vote favorable des producteurs d'orge : article 25 des modifications de 1998. Cependant, ces modifications ne sont jamais entrées en vigueur.

[47] Les modifications de 1998 prévoyaient également d'autres mesures qui sont finalement entrées en vigueur, notamment : a) l'abrogation du pouvoir réglementaire, prévu à l'alinéa 46b) de la Loi sur la CCB (reproduit ci-dessus), d'exclure un type ou un grade de blé du monopole de commercialisation de la CCB, et b) l'introduction de l'article 47.1 à la Loi sur la CCB :

paragraphe 24(1) et article 25 des modifications de 1998. Il est ici utile de reproduire une fois de plus le texte de l'article 47.1 :

47.1 Il ne peut être déposé au Parlement, à l'initiative du ministre, aucun projet de loi ayant pour effet, soit de soustraire quelque type, catégorie ou grade de blé ou d'orge, ou le blé ou l'orge produit dans telle région du Canada, à l'application de la partie IV, que ce soit totalement ou partiellement, de façon générale ou pour une période déterminée, soit d'étendre l'application des parties III et IV, ou de l'une d'elles, à un autre grain, à moins que les conditions suivantes soient réunies :

- a) il a consulté le conseil au sujet de la mesure;
- b) les producteurs de ce grain ont voté – suivant les modalités fixées par le ministre – en faveur de la mesure.

47.1 The Minister shall not cause to be introduced in Parliament a bill that would exclude any kind, type, class or grade of wheat or barley, or wheat or barley produced in any area in Canada, from the provisions of Part IV, either in whole or in part, or generally, or for any period, or that would extend the application of Part III or Part IV or both Parts III and IV to any other grain, unless

- (a) the Minister has consulted with the board about the exclusion or extension; and
- (b) the producers of the grain have voted in favour of the exclusion or extension, the voting process having been determined by the Minister.

[48] Les effets combinés des articles 47 et 47.1 de la Loi sur la CCB sont donc les suivants :

- a) le gouverneur en conseil conserve le pouvoir discrétionnaire absolu, conféré par règlement, d'étendre à l'avoine et à l'orge le système de mise en commun obligatoire des prix (partie III) ou le monopole de commercialisation qu'exerce la CCB sur le commerce interprovincial et l'exportation (partie IV) : *Commission canadienne du blé c. Canada (Procureur général)*, 2007 FC 807, [2008] 2 R.C.F. 87, aux paragraphes 45 et 50 (conf. par 2008 CAF 76);

- b) le pouvoir qu'avait antérieurement le gouverneur en conseil aux termes de l'alinéa 46b) d'exclure n'importe quel type ou grade de blé ou le blé produit dans une région donnée du Canada du monopole de commercialisation qu'exerçait la CCB sur le commerce interprovincial et d'exportation en vertu de la partie IV a été remplacé par l'obligation de procéder par l'adoption d'une loi; de plus, le ministre ne peut faire adopter une telle loi sans avoir consulté la CCB et obtenu un vote favorable des producteurs;
- c) le pouvoir qu'avait antérieurement le gouverneur en conseil de soustraire l'avoine et l'orge de l'application des parties III ou IV, et qui a été reconnu dans l'arrêt *Saskatchewan Wheat Pool c. Canada (Procureur général)*, précité, a été remplacé par l'obligation de procéder par l'adoption d'une loi, et le ministre ne peut faire adopter une telle loi sans avoir consulté la CCB et obtenu un vote favorable des producteurs d'avoine ou d'orge : *Commission canadienne du blé c. Canada (Procureur général)*, précité, aux paragraphes 47, 51 et 52;
- d) l'extension de la partie III ou de la partie IV à d'autres grains doit passer par l'adoption d'une loi, et le ministre ne peut faire adopter une telle loi sans avoir consulté la CCB et obtenu un vote favorable des producteurs.

[49] L'objet et la portée de l'article 47.1 deviennent évidents lorsqu'on examine celui-ci dans le contexte des dispositions qu'il remplace ou modifie. Ainsi, l'article 47.1 rétrocède en grande partie au Parlement le pouvoir réglementaire restreint dont disposait auparavant le gouverneur en conseil au sujet de l'exclusion ou de l'inclusion au régime de la partie III ou de la partie IV de la Loi sur la CCB de certains types ou grades de grains. Toutefois, rien dans l'article 47.1 ou dans l'historique législatif ne donne à penser que le Parlement a limité le pouvoir du ministre de déposer et de recommander au Parlement une loi visant à abroger les dispositions de fond de la Loi sur la CCB ou la loi elle-même.

[50] De plus, le paragraphe 42(1) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, dont le texte est le suivant, me conforte dans cette opinion :

42. (1) Il est entendu que le Parlement peut toujours abroger ou modifier toute loi et annuler ou modifier tous pouvoirs, droits ou avantages attribués par cette loi.

42. (1) Every Act shall be so construed as to reserve to Parliament the power of repealing or amending it, and of revoking, restricting or modifying any power, privilege or advantage thereby vested in or granted to any person.

Les déclarations de l'ancien ministre au Parlement

[51] Il est maintenant bien établi que les comptes rendus des débats parlementaires et les documents semblables peuvent être pris en considération pour interpréter une loi, dans la mesure où ils sont pertinents et fiables et où on ne leur attribue pas une importance excessive : *R. c. Morgentaler*, [1993] 3 R.C.S. 463, à la page 484, *Rizzo & Rizzo Shoes Ltd. (Re)*, précité, au paragraphe 35; *Renvoi relatif à la Loi sur les armes à feu (Can.)*, [2000] 1 R.C.S. 783, au paragraphe 17. Si ces documents sont eux-mêmes ambigus, il convient toutefois de ne pas en tenir compte : *Placer Dome Canada Ltd. c. Ontario (Ministre des Finances)*, [2006] 1 R.C.S. 715, 2006 CSC 20, au paragraphe 39; *Conacher c. Canada (Premier ministre)*, 2010 CAF 131, [2011] 4 R.C.F. 22, au paragraphe 8. Quoi qu'il en soit, il y a lieu d'examiner ces documents avec prudence car « [I]e Hansard peut parfois offrir des éléments de preuve pertinents, mais les opinions des députés, ou même des ministres, ne rendent pas toujours compte de l'intention du législateur telle qu'elle doit être dégagée du texte de la loi » : *A.Y.S.A. Amateur Youth Soccer Association c. Canada (Agence du revenu)*, [2007] 3 R.C.S. 217, 2007 CSC 42, au paragraphe 12.

[52] Aux paragraphes 21 et 22 de ses motifs, le juge de la Cour fédérale a recouru à des éléments de preuve extrinsèques fournis par les intimés pour aider à interpréter comme il l'a fait

l'article 47.1 de la Loi sur la CCB. Le juge de la Cour fédérale s'est notamment appuyé sur des déclarations générales de l'ancien ministre à la Chambre des communes, lors des débats entourant l'adoption des modifications de 1998, au sujet du « principe fondamental du contrôle démocratique par les producteurs », ainsi que du « pouvoir [des agriculteurs] de modifier leur organisme de commercialisation comme ils le jugeront bon » : paragraphe 21 des motifs. Il a également eu recours à un énoncé de politique de 1996, dans lequel figure le passage suivant (paragraphe 22 des motifs) :

À l'avenir, le mandat de la Commission du blé pourra être ajusté, sous trois conditions : premièrement, une recommandation claire à cet effet du conseil d'administration de la Commission canadienne du blé; deuxièmement, lorsque le contrôle de la qualité est mis en jeu, un avis favorable de la Commission canadienne des grains, attestant que le changement ne nuira pas à la réputation de qualité et de régularité du Canada; troisièmement, si le changement proposé est important, un vote favorable des agriculteurs.

[Souligné par le juge de la Cour fédérale.]

[53] Étant donné que l'objet fondamental des modifications de 1998 était de confier aux producteurs de grains une certaine forme de contrôle sur le conseil d'administration de la CCB, il n'est pas surprenant que l'ancien ministre ait fait valoir que ces modifications favorisaient le contrôle démocratique par les producteurs. Cependant, cela ne veut pas nécessairement dire que les producteurs auraient un droit de veto sur tous les changements législatifs apportés ultérieurement à la Loi sur la CCB.

[54] En fait, l'énoncé de politique cité plus tôt, qui fait référence à un vote des producteurs au moment d'apporter un changement important ou fondamental, doit être interprété dans le

contexte global du projet de loi. C'est ainsi que, dans un communiqué de presse du gouvernement, daté du 25 septembre 1997 et annonçant les changements proposés, on trouve l'explication suivante :

[TRADUCTION] La nouvelle loi rendra les agriculteurs maîtres de leur destinée quant à tout changement futur concernant ce que la CCB pourra commercialiser.

Si les agriculteurs veulent soustraire un type particulier de grains de l'actuel système de guichet unique de la CCB, ils peuvent le faire – à trois conditions :

- 1) les administrateurs doivent le recommander;
- 2) la Commission canadienne des grains doit approuver un système de « préservation de l'identité » afin d'assurer le respect des normes de qualité;
- 3) si la « mesure d'exclusion » proposée est importante, elle doit être soumise au vote des agriculteurs.

(Dossier d'appel, à la page 349) [Non souligné dans l'original.]

[55] Par ailleurs, le 17 février 1998, en cherchant à faire adopter à la Chambre des communes, en troisième lecture, le projet de loi menant aux modifications de 1998, l'ancien ministre a expliqué que les changements qui seraient soumis au vote des producteurs ne concernaient que les exclusions ou les inclusions de certains types ou grades de grains par rapport au mandat de commercialisation de la CCB :

La neuvième question a trait aux exclusions. Les agriculteurs peuvent-ils faire exclure un produit agricole du champ de compétence de la CCB? La réponse prévue au projet de loi C-4 est oui.

La nouvelle loi comportera une clause d'exclusion permettant de soustraire, totalement ou partiellement, tout type, toute catégorie ou tout grade de blé ou d'orge de l'application de la compétence de la CCB. Pour déclencher le processus d'exclusion, il faudra d'abord que les administrateurs se prononcent en faveur du projet. Deuxièmement, pour des raisons de contrôle de la qualité, il faudra mettre un système en place afin de prévenir toute confusion du grain exclu avec le grain

Page : 30

commercialisé par la CCB. Troisièmement, si les administrateurs considèrent le projet d'exclusion important, il faudra tenir un vote démocratique auprès des producteurs pour l'approuver.

La dixième question à trait à l'inclusion. Les agriculteurs peuvent-ils faire inclure un produit agricole dans le champ de compétence de la CCB? Là encore, la réponse prévue au projet de loi C-4 est oui.

Pour des raisons d'équité et d'équilibre, puisqu'elle comporte une clause d'exclusion, la nouvelle loi doit comporter également une clause d'inclusion. Le facteur décisif pour l'application des deux clauses sera lié à la décision majoritaire des véritables producteurs des grains en cause, exprimée par un vote démocratique pris auprès des producteurs. Ce sont eux qui auront le dernier mot.

L'existence d'une clause d'inclusion ne modifie pas, en soi, le mandat de la CCB. Elle institue simplement une procédure bien claire pour le modifier si, et uniquement si les producteurs eux-mêmes, non les politiciens ni les lobbyistes, estiment qu'une telle modification sert leurs intérêts supérieurs. On ne pourra se prévaloir de la clause d'inclusion que pour les grains qui correspondent actuellement à la définition de grain dans la loi actuelle sur la CCB.

(Dossier d'appel, à la page 394) [Non souligné dans l'original.]

[56] En expliquant au Comité sénatorial permanent de l'agriculture et des forêts, le 5 mai 1998, pourquoi il proposait d'apporter des modifications au projet de loi en vue d'éliminer et de simplifier la plupart de ses dispositions concernant les inclusions et les exclusions, l'ancien ministre a fait état du contexte et de l'historique des changements proposés. Vu la pertinence de cette explication pour les besoins du présent appel, il est utile de citer un long extrait de la déclaration de l'ancien ministre :

M. Goodale : Sénateur, les dispositions d'inclusion et d'exclusion pourraient assurément être supprimées. Telle est l'essence même de la proposition que j'ai faite à la fin du débat à la Chambre des communes.

Je vais en profiter pour expliquer pourquoi, en tant que question de principe, une procédure d'inclusion et d'exclusion a été prévue dans le projet de loi.

Des instances ont été présentées au comité permanent de l'agriculture et de l'agroalimentaire de la Chambre des communes lors de l'étude du projet de loi précédent, le projet de loi C-72, à la dernière législature. Un certain nombre de témoins de l'Ouest ont fait valoir devant ce comité que, si la loi devait comporter un mécanisme d'exclusion, elle devrait également comporter, pour des raisons d'équité et d'équité, un mécanisme d'inclusion. Il s'agissait tout d'abord d'assurer un certain équilibre.

L'autre motif invoqué était qu'il fallait combler un vide manifeste dans la loi actuelle sur la Commission canadienne du blé. Les règles à suivre pour modifier le mandat de la Commission canadienne du blé ne sont pas claires dans la loi actuelle.

Si les honorables sénateurs veulent bien se référer à un cas récent, M. Mayer, quand il était ministre de l'Agriculture, a modifié le mandat de la Commission canadienne du blé de façon à inclure l'avoine, et il y est parvenu (*sic*) en recourant à un décret.

Dans un autre cas, il a tenté de modifier le mandat de la Commission canadienne du blé en ce qui concerne l'orge, en employant la même technique, un décret. L'initiative a échoué. Elle a été contestée dans les tribunaux et elle a été invalidée.

Un décret a fait l'affaire dans un cas et pas dans un autre. Les tribunaux ont établi une nette distinction entre ce qui convient et ce qui ne convient pas.

Il y a 20 ans environ, il y a eu une discussion pour savoir si la navette, comme on disait à l'époque, devrait relever de la Commission canadienne du blé. Le ministre de l'époque ne voulait pas trancher la question tant que les producteurs ne s'étaient pas prononcés. La loi ne l'exigeait pas. Mais il estimait que les agriculteurs devaient tout d'abord exprimé (*sic*) leur avis à ce sujet. Et vous vous en rappellerez, les agriculteurs ont rejeté l'idée que la navette relève de la Commission canadienne du blé.

Dans les années 1970, une vive discussion a eu lieu au sujet de la politique sur les céréales fourragères. Le mandat de la Commission canadienne du blé a alors été modifié, si ma mémoire est bonne, en partie au moyen d'une loi et en partie au moyen d'un décret. M. Whelan se rappelle peut-être mieux que moi la procédure exacte.

Je cite ces quatre exemples – le vote sur la navette; la discussion sur les céréales fourragères; le cas de l'avoine; et celui de l'orge – pour montrer dans quel fouillis on se retrouve quand il s'agit de modifier le mandat de la Commission canadienne du blé. L'idée d'inscrire des dispositions d'inclusion et d'exclusion dans la loi visait essentiellement à clarifier la situation, non pas à dire ce qu'il fallait faire, mais plutôt à dire que, si c'était ce que les agriculteurs voulaient, telles étaient les étapes à suivre pour atteindre l'objectif ultime.

Ces dispositions que l'on trouve dans la loi proposée ont soulevé des motifs d'inquiétude. Certains groupes estiment qu'elles ordonnent d'avance une conséquence certaine, que du simple fait de les inscrire, même si elles sont de nature facultative et non pas obligatoire, on se trouve à en faire des options que les agriculteurs peuvent adopter si bon leur semble. Or, elles ne modifient en aucune façon le mandat de la Commission canadienne du blé. Elles ne font que préciser le processus à suivre dans le cas où c'est précisément ce que souhaitent les agriculteurs.

Malgré ces assurances, il y a encore des groupes et des organismes qui sont inquiets. La proposition de modification que j'ai présentée à la fin du débat sur la question à la Chambre des communes vise à supprimer dans le projet de loi les points de détail sur l'inclusion et l'exclusion. Ainsi donc, la procédure à suivre pour modifier le mandat de la Commission canadienne du blé reste inchangée.

Ce qu'il faut retenir de l'inclusion, c'est que la seule façon de modifier quoi ce soit est de passer par la voie législative. En d'autres mots, si quelqu'un avait la brillante idée d'ajouter quelque chose au mandat de la Commission canadienne du blé, il faudrait une loi du Parlement pour ce faire.

L'amendement que j'ai proposé supprime les points de détail de l'inclusion et de l'exclusion et ajoute une autre exigence, que les agriculteurs soient consultés au moyen d'un vote.

(Dossier d'appel, aux pages 405 à 407)

[57] Cette explication concorde tout à fait avec la conclusion selon laquelle l'article 47.1 de la Loi sur la CCB n'a trait qu'à l'exclusion ou à l'inclusion de certains types ou grades de blé ou d'orge par rapport au système de mise en commun obligatoire des prix ou du monopole de commercialisation de la CCB.

[58] La portée restreinte de l'article 47.1 est de plus confirmée par le fait que les changements susmentionnés aux modifications de 1998 en rapport avec l'article 47, y compris l'ajout d'un paragraphe 47(5) qui prévoyait la tenue d'un scrutin parmi les producteurs d'orge, ne sont jamais entrés en vigueur. C'est là un signe de plus que le gouvernement de l'époque n'avait pas

l'intention de donner aux producteurs un vaste droit de veto sur tous les aspects de la Loi sur la CCB.

[59] Après avoir examiné avec soin les éléments extrinsèques que les intimés ont présentés et que le juge de la Cour fédérale a utilisés, je ne relève rien dans le dossier qui amène à conclure que l'abrogation du guichet unique dans son ensemble ou de la Loi sur la CCB dans son intégralité était d'une certaine manière rendue subordonnée à l'obtention du consentement préalable de la CCB ou des producteurs de grains. Je n'ai trouvé aucune déclaration qui confirme ou laisse entendre que l'objet des modifications de 1998 était d'empêcher le ministre de proposer au Parlement un projet de loi qui modifiait fondamentalement ou abrogeait la Loi sur la CCB.

La promotion du contrôle démocratique des producteurs de grains sur la CCB

[60] Le juge de la Cour fédérale a également admis l'idée que l'interprétation des lois doit tenir compte des valeurs démocratiques : paragraphes 23 et 24 des motifs. Il a souscrit à l'argument des intimés selon lequel « les pratiques démocratiques de la CCB sont "importantes", car elles sont établies depuis longtemps et [...] elles jouissent d'un important appui auprès des quelque 17 000 producteurs de grain de l'Ouest canadien » et que « [c]et appui mérite le respect » : paragraphe 27 des motifs.

[61] Je ne doute pas qu'il existe au Canada de nombreuses institutions démocratiques et que leur nature démocratique mérite à la fois qu'on les respecte et qu'on les protège : *Qu c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2001 CAF 399, [2002] 1 C.F. 3, aux

paragraphes 42 à 48. En l'espèce cependant, la question est de savoir si cette valeur a préséance sur la volonté d'un parlement démocratiquement élu. Ce n'est pas le cas.

[62] Dans notre système de démocratie représentative, lequel est semblable en principe à celui du Royaume-Uni, l'expression ultime de la démocratie se manifeste par l'intermédiaire des membres élus de la Chambre des communes et des diverses assemblées législatives provinciales agissant dans leurs sphères de compétence respectives. Au Canada, la démocratie repose en fin de compte sur la participation des citoyens aux élections concernant les institutions publiques créées en vertu de la Constitution.

[63] Bien sûr, nombreux sont les Canadiens qui ont intérêt à ce que l'on préserve le caractère démocratique d'autres institutions, telles que les municipalités et les conseils ou les commissions scolaires. Cela dit, les mandats et les priviléges que la loi confère à ces institutions demeurent soumis au contrôle ultime du Parlement ou des assemblées législatives. C'est ainsi que les municipalités peuvent être restructurées, les conseils ou les commissions scolaires abolis et les sociétés d'État redéfinies, et que leurs priviléges et leurs pouvoirs peuvent croître et décroître au fil du temps selon la volonté du Parlement et des assemblées législatives auxquels ils doivent leur existence. Hormis les situations dans lesquelles il est possible d'établir l'existence d'une contrainte de nature constitutionnelle, de tels changements législatifs ne requièrent pas le consentement des institutions touchées ou de leurs électeurs.

[64] La Cour suprême du Canada a statué à maintes reprises qu'il est possible d'adopter des changements aux structures, aux mandats et aux pouvoirs directeurs des municipalités, des

Page : 35

conseils ou des commissions scolaires et d'autres institutions créées par voie législative sans le consentement de ces organismes ou de leurs électeurs : ainsi, dans l'arrêt *Ontario English Catholic Teachers' Assn. c. Ontario (Procureur général)*, [2001] 1 R.C.S. 470, 2001 CSC 15, aux paragraphes 57 et 58, le juge Iacobucci, auteur des motifs unanimes de la Cour suprême du Canada, a conclu ceci :

[57] Comme les conseils des écoles séparées en Ontario n'ont ni un droit à une taxation indépendante, ni un droit absolu à la gestion et au contrôle indépendants, il est loisible de conclure que les conseils des écoles publiques de la province ne disposent pas non plus de tels droits. Sous réserve de l'art. 93, les conseils des écoles publiques n'ont, à titre d'institutions, aucun statut constitutionnel.

[58] Le juge Campbell a bien énoncé le droit à cet égard dans *Ontario Public School Boards' Assn.*, précité, personne 361 :

[TRADUCTION] Les administrations municipales et les institutions municipales à vocation particulière comme les conseils scolaires sont des créatures du gouvernement provincial. Sous réserve des limites constitutionnelles de l'art. 93 de la *Loi constitutionnelle de 1867*, ces institutions n'ont aucun statut constitutionnel ni aucune autonomie indépendante, tandis que la province a le pouvoir juridique absolu et sans réserve de les traiter comme elle l'entend.

Voir aussi *Alberta Public Schools [Public School Boards Assn of Alberta c. Alberta (Procureur général)]* [2002] R.C.S. 409, 2000 CSC 45], par. 33 et 34.

[Non souligné dans l'original.]

[65] Dans le même ordre d'idées, dans l'arrêt *Baier c. Alberta*, [2007] 2 R.C.S. 673, 2007 CSC 31, au paragraphe 39, le juge Rothstein a fait les observations suivantes :

Le droit de voter et celui de se porter candidat sont expressément protégés à l'art. 3 de la *Charte*, mais seulement pour les élections législatives fédérales ou provinciales. L'intervenante Public School Boards' Association of Alberta soutient que les conseils scolaires ont, en tant qu'institutions publiques locales, un statut constitutionnel au [TRADUCTION] « sens conventionnel ou quasi

Page : 36

constitutionnel ». Il n'appartient cependant pas à notre Cour de créer des droits constitutionnels à l'égard d'un troisième ordre de gouvernement lorsque, interprété contextuellement, le texte de la Constitution ne le fait pas.

[66] Dans l'arrêt *Haig c. Canada (Directeur général des élections)*, [1993] 2 R.C.S. 995, les juges majoritaires de la Cour suprême du Canada ont déclaré, à la page 1041 du recueil que « [I]l est évident que le gouvernement n'a aucune obligation constitutionnelle d'offrir [un référendum] à qui que ce soit » et que « [I]l est évident que le référendum en tant que tribune pour favoriser l'expression relève, selon moi, de la politique législative et non du droit constitutionnel » (souligné dans l'original).

[67] Même s'il est question dans ces arrêts de présumés priviléges constitutionnels, les principes qu'ils énoncent s'appliquent tout autant, sinon avec plus de force, aux présumés priviléges établis par voie législative.

[68] Selon moi, le principe démocratique favorise une interprétation de l'article 47.1 de la Loi sur la CCB qui préserve dans la plus grande mesure possible la capacité des membres élus de la Chambre des communes, dont le ministre, de changer cette loi comme bon leur semble. Par ailleurs, c'est ce qu'exige expressément le paragraphe 42(1) de la *Loi d'interprétation*, cité plus tôt.

Les obligations que l'ALÉNA impose au Canada en matière de commerce international

[69] Le juge de la Cour fédérale a également accordé un certain poids à l'argument des intervenants selon lequel « l'article 47.1 s'applique au changement de la structure de la CCB, parce que l'aspect démocratique de cette structure revêt une importance dans le contexte des

obligations en matière de commerce international du Canada au titre de l'ALENA », et il a par ailleurs conclu qu'il s'agissait là « d'une considération importante qui étaye l'argument que l'intention du législateur, lorsqu'il a adopté l'article 47.1, était que cette structure ne puisse être modifiée, sans la consultation et le consentement des producteurs » : paragraphe 28 des motifs.

[70] Aux dires des intervenants, le contrôle qu'exercent les producteurs de grains sur la CCB a mis le Canada à l'abri des plaintes relatives à des pratiques commerciales anticoncurrentielles. Ils font référence à un rapport daté du 6 avril 2004 d'un groupe spécial de l'Organisation mondiale du commerce (l'OMC) qui a rejeté une plainte commerciale déposée contre les mesures prises par le Canada en rapport avec les exportations de blé et le traitement des grains importés (Doc. OMC WT/DS276/R), de même qu'à un rapport daté du 30 août 2004 par lequel l'Organe d'appel de l'OMC a confirmé cette décision (Doc. OMC WT/DS276/AB/R). Ils s'appuient en particulier sur le texte suivant, extrait du rapport du Groupe spécial :

6.124 À notre sens, le fait que le gouvernement canadien n'intervient pas dans les opérations de vente de la CCB confirme cette conclusion plutôt qu'elle ne l'infirme. Étant donné la structure de direction actuelle de la CCB, qui donne aux producteurs de l'Ouest canadien le contrôle de la CCB, le fait que le gouvernement canadien ne surveille pas les opérations de vente de la CCB accroît, plutôt qu'il ne diminue, la probabilité que la CCB commercialise le blé en tenant compte uniquement des intérêts commerciaux des producteurs dont elle est l'agent de commercialisation.

[71] La référence qui est faite à la « structure de direction » de la CCB a trait à la composition du conseil d'administration, et non à un scrutin éventuel des producteurs au sens de l'article 47.1 de la Loi sur la CCB. Ainsi que l'a signalé le Groupe spécial au paragraphe 6.123 de son rapport : « [c]omme nous l'avons noté, la majorité des administrateurs siégeant au Conseil de la CCB sont élus par les producteurs de blé et d'orge de l'Ouest canadien et doivent être réélus

par ces producteurs s'ils veulent exercer plusieurs mandats ». Par ailleurs, dans son propre rapport, l'Organe d'appel de l'OMC confirme (au paragraphe 183) que « [I]l Groupe spécial a fondé sa première constatation sur le fait que la majorité des administrateurs de la CCB sont élus par les producteurs de blé et sur le fait que le gouvernement canadien "ne contrôle pas les opérations courantes de la CCB, ou n'intervient pas dans ces opérations" ». C'est donc dire que ces deux rapports n'abordent pas la question du vote des producteurs prévu à l'article 47.1 de la Loi sur la CCB et ne sont pas pertinents pour l'interprétation de cette disposition.

[72] De plus, l'objet principal de la *Loi sur le libre choix des producteurs de grains en matière de commercialisation* est d'offrir aux producteurs de grains un marché libre et ouvert en mettant fin au monopole qu'exerce la CCB sur le plan de la commercialisation. Il est difficile de comprendre de quelle façon cet objet irait à l'encontre de l'ALÉNA ou de tout autre accord du Canada en matière de commerce international.

[73] C'est l'interprétation de l'article 47.1 qu'avancent les intimés et les intervenants qui mettrait en péril les obligations du Canada en matière de commerce international. Les accords commerciaux à venir, y compris les futurs accords commerciaux multilatéraux de l'OMC, peuvent, à terme, obliger à modifier la Loi sur la CCB en vue de restreindre ou de modifier le monopole qu'exerce la CCB sur le plan de la commercialisation. Comme il a été mentionné plus tôt, c'est en fait ce qui a été exigé en 1994 : *Loi de mise en œuvre de l'Accord sur l'Organisation mondiale du commerce*, article 48. S'il était nécessaire dans l'avenir d'apporter d'autres modifications semblables en vue de mettre en œuvre un accord de commerce international, le gouvernement canadien ne pourrait les proposer au Parlement sans le consentement des

Page : 39

producteurs de grains, selon l'interprétation que donnent les intimés de l'article 47.1. Cela, à mon sens, favorise une interprétation restrictive de l'article 47.1 de la Loi sur la CCB.

La liberté d'association

[74] Le juge de la Cour fédérale n'a pas traité directement de cette question, mais les intervenants invoquent aussi la liberté fondamentale d'association que garantit l'alinéa 2d) de la Charte en tant qu'instrument d'interprétation. L'article 47.1 de la Loi sur la CCB, font-ils valoir, doit être interprété d'une manière qui incite les producteurs de grains de l'Ouest canadien à agir collectivement sur le plan de la commercialisation et qui permette à la majorité d'entre eux de s'exprimer sur les questions qui présentent un intérêt fondamental pour leur subsistance. Cet argument repose principalement sur l'arrêt *Dunmore c. Ontario (Procureur général)*, [2001] 3 R.C.S. 1016, 2001 CSC 94 (*Dunmore*).

[75] Je signale tout d'abord au sujet de cet argument que le principe d'interprétation fondé sur les « valeurs consacrées par la Charte » est d'une application restreinte : *Bell ExpressVu Limited Partnership c. Rex*, précité, aux paragraphes 62 à 66.

[76] De plus, la principale difficulté que présente l'argument des intimés est qu'il a déjà été rejeté par la Cour dans l'arrêt *Archibald c. Canada*, [2000] 4 C.F. 479 (C.A.), 257 N.R. 105. Dans cette affaire, certains producteurs de grains de l'Ouest contestaient les dispositions de la Loi sur la CCB qui les obligaient à mettre en commun et à commercialiser leurs grains par l'entremise de la CCB parce que, entre autres, cette mesure portait atteinte à la liberté

Page : 40

d'association que leur garantissait l'alinéa 2d) de la Charte. Se fondant sur l'arrêt *Office canadien de commercialisation des œufs c. Richardson*, [1998] 3 R.C.S. 157, le juge Rothstein (maintenant juge à la Cour suprême du Canada) a conclu que la commercialisation du blé et de l'orge à l'échelle interprovinciale et sur le marché des exportations n'était pas protégée par l'alinéa 2d) de la Charte : *Archibald c. Canada*, précité, aux paragraphes 40 à 54.

[77] Les intimés soutiennent que l'arrêt *Dunmore* a changé d'une certaine façon l'approche exposée dans l'arrêt *Archibald c. Canada* quant à la manière dont il convient d'utiliser et de comprendre l'alinéa 2d) de la Charte. Je ne suis pas d'accord.

[78] Dans l'arrêt *Dunmore*, après avoir examiné le lien profond qui existe entre les régimes légaux de relations de travail et la liberté des travailleurs de s'organiser en vue de la défense des intérêts de la majorité auprès de leurs employeurs, la majorité de la Cour suprême du Canada a statué que l'exclusion des travailleurs agricoles du régime légal des relations de travail de l'Ontario prévu par la loi violait l'alinéa 2d) de la Charte. Il n'y a cependant pas d'analogie à établir entre les questions analysées dans l'arrêt *Dunmore* et les questions qui sont en jeu en l'espèce, lesquelles s'articulent autour du démantèlement du monopole qu'exerce la CCB sur le plan de la commercialisation sous le régime de la *Loi sur le libre choix des producteurs de grains en matière de commercialisation*.

[79] Comme l'a signalé le juge Bastarache au paragraphe 17 de l'arrêt *Dunmore*, ce ne sont pas toutes les activités que l'alinéa 2d) de la Charte protège. Ainsi, dans le domaine des relations de travail, la Cour suprême du Canada a exclu le droit de grève de la portée de cet alinéa : *Renvoi*

relatif à la Public Service Employee Relations Act (Alb.), [1987] 1 R.C.S. 313, ainsi que AFPC c. Canada, [1987] 1 R.C.S. 424. Dans le contexte de la commercialisation des produits agricoles, la Cour suprême du Canada a également conclu que l'alinéa 2d) ne confère pas un droit illimité au commerce interprovincial ou à l'exportation : *Office canadien de commercialisation des œufs c. Richardson*, précité. Comme l'a signalé le juge McIntyre dans l'arrêt *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, précité, à la page 405 :

[...] Pour des raisons évidentes, la *Charte* ne confère pas de protection constitutionnelle à toutes les activités exercées par des individus. Par exemple, aucune protection n'est conférée par la *Charte* au droit de propriété, aux activités commerciales en général ni à une foule d'autres activités licites [...] Il n'y a tout simplement rien qui justifie d'accorder la protection de la *Charte* à une activité simplement parce qu'elle est exercée par plus d'une personne.

[80] Pour dire les choses simplement, l'alinéa 2d) de la Charte ne confère aucune protection constitutionnelle au monopole exercé sur le plan de la commercialisation ou au système de mise en commun obligatoire des prix prévus par la Loi sur la CCB. La *Loi sur le libre choix des producteurs de grains en matière de commercialisation* ne limite pas non plus la capacité qu'ont les producteurs de grains de s'associer en vue de commercialiser ou de mettre en commun leurs produits.

[81] De ce fait, il n'est pas nécessaire de considérer l'alinéa 2d) de la Charte comme un instrument d'interprétation en vue de déterminer la portée de l'article 47.1 de la Loi sur la CCB.

L'argument relatif à la « forme »

[82] Il n'est pas contesté qu'un parlement ne peut obliger un autre à ne pas faire une certaine chose dans l'avenir. Comme il est indiqué dans Hogg P., *Constitutional Law of Canada* (5^e éd. suppl., vol. 1, feuilles mobiles), à la section 12.3a) :

[TRADUCTION] Si un organe législatif pouvait s'engager à ne pas faire une certaine chose dans l'avenir, un gouvernement pourrait dans ce cas recourir à sa majorité parlementaire pour protéger ses politiques contre une modification ou une abrogation quelconque. Cette mesure lierait les mains d'un gouvernement qui serait par la suite porté au pouvoir dans le cadre d'une nouvelle élection comportant de nouveaux enjeux. Autrement dit, un gouvernement en place pourrait faire échec à l'avance aux politiques que prône l'opposition.

[83] Il ne fait pas de doute non plus que « [l]a rédaction et le dépôt d'un projet de loi font partie du processus législatif dans lequel les tribunaux ne s'immiscent pas » : *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, précité, à la page 559, et que « [t]oute restriction imposée au pouvoir de l'exécutif de déposer des projets de loi constitue une limitation de la souveraineté du Parlement lui-même » : *ibid.*, à la page 560.

[84] Les intimés soutiennent cependant que l'article 47.1 de la Loi sur la CCB impose des obligations au ministre en sa qualité de membre de l'exécutif plutôt qu'en sa qualité de membre du Parlement. Ils estiment donc que l'obligation qu'impose l'article 47.1 au ministre de consulter la CCB et d'obtenir un vote favorable des producteurs de grains avant de présenter un projet de loi est néanmoins exécutoire et impérative, malgré ces principes constitutionnels importants.

[85] Les appellants rétorquent que seules les dispositions « de forme » de nature constitutionnelle peuvent restreindre la manière dont le Parlement peut présenter et adopter une loi. De plus, soutiennent-ils, l'article 47.1 de la Loi sur la CCB n'est pas une disposition de forme de nature constitutionnelle qui assortit d'exigences procédurales la capacité qu'a le Parlement d'adopter des lois, et que cet article est donc inapplicable selon le principe de la souveraineté parlementaire.

[86] J'ai de sérieuses réserves au sujet de l'applicabilité de l'article 47.1 de la Loi sur la CCB, eu égard au principe de la souveraineté parlementaire, à la décision que la Cour suprême du Canada a rendue dans le *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, précité, et aux dispositions du paragraphe 2(2) de la *Loi sur les Cours fédérales*. Il ne me semble pas qu'une disposition prescrivant qu'un projet de loi ne peut être déposé au Parlement que si une société extérieure ou un petit groupe externe y consent constitue simplement une exigence procédurale. L'effet d'une telle disposition est de céder les pouvoirs du Parlement aux mains d'un petit groupe qui n'en fait pas partie. Je doute sérieusement qu'une telle disposition puisse faire obstacle à la présentation d'un projet de loi au Parlement ou mener à l'invalidation d'une loi quelconque que le Parlement adopterait par la suite : *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, précité, aux pages 563 et 564, citant en y souscrivant à cet égard le juge en chef King dans *West Lakes Ltd. v. South Australia* (1980), 25 S.A.S.R. 389, aux pages 397 et 398; voir aussi l'arrêt *Canada (Procureur général) c. Canada (Commission canadienne du blé)*, 2008 CAF 76, 373 N.R. 385, au paragraphe 4.

Page : 44'

[87] Il n'est toutefois pas nécessaire que je tranche de façon définitive cette question, vu la conclusion tirée plus tôt à propos de la portée restreinte de l'article 47.1 de la Loi sur la CCB. Comme l'a signalé J. Goldsworthy dans son ouvrage *Parliamentary Sovereignty, Contemporary Debates* (Cambridge University Press, 2010), à la page 174 : [TRADUCTION] « [l']une des questions les plus importantes que le principe de la souveraineté parlementaire ne règle pas est celle de savoir si - et comment - le Parlement peut faire en sorte que la validité juridique d'une loi à venir dépende du respect des exigences prescrites en matière de procédure ou de forme ». Il ne conviendrait pas que la Cour tranche une question constitutionnelle aussi importante et d'une portée aussi considérable s'il n'est pas strictement nécessaire de le faire pour déterminer l'issue du présent appel.

Conclusion

[88] Pour les motifs qui précèdent, je conclus que la portée de l'article 47.1 de la Loi sur la CCB ne s'étend pas à la *Loi sur le libre choix des producteurs de grains en matière de commercialisation*. Je ferais donc droit aux deux appels et j'infirmerais les ordonnances du juge Campbell de la Cour fédérale. J'adjuderais également les dépens aux appellants, tant devant notre Cour que devant la Cour fédérale.

« Robert M. Mainville »

j.c.a.

« Je suis d'accord
K. Sharlow, j.c.a. »

« Je suis d'accord
Johanne Trudel, j.c.a. »

Traduction certifiée conforme
Édith Malo, LL.B.

COUR D'APPEL FÉDÉRALE

AVOCATS INSCRITS AU DOSSIER

DOSSIER :

A-470-11

**APPEL D'UNE ORDONNANCE DU JUGE CAMPBELL DATÉE DU
7 DÉCEMBRE 2011.**

INTITULÉ :

PROCUREUR GÉNÉRAL DU
CANADA *ET AL* c. FRIENDS OF THE
CANADIAN WHEAT BOARD *ET AL*.

LIEU DE L'AUDIENCE :

Ottawa (Ontario)

DATE DE L'AUDIENCE :

Le 23 mai 2012

MOTIFS DU JUGEMENT :

LE JUGE MAINVILLE

Y ONT SOUSCRIT :

LA JUGE SHARLOW
LA JUGE TRUDEL

DATE DES MOTIFS :

Le 18 juin 2012

COMPARUTIONS :

Robert MacKinnon
Zoe Oxaal

POUR LES APPELANTS

Anders Bruun

POUR LES INTIMÉS

Steven Shrybman

POUR LES INTERVENANTS

AVOCATS INSCRITS AU DOSSIER :

Myles J. Kirvan
Sous-procureur général du Canada

POUR LES APPELANTS

Anders Bruun,
Winnipeg (Manitoba)

POUR LES INTIMÉS

Sack Goldblatt Mitchell LLP
Ottawa (Ontario)

POUR LES INTERVENANTS

Canada (Procureur général) c. Friends of the Canadian Wheat Board, 2012 CAF 183

COUR D'APPEL FÉDÉRALE

AVOCATS INSCRITS AU DOSSIER

DOSSIER : A-471-11

**APPEL D'UNE ORDONNANCE DU JUGE CAMPBELL DATÉE DU
7 DÉCEMBRE 2011.**

INTITULÉ : MINISTRE DE L'AGRICULTURE ET
DE L'AGROALIMENTAIRE, EN SA
QUALITÉ DE MINISTRE
RESPONSABLE DE LA
COMMISSION CANADIENNE DU
BLÉ c. LA COMMISSION
CANADIENNE DU BLÉ *ET AL*

LIEU DE L'AUDIENCE : Ottawa (Ontario)

DATE DE L'AUDIENCE : Le 23 mai 2012

MOTIFS DU JUGEMENT : LE JUGE MAINVILLE

Y ONT SOUSCRIT : LA JUGE SHARLOW
LA JUGE TRUDEL

DATE DES MOTIFS : Le 18 juin 2012

COMPARICTIONS :

Robert MacKinnon POUR L'APPELANT
Zoe Oxaal

John Lorn McDougall POUR LES INTIMÉS
Brian Leonard

Steven Shrybman POUR LES INTERVENANTS

AVOCATS INSCRITS AU DOSSIER :

Myles J. Kirvan
Sous-procureur général du Canada

POUR L'APPELANT

Fraser Milner Casgrain LLP
Toronto (Ontario)

POUR LES INTIMÉS

Sack Goldblatt Mitchell LLP
Ottawa (Ontario)

POUR LES INTERVENANTS

Onglet 89

Renvoi: *Compétence du Parlement relativement à la Chambre Haute*, [1980] 1 R.C.S. 54

54

RE: AUTHORITY OF PARLIAMENT IN RELATION TO THE UPPER HOUSE

[1980] 1 S.C.R.

In the matter of a Reference by the Governor in Council concerning the legislative authority of the Parliament of Canada in relation to the Upper House, as set out in Order in Council P.C. 1978-3581, dated the 23rd day of November, 1978.

1979: March 20, 21; 1979: December 21.

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

REFERENCE BY THE GOVERNOR IN COUNCIL

Constitutional law — Senate — Authority of Parliament to amend constitution — British North America Act, ss. 21 to 36, 91(1).

The Governor General in Council referred to this Court the following two questions, in accordance with s. 55 of the *Supreme Court Act*:

1. Is it within the legislative authority of the Parliament of Canada to repeal sections 21 to 36 of the *British North America Act, 1867*, as amended, and to amend other sections thereof so as to delete any reference to an Upper House or the Senate? If not, in what particular or particulars and to what extent?

2. Is it within the legislative authority of the Parliament of Canada to enact legislation altering, or providing a replacement for, the Upper House of Parliament, so as to effect any or all of the following:
 - (a) to change the name of the Upper House;
 - (b) to change the numbers and proportions of members by whom provinces and territories are represented in that House;
 - (c) to change the qualifications of members of that House;
 - (d) to change the tenure of members of that House;
 - (e) to change the method by which members of that House are chosen by
 - (i) conferring authority on provincial legislative assemblies to select, on the nomination of the respective Lieutenant Governors in Council, some members of the Upper House, and, if a legislative assembly has not selected such mem-

Dans l'affaire des questions soumises par le gouverneur en conseil sur la compétence législative du Parlement du Canada relativement à la Chambre haute, formulées dans le décret C.P. 1978-3581 en date du 23 novembre 1978.

1979: 20, 21 mars; 1979: 21 décembre.

Présents: Le juge en chef Laskin et les juges Martland, Ritchie, Pigeon, Dickson, Estey, Pratte et McIntyre.

QUESTIONS SOUMISES PAR LE GOUVERNEUR EN CONSEIL

Droit constitutionnel — Sénat — Compétence du Parlement d'amender la constitution — Acte de l'Amérique du Nord britannique, art. 21 à 36, 91(1).

Le gouverneur général en conseil a soumis à la Cour en vertu de l'art. 55 de la *Loi sur la Cour suprême*, les deux questions suivantes:

1. Ressort-il de la compétence législative du Parlement du Canada d'abroger les articles 21 à 36 de l'*Acte de l'Amérique du Nord britannique, 1867*, tel que modifié et de modifier les autres articles de cette loi dans lesquels il est fait mention de la Chambre haute ou du Sénat, de manière à supprimer toute référence à la Chambre haute ou au Sénat? Dans la négative, à quel égard ou à quels égards et dans quelle mesure?
2. Ressort-il de la compétence législative du Parlement du Canada de promulguer des lois visant à modifier les dispositions relatives à la Chambre haute du Parlement ou à remplacer ladite Chambre? Ainsi, ressort-il de la compétence du Parlement de faire l'un quelconque ou tous les changements suivants:
 - a) modifier le nom de la Chambre haute;
 - b) modifier le nombre et le pourcentage des membres qui représentent les provinces ou les territoires dans cette chambre;
 - c) modifier les qualités requises pour être membre de cette chambre;
 - d) modifier les termes du mandat des membres de cette chambre;
 - e) modifier le processus de nomination des membres de cette chambre, en
 - (i) conférant aux assemblées législatives provinciales le pouvoir de nommer, sur l'avis du lieutenant-gouverneur en conseil, certains membres de la Chambre haute, la Chambre des Communes étant autorisée à nommer lesdits membres, sur

bers within the time permitted, authority on the House of Commons to select those members on the nomination of the Governor General in Council, and

(ii) conferring authority on the House of Commons to select, on the nomination of the Governor General in Council, some members of the Upper House from each province, and, if the House of Commons has not selected such members from a province within the time permitted, authority on the legislative assembly of the province to select those members on the nomination of the Lieutenant Governor in Council,

(iii) conferring authority on the Lieutenant Governors in Council of the provinces or on some other body or bodies to select some or all of the members of the Upper House, or

(iv) providing for the direct election of all or some of the members of the Upper House by the public; or

(f) to provide that Bills approved by the House of Commons could be given assent and the force of law after the passage of a certain period of time notwithstanding that the Upper House has not approved them?

If not, in what particular or particulars and to what extent?

The answers of the Court are:

To question 1: No.

To question 2(b), (e)(iv) and (f): No.

The remainder of the questions cannot be answered categorically in the absence of a factual background.

The apparent intention of the 1949 amendment to the Act which enacted s. 91(1) was to obviate the necessity for the enactment of a statute of the British Parliament to effect amendments to the Act which theretofore had been obtained through a joint resolution of both Houses of Parliament and without provincial consent. Legislation enacted under this subsection since 1949 has dealt with matters which, according to the practice existing before 1949, would have been referred to the British Parliament by way of a joint resolution of both Houses of Parliament, and without the consent of the provinces. It did not in any substantial way affect federal-provincial relationships. The legislation contemplated in the first question is of an entirely different character. While it does not directly affect the federal-provincial relationships in the sense of changing federal and provincial legislative powers, it does envisage the elimination of one of the two Houses of Parliament, and so would alter

l'avis du gouverneur général en conseil, lorsqu'une assemblée législative provinciale n'agit pas dans les délais impartis, et

(ii) conférant à la Chambre des Communes le pouvoir de nommer dans chaque province, sur l'avis du gouverneur général en conseil, certains membres de la Chambre haute, l'assemblée législative provinciale étant autorisée à nommer lesdits membres, sur l'avis du lieutenant-gouverneur en conseil, lorsque la Chambre des Communes n'agit pas dans les délais impartis.

(iii) conférant soit aux lieutenants-gouverneurs en conseil ou soit à un ou plusieurs organismes le pouvoir de choisir une partie ou la totalité des membres de la Chambre haute; ou

(iv) prévoyant l'élection directe, par la population, d'une partie ou de la totalité des membres de la Chambre haute; ou

(f) prévoir que les projets de la loi approuvés par la Chambre des Communes soient sanctionnés et aient force de loi après l'écoulement d'un certain délai, et ce, même sans leur approbation par la Chambre haute?

Dans la négative, à quel égard ou à quels égards et dans quelle mesure?

Les réponses de la Cour sont:

A la question 1: Non.

A la question 2 par. b), e)(iv) et f): Non.

Pour le reste, en l'absence de précisions sur le contexte, une réponse catégorique est impossible.

La modification de 1949 qui a édicté le par. 91(1) de l'Acte visait manifestement à obvier à la nécessité de la promulgation d'une loi par le Parlement britannique pour apporter à l'Acte des modifications qui, jusqu'alors, avaient été obtenues par une résolution conjointe des deux Chambres du parlement sans le consentement des provinces. Les lois adoptées depuis 1949 en vertu de ce paragraphe ont porté sur des questions qui, selon la pratique antérieure, auraient été soumises au Parlement britannique par voie de résolution conjointe des deux Chambres du parlement sans le consentement des provinces. Elles n'ont aucune répercussion appréciable sur les relations fédérales-provinciales. La loi envisagée dans la première question est d'une toute autre nature. Bien qu'elle n'ait aucun effet direct sur les relations fédérales-provinciales en ce sens qu'elle ne modifie pas les pouvoirs législatifs fédéral et provinciaux, elle vise cependant l'élimination d'une des Chambres du Parlement, et

Renvoi: Compétence du Parlement relativement à la Chambre Haute, [1980] 1 R.C.S. 54

56

RE: AUTHORITY OF PARLIAMENT IN RELATION TO THE UPPER HOUSE

[1980] 1 S.C.R.

the structure of the federal Parliament to which the federal power to legislate is entrusted under s. 91 of the Act.

The Senate has a vital role as an institution forming part of the federal system; one of its primary purposes was to afford protection to the various sectional interests in Canada in relation to the enactment of federal legislation. The power to enact federal legislation was given to the Queen by and with the advice and consent of the Senate and the House of Commons. Thus, the body which had been created as a means of protecting sectional and provincial interests was made a participant in this legislative process.

Further, although s. 91(1) gave the Queen the power, with the advice and consent of the Senate and the House of Commons, to alter the "Constitution of Canada" except in certain expressly designated areas, it does not confer a power to amend the *B.N.A. Act*. The word "Canada" in s. 91(1) does not refer to Canada as a geographical unit but refers to the juristic federal unit. "Constitution of Canada" does not mean the whole of the *British North America Act*, but means the constitution of the federal government, as distinct from the provincial governments. The power of amendment conferred by s. 91(1) is thus limited and it relates to the constitution of the federal government in matters of interest only to that government; the continued existence of the Senate as a part of the federal legislative process is implied in the exceptions provided in s. 91(1).

While s. 91(1) would permit some changes to be made by Parliament in respect of the Senate as now constituted, it is not open to Parliament to make alterations which would affect the fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process. The amendments proposed by para. (b), which imply a change in the method of regional representation, by para. (e) subpara. (iv), which would make the Senate a wholly or partly elected body, and by para. (b) which would allow Acts to be adopted without the consent of the Senate, are precisely in this category. Section 91(1) does not give Parliament the power to alter the fundamental character of the Senate by unilateral action, so the questions formulated in these three paragraphs must be answered in the negative. The other questions cannot be answered categorically in the absence of a factual background.

Quebec North Shore Paper Co. v. Canadian Pacific Limited, [1977] 2 S.C.R. 1054; *McNamara Construction (Western) Ltd. v. The Queen*, [1977] 2 S.C.R. 654;

modifierait ainsi la structure du Parlement fédéral à qui est confié le pouvoir fédéral de légiférer en vertu de l'art. 91 de l'Acte.

Le Sénat a un rôle vital en tant qu'institution faisant partie du système fédéral: un de ses buts primordiaux était d'assurer la protection des divers intérêts régionaux au Canada quant à d'adoption de la législation fédérale. Le pouvoir d'édicter des lois fédérales a été donné à la Reine, de l'avis et du consentement du Sénat et de la Chambre des communes. Ainsi on a voulu que l'organisme créé pour protéger les intérêts des régions et des provinces participe à ce processus législatif.

Par ailleurs, même si le par. 91(1) a donné à la Reine, de l'avis et du consentement du Sénat et de la Chambre des communes, le pouvoir de modifier la «constitution du Canada» sauf en certaines matières désignées expressément, il ne donne pas le pouvoir de modifier l'*A.A.N.B.* Le mot «Canada» au par. 91(1) ne se rapporte pas au Canada au sens géographique mais bien à l'entité juridique fédérale. La «constitution du Canada» ne signifie pas l'ensemble de l'*Acte de l'Amérique du Nord britannique*, mais la constitution du gouvernement fédéral, par opposition aux gouvernements provinciaux. Le pouvoir de modification conféré par le par. 91(1) est donc limité et il se rapporte à la constitution du gouvernement fédéral dans des matières qui concernent uniquement ce gouvernement, les exceptions qui y sont prévues impliquent l'existence continue du Sénat en tant que partie du système législatif fédéral.

Bien que le par. 91(1) permette au Parlement d'apporter certains changements à la constitution actuelle du Sénat, il ne lui permet pas d'apporter des modifications qui porteraient atteinte aux caractéristiques fondamentales ou essentielles attribuées au Sénat pour assurer la représentation régionale et provinciale dans le système législatif fédéral. Sont précisément dans cette catégorie les modifications proposées par le par. b) qui implique un changement dans le mode de représentation régionale, par le par. e) al. (iv) qui ferait du Sénat un organisme entièrement ou partiellement électif et par le par. f) qui permettrait l'adoption de lois sans le consentement du Sénat. Le Parlement n'étant pas autorisé par le par. 91(1) à modifier unilatéralement le caractère fondamental du Sénat, il faut répondre par la négative aux questions formulées dans ces trois paragraphes. Quant aux autres questions, l'absence de précisions sur le contexte ne permet pas de leur donner une réponse catégorique.

Jurisprudence: *Quebec North Shore Paper Co. c. Canadian Pacifique Ltée*, [1977] 2 R.C.S. 1054; *McNamara Construction (Western) Ltd. c. La Reine*, [1977] 2

Renvoi: Compétence du Parlement relativement à la Chambre Haute, [1980] 1 R.C.S. 54

[1980] 1 R.C.S. RENVOI: COMPÉTENCE DU PARLEMENT RELATIVEMENT À LA CHAMBRE HAUTE 57

In re The Regulation and Control of Aeronautics in Canada, [1932] A.C. 54; *Attorney General of Nova Scotia v. Attorney General of Canada and Lord Nelson Hotel Co. Ltd.*, [1951] S.C.R. 31; *In re The Initiative and Referendum Act*, [1919] A.C. 35, aff'g (1916), 27 Man. R. 1 referred to.

REFERENCE by the Governor General in Council, pursuant to s. 55 of the *Supreme Court Act*, concerning the legislative authority of the Parliament of Canada in relation to the Upper House. The Court answered question 1 and subss. (b), (e)(iv) and (f) of question 2 in the negative. It stated that a categorical answer was impossible for the remainder.

J. J. Robinette, Q.C., François Mercier, Q.C., and T. B. Smith, Q.C., for the Attorney General of Canada.

D. W. Mundell, Q.C., and Lorraine E. Weinrib, for the Attorney General of Ontario.

Jerrold W. Kavanagh, Q.C., and Mollie Gallagher, for the Attorney General of Nova Scotia.

Alan D. Reid and Gordon F. Gregory, Q.C., for the Attorney General of New Brunswick.

Ian W. H. Bailey, for the Attorney General of Prince Edward Island.

Patrick McDonald, for the Attorney General of Saskatchewan.

William Henkel, Q.C., for the Attorney General of Alberta.

James A. Nesbitt, Q.C., for the Attorney General of Newfoundland.

THE COURT—By Order in Council P.C. 1978-3581, dated November 23, 1978, the Governor General in Council, pursuant to s. 55 of the *Supreme Court Act*, referred to this Court for hearing and consideration the following two questions:

1. Is it within the legislative authority of the Parliament of Canada to repeal sections 21 to 36 of the *British North America Act, 1867*, as amended, and to amend other sections thereof so as to delete any reference to an Upper House or the Senate? If not, in what particular or particulars and to what extent?

R.C.S. 654; *In re La réglementation et le contrôle de l'aéronautique au Canada*, [1932] A.C. 54; *Procureur général de la Nouvelle-Écosse c. Procureur général du Canada et Lord Nelson Hotel Co. Ltd.*, [1951] R.C.S. 31; *In re The Initiative and Referendum Act*, [1919] A.C. 35, confirmant (1916), 27 Man. R. 1.

QUESTIONS soumises par le gouverneur général en conseil, en vertu de l'art. 55 de la *Loi sur la Cour suprême*, sur la compétence législative du Parlement du Canada relativement à la Chambre haute. La Cour a répondu par la négative à la question 1 et aux par. b), e)(iv) et f) de la seconde question. Elle a déclaré, que pour le reste, une réponse catégorique est impossible.

J. J. Robinette, c.r., François Mercier, c.r., et T. B. Smith, c.r., pour le procureur général du Canada.

D. W. Mundell, c.r., et Lorraine E. Weinrib, pour le procureur général de l'Ontario.

Jerrold W. Kavanagh, c.r., et Mollie Gallagher, pour le procureur général de la Nouvelle-Écosse.

Alan D. Reid et Gordon F. Gregory, c.r., pour le procureur général du Nouveau-Brunswick.

Ian W. H. Bailey, pour le procureur général de l'Île-du-Prince-Édouard.

Patrick McDonald, pour le procureur général de la Saskatchewan.

William. Henkel, c.r., pour le procureur général de l'Alberta.

James A. Nesbitt, c.r., pour le procureur général de Terre-Neuve.

LA COUR—Par le décret C.P. 1978-3581, en date du 23 novembre 1978, le gouverneur général en conseil a soumis à cette Cour, pour audition et examen en vertu de l'art. 55 de la *Loi sur la Cour suprême*, les deux questions suivantes:

1. Ressort-il de la compétence législative du Parlement du Canada d'abroger les articles 21 à 36 de l'*Acte de l'Amérique du Nord britannique, 1867*, tel que modifié et de modifier les autres articles de cette loi dans lesquels il est fait mention de la Chambre haute ou du Sénat, de manière à supprimer toute référence à la Chambre haute ou au Sénat? Dans la négative, à quel égard ou à quels égards et dans quelle mesure?

Renvoi: *Compétence du Parlement relativement à la Chambre Haute*, [1980] 1 R.C.S. 54

58

RE: AUTHORITY OF PARLIAMENT IN RELATION TO THE UPPER HOUSE

[1980] 1 S.C.R.

2. Is it within the legislative authority of the Parliament of Canada to enact legislation altering, or providing a replacement for, the Upper House of Parliament, so as to effect any or all of the following:

- (a) to change the name of the Upper House;
- (b) to change the numbers and proportions of members by whom provinces and territories are represented in that House;
- (c) to change the qualifications of members of that House;
- (d) to change the tenure of members of that House;
- (e) to change the method by which members of that House are chosen by
 - (i) conferring authority on provincial legislative assemblies to select, on the nomination of the respective Lieutenant Governors in Council, some members of the Upper House, and, if a legislative assembly has not selected such members within the time permitted, authority on the House of Commons to select those members on the nomination of the Governor General in Council, and
 - (ii) conferring authority on the House of Commons to select, on the nomination of the Governor General in Council, some members of the Upper House from each province, and, if the House of Commons has not selected such members from a province within the time permitted, authority on the legislative assembly of the province to select those members on the nomination of the Lieutenant Governor in Council,
 - (iii) conferring authority on the Lieutenant Governors in Council of the provinces or on some other body or bodies to select some or all of the members of the Upper House, or
 - (iv) providing for the direct election of all or some of the members of the Upper House by the public; or
 - (f) to provide that Bills approved by the House of Commons could be given assent and the force of law after the passage of a certain period of time notwithstanding that the Upper House has not approved them?
- If not, in what particular or particulars and to what extent?

2. Ressort-il de la compétence législative du Parlement du Canada de promulguer des lois visant à modifier les dispositions relatives à la Chambre haute du Parlement ou à remplacer ladite Chambre? Ainsi, ressort-il de la compétence du Parlement de faire l'un quelconque ou tous les changements suivants:

- a) modifier le nom de la Chambre haute;
- b) modifier le nombre et le pourcentage des membres qui représentent les provinces ou les territoires dans cette chambre;
- c) modifier les qualités requises pour être membre de cette chambre;
- d) modifier les termes du mandat des membres de cette chambre;
- e) modifier le processus de nomination des membres de cette chambre, en
 - (i) conférant aux assemblées législatives provinciales le pouvoir de nommer, sur l'avis du lieutenant-gouverneur en conseil, certains membres de la Chambre haute, la Chambre des Communes étant autorisée à nommer lesdits membres, sur l'avis du gouverneur général en conseil, lorsqu'une assemblée législative provinciale n'agit pas dans les délais impartis, et
 - (ii) conférant à la Chambre des Communes le pouvoir de nommer dans chaque province, sur l'avis du gouverneur général en conseil, certains membres de la Chambre haute, l'assemblée législative provinciale étant autorisée à nommer lesdits membres, sur l'avis du lieutenant-gouverneur en conseil, lorsque la Chambre des Communes n'agit pas dans les délais impartis,
 - (iii) conférant soit aux lieutenants-gouverneurs en conseil ou soit à un ou plusieurs organismes le pouvoir de choisir une partie ou la totalité des membres de la Chambre haute; ou
 - (iv) prévoyant l'élection directe, par la population, d'une partie ou de la totalité des membres de la Chambre haute; ou
 - f) prévoir que les projets de loi approuvés par la Chambre des Communes soient sanctionnés et aient force de loi après l'écoulement d'un certain délai, et ce, même sans leur approbation par la Chambre haute?

Dans la négative, à quel égard ou à quels égards et dans quelle mesure?

Renvoi: *Compétence du Parlement relativement à la Chambre Haute*, [1980] 1 R.C.S. 54

[1980] 1 R.C.S. RENVOI: COMPÉTENCE DU PARLEMENT RELATIVEMENT À LA CHAMBRE HAUTE 59

Submissions in respect of these questions were made to the Court on behalf of the Attorney General of Canada and also on behalf of the Attorneys General of Ontario, Nova Scotia, New Brunswick, Prince Edward Island, Saskatchewan, Alberta and Newfoundland.

Question 1:

Sections 21 to 36 of the *British North America Act*, hereinafter referred to as "the Act", referred to in Question 1, appear in the Act under the heading "The Senate" and deal with the constitution of that body, including the number of senators; the representation in the Senate of the four divisions, *i.e.*, Ontario, Quebec, the Maritime Provinces and the Western Provinces; the qualifications for appointment to the Senate; the appointment of senators; the age limit for senators; resignation and disqualification of senators. References to the Senate by name, or as a House of Parliament, and references to senators are also to be found in ss. 17, 18, 39, 51A, 55, 56, 57, 59, 73, 74, 91, 128, 133, 146 and 147.

It is clear that Question 1 in essence, although not in terms, asks whether the Parliament of Canada has legislative authority to abolish the Senate. The Attorney General of Canada contends that the question should be answered in the affirmative. All of the Attorneys General of the provinces, represented on the hearing, contended that the question should be answered in the negative.

The Attorney General of Canada bases his submission upon the provisions of Class 1 of the subject matters enumerated in s. 91 of the Act. Section 91, which appears in Part VI of the Act, under the heading "Powers of the Parliament", defines the legislative authority of the Parliament of Canada. The opening words of this section are as follows:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this

Le procureur général du Canada et les procureurs généraux de l'Ontario, de la Nouvelle-Écosse, du Nouveau-Brunswick, de l'Île-du-Prince-Édouard, de la Saskatchewan, de l'Alberta et de Terre-Neuve ont présenté à la Cour des exposés sur ces questions.

1^{re} question:

Les articles 21 à 36 de l'*Acte de l'Amérique du Nord britannique*, ci-après désigné «l'Acte», mentionnés dans la première question, figurent dans l'Acte sous le titre «Le Sénat» et portent sur la constitution de cet organisme, y compris le nombre de sénateurs; la représentation au Sénat des quatre divisions, c'est-à-dire, l'Ontario, le Québec, les provinces maritimes et les provinces de l'Ouest; les qualités exigées pour être nommé au Sénat; la nomination, la limite d'âge, la démission et la déchéance des sénateurs. Il est également question du Sénat que l'on désigne par son nom ou comme Chambre du Parlement et des sénateurs aux art. 17, 18, 39, 51A, 55, 56, 57, 59, 73, 74, 91, 128, 133, 146 et 147.

Il est évident que la première question, en substance sinon par ses termes, demande si le Parlement du Canada a la compétence législative pour abolir le Sénat. Le procureur général du Canada prétend qu'il faut répondre par l'affirmative à cette question. Tous les procureurs généraux des provinces représentés à l'audition, prétendent qu'il faut répondre par la négative.

Le procureur général du Canada fonde sa prétention sur les dispositions de la catégorie 1 des sujets énumérés à l'art. 91 de l'Acte. Cet article que l'on trouve dans la Partie VI de l'Acte, sous le titre «Pouvoirs du parlement», définit la compétence législative du Parlement du Canada. En voici le premier alinéa:

91. Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par le présent acte exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois restreindre la généralité des termes ci-haut employés dans le présent article, il est par le présent déclaré que (nonob-

Renvoi: Compétence du Parlement relativement à la Chambre Haute, [1980] 1 R.C.S. 54

60

RE: AUTHORITY OF PARLIAMENT IN RELATION TO THE UPPER HOUSE

[1980] 1 S.C.R.

Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated;

Class 1 of s. 91 was added to it by an amendment to the Act enacted by the British Parliament on December 16, 1949. Section 1 of the amending statute provided as follows:

1. Section 91 of the *British North America Act, 1867* is hereby amended by renumbering Class 1 thereof as Class 1A and by inserting therein immediately before that Class the following as Class 1:—

“1. The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.”

Prior to 1949, in most respects, the Act did not provide for its amendment by any legislative authority in Canada. Accordingly, as it was a statute enacted by the British Parliament, any changes in its content had to be made by way of an amending Act enacted by that Parliament. Many amendments have been made in that way. A brief account of them and of other statutes of a constitutional character is found in a White Paper published in 1965 under the authority of the Honourable Guy Favreau, then Minister of Justice for Canada, under the title of “The Amendment of the Constitution of Canada”:

(1) *The Rupert's Land Act, 1868* authorized the acceptance by Canada of the rights of the Hud-

stant toute disposition contraire énoncée dans le présent acte) l'autorité législative exclusive du Parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés;

La catégorie 1 a été ajoutée par une modification de l'Acte édictée par le Parlement britannique le 16 décembre 1949. Voici le texte de l'art. 1 de la loi modificatrice:

1. L'article quatre-vingt-onze de l'*Acte de l'Amérique du Nord britannique, 1867*, est modifié par la désignation de la catégorie 1 comme catégorie 1A et par l'insertion, immédiatement avant cette catégorie, de la catégorie 1 suivante:

«1. La modification, de temps à autre, de la constitution du Canada, sauf en ce qui concerne les matières rentrant dans les catégories de sujets que la présente loi attribue exclusivement aux législatures des provinces, ou en ce qui concerne les droits ou priviléges accordés ou garantis, par la présente loi ou par toute autre loi constitutionnelle, à la législature ou au gouvernement d'une province, ou à quelque catégorie de personnes en matière d'écoles, ou en ce qui regarde l'emploi de l'anglais ou du français, ou les prescriptions portant que le parlement du Canada tiendra au moins une session chaque année et que la durée de chaque chambre des communes sera limitée à cinq années, depuis le jour du rapport des brefs ordonnant l'élection de cette chambre; toutefois, le parlement du Canada peut prolonger la durée d'une chambre des communes en temps de guerre, d'invasion ou d'insurrection, réelles ou appréhendées, si cette prolongation n'est pas l'objet d'une opposition exprimée par les votes de plus du tiers des membres de ladite chambre.»

Avant 1949, sous presque tous les rapports, l'Acte ne prévoyait pas sa modification par une autorité législative du Canada. Par conséquent, puisqu'il s'agissait d'une loi édictée par le Parlement britannique, tout changement devait être apporté par une loi modificatrice édictée par ce parlement. Plusieurs modifications ont été apportées de cette façon. On trouve dans le Livre blanc publié en 1965 sous l'autorité de l'honorable Guy Favreau, alors ministre de la Justice du Canada, sous le titre «Modifications de la Constitution du Canada» un bref historique de ces modifications et d'autres lois de nature constitutionnelle:

(1) *L'Acte de la Terre de Rupert de 1868* autorisa le Canada à acquérir les droits de la Compagnie de

son's Bay Company over Rupert's Land and the North-Western Territory. It also provided that, on Address from the Houses of Parliament of Canada, the Crown could declare this territory part of Canada and the Parliament of Canada could make laws for its peace, order and good government.

- (2) *The British North America Act of 1871* ratified the Manitoba Act passed by the Parliament of Canada in 1870, creating the province of Manitoba and giving it a provincial constitution similar to those of the other provinces. The British North America Act of 1871 also empowered the Parliament of Canada to establish new provinces out of any Canadian territory not then included in a province; to alter the boundaries of any province (with the consent of its legislature), and to provide for the administration, peace and good government of any territory not included in a province.
- (3) *The Parliament of Canada Act of 1875* amended section 18 of the British North America Act, 1867, which set forth the privileges, immunities and powers of each of the House of Parliament.
- (4) *The British North America Act of 1886* authorized the Parliament of Canada to provide for the representation in the Senate and the House of Commons of any territories not included in any province.
- (5) *The Statute Law Revision Act, 1893* repealed some obsolete provisions of the British North America Act of 1867.
- (6) *The Canadian Speaker (Appointment of Deputy) Act, 1895* confirmed an Act of the Parliament of Canada which provided for the appointment of a Deputy-Speaker for the Senate.
- (7) *The British North America Act, 1907* established a new scale of financial subsidies to the provinces in lieu of those set forth in section 118 of the British North America Act of 1867. While not expressly repealing the original section, it made its provisions obsolete.
- (8) *The British North America Act, 1915* re-defined the Senatorial Divisions of Canada to take into account the provinces of Manitoba, British Columbia, Saskatchewan and Alberta. Although this statute did not expressly amend the text of the original section 22, it did alter its effect.
- la baie d'Hudson sur la Terre de Rupert et le Territoire du Nord-Ouest. Il prévoyait aussi que la Couronne, sur présentation d'adresses de la part des chambres du Parlement du Canada, pourrait déclarer que le territoire ferait partie du Canada, et que le Parlement du Canada pourrait faire des lois pour y assurer la paix, l'ordre et le bon gouvernement.
- (2) *L'Acte de l'Amérique du Nord britannique de 1871* ratifia l'Acte du Manitoba adopté par le Parlement du Canada en 1870, qui créait la province du Manitoba et lui donnait une constitution semblable à celles des autres provinces. De plus, l'Acte conférait au Parlement du Canada le pouvoir d'ériger de nouvelles provinces dans n'importe quel territoire canadien non compris alors dans une province, de modifier les limites de toute province (avec l'accord de sa Législature) et de pourvoir à l'administration, la paix, l'ordre et le bon gouvernement de tout territoire non compris dans une province.
- (3) *L'Acte du Parlement du Canada de 1875* modifia l'article 18 de l'Acte de l'Amérique du Nord britannique de 1867, qui énonce les priviléges, immunités et pouvoirs de chacune des chambres du Parlement.
- (4) *L'Acte de l'Amérique du Nord britannique de 1886* autorisa le Parlement du Canada à pourvoir à la représentation au Sénat et à la Chambre des Communes de tout territoire non compris dans une province.
- (5) *La Loi de 1893 sur la révision du droit statutaire* abrogea certaines dispositions périmées de l'Acte de 1867.
- (6) *L'Acte concernant l'Orateur canadien (nomination d'un suppléant) de 1895* confirma une loi du Parlement du Canada qui permet la nomination d'un orateur suppléant au Sénat.
- (7) *L'Acte de l'Amérique du Nord britannique de 1907* établit une nouvelle échelle de subventions financières aux provinces en remplacement de celles qui sont prévues à l'article 118 de l'Acte de l'Amérique du Nord britannique de 1867. Tout en n'abrogeant pas expressément l'article primitif, il en rendit les dispositions inopérantes.
- (8) *L'Acte de l'Amérique du Nord britannique de 1915* redéfini les divisions sénatoriales du Canada pour tenir compte de l'existence des provinces du Manitoba, de la Colombie-Britannique, de la Saskatchewan et de l'Alberta. Bien qu'il n'ait pas modifié expressément le texte de l'article 22 primitif, il en a sûrement changé la portée.

Renvoi: *Compétence du Parlement relativement à la Chambre Haute*, [1980] 1 R.C.S. 54

- (9) *The British North America Act, 1916* provided for the extension of the life of the current Parliament of Canada beyond the normal period of five years.
- (10) *The Statute Law Revision Act, 1927* repealed additional spent or obsolete provisions in the United Kingdom statutes, including two provisions of the British North America Acts.
- (11) *The British North America Act, 1930* confirmed the natural resources agreements between the Government of Canada and the Governments of Manitoba, British Columbia, Alberta and Saskatchewan, giving the agreements the force of law notwithstanding anything in the British North America Acts.
- (12) *The Statute of Westminster, 1931* while not directly amending the British North America Acts, did alter some of their provisions. Thus, the Parliament of Canada was given the power to make laws having extraterritorial effect. Also, Parliament and the provincial legislatures were given the authority, within their powers under the British North America Acts, to repeal any United Kingdom statute that formed part of the law of Canada. This authority, however, expressly excluded the British North America Act itself.
- (13) *The British North America Act, 1940* gave the Parliament of Canada the exclusive jurisdiction to make laws in relation to Unemployment Insurance.
- (14) *The British North America Act, 1943* provided for the postponement of redistribution of the seats in the House of Commons until the first session of Parliament after the cessation of hostilities.
- (15) *The British North America Act, 1946* replaced section 51 of the British North America Act, 1867, and altered the provisions for the readjustment of representation in the House of Commons.
- (16) *The British North America Act, 1949* confirmed the Terms of Union between Canada and Newfoundland.
- (17) *The British North America Act (No. 2), 1949* gave the Parliament of Canada authority to amend the Constitution of Canada with certain exceptions.
- (9) *L'Acte de l'Amérique du Nord britannique de 1916* prolongea la durée du Parlement du Canada alors en fonctions au-delà de la période normale de cinq ans.
- (10) *La Loi de 1927 sur la révision du droit statutaire* une fois encore abrogea des dispositions périmées ou désuètes des statuts du Royaume-Uni, y compris deux dispositions des Actes de l'Amérique du Nord britannique.
- (11) *L'Acte de l'Amérique du Nord britannique de 1930* confirma les accords relatifs aux ressources naturelles intervenus entre le gouvernement du Canada et ceux du Manitoba, de la Colombie-Britannique, de l'Alberta et de la Saskatchewan et leur donna force de loi, nonobstant toute disposition contraire des Actes de l'Amérique du Nord britannique.
- (12) *Le Statut de Westminster de 1931*, tout en ne modifiant pas directement les Actes de l'Amérique du Nord britannique, changea certaines de leurs dispositions. C'est ainsi, par exemple, que le Parlement du Canada fut autorisé à faire des lois ayant une portée extra-territoriale. En outre, le Parlement et les législatures des provinces furent habilités, dans la limite des pouvoirs respectifs que leur confèrent les Actes de l'Amérique du Nord britannique, à abroger tout statut du Royaume-Uni faisant alors partie des lois du Canada à l'exception expresse, cependant, de l'Acte de l'Amérique du Nord britannique lui-même.
- (13) *L'Acte de l'Amérique du Nord britannique de 1940* accorda au Parlement du Canada la compétence exclusive de légiférer en matière d'assurance-chômage.
- (14) *L'Acte de l'Amérique du Nord britannique de 1943* ajourna le rajustement de la représentation à la Chambre des Communes jusqu'à la première session du Parlement qui suivrait la fin des hostilités.
- (15) *L'Acte de l'Amérique du Nord britannique de 1946* remplaça l'article 51 de l'Acte de l'Amérique du Nord britannique de 1867 et changea les dispositions relatives au rajustement de la représentation à la Chambre des Communes.
- (16) *L'Acte de l'Amérique du Nord britannique de 1949* sanctionna les Conditions d'union entre le Canada et Terre-Neuve.
- (17) *L'Acte de l'Amérique du Nord britannique (n° 2) de 1949* habilita le Parlement du Canada à modifier la Constitution du Canada, à l'exception de certaines catégories de sujets.

[1980] 1 R.C.S. RENVOI: COMPÉTENCE DU PARLEMENT RELATIVEMENT À LA CHAMBRE HAUTE 63

- (18) *The Statute Law Revision Act, 1950* repealed an obsolete section of the British North America Act, 1867.
- (19) *The British North America Act, 1951* gave the Parliament of Canada concurrent jurisdiction with the provinces to make laws in relation to Old Age Pensions.
- (20) *The British North America Act, 1960* amended section 99 and altered the tenure of office of superior court judges.
- (21) *The British North America Act, 1964* amended the authority conferred upon the Parliament of Canada by the British North America Act, 1951, in relation to benefits supplementary to Old Age Pensions.
- (22) *Amendment by Order in Council*
Section 146 of the British North America Act, 1867 provided for the admission of other British North American territories by Order in Council and stipulated that the provisions of any such Order in Council would have the same effect as if enacted by the Parliament of the United Kingdom. Under this section, Rupert's Land and the North-Western Territory were admitted by Order in Council on June 23rd, 1870; British Columbia by Order in Council on May 16th, 1871; Prince Edward Island by Order in Council on June 26th, 1873. Because all of these Orders in Council contained provisions of a constitutional character—adapting the provisions of the British North America Act to the new provinces, but with some modifications in each case—they may therefore be regarded as constitutional amendments.
- (18) *La Loi de 1950 sur la révision du droit statutaire* abrogea un article désuet de l'Acte de l'Amérique du Nord britannique de 1867.
- (19) *L'Acte de l'Amérique du Nord britannique de 1951* autorisa le Parlement du Canada à légiférer concurremment avec les provinces sur les pensions de vieillesse.
- (20) *L'Acte de l'Amérique du Nord britannique de 1960* modifia l'article 99 et changea la durée des fonctions des juges des cours supérieures.
- (21) *L'Acte de l'Amérique du Nord britannique de 1964* modifia les pouvoirs conférés au Parlement du Canada par l'Acte de l'Amérique du Nord britannique de 1951 au sujet des pensions de vieillesse et des prestations additionnelles.
- (22) *Modifications par arrêté en conseil*
L'article 146 de l'Acte de l'Amérique du Nord britannique prévoyait l'adjonction au Canada d'autres territoires de l'Amérique du Nord britannique par arrêté en conseil et stipulait que les dispositions de tels arrêtés auraient le même effet que si elles avaient été édictées par le Parlement du Royaume-Uni. En vertu de cet article, la Terre de Rupert et le Territoire du Nord-Ouest furent admis par arrêté en conseil du 23 juin 1870; la Colombie-Britannique par arrêté en conseil du 16 mai 1871; et l'Île-du-Prince-Édouard par arrêté en conseil du 26 juin 1873. Comme tous ces arrêtés renferment des dispositions d'un caractère constitutionnel, ayant pour objet d'adapter les clauses de l'Acte de l'Amérique du Nord britannique aux nouvelles provinces,—avec les variations nécessaires dans chaque cas,—ils doivent être considérés comme des modifications d'ordre constitutionnel.

The practice, since 1875, has been to seek amendment of the Act by a joint address of both Houses of Parliament. Consultation with one or more of the provinces has occurred in some instances. The amendment in 1907 was based on resolutions passed at provincial conferences, although opposed by British Columbia. The 1930 amendment respecting the transfer of resources to the four western provinces resulted from agreements with those provinces. The 1949 amendment respecting Newfoundland becoming a province was made after there had been an agreement with that province. The amendments of 1940, 1951, 1960 and 1964, respecting unemployment insurance, old age pensions, the compulsory retirement of judges and adding supplementary benefits to old

Depuis 1875, la pratique a été de demander la modification par une adresse conjointe présentée par les deux Chambres du Parlement. Dans certains cas, il y a eu consultation d'une ou plusieurs provinces. La modification de 1907 a été fondée sur des résolutions adoptées au cours de conférences provinciales malgré l'opposition de la Colombie-Britannique. La modification de 1930 relative au transfert de ressources aux quatre provinces de l'Ouest découlait de conventions avec ces provinces. La modification de 1949 en vertu de laquelle Terre-Neuve est devenue une province a été apportée par suite d'un accord avec cette province. Les modifications de 1940, 1951, 1960 et 1964, concernant l'assurance-chômage, les pensions de vieillesse, la retraite obligatoire des juges et des presta-

Renvoi: *Compétence du Parlement relativement à la Chambre Haute*, [1980] 1 R.C.S. 54

64

RE: AUTHORITY OF PARLIAMENT IN RELATION TO THE UPPER HOUSE

[1980] 1 S.C.R.

age pensions all had the unanimous consent of the provinces.

The White Paper, after reviewing the procedures followed in respect of amendments to the Act, went on to state four general principles, as follows:

The first general principle that emerges in the foregoing resumé is that although an enactment by the United Kingdom is necessary to amend the British North America Act, such action is taken only upon formal request from Canada. No Act of the United Kingdom Parliament affecting Canada is therefore passed unless it is requested and consented to by Canada. Conversely, every amendment requested by Canada in the past has been enacted.

The second general principle is that the sanction of Parliament is required for a request to the British Parliament for an amendment to the British North America Act. This principle was established early in the history of Canada's constitutional amendments, and has not been violated since 1895. The procedure invariably is to seek amendments by a joint Address of the Canadian House of Commons and Senate to the Crown.

The third general principle is that no amendment to Canada's Constitution will be made by the British Parliament merely upon the request of a Canadian province. A number of attempts to secure such amendments have been made, but none has been successful. The first such attempt was made as early as 1868, by a province which was at that time dissatisfied with the terms of Confederation. This was followed by other attempts in 1869, 1874 and 1887. The British Government refused in all cases to act on provincial government representations on the grounds that it should not intervene in the affairs of Canada except at the request of the federal government representing all of Canada.

The fourth general principle is that the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces. This principle did not emerge as early as others but since 1907, and particularly since 1930, has gained increasing recognition and acceptance. The nature and the degree of provincial participation in the amending process, however, have not lent themselves to easy definition.

The apparent intention of the 1949 amendment to the Act which enacted s. 91(1) was to obviate the necessity for the enactment of a statute of the British Parliament to effect amendments to the

tions supplémentaires aux pensions de vieillesse, ont toutes été faites du consentement unanime des provinces.

Après avoir passé en revue la procédure suivie pour les modifications de l'Acte, le Livre blanc a énoncé les quatre principes généraux suivants:

Premièrement, bien qu'une loi du Royaume-Uni soit nécessaire pour modifier l'Acte de l'Amérique du Nord britannique, une telle loi n'est promulguée que sur la demande officielle du Canada. Le Parlement du Royaume-Uni n'adopte aucune loi touchant le Canada à moins qu'elle ne soit demandée et acceptée par le Canada; inversement, toute modification que le Canada a demandée dans le passé a été adoptée.

Deuxièmement, le Parlement du Canada doit autoriser toute demande au Parlement britannique de modifier l'Acte de l'Amérique du Nord britannique. Ce principe a été établi dès le début et l'on ne s'en est pas écarté depuis 1895. Une demande de modification prend invariablement la forme d'une adresse conjointe de la Chambre des Communes et du Sénat du Canada à Sa Majesté.

Troisièmement, le Parlement britannique ne peut procéder à une modification de la Constitution du Canada à la seule demande d'une province canadienne. Certaines tentatives ont été faites par des provinces dans ce sens, mais sans succès. La première, qui remonte à 1868, émanait d'une province qui n'était pas satisfaite à l'époque des conditions de la Confédération. D'autres ont suivi en 1869, 1874 et 1887. Le gouvernement britannique a chaque fois refusé de donner suite aux instances des gouvernements provinciaux, soutenant qu'il ne devait pas intervenir dans les affaires du Canada, sauf s'il en était requis par le gouvernement fédéral agissant au nom de tout le Canada.

Quatrièmement, le Parlement du Canada ne procède pas à une modification de la Constitution intéressant directement les rapports fédératifs sans avoir au préalable consulté les provinces et obtenu leur assentiment. Ce principe ne s'est pas concrétisé aussi tôt que les autres, mais, à partir de 1907 et en particulier depuis 1930, il a été de plus en plus affirmé et accepté. Il n'a pas été facile, cependant, de préciser la nature et l'étendue de la participation provinciale à la procédure de modification.

La modification de 1949 qui a édicté le par. 91(1) de l'Acte visait manifestement à obvier à la nécessité de la promulgation d'une loi par le Parlement britannique pour apporter à l'Acte des modifi-

Renvoi: *Compétence du Parlement relativement à la Chambre Haute*, [1980] 1 R.C.S. 54

[1980] 1 R.C.S. RENVOI: COMPÉTENCE DU PARLEMENT RELATIVEMENT À LA CHAMBRE HAUTE 65

Act which theretofore had been obtained through a joint resolution of both Houses of Parliament and without provincial consent. Legislation enacted since 1949 pursuant to s. 91(1) has not, to quote the White Paper, "affected federal-provincial relationships". The following statutes have been enacted by the Parliament of Canada:

- (1) *The British North America Act, 1952*, effected a readjustment of representation in the House of Commons. The principle of representation by population was not affected by this legislation.
- (2) *The British North America Act, 1965*, provided for the compulsory retirement of senators, henceforth appointed, at age seventy-five.
- (3) *The British North America Act (No. 2), 1974*, repealed the provisions of the Act of 1952 and substituted a new readjustment of representation in the House of Commons. The principle of representation by population was maintained.
- (4) *The British North America Act, 1975*, increased the representation of the Northwest Territories in the House of Commons from one to two members.
- (5) *The British North America Act (No. 2), 1975*, increased the total number of senators from 102 to 104, and provided for representation in the Senate for the Yukon Territory and the Northwest Territories by one member each.

All of these measures dealt with what might be described as federal "housekeeping" matters which, according to the practice existing before 1949, would have been referred to the British Parliament by way of a joint resolution of both Houses of Parliament, and without the consent of the provinces. The last two of these statutes were within the power of the Parliament of Canada to enact by virtue of s. 1 of the *British North America Act, 1886*. Like the others they did not in any substantial way affect federal-provincial relationships.

The legislation contemplated in the first question is of an entirely different character. While it does not directly affect federal-provincial relationships in the sense of changing federal and provincial legislative powers, it does envision the elimina-

ficiations qui, jusqu'alors, avaient été obtenues par une résolution conjointe des deux Chambres du Parlement sans le consentement des provinces. Les lois adoptées depuis 1949 en vertu du par. 91(1), n'ont pas, pour citer le Livre blanc, «porté atteinte aux relations fédérales-provinciales». Les lois suivantes ont été adoptées par le Parlement du Canada:

- (1) *L'Acte de l'Amérique du Nord britannique, 1952*, a effectué un rajustement de la représentation à la Chambre des Communes. Cette loi n'a pas modifié le principe de la représentation d'après la population.
- (2) *L'Acte de l'Amérique du Nord britannique, 1965*, a institué, pour l'avenir, la retraite obligatoire des sénateurs à l'âge de soixante-quinze ans.
- (3) *L'Acte de l'Amérique du Nord britannique (n° 2), 1974*, a abrogé les dispositions de l'Acte de 1952 et y'a substitué un nouveau rajustement de la représentation à la Chambre des Communes. Le principe de la représentation d'après la population a été maintenu.
- (4) *L'Acte de l'Amérique du Nord britannique, 1975*, a porté de un à deux le nombre de députés des territoires du Nord-Ouest à la Chambre des Communes.
- (5) *L'Acte de l'Amérique du Nord britannique (n° 2), 1975*, a porté de 102 à 104 le nombre total de sénateurs et prévu la représentation du territoire du Yukon et des territoires du Nord-Ouest au Sénat.

Toutes ces mesures portaient sur ce que l'on pourrait appeler des questions fédérales «internes» qui, selon la pratique antérieure à 1949, auraient été soumises au Parlement britannique par voie de résolution conjointe des deux Chambres du Parlement sans le consentement des provinces. Les deux dernières ressortissaient du pouvoir législatif du Parlement du Canada en vertu de l'art. 1 de l'*Acte de l'Amérique du Nord britannique, 1886*. Comme les autres elles n'ont aucune répercussion appréciable sur les relations fédérales-provinciales.

La loi envisagée dans la première question est d'une toute autre nature. Bien qu'elle n'ait aucun effet direct sur les relations fédérales-provinciales en ce sens qu'elle ne modifie pas les pouvoirs législatifs fédéral et provinciaux, elle vise cepen-

Renvoi: Compétence du Parlement relativement à la Chambre Haute, [1980] 1 R.C.S. 54

66

RE: AUTHORITY OF PARLIAMENT IN RELATION TO THE UPPER HOUSE

[1980] 1 S.C.R.

tion of one of the two Houses of Parliament, and so would alter the structure of the federal Parliament to which the federal power to legislate is entrusted under s. 91 of the Act.

The Senate has a vital role as an institution forming part of the federal system created by the Act. The recitals in the Act have some significance:

Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therin be declared:

Under the Constitution of the United Kingdom, to which reference is made in the first recital, legislative power was and is exercised by the Queen, by and with the advice and consent of the House of Lords and the House of Commons. The Upper House was not and is not an elected body, the Lower House was and is.

It is, we think, proper to consider the historical background which led to the provision which was made in the Act for the creation of the Senate as a part of the apparatus for the enactment of federal legislation. In the debates which occurred at the Quebec Conference in 1864, considerable time was occupied in discussing the provisions respecting the Senate. Its important purpose is stated in the following passages in speeches delivered in the debates on Confederation in the parliament of the province of Canada:

Sir John A. Macdonald:

In order to protect local interests and to prevent sectional jealousies, it was found requisite that the three great divisions into which British North America is separated, should be represented in the Upper House on the princi-

dant l'élimination d'une des Chambres du Parlement, et modifierait ainsi la structure du Parlement fédéral à qui est confié le pouvoir fédéral de légiférer en vertu de l'art. 91 de l'Acte.

Le Sénat a un rôle vital en tant qu'institution faisant partie du système fédéral créé par l'Acte. Les considérants de l'Acte ont une certaine importance:

Considérant que les provinces du Canada, de la Nouvelle-Écosse et du Nouveau-Brunswick ont exprimé le désir de contracter une Union Fédérale pour ne former qu'une seule et même Puissance (*Dominion*) sous la couronne du Royaume-Uni de la Grande-Bretagne et d'Irlande, avec une constitution reposant sur les mêmes principes que celle du Royaume-Uni:

Considérant de plus qu'une telle union aurait l'effet de développer la prospérité des provinces et de favoriser les intérêts de l'Empire Britannique:

Considérant de plus qu'il est opportun, concurremment avec l'établissement de l'union par autorité du parlement, non seulement de décréter la constitution du pouvoir législatif de la Puissance, mais aussi de définir la nature de son gouvernement exécutif:

En vertu de la constitution du Royaume-Uni, dont il est fait mention dans le premier considérant, le pouvoir législatif était, et il l'est encore, exercé par la Reine, de l'avis et du consentement de la Chambre des lords et de la Chambre des Communes. La Chambre haute n'était pas, alors comme aujourd'hui, un organisme électif, la Chambre basse l'était et le demeure.

Il convient, croyons-nous, d'examiner la situation historique qui a suscité les dispositions de l'Acte pour l'institution du Sénat comme partie du système législatif fédéral. Pendant les débats de la Conférence de Québec en 1864, beaucoup de temps a été consacré à la discussion des dispositions relatives au Sénat. Son but important est énoncé dans les passages suivants de discours prononcés au cours des débats sur la Confédération dans le parlement de la province du Canada:

Sir John A. Macdonald:

Afin de protéger les intérêts locaux de chaque province, nous avons jugé nécessaire de donner aux trois grandes divisions de l'Amérique Britannique du Nord une représentation égale dans la chambre haute, car chacune de

Renvoi: *Compétence du Parlement relativement à la Chambre Haute*, [1980] 1 R.C.S. 54

[1980] 1 R.C.S. RENVOI: COMPÉTENCE DU PARLEMENT RELATIVEMENT À LA CHAMBRE HAUTE 67

ple of equality. There are three great sections, having different interests, in this proposed Confederation . . . To the Upper House is to be confided the protection of sectional interests: therefore is it that the three great divisions are there equally represented for the purpose of defending such interests against the combinations of majorities in the Assembly.

Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, Quebec, 1865, pages 35 and 38.

The Honourable George Brown:

But the very essence of our compact is that the union shall be federal and not legislative. Our Lower Canada friends have agreed to give us representation by population in the Lower House, on the express condition that they shall have equality in the Upper House. On no other condition could we have advanced a step; and, for my part, I am quite willing they should have it. In maintaining the existing sectional boundaries and handing over the control of local matters to local bodies, we recognize, to a certain extent, a diversity of interests; and it is quite natural that the protection for those interests, by equality in the Upper Chamber, should be demanded by the less numerous provinces.

Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, Quebec, 1865, p. 88.

A primary purpose of the creation of the Senate, as a part of the federal legislative process, was, therefore, to afford protection to the various sectional interests in Canada in relation to the enactment of federal legislation. The Act, as originally enacted, provided, in s. 22, that in relation to the constitution of the Senate, Canada should be deemed to consist of Three Divisions, to be equally represented, *i.e.* Ontario, Quebec and the Maritime Provinces (Nova Scotia and New Brunswick). This provision was later amended and s. 22 now provides for Four Divisions, the Western Provinces of Manitoba, British Columbia, Saskatchewan and Alberta being added as a Fourth Division. The Act now makes provision for representation of Prince Edward Island (as one of the Maritime Provinces), Newfoundland, the Yukon Territory and the Northwest Territories. Subsection 23(5) of the Act requires that a senator shall be resident in the province for which he is appointed.

ces divisions aura des intérêts différents. . . A la chambre haute sera confié le soin de protéger les intérêts de section; il en résulte que les trois grandes divisions seront également représentées pour défendre leurs propres intérêts contre toutes combinaisons de majorités dans l'Assemblée.

Débats parlementaires sur la question de la Confédération des provinces de l'Amérique Britannique du Nord, Québec, 1865, aux pp. 35 et 38.

L'honorable George Brown:

Or, l'essence de notre convention est que l'union sera fédérale et nullement législative. Nos amis du Bas-Canada ne nous ont concédé la représentation d'après la population qu'à la condition expresse qu'ils auraient l'égalité dans le conseil législatif. Ce sont là les seuls termes possibles d'arrangement et, pour ma part, je les ai acceptés de bonne volonté. Du moment que l'on conserve les limites actuelles des provinces et que l'on donne à des corps locaux d'administration des affaires locales, on reconnaît jusqu'à un certain point une diversité d'intérêts et la raison pour les provinces moins populeuses de demander la protection de leurs intérêts par l'égalité de représentation dans la chambre haute.

Débats parlementaires sur la question de la Confédération des provinces de l'Amérique Britannique du Nord, Québec, 1865, à la p. 87.

Un but primordial de l'institution du Sénat, en tant que partie du système législatif fédéral, était donc d'assurer la protection des divers intérêts régionaux au Canada quant à l'adoption de la législation fédérale. Dans sa forme initiale, l'Acte prévoyait à l'art. 22 qu'en ce qui concerne la composition du Sénat, le Canada serait censé comprendre trois divisions également représentées, c.-à-d. l'Ontario, le Québec et les provinces maritimes (la Nouvelle-Écosse et le Nouveau-Brunswick). Cette disposition a été modifiée par la suite et l'art. 22 prévoit maintenant quatre divisions, la quatrième division comprenant les provinces de l'Ouest: le Manitoba, la Colombie-Britannique, la Saskatchewan et l'Alberta. L'Acte prévoit maintenant la représentation de l'Île-du-Prince-Édouard (comme l'une des provinces maritimes), de Terre-Neuve, du territoire du Yukon et des territoires du Nord-Ouest. Le paragraphe 5 de l'art. 23 exige qu'un sénateur réside dans la province pour laquelle il est nommé.

68

RE: AUTHORITY OF PARLIAMENT IN RELATION TO THE UPPER HOUSE

[1980] 1 S.C.R.

The place of the Senate in the exercise of federal legislative powers is determined by ss. 17 and 91 of the Act. The former section provides that:

17. There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

The opening words of s. 91, the all important section defining federal legislative powers, have already been quoted. Power to "make laws for the Peace, Order and Good Government of Canada in relation to all Matters not coming within the Classes of Subjects of this Act assigned exclusively to the Legislatures of the Provinces" was conferred by the British Parliament upon "the Queen, by and with the Advice and Consent of the Senate and the House of Commons".

The creation of a federal system in Canada involved the necessity of effecting a division of legislative powers. This division is made by the provisions of ss. 91 and 92 of the Act. The latter section empowered each provincial legislature generally to make laws, effective within the province, in respect of matters of a local or private nature. Fifteen specific classes of subjects were enumerated. Section 91 provided generally for the making of laws for the peace, order and good government of Canada. Twenty-nine classes of subject matters were enumerated. Legislation dealing with those matters might affect local or private matters within a province.

The power to enact federal legislation was given to the Queen by and with the advice and consent of the Senate and the House of Commons. Thus, the body which had been created as a means of protecting sectional and provincial interests was made a participant in this legislative process.

The amendment to the Act made in 1949 added an additional class of subject matters to those which already existed. By that time the classes had been increased to thirty. The amendment was made on a joint resolution of both Houses of Parliament, but without the consent of the provinces. It gave power to the Queen, by and with the advice and consent of the Senate and the House of Commons to amend "the Constitution of Canada".

La place du Sénat dans l'exercice du pouvoir législatif fédéral est déterminée par les art. 17 et 91 de l'Acte. Voici le texte du premier:

17. Il y aura, pour le Canada, un parlement qui sera composé de la Reine, d'une chambre haute appelée le Sénat, et de la Chambre des Communes.

Le premier alinéa de l'art. 91, l'article d'importance primordiale qui définit le pouvoir législatif fédéral, à déjà été cité. Le pouvoir de «faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par le présent Acte exclusivement assignés aux législatures des provinces» a été conféré par le Parlement britannique à «la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes».

La création d'un système fédéral au Canada entraînait la nécessité d'effectuer un partage des pouvoirs législatifs. Ce partage est fait par les dispositions des art. 91 et 92 de l'Acte. Ce dernier article confère généralement à chaque législature provinciale le pouvoir de faire des lois exécutoires à l'intérieur de la province, dans des matières de nature locale ou privée. Quinze catégories de sujets y sont énumérées. L'article 91 prévoit en termes généraux le pouvoir de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada. Vingt-neuf catégories de sujets y sont énumérées. Les lois qui traitent de ces matières peuvent avoir un effet sur les matières d'une nature locale ou privée à l'intérieur d'une province.

Le pouvoir d'édicter des lois fédérales a été donné à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes. Ainsi, on a voulu que l'organisme créé pour protéger les intérêts des régions et des provinces participe à ce processus législatif.

La modification apportée à l'Acte en 1949 a ajouté à l'art. 91 une catégorie de sujets à celles qui étaient déjà énumérées et dont le nombre avait été porté à trente. La modification a été apportée à la suite d'une résolution conjointe des deux Chambres du Parlement, mais sans le consentement des provinces. Elle a donné à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, le pouvoir de modifier «la constitution

This power was made subject to certain specific exceptions, as follows:

... except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least one each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.

The phrase "Constitution of Canada" does not appear elsewhere in the Act. The word "constitution" appears in various places and in different contexts. The preamble to the Act refers to "a Constitution similar in principle to that of the United Kingdom" and, later, to "the constitution of Legislative Authority in the Dominion". Section 22 refers to "the Constitution of the Senate" as being deemed to consist of four divisions. Part V of the Act is entitled "Provincial Constitutions" and the sections in that Part, 58 to 90, deal with the exercise of executive power and legislative power in the provinces. Section 92(1) refers to the amendment of "the Constitution of the Province". Section 147 refers to "Three Divisions into which Canada is, in relation to the Constitution of the Senate, divided by this Act".

The Attorney General of Canada submitted that the power conferred upon Parliament by s. 91(1) is limited only by the specific exceptions contained in it. He contended that the very specificity of these exceptions pointed to the wide powers being conferred. If this approach were adopted, it would mean that the Federal Parliament, acting unilaterally, could amend any part of the Act, subject only to the exceptions specified in s. 91(1). But s. 91(1) does not give power to amend the Act. Instead, the phrase "Constitution of Canada" is used. In our opinion, the word "Canada" as used in s. 91(1)

du Canada». Ce pouvoir est assujetti aux exceptions expresses suivantes:

... sauf en ce qui concerne les matières rentrant dans les catégories de sujets que la présente loi attribue exclusivement aux législatures des provinces, ou en ce qui concerne les droits ou priviléges accordés ou garantis, par la présente loi ou par toute autre loi constitutionnelle, à la législature ou au gouvernement d'une province, ou à quelque catégorie de personnes en matière d'écoles, ou en ce qui regarde l'emploi de l'anglais ou du français, ou les prescriptions portant que le parlement du Canada tiendra au moins une session chaque année et que la durée de chaque chambre des communes sera limitée à cinq années, depuis le jour du rapport des brefs ordonnant l'élection de cette chambre; toutefois, le parlement du Canada peut prolonger la durée d'une chambre des communes en temps de guerre, d'invasion ou d'insurrection, réelles ou appréhendées, si cette prolongation n'est pas l'objet d'une opposition exprimée par les votes de plus du tiers des membres de ladite chambre.

L'expression «constitution du Canada» ne se trouve pas ailleurs dans l'Acte. On y trouve le mot «constitution» à divers endroits et dans différents contextes. Le préambule fait mention d'une «constitution reposant sur les mêmes principes que celle du Royaume-Uni». L'article 22 traite de «la composition du Sénat» (en anglais «*Constitution of the Senate*» qui est censé comprendre quatre divisions. La Partie V de l'Acte porte le titre: «Constitutions provinciales» et les art. 58 à 90 de cette Partie traitent de l'exercice du pouvoir exécutif et du pouvoir législatif dans les provinces. Le paragraphe 92(1) prévoit la modification de «la constitution de la province». L'article 147 se rapporte aux «trois divisions en lesquelles le Canada est, relativement à la composition du Sénat, partagé par le présent acte».

Le procureur général du Canada prétend que le pouvoir conféré au Parlement par le par. 91(1) est limité uniquement par les exceptions expresses y contenues. Il soutient que la spécificité même de ces exceptions indique l'ampleur du pouvoir ainsi conféré. Si cette façon de voir était adoptée, cela signifierait que le Parlement fédéral, agissant unilatéralement, pourrait modifier n'importe quelle partie de l'Acte, sous réserve seulement des exceptions énoncées au par. 91(1). Mais, le par. 91(1) ne donne pas le pouvoir de modifier l'Acte. Il emploie plutôt l'expression «constitution du

Renvoi: *Compétence du Parlement relativement à la Chambre Haute*, [1980] 1 R.C.S. 54

70

RE: AUTHORITY OF PARLIAMENT IN RELATION TO THE UPPER HOUSE

[1980] 1 S.C.R.

does not refer to Canada as a geographical unit but refers to the juristic federal unit. "Constitution of Canada" does not mean the whole of the *British North America Act*, but means the constitution of the federal government, as distinct from the provincial governments. The power of amendment conferred by s. 91(1) is limited to matters of interest only to the federal government.

The word "Canada" is used with reference to the juristic federal unit in several sections of the Act, of which the following are examples:

Section 111 provided that "Canada shall be liable for the Debts and Liabilities of each Province existing at the Union".

Section 125 provides that "No Lands or Property belonging to Canada or any Province shall be liable to taxation".

Section 101 refers to "the Laws of Canada", the meaning of which phrase has recently been interpreted by this Court. The section reads as follows:

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

In *Quebec North Shore Paper Company v. Canadian Pacific Limited*¹, there was in issue the scope of the jurisdiction of the Federal Court, which is a Court created by federal legislation pursuant to s. 101, "for the better Administration of the Laws of Canada". The expression "Laws of Canada" was construed as meaning only applicable existing federal law and was determined not to include matters respecting which the Federal Parliament could have enacted legislation.

In *McNamara Construction (Western) Limited v. The Queen*², this Court denied the right of the

Canada». A notre avis, le mot «Canada» au par. 91(1) ne se rapporte pas au Canada au sens géographique mais bien à l'entité juridique fédérale. La «constitution du Canada» ne signifie pas l'ensemble de l'*Acte de l'Amérique du Nord britannique*, mais la constitution du gouvernement fédéral, par opposition aux gouvernements provinciaux. Le pouvoir de modification conféré par le par. 91(1) est limité à ce qui concerne uniquement le gouvernement fédéral.

Le mot «Canada» est employé pour désigner l'entité juridique fédérale dans plusieurs articles de l'Acte, dont les suivants:

L'article 111 prévoit que «de Canada sera responsable des dettes et obligations de chaque province existantes lors de l'union».

L'article 125 prévoit que «nulle terre ou propriété appartenant au Canada ou à aucune province en particulier ne sera sujette à la taxation».

L'article 101 mentionne les «lois du Canada», expression que cette Cour a récemment interprétée. En voici le texte:

101. Le parlement du Canada pourra, nonobstant toute disposition contraire énoncée dans le présent acte, lorsque l'occasion le requerra, adopter des mesures à l'effet de créer, maintenir et organiser une cour générale d'appel pour le Canada, et établir des tribunaux additionnels pour la meilleure administration des lois du Canada.

Dans *Quebec North Shore Paper Company c. Canadien Pacifique Limitée*¹, le litige portait sur l'étendue de la compétence de la Cour fédérale, qui a été établie par loi fédérale en vertu de l'art. 101 «pour la meilleure administration des lois du Canada». On y a statué que l'expression «lois du Canada» signifie seulement les lois fédérales existantes et ne comprend pas les matières au sujet desquelles le Parlement fédéral aurait pu édicter des lois.

Dans *McNamara Construction (Western) Limited c. La Reine*², cette Cour a statué que la Cour

¹ [1977] 2 S.C.R. 1054.

² [1977] 2 S.C.R. 654.

¹ [1977] 2 R.C.S. 1054.

² [1977] 2 R.C.S. 654.

Renvoi: Compétence du Parlement relativement à la Chambre Haute, [1980] 1 R.C.S. 54

[1980] 1 R.C.S. RENVOI: COMPÉTENCE DU PARLEMENT RELATIVEMENT À LA CHAMBRE HAUTE 71

Federal Court to entertain a claim by the federal Crown for breach of contract, a matter of provincial law.

In our opinion, the power of amendment given by s. 91(1) relates to the constitution of the federal government in matters of interest only to that government. The statutes enacted by the Federal Parliament since 1949, to which we have previously referred, are illustrations of the exercise of that power.

The next question is whether, in that limited sense, s. 91(1) would permit the Federal Parliament to abolish the Senate.

Bearing in mind the historical background in which the creation of the Senate as a part of the federal legislative process was conceived, the words of Lord Sankey L.C. in *re The Regulation and Control of Aeronautics in Canada*³, at p. 70, although they were written in relation to the Act as originally enacted, are apt:

Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies.

In our opinion, the power given to the Federal Parliament by s. 91(1) was not intended to enable it to alter in any way the provisions of ss. 91 and 92 governing the exercise of legislative authority by the Parliament of Canada and the Legislatures of the Provinces. Section 91(1) is a particularization of the general legislative power of the Parliament of Canada. That general power can be exercised only by the Queen by and with the advice and consent of the Senate and the House of Commons. Section 91(1) cannot be construed to confer

fédérale n'a pas le droit de juger une réclamation du gouvernement fédéral pour violation de contrat, une matière qui relève du droit provincial.

A notre avis, le pouvoir de modification conféré par le par. 91(1) se rapporte à la constitution du gouvernement fédéral dans les matières qui concernent uniquement ce gouvernement. Les lois édictées par le Parlement fédéral depuis 1949, que j'ai déjà mentionnées, illustrent l'exercice de ce pouvoir.

La question suivante est de savoir si, pris dans ce sens restreint, le par. 91(1) permet au Parlement fédéral d'abolir le Sénat.

Si l'on garde à l'esprit la situation historique dans laquelle l'institution du Sénat a été conçue comme partie du système législatif fédéral, l'opinion de lord Sankey L.C. dans *In re La réglementation et le contrôle de l'aéronautique au Canada*³, à la p. 70, bien que rédigée en regard de l'Acte dans sa forme initiale, est toujours pertinente:

[TRADUCTION] Dans la mesure où l'Acte renferme un compromis en vertu duquel les provinces primitives consentaient à se fédérer, il est important de ne pas perdre de vue que le maintien des droits des minorités était une des conditions auxquelles ces minorités consentaient à entrer dans la fédération et qu'il constituait la base sur laquelle toute la structure allait par la suite être érigée. La façon dont on l'interprète d'année en année ne doit pas faire perdre de vue ou modifier les dispositions du contrat initial qui prévoyait l'établissement de la fédération; il n'est pas juste non plus qu'une interprétation judiciaire des dispositions des art. 91 et 92 impose aux membres de la fédération un contrat nouveau et différent.

A notre avis, le pouvoir que le par. 91(1) a donné au Parlement fédéral ne visait pas à lui permettre de modifier de quelque façon les dispositions des art. 91 et 92 régissant l'exercice de l'autorité législative par le Parlement du Canada et les législatures provinciales. Le paragraphe 91(1) est une particularisation du pouvoir législatif général du Parlement du Canada. Ce pouvoir général ne peut être exercé que par la Reine du consentement et de l'avis du Sénat et de la Chambre des Communes. On ne peut interpréter le par.

³ [1932] A.C. 54.

³ [1932] A.C. 54.

Renvoi: Compétence du Parlement relativement à la Chambre Haute, [1980] 1 R.C.S. 54

72

RE: AUTHORITY OF PARLIAMENT IN RELATION TO THE UPPER HOUSE

[1980] 1 S.C.R.

power to supplant the whole of the rest of the section. It cannot be construed as permitting the transfer of the legislative powers enumerated in s. 91 to some body or bodies other than those specifically designated in it.

This Court, in *Attorney General of Nova Scotia v. Attorney General of Canada and Lord Nelson Hotel Company Limited*⁴, determined that neither the Parliament of Canada nor a Provincial Legislature could delegate to the other the legislative powers with which it has been vested nor receive from the other the powers with which the other has been vested. The elimination of the Senate would go much further in that it would involve a transfer by Parliament of all its legislative powers to a new legislative body of which the Senate would not be a member.

In the case of *In re The Initiative and Referendum Act*⁵, the Court of Appeal for Manitoba held that *The Initiative and Referendum Act*, 6 Geo. V, c. 59, was *ultra vires* of the Manitoba Legislature to enact. This statute provided a procedure whereby laws of the province could be made and repealed by direct vote of the electors instead of only by the Legislature. Section 92(1) of the *British North America Act* provides that:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,—

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.

The Court held that s. 92 of the Act vests the power to make or repeal laws exclusively in the Legislature and that it did not contemplate the creation of a new legislative body to which the Legislature could delegate its powers of legislation or with which it would share them. It was held that this legislation could not be supported as constituting an amendment of the constitution

91(1) de façon à permettre de supplanter tout le reste de l'article. On ne peut l'interpréter de façon à permettre le transfert des pouvoirs législatifs énumérés dans l'art. 91 à un ou plusieurs organismes autres que ceux qui y sont expressément désignés.

Dans *Procureur général de la Nouvelle-Écosse c. Procureur général du Canada et Lord Nelson Hotel Company Limited*⁴, cette Cour a décidé que ni le Parlement du Canada ni une législature provinciale ne peuvent déléguer à l'autre les pouvoirs législatifs dont ils sont investis ni recevoir de l'autre les pouvoirs dont l'autre est investi. L'élimination du Sénat irait beaucoup plus loin car elle impliquerait le transfert par le Parlement de tous ses pouvoirs législatifs à un nouvel organisme législatif dont le Sénat ne ferait pas partie.

Dans l'arrêt *In re The Initiative and Referendum Act*⁵, la Cour d'appel du Manitoba a jugé que *The Initiative and Referendum Act*, 6 Geo. V, chap. 59, était *ultra vires* du pouvoir législatif de la législature du Manitoba. Cette loi prévoyait une procédure au moyen de laquelle les lois de la province pouvaient être édictées ou abrogées par vote direct des électeurs plutôt que par la seule législature. Le paragraphe 92(1) de l'*Acte de l'Amérique du Nord britannique* prévoit:

92. Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, savoir:

1. L'amendement de temps à autre, nonobstant toute disposition contraire, énoncée dans le présent acte, de la constitution de la province, sauf les dispositions relatives à la charge de lieutenant-gouverneur.

La Cour a jugé que l'art. 92 de l'Acte confère à la législature le pouvoir exclusif d'édicter ou d'abroger des lois et qu'il ne vise pas l'institution d'un nouvel organisme législatif à qui la législature pourrait déléguer ses pouvoirs législatifs ou avec lequel elle pourrait les partager. La Cour a jugé qu'on ne pouvait pas justifier cette loi en invoquant qu'elle constituait une modification de la constitu-

⁴ [1951] S.C.R. 31.

⁵ (1916), 27 Man. R. 1.

⁴ [1951] R.C.S. 31.

⁵ (1916), 27 Man. R. 1.

Renvoi: Compétence du Parlement relativement à la Chambre Haute, [1980] 1 R.C.S. 54

[1980] 1 R.C.S. RENVOI: COMPÉTENCE DU PARLEMENT RELATIVEMENT À LA CHAMBRE HAUTE 73

under s. 92(1). Chief Justice Howell dealt with this point at p. 7:

The Legislature can in no way change any of the provisions of section 92. By s-s. 1, the Provincial constitution can be changed by the Legislature; but, no matter what changes are made in the constitution, the Provincial Legislature and no other body can legislate on the subjects set forth in the remainder of the sub-sections. I think that is a fair construction to place on that section, read in the light of the whole Act.

It was also held that such legislation would interfere with the "Office of Lieutenant Governor" in that it would render him powerless to prevent legislation, passed in the manner contemplated, from becoming law.

The judgment of the Privy Council⁶ dismissed the appeal from this judgment on the latter ground, but Viscount Haldane went on to say, at p. 945:

Having said so much, their Lordships, following their usual practice of not deciding more than is strictly necessary, will not deal finally with another difficulty which those who contend for the validity of this Act have to meet. But they think it right, as the point has been raised in the Court below, to advert to it. Sect. 92 of the Act of 1867 entrusts the legislative power in a Province to its Legislature, and to that Legislature only. No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done when in *Hodge v. The Queen* (9 App. Cas. 117), the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise.

The continued existence of the Senate as a part of the federal legislative process is implied in the exceptions provided in s. 91(1). One exception to the power conferred by s. 91(1) to amend the Constitution of Canada is "as regards the require-

tion en vertu du par. 92(1). Le juge en chef Howell a traité ainsi de la question à la p. 7:

[TRADUCTION] La Législature ne peut d'aucune façon modifier les dispositions de l'art. 92. En vertu du par. 1 elle peut modifier la constitution de la province; mais, quels que soient les changements apportés à la constitution, seule la législature provinciale peut légiférer sur les sujets énumérés dans les autres paragraphes. C'est là, je crois, une interprétation juste de l'article si on le lit à la lumière de l'ensemble de l'Acte.

La Cour a également jugé que cette loi portait atteinte à «la charge du lieutenant-gouverneur» en lui enlevant tout pouvoir de refuser un texte de loi adopté de la façon prévue.

L'arrêt du Conseil privé⁶, a rejeté sur ce dernier moyen l'appel de ce jugement, mais le vicomte Haldane a ajouté à la p. 945:

[TRADUCTION] Ceci dit, suivant leur pratique habituelle de ne décider que le strict nécessaire, leurs Seigneuries ne trancheront pas d'une manière définitive une autre difficulté à laquelle ceux qui prônent la validité de la loi doivent faire face. Mais ils croient juste d'en parler, la question ayant été discutée à la Cour d'appel du Manitoba. L'article 92 de l'Acte de 1867 confie l'autorité législative au sein de la province à sa législature, et à elle seulement. Nul doute qu'un organisme jouissant, sur les sujets qui sont de sa compétence, d'un pouvoir de légiférer aussi étendu que celui qui appartient à une législature provinciale au Canada pourrait, tout en préservant ses propres pouvoirs dans leur intégrité, se faire aider par des organismes subordonnés. Ceci était le cas lorsque, dans l'affaire *Hodge c. La Reine* (9 App. Cas. 117), il a été décidé que la législature de l'Ontario avait le droit de confier à un bureau de commissaires le pouvoir d'édicter des règlements relatifs aux tavernes; il ne s'ensuit pas toutefois que la Législature provinciale puisse créer un nouvel organe législatif qui n'est pas mentionné dans l'Acte auquel il doit son existence. Leurs Seigneuries ne font ici rien d'autre que souligner la gravité des questions constitutionnelles qui se posent à cet égard.

Les exceptions prévues au par. 91(1) impliquent l'existence continue du Sénat en tant que partie du système législatif fédéral. Une exception au pouvoir conféré par le par. 91(1) de modifier la constitution du Canada est «en ce qui regarde ... les

⁶ [1919] A.C. 935.

⁶ [1919] A.C. 935.

Renvoi: *Compétence du Parlement relativement à la Chambre Haute*, [1980] 1 R.C.S. 54

74

RE: AUTHORITY OF PARLIAMENT IN RELATION TO THE UPPER HOUSE

[1980] 1 S.C.R.

ment that there shall be a session of the Parliament of Canada at least once each year". "Parliament" under s. 17 is to consist of the Queen, the Senate and the House of Commons. This exception contemplates that there shall continue to be sessions of the Senate and the House of Commons at least once each year.

The next exception requires that "no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House" except in time of real or apprehended war, invasion or insurrection.

These two exceptions clearly indicate that the power to amend "the Constitution of Canada" given by s. 91(1) was not intended to include the power to eliminate the Senate or the House of Commons.

The Attorney General of Canada contended that the power to amend given by s. 91(1) was the equivalent, in the federal field, of s. 92(1) in the provincial field.

He points out that, pursuant to that power, the provinces of Manitoba, New Brunswick, Prince Edward Island, Nova Scotia and Quebec abolished their respective legislative councils.

The two sections are not, however, analogous. Section 92 does not, as does s. 91, particularize the participants in the law making process. Section 91 confers the authority to legislate in respect of matters within that section upon the Queen, with the advice and consent of the Senate and the House of Commons. Section 92 confers the authority to legislate in respect of matters within that section upon "the Legislature".

More importantly, s. 92(1) gives a power to amend the constitution of a province to the legislature, except as regards the office of the Lieutenant Governor, "notwithstanding anything in this Act". Section 91(1) confers a power of amendment subject to specified exceptions which, as we have already pointed out, contemplate the continued existence of both the Senate and the House of Commons.

prescriptions portant que le parlement du Canada tiendra au moins une session chaque année». Aux termes de l'art. 17, le «parlement» sera composé de la Reine, du Sénat et de la Chambre des Communes. Cette exception implique que le Sénat et la Chambre des Communes devront continuer de siéger au moins une fois chaque année.

L'exception suivante porte que «la durée de chaque chambre des communes sera limitée à cinq années, depuis le jour du rapport des brefs ordonnant l'élection de cette chambre» sauf en temps de guerre, d'invasion ou d'insurrection, réelles ou appréhendées.

Ces deux exceptions indiquent clairement que le pouvoir de modifier «la constitution du Canada» donné par le par. 91(1) ne comprend pas celui d'éliminer le Sénat ou la Chambre des Communes.

Le procureur général du Canada prétend que le pouvoir de modification conféré par le par. 91(1) est l'équivalent, dans le domaine fédéral, du par. 92(1) dans le domaine provincial.

Il fait remarquer qu'en vertu de ce pouvoir les provinces du Manitoba, du Nouveau-Brunswick, de l'Île-du-Prince-Édouard, de la Nouvelle-Écosse et du Québec ont aboli leur conseil législatif respectif.

Cependant, les deux articles ne sont pas analogues. Contrairement à l'art. 91, l'art. 92 ne nomme pas les organes du pouvoir législatif. L'article 91 confère le pouvoir de légiférer, dans les matières qu'il vise, à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes. L'article 92 confère à «la législature» le pouvoir de légiférer dans les matières qu'il énumère.

Ce qui est plus important, c'est que le par. 92(1) donne à la législature le pouvoir de modifier la constitution de la province, sauf les dispositions relatives à la charge de lieutenant-gouverneur, «nonobstant toute disposition contraire énoncée dans le présent acte». Mais le par. 91(1) confère un pouvoir de modification sous réserve d'exceptions précises lesquelles, comme nous l'avons déjà mentionné, impliquent l'existence continue du Sénat et de la Chambre des Communes.

Renvoi: Compétence du Parlement relativement à la Chambre Haute, [1980] 1 R.C.S. 54

[1980] 1 R.C.S. RENVOI: COMPÉTENCE DU PARLEMENT RELATIVEMENT À LA CHAMBRE HAUTE 75

For the foregoing reasons, we would answer the first question in the negative.

Question 2:

The Attorney General of Canada submits that this question, in all its aspects, should be answered in the affirmative. Differing views were expressed by the Attorneys General of the provinces.

All of the provincial Attorneys General, other than the Attorney General of Prince Edward Island, submitted that Question 2(f) should be answered in the negative. This sub-question raises the question of the power of Parliament, under s. 91(1), to provide that all bills be given assent and the force of law after a certain time period notwithstanding that they had not been approved by the Upper House. The only provision presently existing, which limits the power of the Senate as compared with the power of the House of Commons, is s. 53 which provides that bills for appropriating any part of the public revenue or for imposing any tax or impost shall originate in the House of Commons.

A provision of the kind contemplated would seriously impair the position of the Senate in the legislative process because it would permit legislation to be enacted under s. 91 without the consent of the Senate. For the reasons already given in respect of Question 1, it is our view that Parliament cannot under s. 91(1) impair the role of the Senate in that process. We would answer this question in the negative.

With respect to the other portions of Question 2, the Attorney General of Ontario and the Attorney General of Nova Scotia submit that these sub-questions cannot be answered categorically in the form in which they are asked. As the Attorney General of Nova Scotia puts it, they cannot be answered "in the absence of a factual context or actual draft legislation". In our opinion there is merit in this contention. We will deal with the sub-questions seriatim.

Pour les motifs qui précèdent, nous sommes d'avis de répondre à la première question par la négative.

2^e question:

Le procureur général du Canada prétend, qu'à tous égards, il faut répondre à cette question par l'affirmative. Les procureurs généraux des provinces ont exprimé des vues différentes.

Tous les procureurs généraux des provinces, à l'exception du procureur général de l'Île-du-Prince-Édouard, ont soutenu qu'il faut répondre par la négative à la question 2(f). Ce paragraphe pose la question du pouvoir du Parlement, en vertu du par. 91(1), de prévoir que tous les projets de loi soient sanctionnés et aient force de loi après l'écoulement d'un certain délai, et ce, même sans leur approbation par la Chambre haute. La seule disposition actuelle, qui limite le pouvoir du Sénat, par rapport à celui de la Chambre des Communes, est l'art. 53 qui prévoit que tout projet de loi ayant pour but l'approbation d'une portion quelconque du revenu public, ou la création de taxes ou d'impostes, devra originer dans la Chambre des Communes.

Une disposition de la nature de celle que l'on envisage affaiblirait beaucoup la position du Sénat dans le système législatif parce qu'elle permettrait que des lois soient édictées en vertu de l'art. 91 sans le consentement du Sénat. Pour les motifs déjà donnés, quant à la première question, nous croyons que le Parlement ne peut, en vertu du par. 91(1), affaiblir le rôle du Sénat dans ce système. Nous sommes d'avis de répondre à cette question par la négative.

En ce qui a trait aux autres parties de la seconde question, le procureur général de l'Ontario et le procureur général de la Nouvelle-Écosse prétendent que l'on ne peut y répondre catégoriquement dans la forme où elles sont posées. Pour reprendre les paroles du procureur général de la Nouvelle-Écosse, on ne peut répondre à ces questions [TRA-DUCTION] «en l'absence de précisions sur le contexte ou d'un projet de loi rédigé». Cette prétention nous paraît bien fondée. Nous examinerons successivement chaque paragraphe.

Renvoi: Compétence du Parlement relativement à la Chambre Haute, [1980] 1 R.C.S. 54

76

RE: AUTHORITY OF PARLIAMENT IN RELATION TO THE UPPER HOUSE

[1980] 1 S.C.R.

Sub-question (a) asks whether Parliament could change the name of the Upper House. We would assume that a change of name would be proposed only as a part of some scheme for the alteration of the Senate itself. If that scheme were to be held *ultra vires* of Parliament, then the change of name would probably go with it. We do not think the question can properly be answered in the absence of such a context.

Sub-question (b) involves changing the numbers and proportions of members by whom provinces and territories are represented in the Senate. None of the provinces supported the federal submission on this point.

As previously noted, the system of regional representation in the Senate was one of the essential features of that body when it was created. Without it, the fundamental character of the Senate as part of the Canadian federal scheme would be eliminated. In the absence of a factual context, it is not possible to say whether a change contemplated by this question would be in keeping with that fundamental character.

Sub-question (c) deals with a change in the qualifications of senators. The difficulty here is that we have not been told what changes are contemplated. Some of the qualifications for senators prescribed in s. 23, such as the property qualifications, may not today have the importance which they did when the Act was enacted. On the other hand, the requirement that a senator should be resident in the province for which he is appointed has relevance in relation to the sectional characteristic of the make-up of the Senate. In our opinion, the question cannot be answered categorically.

Sub-question (d) relates to the tenure of senators. At present, a senator, when appointed, has tenure until he attains the age of seventy-five. At some point, a reduction of the term of office might impair the functioning of the Senate in providing what Sir John A. Macdonald described as "the sober second thought in legislation". The Act contemplated a constitution similar in principle to that of the United Kingdom, where members of the House of Lords hold office for life. The imposition

Au paragraphe (a) on demande si le Parlement peut modifier le nom de la Chambre haute. Nous présumons qu'un changement de nom ne serait proposé que dans le cadre d'un projet de modification du Sénat lui-même. Si ce projet était jugé *ultra vires* du Parlement, alors le changement de nom le serait probablement aussi. Nous ne croyons pas que l'on puisse répondre convenablement à cette question en l'absence d'un tel contexte.

Le paragraphe (b) implique un changement dans le nombre et la proportion des membres du Sénat qui y représentent les provinces et les territoires. Aucune des provinces n'a appuyé la prétention fédérale sur ce point.

Comme on l'a vu, le mode de représentation régionale au Sénat était l'un des caractères essentiels de cet organisme lors de sa création. Sans lui, le caractère fondamental du Sénat en tant que partie du système fédéral canadien disparaît. En l'absence de précisions sur le contexte, il n'est pas possible de dire si un changement visé par cette question respecterait ce caractère fondamental.

Le paragraphe (c) porte sur un changement dans les qualités exigées des sénateurs. La difficulté ici, est que nous ignorons quels changements sont envisagés. Certaines des qualités exigées des sénateurs à l'art. 23, comme celles qui ont trait à leurs biens, peuvent ne pas avoir aujourd'hui l'importance qu'elles avaient lorsque l'Acte a été édicté. Par ailleurs, l'exigence qu'un sénateur réside dans la province pour laquelle il est nommé est importante par rapport aux caractéristiques des divisions qui composent le Sénat. A notre avis, on ne peut répondre catégoriquement à cette question.

Le paragraphe (d) concerne la durée des fonctions des sénateurs. Actuellement, lorsqu'ils sont nommés, les sénateurs occupent leur charge jusqu'à l'âge de soixantequinze ans. À un certain point, la réduction de la durée des fonctions pourrait nuire au bon fonctionnement du Sénat qui assure, pour reprendre les paroles de Sir John A. Macdonald, [TRADUCTION] «un deuxième coup d'œil attentif à la loi». L'Acte prévoit une constitution semblable, en principe, à celle du Royaume-

Renvoi: Compétence du Parlement relativement à la Chambre Haute, [1980] 1 R.C.S. 54

[1980] 1 R.C.S. RENVOI: COMPÉTENCE DU PARLEMENT RELATIVEMENT À LA CHAMBRE HAUTE 77

of compulsory retirement at age seventy-five did not change the essential character of the Senate. However, to answer this question we need to know what change of tenure is proposed.

Sub-question (e), paragraphs (i), (ii) and (iii), contemplates changing the method of appointment of senators, presently the function of the Governor General, by having "some" members selected by provincial legislatures, "some" members by the House of Commons, "some" members selected by the Lieutenant Governor in Council or "some other body or bodies". The selection of senators by a provincial legislature or by the Lieutenant Governor of a province would involve an indirect participation by the provinces in the enactment of federal legislation and is contrary to the reasoning of this Court in the *Lord Nelson Hotel* case previously cited.

Again, we do not feel that we have a factual context in which to formulate a satisfactory answer.

Sub-question (e) paragraph (iv) deals with the possible selection of all or some members of the Senate by direct election by the public. The substitution of a system of election for a system of appointment would involve a radical change in the nature of one of the component parts of Parliament. As already noted, the preamble to the Act referred to "a constitution similar in principle to that of the United Kingdom", where the Upper House is not elected. In creating the Senate in the manner provided in the Act, it is clear that the intention was to make the Senate a thoroughly independent body which could canvass dispassionately the measures of the House of Commons. This was accomplished by providing for the appointment of members of the Senate with tenure for life. To make the Senate a wholly or partially elected body would affect a fundamental feature of that body. We would answer this sub-question in the negative.

Dealing generally with Question 2, it is our opinion that while s. 91(1) would permit some

Uni, où les membres de la Chambre des lords siègent à vie. L'imposition de la retraite obligatoire à l'âge de soixante-quinze ans n'a pas modifié le caractère essentiel du Sénat. Cependant, pour répondre à cette question, il nous faudrait savoir quels changements on se propose d'apporter à la durée des fonctions.

Le paragraphe (e), aux alinéas (i), (ii) et (iii), envisage le changement du mode de nomination des sénateurs, pouvoir qu'exerce actuellement le gouverneur général. On ferait choisir «certains» membres du Sénat par les législatures provinciales, «certains» membres par la Chambre des Communes, «certains» membres par les lieutenants-gouverneurs en conseil ou par «un ou plusieurs organismes». Le choix de sénateurs par une législature provinciale ou par le lieutenant-gouverneur d'une province impliquerait une participation indirecte des provinces à l'adoption des lois fédérales et cela est contraire au raisonnement de cette Cour dans l'arrêt *Lord Nelson Hotel* cité précédemment.

De nouveau, nous ne croyons pas avoir sur le contexte des précisions qui nous permettraient de formuler une réponse satisfaisante.

Le paragraphe (e) à l'alinéa (iv) vise la sélection possible d'une partie ou de la totalité des membres du Sénat par voie d'élection directe par le peuple. La substitution d'un système d'élection à un système de nomination implique un changement radical dans la nature d'un des organes du Parlement. Comme on l'a vu, le préambule de l'Acte parle d'une constitution reposant sur les mêmes principes que celle du Royaume-Uni, où la Chambre haute n'est pas élective. En créant le Sénat de la manière prévue à l'Acte, il est évident qu'on voulait en faire un organisme tout à fait indépendant qui pourrait revoir avec impartialité les mesures adoptées par la Chambre des Communes. On y est arrivé en disposant que les membres du Sénat seraient nommés à vie. Si l'on faisait du Sénat un organisme entièrement ou partiellement électif, on en modifierait un trait fondamental. Nous sommes d'avis de répondre par la négative sur ce point.

Examinant de façon générale la seconde question, nous sommes d'avis que, bien que le par-

changes to be made by Parliament in respect of the Senate as now constituted, it is not open to Parliament to make alterations which would affect the fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process. The character of the Senate was determined by the British Parliament in response to the proposals submitted by the three provinces in order to meet the requirement of the proposed federal system. It was that Senate, created by the Act, to which a legislative role was given by s. 91. In our opinion, its fundamental character cannot be altered by unilateral action by the Parliament of Canada and s. 91(1) does not give that power.

We answer Question 1 in the negative. We answer sub-questions 2(b), 2(e)(iv) and 2(f) in the negative. In our opinion, the other sub-questions in Question 2, in the absence of a factual background, cannot be answered categorically.

The questions referred to have been answered as follows:

Question 1: No

Question 2: (a) No answer

- (b) *No*
- (c) *No answer*
- (d) *No answer*
- (e) (i) *No answer*
- (ii) *No answer*
- (iii) *No answer*
- (iv) *No*

(f) *No*

*Solicitor for the Attorney General of Canada:
Roger Tassé, Ottawa.*

*Solicitor for the Attorney General of Ontario:
Allan Leal, Toronto.*

Solicitor for the Attorney General of Nova Scotia: Gordon F. Coles, Halifax.

91(1) permette au Parlement d'apporter certains changements à la constitution actuelle du Sénat, il ne lui permet pas d'apporter des modifications qui porteraient atteinte aux caractéristiques fondamentales ou essentielles attribuées au Sénat pour assurer la représentation régionale et provinciale dans le système législatif fédéral. Le Parlement britannique a déterminé le caractère du Sénat d'après les propositions soumises par les trois provinces pour rencontrer les exigences du système fédéral proposé. C'est à ce Sénat, créé par l'Acte, que l'art. 91 a donné un rôle législatif. Nous sommes d'avis que le Parlement du Canada ne peut en modifier unilatéralement le caractère fondamental et le par. 91(1) ne l'y autorise pas.

Nous répondons par la négative à la première question ainsi qu'aux paragraphes 2(b), 2(e) alinéa (iv) et 2(f) de la seconde question. A notre avis, en l'absence de précisions sur le contexte, il n'est pas possible de donner une réponse catégorique au reste de la seconde question.

Les questions soumises ont reçu les réponses suivantes:

Question 1: Non

Question 2: a) Pas de réponse

- b) *Non*
- c) *Pas de réponse*
- d) *Pas de réponse*
- e) (i) *Pas de réponse*
- (ii) *Pas de réponse*
- (iii) *Pas de réponse*
- (iv) *Non*

f) *Non*

*Procureur du procureur général du Canada:
Roger Tassé, Ottawa.*

*Procureur du procureur général de l'Ontario:
Allan Leal, Toronto.*

Procureur du procureur général de la Nouvelle-Écosse: Gordon F. Coles, Halifax.

Renvoi: *Compétence du Parlement relativement à la Chambre Haute*, [1980] 1 R.C.S. 54

[1980] 1 R.C.S. RENVOI: COMPÉTENCE DU PARLEMENT RELATIVEMENT À LA CHAMBRE HAUTE 79

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

Solicitor for the Attorney General of Prince Edward Island: Graham W. Stewart, Charlottetown.

Solicitor for the Attorney General of Saskatchewan: Richard Gosse, Regina.

Solicitors for the Attorney General of Alberta: Ross Paisley and William Henkel, Edmonton.

Solicitor for the Attorney General of Newfoundland: James A. Nesbitt, St. John.

Procureur du procureur général du Nouveau-Brunswick: Gordon F. Gregory, Fredericton.

Procureur du procureur général de l'Île-du-Prince-Édouard: Graham W. Stewart, Charlottetown.

Procureur du procureur général de la Saskatchewan: Richard Gosse, Regina.

Procureurs du procureur général de l'Alberta: Ross Paisley et William Henkel, Edmonton.

Procureur du procureur général de Terre-Neuve: James A. Nesbitt, St-Jean.

Onglet 90

Manitoba Gov't Employees Assoc. and The Government of Manitoba [1978] 1 R.C.S. 1123

[1978] 1 R.C.S.

MANITOBA GOV'T EMPLOYEES ASSOC., ETC.

1123

The Manitoba Government Employees Association Appellant;

and

The Government of Manitoba, The Manitoba Liquor Control Commission and The Government of Canada Respondents.

1977: February 22; 1977: September 30.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR MANITOBA

Constitutional law — Agreement between Canada and Manitoba providing for application of Anti-Inflation Act — Earlier collective agreement between Manitoba Government Employees Association and Liquor Control Commission — Whether employees and employer bound by Anti-Inflation Act and Guidelines — Anti-Inflation Act, 1974-75-76 (Can.), c. 75, s. 4(3) — The Executive Government Organization Act, 1970 (Man.), c. 17, s. 16.

The appellant Association brought an application in the Manitoba Court of Queen's Bench for an order declaring and determining "(a) that the Memorandum of agreement purportedly made on February 25, 1976, between the Government of Canada and the Government of the Province of Manitoba does not have the effect of rendering the Anti-Inflation Act and Guidelines made thereunder applicable to the provincial public sector in Manitoba as said term is defined in the Anti-Inflation Act and the said memorandum of agreement; (b) that the collective agreement dated February 5, 1976, made between the Manitoba Liquor Control Commission and the Manitoba Government Employees Association, is binding on the parties thereto and that a failure on the part of the Manitoba Liquor Control Commission to comply with the terms and conditions thereof, including the payment of the wages therein provided, would constitute a breach of the said agreement, and, as well, for an order to quash the order of the Administrator dated August 27, 1976, whereby the said Administrator purported, *inter alia*, to limit compensation increases to employees of the Manitoba Liquor Control Commission to 12% and to order payment of \$300,000.00 to the Crown in right of Canada representing the purported excess wages paid since January 1, 1976, under the collective agreement dated February 5, 1976, made between the Manitoba Government

The Manitoba Government Employees Association Appelante;

et

Le gouvernement du Manitoba, la Manitoba Liquor Control Commission et le gouvernement du Canada Intimés.

1977: 22 février; 1977: 30 septembre.

Présents: Le juge en chef Laskin et les juges Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz et de Grandpré.

EN APPEL DE LA COUR DU BANC DE LA REINE DU MANITOBA

Droit constitutionnel — Accord entre le Canada et le Manitoba pour l'application de la Loi anti-inflation — Convention collective conclue antérieurement entre la Manitoba Government Employees Association et la Liquor Control Commission — Les employés et l'employeur sont-ils liés par la Loi anti-inflation et ses indicateurs? — Loi anti-inflation, 1974-75-76 (Can.), c. 75, art. 4(3) — The Executive Government Organization Act, 1970 (Man.), c. 17, art. 16.

L'association appelante a demandé à la Cour du Banc de la Reine du Manitoba une ordonnance portant «(a) que l'accord apparemment conclu le 25 février 1976 entre le gouvernement du Canada et le gouvernement de la province du Manitoba ne rend pas la Loi anti-inflation ni les indicateurs fixés sous son régime applicables au secteur public du Manitoba tel que défini dans la Loi anti-inflation et ledit accord; (b) que la convention collective signée le 5 février 1976 par la Manitoba Liquor Control Commission et la Manitoba Government Employees Association lie les parties et que le défaut de la Manitoba Liquor Control Commission d'en respecter les termes et conditions, notamment de payer les salaires qui y sont prévus, constituerait une violation de ladite convention, et également, l'annulation de l'ordonnance du Directeur, rendue le 27 août 1976, visant notamment à limiter à 12% l'augmentation des rémunérations des employés de la Manitoba Liquor Control Commission et ordonnant de payer \$300,000 à la Couronne du chef du Canada, soit le prétendu excédent de salaires versés depuis le 1^{er} janvier 1976 en vertu de la convention collective du 5 février 1976 conclue entre la Manitoba Government Employees Association et la Manitoba

Manitoba Gov't Employees Assoc. and The Government of Manitoba [1978] 1 R.C.S. 1123

1124

MANITOBA GOV'T EMPLOYEES ASSOC., ETC.

[1978] 1 S.C.R.

Employees Association and the Manitoba Liquor Control Commission."

The application was dismissed on the ground that s. 16 of *The Executive Government Organization Act*, 1970 (Man.), c. 17, provided the necessary legislative authority for the provincial Order in Council authorizing the execution of the agreement between Canada and Manitoba which purported to bring into effect in that Province the provisions of the *Anti-Inflation Act*, 1974-75-76 (Can.), c. 75, and the Guidelines made thereunder. From this decision an appeal was brought *per saltum* to this Court by the Court's leave. The issue raised by the appeal turned upon the construction to be placed on s. 16 of *The Executive Government Organization Act* in conjunction with s. 4(3) of the *Anti-Inflation Act*, which authorizes the Federal Minister of Finance with the approval of the Governor in Council to enter into an agreement with the Province providing for the application of the *Anti-Inflation Act* and the Guidelines made thereunder, in accordance with the terms of the agreement.

Held (Laskin C.J. and Martland, Judson and Spence JJ. dissenting): The appeal should be allowed.

Per Ritchie, Pigeon, Dickson, Beetz and de Grandpré JJ.: The effect of the judgment below was that the *Anti-Inflation Act* and the Guidelines passed thereunder were incorporated as law in Manitoba by the agreement between Canada and Manitoba which was executed 16 days after the collective agreement was entered into between the appellant and the Manitoba Liquor Control Commission, pursuant to the provisions of *The Labour Relations Act*, 1972 (Man.), c. 75. This would mean that legislation of a general character, *i.e.*, *The Executive Government Organization Act*, should be interpreted as affording authority to override subsequent legislation dealing with a particular subject, *i.e.*, labour relations, by the passage of an Order in Council.

To accept the construction placed on s. 16 by the Court below would offend against three accepted rules of statutory interpretation in that it would give to a general statute a meaning which conflicts with special legislation, would dramatically affect vested interests and would construe the power accorded to the Executive under that section as including the right to authorize the Minister to enter into retroactive agreements.

The judge of first instance was in error in concluding that s. 16 provides the necessary legislative authority for the Order in Council authorizing the First Minister of

Liquor Control Commission.^a

La demande a été rejetée au motif que l'art. 16 de *The Executive Government Organization Act*, 1970 (Man.), c. 17, autorisait l'adoption, par décret provincial, de l'accord intervenu entre le Canada et le Manitoba pour donner effet, dans cette province, aux dispositions de la *Loi anti-inflation*, 1974-75-76 (Can.), c. 75, et aux indicateurs fixés sous son régime. Pourvoi de cette décision a été interjeté, *per saltum*, sur autorisation de la Cour. Le pourvoi porte sur l'interprétation qu'il faut donner à l'art. 16 de *The Executive Government Organization Act* lu conjointement avec le par. 4(3) de la *Loi anti-inflation* qui autorise le ministre fédéral des Finances, avec l'approbation du gouverneur en conseil, à conclure avec la province un accord prévoyant l'application de la *Loi anti-inflation* et des indicateurs fixés sous son régime, conformément aux conditions qu'il stipule.

Arrêt (le juge en chef Laskin et les juges Martland, Judson et Spence étant dissidents): Le pourvoi doit être accueilli.

Les juges Ritchie, Pigeon, Dickson, Beetz et de Grandpré: Aux termes de la décision du tribunal d'instance inférieure, la *Loi anti-inflation* et les indicateurs fixés sous son régime ont été introduits dans le droit du Manitoba par l'accord intervenu entre le Canada et le Manitoba seize jours après la signature de la convention collective conclue entre l'appelante et la Manitoba Liquor Control Commission, conformément aux dispositions de *The Labour Relations Act*, 1972 (Man.), c. 75. Cela voudrait dire qu'on doit interpréter une loi d'ordre général, en l'occurrence *The Executive Government Organization Act*, comme accordant le pouvoir de déroger, par décret, à une législation subséquente portant sur un domaine particulier, à savoir, les relations de travail.

Accepter l'interprétation de l'art. 16 donnée par le tribunal d'instance inférieure contreviendrait gravement à trois règles bien établies d'interprétation des lois: elle donnerait à une loi d'ordre général un sens incompatible avec une loi spéciale, elle modifierait fondamentalement des droits acquis et elle impliquerait que le pouvoir dont est investi l'exécutif en vertu de cet article comprend le droit d'autoriser le ministre à conclure des ententes ayant effet rétroactif.

Le juge de première instance a fait erreur en concluant que l'art. 16 donne le fondement législatif nécessaire au décret en conseil autorisant le premier ministre

[1978] 1 R.C.S.

MANITOBA GOV'T EMPLOYEES ASSOC., ETC.

1125

the Government of Manitoba to execute the agreement with the Government of Canada on behalf of that Province. The Order in Council in question was not effective to authorize the conclusion of an agreement changing the law of the Province in a manner inconsistent with specific legislation subsequently passed and in retroactive derogation of the vested rights of the appellant and the employees which it represents under its collective agreement with the Liquor Control Commission of Manitoba.

Per Laskin C.J. and Martland, Judson and Spence JJ., dissenting: Specific legislation such as was enacted by Nova Scotia, Prince Edward Island and New Brunswick, and confirmatory legislation such as was enacted by Ontario and Newfoundland (the former after the decision of this Court in the *Anti-Inflation* reference, [1976] 2 S.C.R. 373, the latter after the hearing in this Court but before the decision) does not determine the success of the challenge offered to the effectiveness of the federal Act and Guidelines in the Manitoba public sector in the present case. While it may more clearly establish their operative force in respect of the public sector in those Provinces, it cannot be said that general legislation such as is found in s. 16 is *ipso facto* ineffective for reaching the same end.

It is one thing to regard s. 16 as itself authorizing a change in provincial law by reason of an agreement authorized thereunder through which the change is made by incorporating into the agreement provisions of a federal statute to operate as provincial law. In such a case the mere entry into an agreement cannot accomplish such a change because the agreement leads nowhere except back to its source which is s. 16. That, however, is not this case. It is another thing to view s. 16 as providing a legislative base for an agreement which becomes operative under federal law and which makes that law, as federal law, applicable in a Province to the extent provided in the agreement. That is this case and s. 16 is apt for this purpose.

[Reference re *Anti-Inflation Act*, [1976] 2 S.C.R. 373, applied; *Re Township of York and Township of North York* (1925), 57 O.L.R. 644; *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271; *Western Counties Railway Co. v. Windsor and Annapolis Railway Co.* (1882), 7 App. Cas. 178, referred to.]

APPEAL *per saltum* from a judgment rendered by Nitikman J. in the Court of Queen's Bench for Manitoba on an application brought by the Manitoba Government Employees Association.

du gouvernement du Manitoba à conclure une entente avec le gouvernement du Canada au nom de cette province. Le décret en cause ne permet pas la conclusion d'un accord modifiant le droit de la province d'une façon incompatible avec une loi spéciale adoptée subseqüemment et portant atteinte rétroactivement aux droits acquis de l'appelante et des employés qu'elle représente, en vertu de la convention collective conclue avec la Liquor Control Commission du Manitoba.

Le juge en chef Laskin et les juges Martland, Judson et Spence, dissidents: Les lois spéciales, comme celles de la Nouvelle-Écosse, de l'Île-du-Prince-Édouard et du Nouveau-Brunswick, et les lois confirmatives, comme celles de l'Ontario et de Terre-Neuve (la première adoptée avant que jugement ne soit rendu dans le *Renvoi sur la Loi anti-inflation*, [1976] 2 R.C.S. 373, et la deuxième, après l'audition mais avant le prononcé du jugement) ne permettent pas en l'espèce de tirer une conclusion sur l'application de la loi fédérale et des indicateurs au secteur public du Manitoba. Même si ces lois particulières établissent plus clairement leur force exécutoire à l'égard du secteur public de ces provinces, on ne peut dire que les lois d'ordre général, comme l'art. 16, ne peuvent atteindre *ipso facto* le même but.

C'est une chose de considérer que l'art. 16 autorise lui-même une modification du droit provincial par la conclusion d'un accord dans lequel seront incorporées les dispositions d'une loi fédérale qui doit s'appliquer en tant que législation provinciale. Dans un tel cas, la seule conclusion d'un accord ne peut entraîner une telle modification parce qu'il ne fait que renvoyer à sa source, c'est-à-dire l'art. 16. Ce n'est cependant pas le cas en l'espèce. C'est tout autre chose de considérer que l'art. 16 donne une base législative à un accord qui devient exécutoire en vertu d'une loi fédérale et qui rend cette loi, à titre de loi fédérale, applicable à une province dans la mesure prévue dans l'accord. C'est le cas en l'espèce et l'art. 16 convient à cette fin.

[Arrêt appliqué: *Renvoi relatif à la Loi anti-inflation*, [1976] 2 R.C.S. 373; arrêts mentionnés: *Re Township of York and Township of North York* (1925), 57 O.L.R. 644; *Gustavson Drilling (1964) Ltd. c. Le ministre du Revenu national*, [1977] 1 R.C.S. 271; *Western Counties Railway Co. v. Windsor and Annapolis Railway Co.* (1882), 7 App. Cas. 178.]

POURVOI *per saltum* contre une décision du juge Nitikman de la Cour du Banc de la Reine du Manitoba sur une demande présentée par la Manitoba Government Employees Association.

1126

MANITOBA GOV'T EMPLOYEES ASSOC., ETC. *The Chief Justice*

[1978] 1 S.C.R.

Appeal allowed, Laskin C.J. and Martland, Judson and Spence JJ. dissenting.

W. L. Ritchie, Q.C., and *W. D. Hamilton*, for the appellant.

B. F. Squair, for the respondent, the Government of Manitoba.

J. Scollin, Q.C., and *D. Frayer*, for the respondent, the Government of Canada.

J. S. Walker, Q.C., for the respondent, the Manitoba Liquor Control Commission.

The judgment of Laskin C.J. and Martland, Judson and Spence JJ. was delivered by

THE CHIEF JUSTICE (dissenting)—The issue in this appeal, which comes here *per saltum* through the required consents of the parties and by leave of this Court, is whether certain employees in the public sector in Manitoba, namely, employees of the Manitoba Liquor Control Commission, and the Commission itself as their employer are bound by the federal *Anti-Inflation Act*, 1974-75-76 (Can.), c. 75, and Guidelines authorized thereunder. If they are so bound, the consequence would be to make their collective agreement of February 9, 1976 (declared to be retroactive to January 1, 1976) subject to the restraints of the Act and Guidelines.

The issue turns on the effect, pursuant to s. 4(3) of the *Anti-Inflation Act*, of an agreement made by the Government of Manitoba, through its first Minister, with the Government of Canada, through its Minister of Finance, on February 25, 1976 providing for the application of the *Anti-Inflation Act* and Guidelines to the public sector in Manitoba, as defined in the agreement. Three recitals in this agreement should be noticed, as follows:

AND WHEREAS SUBSECTION 4(3) of the federal act authorizes the Federal Minister with the approval of the Governor in Council to enter into an agreement with the Province providing for the application of the federal act and the guidelines made thereunder, in accordance with the terms of the agreement

Pourvoi accueilli, le juge en chef Laskin et les juges Martland, Judson et Spence étant dissidents.

W. L. Ritchie, c.r., et *W. D. Hamilton*, pour l'appelante.

B. F. Squair, pour l'intimé, le gouvernement du Manitoba.

J. Scollin, c.r., et *D. Frayer*, pour l'intimé, le gouvernement du Canada.

J. S. Walker, c.r., pour l'intimée, la Manitoba Liquor Control Commission.

Le jugement du juge en chef Laskin et des juges Martland, Judson et Spence a été rendu par

LE JUGE EN CHEF (dissident)—Le présent pourvoi a été entendu *per saltum*, sur consentement en bonne et due forme des parties et sur autorisation de la présente Cour. Il porte sur la question de savoir si certains employés du secteur public du Manitoba, en l'occurrence les employés de la Liquor Control Commission du Manitoba, et la Liquor Control Commission elle-même en tant qu'employeur, sont liés par la *Loi anti-inflation* fédérale, 1974-75-76 (Can.), c. 75 et les indicateurs fixés sous son régime. Dans l'affirmative, leur convention collective du 9 février 1976 (rétroactive au 1^{er} janvier 1976) est soumise aux restrictions de la Loi et des indicateurs.

Le point en litige dépend de l'effet d'un accord conclu conformément au par. 4(3) de la *Loi anti-inflation*, le 25 février 1976 entre le gouvernement du Manitoba, par l'intermédiaire de son premier ministre, et le gouvernement du Canada, par l'intermédiaire de son ministre des Finances. Cet accord prévoit l'assujettissement du secteur public du Manitoba, tel que défini dans l'accord, à la *Loi anti-inflation* et à ses indicateurs. Trois considérants de l'accord sont à retenir:

[TRADUCTION] ET ATTENDU QUE LE PARAGRAPHE 4(3) de la loi fédérale autorise le ministre fédéral, avec l'approbation du gouverneur en conseil, à conclure avec la province un accord prévoyant l'application de la loi fédérale et des indicateurs fixés sous son régime, conformément aux conditions qu'il stipule.

Manitoba Gov't Employees Assoc. and The Government of Manitoba [1978] 1 R.C.S. 1123

[1978] 1 R.C.S.

MANITOBA GOV'T EMPLOYEES ASSOC., ETC. *Le Juge en Chef*

1127

AND WHEREAS the Federal Minister has been authorized to enter into this agreement pursuant to Order in Council P.C. 1976-338 dated this 17th day of February, 1976.

AND WHEREAS the Provincial Minister has been authorized to enter into this agreement pursuant to Order in Council 10-76 dated this 14th day of January, 1976.

The provincial Order in Council, referred to in the last-mentioned recital, begins with a reference to s. 16 of *The Executive Government Organization Act*, 1970 (Man.), c. 17, and includes also the following paragraphs:

AND WHEREAS the Parliament of Canada has enacted the Anti-Inflation Act which provides, among other matters, authority for the Minister of Finance of Canada to enter into an agreement with the government of a province providing for the application of the Anti-Inflation Act and the guidelines established thereunder to Her Majesty in right of the province, agents of Her Majesty in right of the province and certain other bodies within the provincial sector, including municipalities in the province and municipal or public bodies performing a function of government in the province;

AND WHEREAS it is deemed for the benefit of the residents of Manitoba for the Government of Manitoba to enter into an agreement with the Minister of Finance providing for the application of the Anti-Inflation Act and the guidelines established thereunder to Her Majesty in right of the Province, agents of Her Majesty in right of the province and certain other bodies within the provincial sector, including municipalities in the province and municipal or public bodies performing a function of government in the province;

The Order in Council concludes by authorizing entry into an agreement in the form set out in the Schedule or a form to like effect. It is not disputed that the agreement of February 25, 1976, conforms to the authorization given by the Order-in-Council.

Section 16 of *The Executive Government Organization Act* provides as follows:

16. The Lieutenant Governor in Council may authorize a minister, for and on behalf of the government, or an agency of the government, to enter into an agreement with

(a) the Government of Canada, or a minister or agency of the Government of Canada; or

ET ATTENDU que le ministre fédéral a été autorisé, par le décret C.P. 1976-338 du 17 février 1976, à conclure la présente entente.

ET ATTENDU que le ministre provincial a été autorisé, par le décret 10-76 du 14 janvier 1976, à conclure la présente entente.

Le décret provincial, mentionné au dernier considérant, fait d'abord référence à l'art. 16 de *The Executive Government Organization Act*, 1970 (Man.), c. 17 et compte les alinéas suivants:

[TRADUCTION] ET ATTENDU que le Parlement du Canada a édicté la Loi anti-inflation qui dispose, notamment, que le ministre des Finances du Canada a le pouvoir de conclure avec le gouvernement d'une province un accord prévoyant l'application de la Loi anti-inflation et des indicateurs fixés sous son régime à Sa Majesté du chef de la province, à ses mandataires et à certains organismes relevant de la compétence provinciale, y compris les municipalités et les organismes publics et municipaux qui exécutent des fonctions de gouvernement dans la province;

ET ATTENDU qu'il est dans l'intérêt des habitants du Manitoba que le gouvernement du Manitoba conclue avec le ministre des Finances un accord prévoyant l'application de la Loi anti-inflation et des indicateurs fixés sous son régime à Sa Majesté du chef de la province, à ses mandataires et à certains organismes relevant de la compétence provinciale, y compris les municipalités et les organismes publics et municipaux qui exécutent des fonctions de gouvernement dans la province;

Le décret se termine en accordant le pouvoir de conclure pareil accord selon une formule jointe en annexe ou une formule équivalente. Personne ne conteste que l'entente du 25 février 1976 est conforme à l'autorisation prévue dans le décret.

L'article 16 de *The Executive Government Organization Act* prévoit:

[TRADUCTION] **16.** Le lieutenant-gouverneur en conseil peut autoriser un ministre à conclure un accord, au nom du gouvernement ou d'un de ses mandataires, avec

a) le gouvernement du Canada, un de ses ministres ou mandataires; ou

1128

MANITOBA GOV'T EMPLOYEES ASSOC., ETC. *The Chief Justice*

[1978] 1 S.C.R.

- (b) the government of another province of Canada, or a minister or agency of the government of another province of Canada; or
 - (c) a municipality, school district, school division, or other local authority; or
 - (d) any person or group of persons;
- for the benefit or purposes of the residents of Manitoba or any part thereof.

As already noted, the Order in Council authorizing the agreement entered into pursuant to this provision recites that it was entered into for the benefit of the residents of Manitoba and there is no suggestion here that this is challengeable, certainly not in the present case.

What is left to consider, therefore, is whether the operation of s. 4(3) of the *Anti-Inflation Act* upon the agreement, authorized on each side by statutory authority, results in making the *Anti-Inflation Act* and Guidelines operative in the Manitoba public sector as defined in the agreement and to have effect by prevailing over any inconsistent provincial legislation as provided by s. 4.1(1) of the *Anti-Inflation Act*. Before proceeding to examine s. 4(3), I wish to take account of a subsidiary submission by counsel for the appellant, touching the retroactive operation of the agreement which, under its terms, was to apply from and after October 14, 1975, subject to certain termination provisions not here material. If in the setting of s. 4(3) and s. 4.1(1) of the *Anti-Inflation Act*, the agreement operates according to its terms, there is no legal vice in its retroactive operation.

The validity of the *Anti-Inflation Act* and Guidelines, including s. 4, was upheld by this Court in *Reference re Anti-Inflation Act*¹. The Court made it clear that federal authority, in the circumstances, was broad enough to have enabled the Parliament of Canada to embrace the provincial public sector without the "contracting in" provisions of s. 4(3)(4). It is true that s. 4(2) excludes the provincial public sector from the embrace of the *Anti-Inflation Act* but it is a qualified exclusion made subject to s. 4(3).

b) le gouvernement d'une autre province du Canada ou un de ses ministres ou mandataires; ou

c) une municipalité, un district scolaire, une division scolaire ou une autre autorité locale; ou
d) toute personne ou groupe de personnes;

dans l'intérêt et à l'avantage des habitants du Manitoba ou d'une partie.

Comme je l'ai déjà signalé, le décret permettant la conclusion de l'accord en vertu de cette disposition déclare qu'il a été conclu dans l'intérêt et à l'avantage des habitants du Manitoba, et on ne prétend pas ici que cela soit contestable, certainement pas en l'espèce.

Il reste donc à examiner si l'application du par. 4(3) de la *Loi anti-inflation* à l'accord, autorisé des deux côtés par une loi, rend la *Loi anti-inflation* et les indicateurs applicables au secteur public du Manitoba, tel que défini dans l'accord, et les fait prévaloir sur toute loi provinciale incompatible, comme le prévoit le par. 4.1(1) de la *Loi anti-inflation*. Avant d'étudier le par. 4(3), je répondrai à une prétention subsidiaire de l'avocat de l'appelante au sujet de l'effet rétroactif de l'accord qui, selon ses propres termes, s'applique à compter du 14 octobre 1975, sous réserve de certaines clauses de résiliation non pertinentes en l'espèce. Si dans le cadre des dispositions des par. 4(3) et 4.1(1) de la *Loi anti-inflation*, l'accord est en vigueur selon ses propres termes, son effet rétroactif ne le vici pas en droit.

Dans le *Renvoi relatif à la Loi anti-inflation*¹, cette Cour a confirmé la validité de la *Loi anti-inflation* et des indicateurs, y compris l'art. 4. La Cour a clairement décidé que le pouvoir fédéral est, dans les circonstances, suffisamment étendu pour permettre au Parlement du Canada d'englober le secteur public provincial sans prévoir aux par. 4(3) et (4) la «nécessité» d'un accord. Il est vrai que le par. 4(2) prévoit que la *Loi anti-inflation* ne s'appliquera pas au secteur public provincial, mais cette exclusion est faite sous réserve du par. 4(3).

¹ (1976), 68 D.L.R. (3d) 452, [1976] 2 S.C.R. 373.

¹ (1976), 68 D.L.R. (3d) 452, [1976] 2 R.C.S. 373.

[1978] 1 R.C.S.MANITOBA GOV'T EMPLOYEES ASSOC., ETC. *Le Juge en Chef*1129

Subsections (3) and (4) of s. 4, different in their scope, read as follows:

(3) The Minister may, with the approval of the Governor in Council, enter into an agreement with the government of a province providing for the application of this Act and the guidelines to

- (a) Her Majesty in right of that province,
- (b) agents of Her Majesty in that right,
- (c) bodies described in paragraphs (2)(b) and (c), and
- (d) bodies prescribed by the regulations pursuant to paragraph 2(d),

or any of such bodies, agents and Her Majesty in that right, and where any such agreement is entered into, this Act is binding in accordance with the terms of the agreement and the guidelines apply in accordance with the terms thereof with effect on and after the day on and after which the guidelines apply, by virtue of the operation of this Act, with respect to Her Majesty in right of Canada.

(4) The Minister may, with the approval of the Governor in Council, enter into an agreement with the government of a province providing for the application to

- (a) Her Majesty in right of that province,
- (b) agents of Her Majesty in that right,
- (c) bodies described in paragraphs (2)(b) and (c), and
- (d) bodies prescribed by the regulations pursuant to paragraph (2)(d),

or any of such bodies, agents and Her Majesty in that right, of such of the guidelines made under subsection 3(2) as are applicable to public sector suppliers of commodities or services and public sector employees and their employers, and for the administration and enforcement of those guidelines in their application thereto in a manner provided for in the agreement or as determined by the government of the province.

The differences in these two provisions are, in my view, of central importance for the determination of this appeal. Section 4(3) provides for an inter-governmental agreement "for the application of this Act and the guidelines" to the provincial public sector and makes the Act binding in accordance with the terms of the agreement and, further, the Guidelines apply in accordance with the terms of the agreement. By contrast, s. 4(4) relates to an inter-governmental agreement that does not provide for the application of the Act and Guidelines

Les paragraphes (3) et (4) de l'art. 4 ont un champ d'application différent:

(3) Le Ministre peut, avec l'approbation du gouverneur en conseil, conclure avec le gouvernement d'une province un accord prévoyant l'application de la présente loi et des indicateurs

- a) à Sa Majesté du chef d'une province,
- b) à ses mandataires,
- c) aux organismes visés aux alinéas (2)b) et c), et
- d) aux organismes désignés par règlement en vertu de l'alinéa (2)d);

la présente loi s'applique, dès la conclusion de l'accord, conformément aux conditions qu'il stipule et les indicateurs s'appliquent, aux mêmes conditions, à compter de la date à laquelle les indicateurs s'appliquent à Sa Majesté du chef du Canada par l'effet de la présente loi.

(4) Le Ministre peut, avec l'approbation du gouverneur en conseil, conclure avec le gouvernement d'une province un accord prévoyant l'application

- a) à Sa Majesté du chef d'une province,
- b) à ses mandataires,
- c) aux organismes visés aux alinéas (2)b) et c), et
- d) aux organismes désignés par règlement en vertu de l'alinéa (2)d),

des indicateurs prescrits en vertu du paragraphe 3(2) qui s'appliquent aux fournisseurs d'articles ou de services du secteur public et aux employés du secteur public ainsi qu'à leurs employeurs, et prévoyant le mode d'application des indicateurs ou prévoyant que celui-ci sera déterminé par le gouvernement de la province.

Les différences entre ces deux dispositions sont, à mon avis, d'une importance fondamentale en l'espèce. Le paragraphe 4(3) prévoit la conclusion d'un accord intergouvernemental pour «l'application de la présente loi et des indicateurs» au secteur public provincial et dispose que la Loi et les indicateurs s'appliquent alors conformément aux conditions stipulées dans l'accord. Au contraire, le par. 4(4) vise un accord intergouvernemental qui ne prévoit pas l'application de la Loi et des indicateurs au secteur public provincial, mais seulement

1130

MANITOBA GOV'T EMPLOYEES ASSOC., ETC. *The Chief Justice*

[1978] 1 S.C.R.

to the provincial public sector but only for bringing the provincial public sector under certain Guidelines and for administration of those Guidelines as provided in the agreement or as determined by the Government of the Province.

It may be that if, in the present case, Manitoba had sought to support the application of the Guidelines to its provincial public sector under s. 4(4) of the *Anti-Inflation Act*, so as to make the collective agreement aforementioned subject to such Guidelines by virtue only of the agreement authorized under s. 16 of *The Executive Government Organization Act*, it would have been ineffective for that purpose. In short, a s. 4(4) agreement might draw no force from the *Anti-Inflation Act* but would require provincial legislation of a more pronounced kind than that of s. 16 of *The Executive Government Organization Act*, to enable the Guidelines to prevail against inconsistent provincial legislation.

The contention put forward by the appellant in this case would draw no distinction between a s. 4(3) agreement and a s. 4(4) agreement and, indeed, its submission is that the authorization for the agreement in the present case under s. 16 of *The Executive Government Organization Act* does not take the present case beyond the situation in which Ontario found itself in the *Anti-Inflation* reference in seeking to support a s. 4(3) agreement by an Order in Council, without the back-up of authorizing legislation. I cannot agree that s. 16 of *The Executive Government Organization Act* accomplishes nothing so far as s. 4(3) is concerned.

In its reasons in the *Anti-Inflation* reference concerning the Ontario agreement, this Court, which was unanimous on this issue, referred to the operative effect of s. 4(3) as follows (68 D.L.R. (3d) 452 at p. 502):

... s. 4(3) does not involve any delegation of legislative power by Parliament. There is not here any delegation upon which a power to enact legislation is conferred; rather there is an incorporation of federal enactments as supervening law in Ontario. Again, there is no delegation of administrative power by Parliament; if anything, there is delegation by the Government of Ontario to the

G
S
1977
l'assujettissement du secteur public provincial à certains indicateurs et leur mode d'application aux conditions stipulées dans l'accord ou à celles déterminées par le gouvernement de la province.

Si, en l'espèce, le Manitoba avait cherché à fonder l'application des indicateurs au secteur public provincial sur le par. 4(4) de la *Loi anti-inflation*, de sorte que la convention collective susmentionnée soit subordonnée à ces indicateurs uniquement en vertu de l'accord autorisé par l'art. 16 de *The Executive Government Organization Act*, il est possible qu'il aurait échoué à cet égard. En résumé, il se peut qu'un accord conclu en vertu du par. 4(4) ne tire aucun effet de la *Loi anti-inflation*, mais exige une loi provinciale plus précise que l'art. 16 de *The Executive Government Organization Act* pour que les indicateurs prévalent sur une loi provinciale incompatible.

La prétention de l'appelante ne fait en l'espèce aucune distinction entre un accord conclu en vertu du par. 4(3) et celui conclu en vertu du par. 4(4) et allège, en fait, que l'accord conclu sur autorisation accordée en vertu de l'art. 16 de *The Executive Government Organization Act* crée une situation équivalente à celle où se trouvait l'Ontario dans le *Renvoi sur la Loi anti-inflation*, où cette province cherchait à faire appliquer un accord conclu en vertu du par. 4(3) et autorisé par un décret, mais non fondé sur une loi provinciale. Je ne puis admettre que l'art. 16 de *The Executive Government Organization Act* n'ait aucun effet dans la mesure où le par. 4(3) est en cause.

Dans ses motifs de jugement prononcés dans le *Renvoi sur la Loi anti-inflation* au sujet de l'accord conclu par l'Ontario, la présente Cour, qui était unanime sur ce point, a exposé en ces termes le mécanisme du par. 4(3) (68 D.L.R. (3d) 452, à la p. 502):

... le par. (3) de l'art. 4 n'implique aucune délégation de pouvoir législatif par le Parlement. Il n'y a en l'espèce aucun délégué à qui le pouvoir de faire des lois soit conféré; c'est plutôt la législation fédérale qui est incorporée à la législation ontarienne. Il n'y a pas non plus délégation de pouvoirs administratifs par le Parlement; s'il y a quelque délégation, elle est consentie par le

federal authorities. Administration and enforcement of the Act and the Guidelines are to proceed as a federal exercise, although the scope of the application of the Act and Guidelines to the provincial public sector is governed by the agreement.

I contrast with this the effect of s. 4(4) which, in my view, contemplates that the administration and enforcement of the Guidelines would proceed as a *provincial* exercise, incorporating the Guidelines by reference as part of provincial law, and thereby requiring some effective provision that would make the Guidelines, as provincial law, prevail over any other provincial legislation in case of inconsistency.

I would add here, to avoid misunderstanding, that the reference in the above-quoted passage to "incorporation of federal enactments as supervening law in Ontario" is a reference to such incorporation through an agreement which is concluded in pursuance of s. 4(3), a provision which makes the Act and Guidelines binding in accordance with the terms of the agreement. In this sense, it is, as was stated in the quoted passage, a federal exercise not a provincial one.

Ontario, in the *Anti-Inflation* reference, like Manitoba here, was purporting to enter into a s. 4(3) agreement, and it was in that light that the Court noted that the Ontario Government's action "was not backed by provincial legislative authority as was the case in respect of agreements with all the other Provinces save Newfoundland which, like Ontario, proceeded by Order in Council" (68 D.L.R. (3d) 452, at pp. 503-4).

Some of the s. 4(3) agreements, for example those of Nova Scotia and Prince Edward Island, were backed by provincial legislation which was much more explicit as to the binding effect of the federal Act and Guidelines upon the provincial public sector than is the Manitoba legislation in this case: see the *Anti-Inflation (Nova Scotia) Act*, 1975 (N.S.), c. 54; *An Act to Authorize a Federal-Provincial Anti-Inflation Agreement*, 1975, (P.E.I.), c. 63. New Brunswick enacted legislation which, without being as explicit as that of Nova Scotia and of Prince Edward Island, was particular authorizing legislation relating to the

gouvernement de l'Ontario à l'autorité fédérale. L'administration et l'application de la Loi et des Indicateurs sont confiées au fédéral, bien que leur champ d'application soit régi par l'accord à l'égard du secteur public provincial.

J'oppose à cela l'effet du par. 4(4) qui, à mon avis, prévoit que la mise en application des indicateurs est confiée à la *province* qui les incorporera à la législation provinciale, ce qui exigera certaines dispositions exécutoires pour assurer, en cas d'incompatibilité, la prépondérance des indicateurs sur toute autre loi provinciale.

Pour éviter toute confusion, j'ajouterais que, dans la dernière citation, l'expression «la législation fédérale [...] est incorporée à la législation ontarienne» vise pareille incorporation par un accord conclu en vertu du par. 4(3) qui prévoit l'application de la Loi et des indicateurs conformément aux conditions de l'accord. Dans ce sens, comme le dit l'extrait cité, l'application en est confiée au fédéral et non au provincial.

Dans le *Renvoi sur la Loi anti-inflation*, l'Ontario, comme le Manitoba en l'espèce, a cherché à conclure un accord en vertu du par. 4(3), et c'est dans cette optique que la Cour a déclaré que le pouvoir du gouvernement ontarien à cet égard n'était «fondé sur aucune loi provinciale, contrairement aux accords conclus par toutes les autres provinces, à l'exception de Terre-Neuve, qui, comme l'Ontario, a procédé par arrêté en conseil» (68 D.L.R. (3d) 452, aux pp. 503 et 504).

Certains accords conclus en vertu du par. 4(3), par exemple ceux de la Nouvelle-Écosse et de l'Île-du-Prince-Édouard, sont fondés sur une loi provinciale beaucoup plus explicite quant à l'application au secteur public provincial de la loi fédérale et des indicateurs que ne l'est la Loi du Manitoba: voir l'*Anti-Inflation (Nova Scotia) Act*, 1975 (N.-É.), c. 54; *An Act to Authorize a Federal-Provincial Anti-Inflation Agreement*, 1975 (Î.-P.-É.), c. 63. Le Nouveau-Brunswick a édicté une loi qui, sans être aussi explicite que celles de la Nouvelle-Écosse et de l'Île-du-Prince-Édouard, autorise spécifiquement l'application de la *Loi*

1132

MANITOBA GOVT EMPLOYEES ASSOC., ETC. *The Chief Justice*

[1978] 1 S.C.R.

application of the *Anti-Inflation Act*: see 1975 (N.B.), c. 93. British Columbia legislation, the *Anti-Inflation Measures Act*, enacted June 9, 1976, appears to authorize a s. 4(4) agreement by reason of its provision for the appointment of persons to carry out the purposes of the Act and the terms of any agreement entered into with Canada for the application of the federal Act and Guidelines in the provincial public sector. Alberta passed somewhat similar legislation, *The Temporary Anti-Inflation Measures Act*, 1975 (Alta.), c. 83, which went farther in the s. 4(4) direction by establishing its own Anti-Inflation Measures Board and its own enforcement procedures. Quebec, on the other hand, passed its own *Anti-Inflation Act* (see 1975 (Que.), c. 16), defining its public sector scope and its administration under its provisions without any apparent dovetailing with the federal Act and Guidelines. Ontario cured the defect shown up by this Court in the *Anti-Inflation* reference by legislation ratifying the purported s. 4(3) agreement that the Government had made, and by providing that the agreement as ratified by the Act would prevail against any other law of Ontario in case of inconsistency: see *The Anti-Inflation Agreement Act*, 1976 (Ont.), c. 61. Newfoundland also enacted a confirming statute *The Federal-Provincial Anti-Inflation Agreement Act*, 1976 (Nfld.), No. 52, which expressly provided that the federal Act and Guidelines be binding in the provincial public sector and that they were to have effect notwithstanding anything to the contrary in any other Newfoundland statute or law.

Such specific legislation as was enacted by Nova Scotia, Prince Edward Island and New Brunswick, and such confirmatory legislation as was enacted by Ontario and Newfoundland (the former after the decision of this Court in the *Anti-Inflation* reference, the latter after the hearing in this Court but before the decision) does not determine the success of the challenge offered to the effectiveness of the federal Act and Guidelines in the Manitoba public sector in the present case. While it may more clearly establish their operative force in respect of the public sector in those Provinces, it cannot be said that general legislation such as is found in s. 16 of *The Executive Government*

anti-inflation: voir 1975 (N.-B.), c. 93. La Loi de la Colombie-Britannique, l'*Anti-Inflation Measures Act*, édictée le 9 juin 1976, paraît autoriser la conclusion d'un accord en vertu du par. 4(4) puisqu'elle prévoit la nomination de personnes chargées de mettre en œuvre la Loi et tout accord conclu avec le Canada pour l'application de la loi fédérale et des indicateurs au secteur public provincial. L'Alberta a adopté une loi similaire, *The Temporary Anti-Inflation Measures Act*, 1975 (Alberta), c. 83, qui va plus loin en ce qui concerne le par. 4(4) puisqu'elle établit sa propre commission de lutte contre l'inflation et ses propres procédures d'application. Le Québec, pour sa part, a adopté la *Loi concernant les mesures anti-inflationnistes*, (1975 (Qué.), c. 16), qui fixe sa portée vis-à-vis du secteur public provincial et des règles d'application sans aucun lien apparent avec la loi fédérale et les indicateurs. L'Ontario a remédié à l'omission constatée par cette Cour dans le *Renvoi sur la Loi anti-inflation* en promulguant une loi ratifiant l'accord conclu en vertu du par. 4(3) par le gouvernement et prévoyant que l'accord ainsi ratifié prévaudrait, en cas d'incompatibilité, sur toute autre loi de l'Ontario: voir *The Anti-Inflation Agreement Act*, 1976 (Ont.), c. 61. Terre-Neuve a également promulgué une loi confirmative, *The Federal-Provincial Anti-Inflation Agreement Act*, 1976 (Terre-Neuve), n° 52, qui prévoit expressément que le secteur public provincial est assujetti à la loi fédérale et aux indicateurs qui s'appliqueront nonobstant toute disposition contraire d'une autre loi de Terre-Neuve.

Des lois spéciales, comme celles de la Nouvelle-Écosse, de l'Île-du-Prince-Édouard et du Nouveau-Brunswick, et des lois confirmatives comme celles de l'Ontario et de Terre-Neuve (la première adoptée avant que jugement ne soit rendu par cette Cour dans le *Renvoi sur la Loi anti-inflation* et la deuxième, après l'audition mais avant le prononcé du jugement) ne permettent pas en l'espèce de tirer une conclusion sur l'application de la loi fédérale et des indicateurs au secteur public du Manitoba. Bien que ces lois spéciales établissent plus clairement leur force exécutoire à l'égard du secteur public de ces provinces, on ne peut dire qu'une législation d'ordre général, comme l'art. 16

Manitoba Gov't Employees Assoc. and The Government of Manitoba [1978] 1 R.C.S. 1123

[1978] 1 R.C.S.

MANITOBA GOV'T EMPLOYEES ASSOC., ETC. *Le Juge en Chef*

1133

Organization Act is *ipso facto* ineffective for reaching the same end.

It is one thing to regard s. 16 as itself authorizing a change in provincial law by reason of an agreement authorized thereunder through which the change is made by incorporating into the agreement provisions of a federal statute to operate as provincial law. I would agree that in such a case the mere entry into an agreement cannot accomplish such a change because the agreement leads nowhere except back to its source which is s. 16. That, however, is not this case. It is another thing to view s. 16 as providing a legislative base for an agreement which becomes operative under federal law and which makes that law, as federal law, applicable in a Province to the extent provided in the agreement. That is this case and, in my opinion, s. 16 is apt for this purpose.

I would dismiss the appeal.

The judgment of Ritchie, Pigeon, Dickson, Beetz and de Grandpré JJ. was delivered by

RITCHIE J.—This is an appeal brought *per saltum* with leave of this Court and consent of all parties concerned from a judgment rendered by Mr. Justice Nitikman in Manitoba Court of Queen's Bench before whom the present application was brought by the Manitoba Government Employees Association. Mr. Justice Nitikman summarized the nature of the Order applied for at the outset of his judgment in the following terms:

Applicant moves for an order declaring and determining

(a) "that the Memorandum of agreement purportedly made on February 25, 1976, between the Government of Canada and the Government of the Province of Manitoba does not have the effect of rendering the Anti-Inflation Act and guidelines made thereunder applicable to the provincial public sector in Manitoba as said term is defined in the Anti-Inflation Act and the said memorandum of agreement."

(b) "that the collective agreement dated February 5, 1976 made between the Manitoba Liquor Control Commission and the Manitoba Government Employees Association, is binding on the parties thereto and that a failure on the part of the Manitoba Liquor Control Commission to comply with the terms

de *The Executive Government Organization Act*, ne peut pas atteindre *ipso facto* le même but.

C'est une chose de considérer que l'art. 16 autorise lui-même une modification du droit provincial par la conclusion d'un accord dans lequel seront incorporées les dispositions d'une loi fédérale qui doit s'appliquer en tant que législation provinciale. J'admet que, dans un tel cas, la seule conclusion d'un accord ne peut entraîner pareille modification parce qu'il ne fait que renvoyer à sa source, c'est-à-dire l'art. 16. Ce n'est pas cependant le cas en l'espèce. C'est tout autre chose de considérer que l'art. 16 donne une base législative à un accord qui devient exécutoire en vertu d'une loi fédérale et qui rend cette loi, à titre de loi fédérale, applicable à une province dans la mesure prévue dans l'accord. C'est le cas en l'espèce et, à mon avis, l'art. 16 convient à cette fin.

Je suis d'avis de rejeter le pourvoi.

Le jugement des juges Ritchie, Pigeon, Dickson, Beetz et de Grandpré a été rendu par

LE JUGE RITCHIE—Pourvoi est interjeté, *per saltum*, sur autorisation de cette Cour et sur consentement en bonne et due forme de toutes les parties, d'une décision du juge Nitikman de la Cour du Banc de la Reine du Manitoba à laquelle la présente demande avait été soumise par la Manitoba Government Employees Association. En préambule à son jugement, le juge Nitikman a résumé en ces termes la nature de l'ordonnance recherchée:

[TRADUCTION] La requérante demande une ordonnance portant

a) «que l'accord apparemment conclu le 25 février 1976 entre le gouvernement du Canada et le gouvernement de la province du Manitoba ne rend pas la Loi anti-inflation ni les indicateurs fixés sous son régime applicables au secteur public du Manitoba tel que défini dans la Loi anti-inflation et ledit accord»;

b) «que la convention collective signée le 5 février 1976 par la Manitoba Liquor Control Commission et la Manitoba Government Employees Association lie les parties et que le défaut de la Manitoba Liquor Control Commission d'en respecter les termes et conditions, notamment de payer les salaires qui y sont

Manitoba Gov't Employees Assoc. and The Government of Manitoba [1978] 1 R.C.S. 1123

1134

MANITOBA GOV'T EMPLOYEES ASSOC., ETC. *Ritchie J.*

[1978] 1 S.C.R.

and conditions thereof, including the payment of the wages therein provided, would constitute a breach of the said agreement."

and, as well, for an order to quash the order of the Administrator dated August 27, 1976, whereby the said Administrator purported to, inter alia, limit compensation increases to employees of the Manitoba Liquor Control Commission to 12% and to order payment of \$300,000.00 to the Crown in right of Canada representing the purported excess wages paid since January 1, 1976, under the collective agreement dated February 5, 1976, made between the Manitoba Government Employees Association and the Manitoba Liquor Control Commission.

In dismissing the application, Mr. Justice Nitikman founded his judgment on the ground that s. 16 of *The Executive Government Organization Act*, 1970 (Man.), c. 17, which is hereinafter recited, provided the necessary legislative authority for the provincial Order in Council authorizing the execution of the agreement between Canada and Manitoba which purported to bring into effect in that Province the provisions of the *Anti-Inflation Act*, 1974-75-76 (Can.), 75, and the Guidelines made thereunder.

The learned judge of first instance concluded his reasons for judgment with the following paragraph:

For all of the reasons previously set out I hold that Section 16 of the *Executive Government Organization Act* provides the necessary legislative authority for Order-in-Council 10-76 which authorized the Honourable the First Minister of the Government of Manitoba to execute on behalf of Manitoba the agreement with the Government of Canada pursuant to Section 4(3) of the *Anti-Inflation Act* and as a result of the execution of the agreement between Canada and Manitoba the *Anti-Inflation Act* is binding on and the Guidelines made thereunder apply to the public sector of Manitoba and have been since the execution of the agreement which is dated February 25, 1976, with effect from and after October 14, 1975, as set out in said agreement.

Having reached the conclusion on the first sought order, it becomes unnecessary to deal with the second and third orders.

I think it perhaps pertinent to observe at the outset that the notice of motion for leave to appeal to this Court was made by the Manitoba Govern-

prévus, constituerait une violation de ladite convention»,

et également, l'annulation de l'ordonnance du Directeur, rendue le 27 août 1976, visant notamment à limiter à 12% l'augmentation des rémunérations des employés de la Manitoba Liquor Control Commission et ordonnant de payer \$300,000 à la Couronne du chef du Canada, soit le prétendu excédent de salaires versés depuis le 1^{er} janvier 1976 en vertu de la convention collective du 5 février 1976 conclue entre la Manitoba Government Employees Association et la Manitoba Liquor Control Commission.
77 CanLII 1981 S.C.J.

Le juge Nitikman a rejeté la demande au motif que l'art. 16 de *The Executive Government Organization Act*, 1970 (Man.), c. 17 (cité ci-dessous), autorise l'adoption, par décret provincial, de l'accord intervenu entre le Canada et le Manitoba pour donner effet, dans cette province, aux dispositions de la *Loi anti-inflation*, 1974-75-76 (Can.), c. 75, et aux indicateurs fixés sous son régime.

Le savant juge de première instance a conclu ainsi ses motifs de jugement:

[TRADUCTION] Pour les motifs susmentionnés, je suis d'avis que l'art. 16 de *The Executive Government Organization Act* confère le pouvoir d'adopter légitimement le décret 10-76 qui autorise le premier ministre du Manitoba à conclure, au nom du Manitoba, un accord avec le gouvernement du Canada, conformément au par. 4(3) de la *Loi anti-inflation*, que l'accord ainsi conclu entre le Canada et le Manitoba rend la *Loi anti-inflation* et les indicateurs applicables au secteur public du Manitoba et ce, dès la conclusion de l'accord, le 25 février 1976, avec effet rétroactif au 14 octobre 1975, comme le prévoit ladite entente.

Vu ma conclusion sur la première ordonnance recherchée, il est inutile d'examiner les deuxième et troisième ordonnances demandées.

Il convient de noter dès maintenant que l'avis de requête pour autorisation d'appel à cette Cour, soumis par la Manitoba Government Employees'

ment Employees' Association and contained the following, amongst other, grounds:

- (3) That the proceedings in this cause involve the interpretation of the Judgment of this Honourable Court pronounced on July 12, 1976 in the Reference on the Constitutionality of *The Anti-Inflation Act* and, in particular, the remarks made by The Right Honourable Bora Laskin, P.C., C.J.C., with respect to the legal effect of agreements entered into by the Provinces pursuant to Section 4(3) of *The Anti-Inflation Act* and the manner in which *The Anti-Inflation Act* and Guidelines made thereunder are to be rendered applicable to the Provincial Public Sectors, in particular, the provincial public sector of Manitoba;
- (4) That the Applicant's position rests, to a great extent, upon the interpretation to be given to the remarks of this Honourable Court in the Constitutional Reference on *The Anti-Inflation Act*, and in particular "... the statement of the Chief Justice to the effect that all the other provinces save Newfoundland and Ontario had legislative authority in respect of their agreements with Canada ... ", and whether, by such a statement, this Honourable Court decided all such agreements had proper statutory authority;

- (5) That the proceedings in this cause involve the interpretation and application of Section 16 of *The Executive Government Organization Act* of Manitoba which was enacted in 1970, and in particular, whether or not said Section provides sufficient statutory authority for the Province of Manitoba to enter into an agreement with the Government of Canada pursuant to Section 4(3) of *The Anti-Inflation Act*, which would have the effect of altering the existing law of Manitoba or of extinguishing or modifying or otherwise interfering with the rights which have been vested under the collective agreement made between the Manitoba Government Employees Association and one of the agencies of the Government of Manitoba, namely, the Manitoba Liquor Control Commission, which collective agreement antedates the agreement purportedly made between the Government of Canada and the Government of the Province of Manitoba, and which collective agreement was entered into pursuant to the provisions of the *The Labour Relations Act* enacted in 1972; . . .

In view of the fact that in my opinion the issue raised by this appeal turns upon the construction to be placed on s. 16 of *The Executive Government Organization Act* in conjunction with s. 4(3) of the

Association, invoque, parmi d'autres, les motifs suivants:

- [TRADUCTION] (3) Que les présentes procédures requièrent l'interprétation du jugement prononcé le 12 juillet 1976 par cette honorable Cour dans le renvoi relatif à la validité de la *Loi anti-inflation* et, en particulier, celle des observations du juge en chef du Canada, le très honorable Bora Laskin, C.P., relativement aux effets juridiques des accords conclus par les provinces conformément au par. 4(3) de la *Loi anti-inflation* et à la façon dont la *Loi anti-inflation* et les indicateurs fixés sous son régime s'appliquent aux secteurs publics provinciaux, en particulier au secteur public provincial du Manitoba;
- (4) Que la thèse de la requérante repose, dans une large mesure, sur l'interprétation qu'il faut donner aux observations de cette honorable Cour dans le renvoi relatif à la constitutionnalité de la *Loi anti-inflation*, et en particulier à la déclaration du juge en chef selon laquelle dans toutes les autres provinces, à l'exception de Terre-Neuve et de l'Ontario, un texte législatif autorise la conclusion d'accords avec le Canada, et sur la question de savoir si, par une telle déclaration, cette honorable Cour a jugé que tous ces accords avaient été conclus en vertu d'un pouvoir statutaire légitime;

- (5) Que les présentes procédures requièrent l'interprétation de l'art. 16 de *The Executive Government Organization Act* du Manitoba qui a été promulguée en 1970, et son application, et en particulier, la détermination du point de savoir si cet article accorde à la province du Manitoba le pouvoir statutaire de conclure un accord avec le gouvernement du Canada conformément au par. 4(3) de la *Loi anti-inflation*, ce qui aurait pour effet de modifier la législation du Manitoba, d'abolir, atténuer ou autrement modifier les droits qui ont été accordés par la convention collective signée par la Manitoba Government Employees Association et une des régies du Manitoba, la Manitoba Liquor Control Commission, cette convention collective ayant été conclue conformément aux dispositions de *The Labour Relations Act* de 1972, antérieurement à la signature de l'accord entre le gouvernement du Canada et le gouvernement du Manitoba; . . .

Puisqu'à mon avis, le point en litige dans ce pourvoi porte sur l'interprétation qu'il faut donner à l'art. 16 de *The Executive Government Organization Act* lu conjointement avec le par. 4(3) de la

1136

MANITOBA GOV'T EMPLOYEES ASSOC., ETC. *Ritchie J.*

[1978] 1 S.C.R.

Anti-Inflation Act, I find it necessary to reproduce that section at the outset:

4. (3) The Minister may, with the approval of the Governor in Council, enter into an agreement with the government of a province providing for the application of this Act and the guidelines to

- (a) Her Majesty in right of that province,
- (b) agents of Her Majesty in that right,
- (c) bodies described in paragraphs (2)(b) and (c), and
- (d) bodies prescribed by the regulations pursuant to paragraph (2)(d),

or any of such bodies, agents and Her Majesty in that right, and where any such agreement is entered into, this Act is binding in accordance with the terms of the agreement and the guidelines apply in accordance with the terms thereof with effect on and after the day on and after which the guidelines apply, by virtue of the operation of this Act, with respect to Her Majesty in right of Canada.

In the *Reference re Anti-Inflation Act*, (hereinafter referred to as "the Reference") which is now conveniently reported in 68 D.L.R. (3d) at p. 452, the second question posed for the opinion of the Court was phrased as follows:

2. If the Anti-Inflation Act is intra vires the Parliament of Canada, is the Agreement entitled "Between the Government of Canada and the Government of the Province of Ontario", entered into on January 13, 1976, (a copy of which is annexed hereto together with copies of the Orders of the Governor in Council and the Lieutenant Governor in Council as Annex "B") effective under the Anti-Inflation Act to render that Act binding on, and the Anti-Inflation Guidelines made thereunder applicable to, the provincial public sector in Ontario as defined in the Agreement.

In that case the agreement in question had been executed on behalf of the Province of Ontario under the authority of an Order in Council unsupported by any provincial legislation authorizing its execution.

In the course of delivering the unanimous opinion of the Court that the second question should be answered in the negative, Chief Justice Laskin had occasion to say, at p. 504:

If the agreement alone has the effect contended for, it imposes the Guidelines and accompanying sanctions of the provincial public sector, thereby altering the existing

Loi anti-inflation, je crois qu'il est nécessaire de citer au départ cet article:

4. (3) Le Ministre peut, avec l'approbation du gouverneur en conseil, conclure avec le gouvernement d'une province un accord prévoyant l'application de la présente loi et des indicateurs

- a) à Sa Majesté du chef d'une province,
- b) à ses mandataires,
- c) aux organismes visés aux alinéas (2)b) et c), et
- d) aux organismes désignés par règlement en vertu de l'alinéa (2)d);

la présente loi s'applique, dès la conclusion de l'accord, conformément aux conditions qu'il stipule et les indicateurs s'appliquent, aux mêmes conditions, à compter de la date à laquelle les indicateurs s'appliquent à Sa Majesté du chef du Canada par l'effet de la présente loi.

Dans le *Renvoi relatif à la Loi anti-inflation* (ci-après appelé «le Renvoi») qui est maintenant commodément publié à 68 D.L.R. (3d) à la p. 452, la deuxième question soumise à la Cour était la suivante:

2. Si la Loi anti-inflation est constitutionnelle, l'Accord intitulé «Between the Government of Canada and the Government of the Province of Ontario», conclu le 13 janvier 1976 (dont un exemplaire, de même que le texte des décrets du gouverneur et du lieutenant-gouverneur en conseil, figurent à l'annexe «B» ci-après), a-t-il pour effet d'assujettir le secteur public ontarien, tel que défini dans ledit accord, à la Loi et aux Indicateurs anti-inflation?

Dans cette affaire, l'accord avait été conclu au nom de la province de l'Ontario en vertu d'un décret qui n'était autorisé par aucun texte législatif provincial.

La Cour décida unanimement de répondre négativement à la deuxième question, par la voix du juge en chef Laskin, qui dit à ce sujet (à la p. 504):

Si l'accord seul a l'effet prétendu, il impose les Indicateurs et leurs sanctions au secteur public provincial et, par le fait même, modifie la loi existante de l'Ontario et

Manitoba Gov't Employees Assoc. and The Government of Manitoba [1978] 1 R.C.S. 1123

[1978] 1 R.C.S.

MANITOBA GOV'T EMPLOYEES ASSOC., ETC. *Le Juge Ritchie*

1137

law of Ontario and precluding changes in that law that are inconsistent with the Guidelines: see s. 4(1) of the *Anti-Inflation Act*. I am unable to appreciate how the provincial Executive, *suo motu*, can accomplish such a change. I agree, of course, that the Executive or a Minister authorized by it may be the proper signatory of an agreement to which the Government of Ontario is a party. That, however, is merely the formality of execution; and even if the agreement is binding upon the Government of Ontario as such, on the analogy of treaties which may bind the contracting parties but yet be without domestic force, that would not make the agreement part of the law of Ontario binding upon persons purportedly affected by it.

The contention of the Attorney-General of Ontario that the Crown in right of Ontario, represented by the Lieutenant-Governor, has a common law power and capacity to enter into agreements if there are no statutory restrictions does not answer the question of authority to effect changes in Ontario law through such agreements. The issue here is not prerogative power alone or the authority to exercise a prerogative power when given by Order in Council so as to place responsibility for it upon the Ministers present at the meeting of the Executive Council. Nor does the issue engage any concern with responsible Government and the political accountability of the Ministers to the Legislative Assembly. Rather what is at issue is the right of the Crown, although duly protected by an Order in Council, to bind its subjects in the Province to laws not enacted by the Legislature nor made applicable to such subjects by adoption under authorizing legislation. There is no principle in this country, as there is not in Great Britain, that the Crown may legislate by proclamation or Order in Council to bind citizens where it so acts without support of a statute of the Legislature: see Dicey, *Law of the Constitution*, 10th ed. (1959), pp. 50-54.

The fact that the Crown can contract carries the matter no farther than that the contract may be binding upon it or that it may sue the other contracting party on the contract. What we have here is not a contract in this sense at all, but an agreement to have certain legislative enactments become operative as provincial law.

Finally, in one of the closing passages of his judgment, the Chief Justice observed:

It is one thing for the Crown in right of a Province to contract for itself; it is a completely different thing for it to contract for the application to its inhabitants, and to labour organizations in the Province, of laws to govern their operations and relations without statutory author-

empêche d'y apporter des modifications incompatibles avec les Indicateurs: voir art. 4.(1) de la *Loi anti-inflation*. Je ne vois pas comment le pouvoir exécutif provincial pourrait, de son chef, effectuer de tels changements. Naturellement, je suis d'accord que l'exécutif, ou un ministre autorisé par lui, peut régulièrement signer un accord auquel le gouvernement de l'Ontario est partie. Toutefois, cela ne vise que la formalité de la signature; même si l'accord lie le gouvernement de l'Ontario comme tel, par analogie avec les traités qui peuvent lier les parties contractantes mais sans avoir d'effet en droit interne, il ne devient pas une loi de l'Ontario à l'égard des personnes qu'il prétend obliger à s'y conformer.

La prétention du procureur général de l'Ontario, savoir que Sa Majesté du chef de l'Ontario, représentée par le lieutenant-gouverneur, a de droit commun, en l'absence de restriction législative, le pouvoir et la capacité de conclure des accords, ne démontre pas l'existence du pouvoir de modifier les lois de l'Ontario par de tels accords. La question en litige n'est pas l'étendue de la prérogative de l'exécutif ni le droit de l'exercer en vertu d'un arrêté en conseil de manière que la responsabilité incombe aux ministres présents à la réunion du Conseil exécutif. Il ne s'agit pas non plus de la théorie du gouvernement responsable ni de la responsabilité politique des ministres devant l'Assemblée législative. Ce qui est en litige, c'est le pouvoir du gouvernement provincial, même dûment autorisé par arrêté en conseil, d'assujettir les citoyens de la province à des lois qui n'ont pas été adoptées par la législature ou rendues applicables par décret émis en vertu d'une loi. Rien ne permet à Sa Majesté, en ce pays comme en Grande-Bretagne, de légiférer par proclamation, décret ou arrêté en conseil de façon à lier les citoyens sans s'appuyer sur une loi de la législature: voir Dicey, *Law of the Constitution* (10^e éd. 1959), pp. 50-54.

Le pouvoir de contracter qu'a le gouvernement ne signifie rien de plus qu'il peut se trouver lié par le contrat ou peut poursuivre l'autre partie contractante. Ce que nous avons en l'espèce n'est aucunement une obligation contractuelle en ce sens, mais un accord ayant pour objet de donner à certaines dispositions législatives l'effet d'une loi provinciale.

Enfin, il a fait remarquer, dans un des derniers paragraphes de son jugement:

Ce n'est pas, de la part de Sa Majesté du chef d'une province, de s'engager en son nom que de s'engager à ce que les citoyens et les associations de travailleurs de la province soient assujettis à des lois qui régissent leurs activités d'une certaine manière, sans autorité législative

1138

MANITOBA GOV'T EMPLOYEES ASSOC., ETC. *Ritchie J.*

[1978] 1 S.C.R.

ity to that end. This would be, in effect, to legislate in the guise of a contract. The terms of the present agreement, at their narrowest, embrace more than what the Crown can bring under contractual obligation of its own authority.

I have quoted at such length from the judgment of the Chief Justice in his answer to the second question posed by the Reference because I was one of those who agreed with it and I accept it as a statement of the existing law in this country.

The first covenant of the agreement entered into between the Government of Canada and the Province of Manitoba on February 25, 1976, provided that:

(1) Canada and the Province hereby agree that the federal act and the national guidelines shall apply to the provincial public sector.

This covenant purported to subject the provincial public sector to the provisions of the *Anti-Inflation Act* and the Guidelines made thereunder which were at variance with the terms of a collective agreement entered into between the appellant and the Manitoba Liquor Control Commission made pursuant to the provisions of *The Labour Relations Act* of Manitoba, 1972 (Man.), c. 75. In the implementation of the covenant above referred to and pursuant to the authority vested in him by s. 20(1) of the *Anti-Inflation Act*, the Anti-Inflation Administrator of that Act made an order overriding the terms of the collective agreement and limiting any increase in the salaries of the employees to a maximum annual average increase of 12 per cent and requiring the Liquor Control Commission of Manitoba to repay to Her Majesty in right of Canada the amount of increases paid in accordance with the collective agreement between January 1, 1976, and the date of the order (August 27, 1976). This amounted to the sum of \$300,000.

I had thought that the negative answer of this Court to the second question posed by the Reference constituted a decision that the public sector in a province could only be bound by a s. 4(3) agreement with the Government of Canada when the execution of that agreement had been authorized by a statute of the province directed to that end, and that an order of the Lieutenant-Governor

à cette fin. Cela équivaut à légiférer sous l'apparence d'un contrat. Les conditions de l'accord en l'espèce, même dans leur sens le plus restreint, dépassent le cadre à l'intérieur duquel Sa Majesté peut, de sa propre autorité, s'engager contractuellement.

J'ai cité aussi longuement la réponse du Juge en chef à la deuxième question du Renvoi parce que je suis de ceux qui y ont souscrit et que je l'accepte comme l'énoncé de l'état du droit au Canada.

La première clause de l'accord conclu par le gouvernement du Canada et la province du Manitoba le 25 février 1976, prévoit que:

[TRADUCTION] (1) Le Canada et la Province conviennent par les présentes que la loi fédérale et les indicateurs nationaux s'appliqueront au secteur public provincial.

Cette clause avait pour but d'assujettir le secteur public provincial aux dispositions de la *Loi anti-inflation* et aux indicateurs fixés sous son régime. Ces derniers étaient incompatibles avec les conditions de la convention collective conclue conformément aux dispositions de *The Labour Relations Act* of Manitoba, 1972 (Man.), c. 75, entre l'appelante et la Manitoba Liquor Control Commission. Afin d'appliquer la clause précitée et conformément aux pouvoirs qui lui étaient accordés par le par. 20(1) de la *Loi anti-inflation*, le Directeur nommé en vertu de cette loi a rendu une ordonnance qui dérogeait à la convention collective en limitant l'augmentation annuelle moyenne des salaires des employés à un maximum de 12 pour cent et en exigeant que la Liquor Control Commission du Manitoba remette à sa Majesté du chef du Canada le montant correspondant à l'excédent des augmentations versées conformément à la convention collective entre le 1^{er} janvier 1976 et la date de l'ordonnance (27 août 1976), soit \$300,000.

J'avais cru comprendre que la réponse négative de la présente Cour à la deuxième question du Renvoi signifiait que le secteur public d'une province n'était lié par un accord conclu avec le gouvernement du Canada en vertu du par. 4(3) que lorsque cet accord était autorisé par une loi provinciale à cet effet et qu'un décret du lieutenant-gouverneur en conseil non autorisé par

in Council unsupported by any such legislation and purporting to provide such authority was ineffective to bind the employees in the provincial public sector. As will appear from the passages quoted above, the Reference was concerned with an order of the Lieutenant-Governor in Council of Ontario purporting to authorize the signing of such an agreement and it was my understanding that it was because this Order in Council "was not backed by provincial legislative authority" that it was found to be ineffective to make the *Anti-Inflation Act* and Guidelines applicable to the provincial public sector in Ontario.

Having regard to this finding, it appears to me that the question to be answered in this appeal is whether the Order in Council relied on in this case was "backed up" by any statute of the Province of Manitoba authorizing its execution and thereby requiring the employees in the public sector of that Province to comply with terms basically different from those contained in the outstanding collective agreement duly made and authorized under the law of Manitoba as it existed at the time when it was made.

In the Order in Council authorizing the Government of Manitoba to enter into the agreement with the Government of Canada, the provisions of s. 16 of *The Executive Government Organization Act* are recited as follows:

WHEREAS section 16 of The Executive Government Organization Act, being chapter E170 of The Revised Statutes, provides in part as follows:

16. The Lieutenant Governor in Council may authorize a minister, for and on behalf of the government, or an agency of the government, to enter into an agreement with

- (a) the Government of Canada, or a minister or agency of the Government of Canada; or
- (b) ...
- (c) ...
- (d) ...

for the benefit or purposes of the residents of Manitoba or any part thereof.

The Order then proceeds to recite that:

... it is deemed for the benefit of the residents of Manitoba for the Government of Manitoba to enter into an agreement with the Minister of Finance providing for

parcille loi et ayant pour but d'accorder ce pouvoir ne liait pas les employés du secteur public provincial. Comme les extraits cités précédemment l'indiquent, le Renvoi avait trait à un décret du lieutenant-gouverneur en conseil de l'Ontario qui avait pour but d'autoriser la signature d'un tel accord et j'avais cru comprendre qu'on avait jugé que le secteur public provincial de l'Ontario n'était pas assujetti à la *Loi anti-inflation* ni aux indicateurs parce que le décret «n'était fondé sur aucune loi provinciale».

Compte tenu de cette décision, il semble que la question soulevée par le présent pourvoi est de savoir si le décret invoqué en l'espèce est «fondé» sur une loi habilitante de la province du Manitoba et peut ainsi imposer aux employés du secteur public de cette province des conditions fondamentalement différentes des stipulations d'une convention collective en vigueur, régulièrement conclue et autorisée par la législation du Manitoba.

Le décret donnant au gouvernement du Manitoba le pouvoir de conclure un accord avec le gouvernement du Canada, cite les dispositions de l'art. 16 de *The Executive Government Organization Act*:

[TRADUCTION] ATTENDU qu'il est prévu à l'art. 16 de The Executive Government Organization Act, chap. E170 des Statuts revisés que:

16. Le lieutenant-gouverneur en conseil peut autoriser un ministre à conclure un accord, au nom du gouvernement ou d'un de ses mandataires, avec

- a) le gouvernement du Canada, un de ses ministres ou mandataires; ou
- b) ...
- c) ...
- d) ...

dans l'intérêt et à l'avantage des habitants du Manitoba ou d'une partie.

Le décret expose ensuite que:

[TRADUCTION] ... il est dans l'intérêt des habitants du Manitoba que le gouvernement du Manitoba conclue avec le ministre des Finances un accord prévoyant l'ap-

1140

MANITOBA GOV'T EMPLOYEES ASSOC., ETC. *Ritchie J.*

[1978] 1 S.C.R.

the application of the Anti-Inflation Act and the guidelines established thereunder to Her Majesty in right of the province, . . .

And in conclusion it is recommended:

THAT the Government of Manitoba be authorized to enter into an agreement with the Government of Canada . . . *providing for the application of the Anti-Inflation Act and the guidelines established thereunder to the provincial public sector* and that the Honourable the First Minister of the Government of Manitoba be authorized to execute the agreement for and on behalf of the Government of Manitoba.

(The italics are my own.)

It will be observed that *The Executive Government Organization Act* (1970) is a general statute making no reference to any specific area of government action but what is contended here is that s. 16 nevertheless vests in the Lieutenant-Governor in Council authority to enter into binding agreements having the force of law and containing terms which are inconsistent with the provisions of a statute dealing with the specific area of labour relations (*The Labour Relations Act* (1972)) which was enacted two years later. Section 64 of *The Labour Relations Act* provides that:

A collective agreement entered into by a bargaining agent is, subject to and for the purpose of this Act, binding upon

- (a) The bargaining agent and every employee in the unit of employees to which the collective agreement applies;
- (b) The employer who has entered into the collective agreement or on whose behalf the collective agreement has been entered into; . . .

The collective agreement in question was entered into by the duly certified bargaining agent of the appellant for the purpose, amongst other things, of establishing and maintaining rates of pay, hours of work and other working conditions and conditions of employment. In fulfilment of this purpose the agreement contained an elaborate schedule establishing rates of pay for various classes of employees and there can be little doubt that the provision for these rates had the force of law.

Section 4.1(1) of the *Anti-Inflation Act* is concerned with:

plication de la Loi anti-inflation et des indicateurs fixés sous son régime à Sa Majesté du chef de la province, . . .
1977 CanLII 19654

Enfin, il recommande:

[TRADUCTION] QUE le gouvernement du Manitoba soit autorisé à conclure un accord avec le gouvernement du Canada . . . prévoyant l'assujettissement du secteur public provincial à la Loi anti-inflation et aux indicateurs fixés sous son régime et que l'honorable Premier ministre du gouvernement du Manitoba soit autorisé à signer l'accord au nom du gouvernement du Manitoba.

(Les italiques sont de moi.)

Il convient de remarquer que *The Executive Government Organization Act* (1970) est une loi d'ordre général qui ne fait spécifiquement référence à aucun domaine d'action gouvernementale. On prétend toutefois en l'espèce que l'art. 16 confère au lieutenant-gouverneur en conseil le pouvoir de conclure des ententes exécutoires ayant force de loi même si elles sont en partie incompatibles avec les dispositions de la loi spéciale relative aux relations de travail (*The Labour Relations Act* (1972)) qui a été édictée deux ans plus tard. L'article 64 de *The Labour Relations Act* prévoit que:

[TRADUCTION] Une convention collective conclue par un agent négociateur lie, sous réserve et aux fins de la présente loi,

- a) l'agent négociateur et tout travailleur de l'unité d'employés à qui elle s'applique;
- b) l'employeur qui a conclu la convention ou au nom de qui cette dernière a été conclue; . . .

La convention collective en cause a été conclue par l'agent négociateur régulièrement accrédité de l'appelante afin, notamment, de fixer les taux de salaires, la durée du travail et les autres conditions de travail et d'emploi. Dans ce but, la convention contenait un tableau détaillé établissant les taux de salaires des différentes classes d'employés et il est certain que ces taux avaient force de loi.

Le paragraphe 4.1(1) de la *Loi anti-inflation* vise:

Manitoba Gov't Employees Assoc. and The Government of Manitoba [1978] 1 R.C.S. 1123

[1978] 1 R.C.S.

MANITOBA GOV'T EMPLOYEES ASSOC., ETC. *Le Juge Ritchie*

1141

4.1 (1) Any body that, pursuant to any other Act or law, establishes or approves the prices or profit margins of any . . . person to whom the guidelines or any provision or provisions of the guidelines apply . . .

and which provides that:

. . . to the extent that those guidelines are inconsistent with any Act or law otherwise governing that body in the exercise of its powers and the performance of its duties and functions, the guidelines prevail.

The effect of Mr. Justice Nitikman's judgment is that the *Anti-Inflation Act* and the Guidelines passed thereunder were incorporated as law in Manitoba by the agreement between Canada and Manitoba which was executed 16 days after the collective agreement. This would mean that legislation of a general character, *i.e.*, *The Executive Government Organization Act*, should be interpreted as affording authority to override subsequent legislation dealing with a particular subject, *i.e.*, labour relations, by the passage of an Order in Council.

This reasoning appears to me to run contrary to the general principle expressed in the following terms in Halsbury's *Laws of England*, 3rd ed., vol. 36 at p. 468:

To the extent that the continued application of a general enactment to a particular case is inconsistent with special provision subsequently made as respects that case, the general enactment is overridden by the particular, the effect of the latter being to exempt the case in question from the operation of the general enactment or, in other words, to repeal the general enactment in relation to that case.

This is the principle adopted by Riddell J.A. in *Re Township of York and Township of North York*² where he said, at p. 648:

It is, of course, elementary that special legislation overrides general legislation in case of a conflict—the general maxim is *Generalia specialibus non derogant* . . . even where the general legislation is subsequent: *Barker v. Edgar*, [1898] A.C. 748, at p. 754, in the Judicial Committee. The reason is that the Legislature has given attention to the particular subject and made provision for it, and the presumption is that such provision is not to be interfered with by general legislation intended for a wide range of objects: . . .

4.1 (1) Tout organisme qui, en vertu d'une autre loi ou règle de droit, établit ou approuve les prix ou les marges bénéficiaires . . . d'une personne assujettie à toutes dispositions des indicateurs . . .

et prévoit que:

. . . les dispositions des indicateurs l'emportent sur toute autre loi ou règle de droit qui régit l'organisme.

Aux termes de la décision du juge Nitikman, l'accord intervenu entre le Canada et le Manitoba 16 jours après la signature de la convention collective a eu pour effet d'introduire la *Loi anti-inflation* et les indicateurs fixés sous son régime dans le droit manitobain. Cela voudrait dire qu'on doit interpréter une loi d'ordre général, en l'occurrence *The Executive Government Organization Act*, comme accordant le pouvoir de déroger, par décret, à une législation subséquente portant sur un domaine particulier, savoir, les relations de travail.

Ce raisonnement me semble contraire au principe général formulé en ces termes par Halsbury, *Laws of England*, 3^e éd., vol. 36 à la p. 468:

[TRADUCTION] Dans la mesure où l'application d'une loi générale à un cas particulier est incompatible avec une disposition spéciale édictée par la suite à cet égard, la loi spéciale l'emporte sur la loi générale car elle soustrait le cas particulier à l'application de cette dernière ou, en d'autres termes, abroge la loi générale relativement à ce cas.

Ce principe a été adopté par le juge Riddell dans *Re Township of York and Township of North York*², où il a dit, à la p. 648:

[TRADUCTION] Il est certes élémentaire qu'en cas de conflit la loi spéciale l'emporte sur la loi générale—selon la maxime *Generalia specialibus non dérogant* . . . même si la loi générale est postérieure: *Barker v. Edgar*, [1898] A.C. 748, à la p. 754, arrêt du comité judiciaire. En effet, si le législateur s'est penché sur un domaine particulier et a édicté des dispositions à son égard, on peut présumer qu'une loi générale visant un grand nombre d'objets ne doit pas porter atteinte à de telles dispositions: . . .

² [1925], 57 O.L.R. 644.

² [1925], 57 O.L.R. 644.

1142

MANITOBA GOV'T EMPLOYEES ASSOC., ETC. *Ritchie J.*

[1978] 1 S.C.R.

Mr. Justice Nitikman, while recognizing the validity of this principle, found it inapplicable to the circumstances in the present case saying:

I agree with the general principle of statutory construction that in proper circumstances the provisions of a specific Act override, supersede and take precedence over the provisions of a general act. It is, however, my considered opinion that principle is not in issue here.

The learned judge proceeded to observe that

It is not Section 16 of the *Executive Government Organization Act* which creates any change in provincial legislation. Section 16 is only the legislative authority to the Executive Government of Manitoba to execute the agreement with the Government of Canada pursuant to Section 4(3) of *Anti-Inflation Act*.

On the conclusion of the agreement between Canada and Manitoba dated February 25, 1976, pursuant to Section 4(3) of the *Anti-Inflation Act*, the said *Act* and the guidelines thereunder came into operation applicable to the Manitoba Public sector with effect from and after October 15, 1975. This Federal enactment rendered inoperative any inconsistent provincial legislation, because enactments of Parliament within its competency override provincial legislation.

It will be seen that these observations are predicated on the learned judge's assumption that s. 16 affords legislative authority to the Executive Government to execute the section 4(3) agreement and thereby bring the *Anti-Inflation Act* and the Guidelines into operation as a federal enactment rendering inoperative any inconsistent provincial legislation. As I have indicated, this is, in my opinion, the question which lies at the very heart of this appeal. In the course of his reasons for judgment in the Reference at p. 503, the Chief Justice pointed out that it was not suggested in that case "that the authority of the Provincial Executive for the execution of the agreement in the name of the Government of Ontario came from Parliament" nor did I understand that any such suggestion was made in this case. In the Reference there was no legislative authority to "back up" the Ontario Order in Council and to me the whole question here is whether or not s. 16 provided that authority in Manitoba.

In this regard I adopt the submission made on behalf of the Government of Canada and con-

Le juge Nitikman, tout en reconnaissant la validité de ce principe, le trouve inapplicable aux circonstances de l'espèce:
CanLII

[TRADUCTION] J'admetts le principe général d'interprétation des lois voulant que, dans des circonstances appropriées, les dispositions d'une loi spéciale annulent, remplacent et supplacent les dispositions d'une loi générale. Je suis cependant d'avis que ce principe n'est pas en cause ici.

Le savant juge poursuit en disant:

[TRADUCTION] L'article 16 de *The Executive Government Organization Act* ne modifie pas la loi provinciale. Il confère simplement à l'exécutif du Manitoba le pouvoir de conclure un accord avec le gouvernement du Canada conformément au par. 4(3) de la *Loi anti-inflation*.

Dès la signature de l'accord intervenu entre le Canada et le Manitoba, le 25 février 1976, conformément au par. 4(3) de la *Loi anti-inflation*, cette *loi* et les indicateurs fixés sous son régime sont devenus applicables au secteur public du Manitoba et ce, rétroactivement au 15 octobre 1975. Cette loi fédérale a rendu inopérante toute loi provinciale incompatible, parce que les lois du Parlement édictées dans les limites de sa compétence supplantent la législation provinciale.

On voit que le savant juge est parti du principe que l'art. 16 confère à l'exécutif le pouvoir de conclure l'accord prévu au par. 4(3) et, partant, d'appliquer la *Loi anti-inflation* et les indicateurs en tant que loi fédérale ayant pour effet de rendre inopérante toute loi provinciale incompatible. Comme je l'ai indiqué, cette question est, à mon avis, au centre du présent pourvoi. Dans ses motifs de jugement prononcés dans le Renvoi, le Juge en chef, à la p. 503, a signalé qu'on n'avait pas prétendu «que le pouvoir de l'exécutif provincial de conclure l'accord au nom du gouvernement de l'Ontario émanait du Parlement» et je ne crois pas qu'une telle prétention ait été formulée dans la présente cause. Dans le Renvoi, le décret ontarien n'était «fondé» sur aucune loi provinciale et, selon moi, tout le litige repose sur la question de savoir si l'art. 16 accorde ce pouvoir au Manitoba.

A cet égard, j'adopte le moyen avancé au nom du gouvernement du Canada que l'on trouve dans

Manitoba Gov't Employees Assoc. and The Government of Manitoba [1978] 1 R.C.S. 1123

[1978] 1 R.C.S.

MANITOBA GOV'T EMPLOYEES ASSOC., ETC. *Le Juge Ritchie*

1143

tained in the following passage to be found in the factum of the Deputy Attorney General:

Although, as the trial judge observes (case p. 134, 11.19-24), it is not section 16 of *The Executive Government Organization Act* which creates any change in Provincial legislation, this Respondent recognizes that section 16 cannot provide a foundation for the agreement in this case unless that section *does* authorize the Executive to suspend the operation of other Provincial legislation.

In my opinion, s. 16 does no more than authorize the making of agreements as therein specified but it is lacking in any provision that such agreements once entered into will be effective to suspend the operation of other provincial legislation or constitute legislation binding on employees in the public sector of the Province of Manitoba. If the section is to be read as giving legislative force to all agreements entered into under the authority of an Order in Council on the ground that the Executive deems such an agreement to be "for the benefit or purposes of the residents of Manitoba" then this would appear to me to constitute a delegation of legislative power amounting to an abdication by the legislature of its ultimate authority to pass laws "for the benefit or purposes of the residents of Manitoba".

Mr. Justice Nitikman has pointed out that the effect of treating the agreement between Canada and Manitoba as having been authorized by *The Executive Government Organization Act*, entails holding that:

... the said Act and the guidelines thereunder came into operation applicable to the Manitoba public sector with effect from and after October 15, 1975.

This gives retroactive effect to the authority vested in the executive under s. 16 and the rule in this regard as applicable to Canadian statutes was clearly stated by Mr. Justice Dickson in this Court in the case of *Gustavson Drilling (1964) Limited v. Minister of National Revenue*³, where he said, at p. 279:

The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act.

³ [1977] 1 S.C.R. 271.

l'extrait suivant du factum du sous-procureur général:

[TRADUCTION] Bien que, comme l'a fait remarquer le juge de première instance (dossier p. 134, 11.19-24), l'art. 16 de *The Executive Government Organization Act* ne modifie pas la loi provinciale, l'intimée reconnaît qu'en l'espèce, il ne peut servir de fondement à l'accord à moins qu'il n'autorise expressément l'exécutif à suspendre l'application d'autres lois provinciales.

A mon avis, l'art. 16 autorise seulement la conclusion de certains accords mais il ne prévoit pas que de tels accords ont pour effet de suspendre l'application des autres lois provinciales ou de lier les employés du secteur public de la province du Manitoba. Si l'article accordait une force législative à tous les accords conclus en vertu d'un décret parce que l'exécutif juge qu'une telle entente est «dans l'intérêt et à l'avantage des habitants du Manitoba», cela constituerait, selon moi, une délégation de pouvoirs législatifs équivalant à une renonciation de la législature à exercer son pouvoir fondamental d'adopter des lois «dans l'intérêt et à l'avantage des habitants du Manitoba».

Le juge Nitikman a fait observer que le fait de traiter l'accord intervenu entre le Canada et le Manitoba comme s'il avait été autorisé par *The Executive Government Organization Act*, l'amenaît à conclure que:

[TRADUCTION] ... cette loi et les indicateurs fixés sous son régime s'appliquent au secteur public du Manitoba depuis le 15 octobre 1975.

Ceci donne un effet rétroactif au pouvoir accordé à l'exécutif par l'art. 16 et la règle applicable aux lois canadiennes à cet égard a été clairement énoncée par le juge Dickson de cette Cour dans *Gustavson Drilling (1964) Limited c. Le ministre du Revenu national*³, où il a dit, à la p. 279:

Selon la règle générale, les lois ne doivent pas être interprétées comme ayant une portée rétroactive à moins que le texte de la Loi ne le décrète expressément ou n'exige implicitement une telle interprétation.

³ [1977] 1 R.C.S. 271.

1144

MANITOBA GOV'T EMPLOYEES ASSOC., ETC. *Ritchie J.*

[1978] 1 S.C.R.

I find no language in *The Executive Government Organization Act* which either expressly or by necessary implication requires retroactive construction to be given to that statute.

There is another principle of statutory interpretation which appears to me to mitigate against the construction which Mr. Justice Nitikman places on s. 16, and that is that the effect which he gives to the legislation would result in extinguishing rights vested in employees in the public sector in Manitoba pursuant to the collective agreement hereinbefore referred to. The decision of the Administrator of the *Anti-Inflation Act* makes it plain that the implementation of the proposed s. 4(3) agreement would drastically alter the wage scale of employees of the Manitoba Liquor Control Commission and would do so, as I have said, with retrospective effect.

In this regard I refer to the opinion delivered by Lord Watson in the Privy Council in *Western Counties Railway Co. v. Windsor and Annapolis Railway Co.*⁴, where he said:

The canon of construction applicable to such a statute is that it must not be deemed to take away or extinguish the right of the respondent company, unless it appear, by express words, or by plain implication that it was the intention of the Legislature to do so.

And the following passage is to be found later in the same opinion:

Thus far, however, the law appears to be plain—that in order to take away the right it is not sufficient to shew that the thing sanctioned by the Act, if done, will of sheer . . . necessity put an end to the right, it must also be shewn that the Legislature have authorized the thing to be done at all events, and irrespective of its possible interference with existing rights.

And it is further stated that:

There is a great difference between giving authority to make an agreement and authorizing it to be made and forthwith carried out so as to override and destroy all private rights that may stand in its way.

In my view to accept the construction placed on s. 16 by Mr. Justice Nitikman would offend against three accepted rules of statutory interpre-

Rien dans *The Executive Government Organization Act* n'exige expressément ou implicitement qu'on donne à cette loi un effet rétroactif.

1977 CanLII

Selon moi, un autre principe d'interprétation des lois joue contre l'interprétation de l'art. 16 donnée par le juge Nitikman: l'effet qu'il reconnaît à la loi aurait pour résultat d'abolir des droits conférés aux employés du secteur public du Manitoba conformément à la convention collective mentionnée ci-dessus. Aux termes de la décision du Directeur de la *Loi anti-inflation*, il est évident que l'application de l'accord proposé en vertu du par. 4(3) modifierait radicalement l'échelle de salaires des employés de la Manitoba Liquor Control Commission et ce, comme je l'ai déjà dit, avec effet rétroactif.

A ce sujet, je renvoie à l'opinion de lord Watson, du Conseil privé, dans *Western Counties Railway Co. v. Windsor and Annapolis Railway Co.*⁴, où il a dit:

[TRADUCTION] Le critère d'interprétation de pareille loi est qu'il ne faut pas considérer qu'elle retire ou éteint les droits de la compagnie intimée, sauf s'il ressort explicitement ou implicitement que telle était l'intention de la législature.

On peut trouver l'extrait suivant un peu plus loin dans les mêmes motifs:

[TRADUCTION] Jusqu'à maintenant toutefois, la règle de droit paraît simple: il ne suffit pas, pour retirer un droit, de démontrer que, si la mesure sanctionnée par la Loi est appliquée, elle mettra automatiquement fin au droit; il faut également établir que la législature en a autorisé l'application dans tous les cas, quels qu'en soient les effets possibles sur les droits existants.

Il a également déclaré:

[TRADUCTION] Il y a une grande différence entre permettre la conclusion d'une entente et permettre qu'elle soit conclue et appliquée aussitôt de façon à annuler et détruire tous les droits individuels qui pourraient lui faire obstacle.

A mon avis, accepter l'interprétation de l'art. 16 donnée par le juge Nitikman contreviendrait gravement à trois règles bien établies d'interprétation

⁴ (1882), 7 App. Cas. 178.

⁴ (1882), 7 App. Cas. 178.

[1978] 1 R.C.S.

MANITOBA GOV'T EMPLOYEES ASSOC., ETC. *Le Juge Ritchie*

1145

tation in that it would give to a general statute a meaning which conflicts with special legislation, would dramatically affect vested interests and would construe the power accorded to the Executive under that section as including the right to authorize the Minister to enter into retroactive agreements.

In reaching his conclusion, Mr. Justice Nitikman found the following excerpt from the reasons for judgment of the Chief Justice in the Reference to be "weighty and highly persuasive", and his interpretation of it appears to have coloured his reasoning at least in some degree. The passage to which reference is made from the judgment of the Chief Justice occurs at p. 503 where, after referring to the lack of legislative authority for the Order in Council passed in that case, he went on to say:

... it was not backed by provincial legislative authority as was the case in respect of the agreements with all the other Provinces save Newfoundland which, like Ontario, proceeded by order in council.

I think it should be pointed out that no question as to the validity of s. 16 of *The Executive Government Organization Act* was at issue on the Reference, and that if the Chief Justice's statement can be considered as an oblique reference to that section, it cannot, in my opinion, be regarded as having been necessary to the determination of the questions there at issue.

Nor do I think that the passage last quoted is to be treated as a definitive comment on the construction to be placed on the legislation of "all other Provinces" authorizing the making of agreements with the Government of Canada, although there are cases of which British Columbia is an example, where the legislative authority is so clearly spelled out as to give rise to no difficulty.

The British Columbia *Anti-Inflation Measures Act*, (Bill 16 of 1976) which was proclaimed in force on June 21, 1976, provides:

Sec. 5. Agreements.—The Minister may, on behalf of the Government and with the approval of the Lieutenant-Governor in Council, enter into agreements

(a) with Canada respecting the application of the *Anti-Inflation Act* (Canada), the regulations and Federal guidelines in the Province, and the manner and extent to which the *Anti-Inflation Act* (Canada),

des lois: elle donnerait à une loi d'ordre général un sens incompatible avec une loi spéciale, elle modifierait fondamentalement des droits acquis et elle impliquerait que le pouvoir dont est investi l'exécutif en vertu de cet article comprend le droit d'autoriser le ministre à conclure des ententes ayant effet rétroactif.

En se prononçant ainsi, le juge Nitikman a jugé que l'extrait suivant des motifs de jugement du Juge en chef dans le Renvoi est «important et très persuasif», mais l'interprétation qu'il en donne semble en avoir faussé le raisonnement, du moins jusqu'à un certain point. Cet extrait se trouve à la p. 503. Après avoir fait remarquer qu'aucun texte législatif ne permettait l'adoption du décret édicté en l'espèce, le Juge en chef a poursuivi en disant:

... il n'est fondé sur aucune loi provinciale, contrairement aux accords conclus par toutes les autres provinces, à l'exception de Terre-Neuve, qui, comme l'Ontario, a procédé par arrêté en conseil.

Je pense qu'il faut souligner que la validité de l'art. 16 de *The Executive Government Organization Act* n'était pas en cause dans le Renvoi et que, si l'on peut envisager la déclaration du Juge en chef comme une mention indirecte de cet article, on ne peut, à mon avis, considérer qu'elle ait été nécessaire dans ce cas-là pour trancher les questions en litige.

Je ne pense pas non plus que ce passage constitue une conclusion définitive sur l'interprétation à donner aux lois de «toutes les autres provinces» qui autorisent des accords avec le gouvernement du Canada, bien qu'il y ait des cas, et la Colombie-Britannique en est un exemple, où la loi est si claire que son interprétation ne peut soulever aucune difficulté.

L'*Anti-Inflation Measures Act* de la Colombie-Britannique (Bill 16 de 1976) qui est entrée en vigueur le 21 juin 1976, prévoit:

[TRADUCTION] Art. 5. Accords.—Le Ministre peut, au nom du gouvernement et avec l'approbation du lieutenant-gouverneur en conseil, conclure des accords

a) avec le Canada au sujet de l'application, dans la province, de la *Loi anti-inflation* (Canada), des règlements et des indicateurs fédéraux, et de la façon dont ceux-ci s'appliqueront au prix des articles et des servi-

1146

MANITOBA GOV'T EMPLOYEES ASSOC., ETC. *Ritchie J.*

[1978] 1 S.C.R.

the regulations, or the Federal guidelines shall apply to the prices of commodities or services and *the compensation of employees in the Provincial public sector, and . . .*

(The italics are my own.)

The glaring difference between this type of legislation and *The Executive Government Organization Act* here in question will be at once apparent.

With the greatest respect for those who may entertain a different view, I am of opinion that Mr. Justice Nitikman was in error in concluding that s. 16 of *The Executive Government Organization Act* provides the necessary legislative authority for the Order in Council authorizing the first minister of the Government of Manitoba to execute the agreement with the Government of Canada on behalf of that Province. In the view which I take of the matter, the Order in Council in question was not effective to authorize the conclusion of an agreement changing the law of the Province in a manner inconsistent with specific legislation subsequently passed and in retroactive derogation of the vested rights of the appellant and the employees which it represents under its collective agreement with the Liquor Control Commission of Manitoba.

It follows that I would allow this appeal, set aside the judgment of Mr. Justice Nitikman and grant the order declaring and determining that the memorandum of agreement purportedly made on February 25, 1976, between the Government of Canada and the Government of Manitoba, does not have the effect of rendering the *Anti-Inflation Act* and Guidelines made thereunder applicable to the Provincial public sector in Manitoba; and I would further direct that the collective agreement dated February 5, 1976, made between the Manitoba Liquor Control Commission and the Manitoba Government Employees Association is binding on the parties thereto.

I would also grant the appellant's application for an order to quash the order of Donald D. Tansley, the Administrator under the *Anti-Inflation Act*, dated 27th of August, 1976.

The appellant is entitled to its costs throughout.

ces et aux rémunérations des employés du secteur public provincial, et . . .

1977 CanLII 18625CSC

(Les italiques sont de moi.)

La différence manifeste entre ce genre de loi et *The Executive Government Organization Act* en cause ici ressort tout de suite.

Avec le plus grand respect pour ceux dont le point de vue est différent, je suis d'avis que le juge Nitikman a fait erreur en concluant que l'art. 16 de *The Executive Government Organization Act* donne le fondement législatif nécessaire au décret autorisant le premier ministre du gouvernement du Manitoba à conclure une entente avec le gouvernement du Canada au nom de cette province. A mon sens, le décret ne permet pas la conclusion d'un accord modifiant le droit de la province d'une façon incompatible avec une loi spéciale adoptée subséquemment et portant atteinte rétroactivement aux droits acquis de l'appelante et des employés qu'elle représente, en vertu de la convention collective conclue avec la Liquor Control Commission du Manitoba.

Je suis d'avis d'accueillir le pourvoi, d'annuler le jugement du juge Nitikman et de déclarer que l'entente apparemment conclue le 25 février 1976 entre le gouvernement du Canada et le gouvernement du Manitoba n'a pas pour effet de rendre applicables la *Loi anti-inflation* et les indicateurs fixés sous son régime au secteur public provincial du Manitoba; et de statuer en outre que la convention collective du 5 février 1976 conclue entre la Manitoba Liquor Control Commission et la Manitoba Government Employees Association lie les parties en cause.

Je suis également d'avis d'accueillir la demande de l'appelante sollicitant l'annulation de l'ordonnance rendue le 27 août 1976 par Donald D. Tansley, Directeur aux termes de la *Loi anti-inflation*.

L'appelante a droit à ses dépens dans toutes les cours.

Manitoba Gov't Employees Assoc. and The Government of Manitoba [1978] 1 R.C.S. 1123

[1978] 1 R.C.S.

MANITOBA GOVT. EMPLOYEES ASSOC., ETC.

1147

Judgment accordingly, LASKIN C.J. and MARTLAND, JUDSON and SPENCE JJ. dissenting.

Solicitors for the appellant: Thompson, Dorfman, Sweatman, Winnipeg.

Solicitors for the Government of Manitoba: Deputy Attorney General of Manitoba, Winnipeg.

Solicitors for the Manitoba Liquor Control Commission: Walker, Cristall & Pandya, Winnipeg.

Solicitors for the Government of Canada: Deputy Attorney General of Canada, Ottawa.

Jugement en conséquence, le juge en chef LASKIN et les juges MARTLAND, JUDSON et SPENCE étant dissidents.

Procureurs de l'appelante: Thompson, Dorfman, Sweatman, Winnipeg.

Procureurs du gouvernement du Manitoba: Sous-procureur général du Manitoba, Winnipeg.

Procureurs de la Manitoba Liquor Control Commission: Walker, Cristall & Pandya, Winnipeg.

Procureurs du gouvernement du Canada: Sous-procureur général du Canada, Ottawa.

