COMMENTS

COMMENTAIRES

CONSTITUTIONAL LAW—TRADE MARKS ACT'S UNFAIR COMPETITION PROVISIONS—CRIMINAL LAW AND CIVIL REMEDY—TRADE AND COMMERCE—TREATY—STARE DECISIS.—The Supreme Court of Canada has just decided a constitutional case of great importance. In *MacDonald* v. *Vapor Canada Ltd*[1] the court held that section 7(e) of the federal Trade Marks Act[2] was unconstitutional. The striking down of a federal law is itself an event of significance in Canadian constitutional law, because until this decision not a single federal law has been struck down by the Supreme Court of Canada since the abolition of Privy Council appeals.[3] The case is also important for beginning to formulate what appears to be an entirely new definition of the "general" trade and commerce power, for presaging the resurgence of a federal "treaty" power, and for indicating a willingness to reconsider Privy Council precedents. Naturally, the case has an important impact on the law of industrial property too, but this comment will not deal with the industrial property aspect of the decision.

The Statute

At issue in the case was the constitutionality of paragraph (e) of section 7 of the Trade Marks Act. Section 7 of the Trade

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[1] Decision of the Supreme Court of Canada of Jan. 30th, 1976, as yet unreported. References to passages in the two opinions will hereafter be cited simply by page number, which will be the page in the relevant opinion in the typed reasons for judgment issued by the Court.

[2] R.S.C., 1970, c. T-10.

[3] See P. C. Weiler, The Supreme Court and the Law of Canadian Federalism (1973), 23 U. of T.L.J. 307, at p. 362; D. Gibson, And One Step Backward: The Supreme Court and Constitutional Law in the Sixties (1975), 53 Can. Bar Rev. 621, at p. 625.

Marks Act has nothing to do with trade marks, but prohibits certain unfair competitive practices. Paragraph (a) prohibits false statements discrediting a competitor; (b) prohibits passing off; (c) prohibits substitution of the wrong goods; (d) prohibits false and misleading descriptions of goods or services; and (e), which is the final paragraph (and the one in issue), provides that no person shall:

> e) do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada.

Section 53 of the Act authorizes a court to grant civil relief for the breach of section 7, including an injunction, damages and an accounting of profits. The Act does not impose any criminal sanction for breach of section 7. Section 55 of the Act gives jurisdiction over the enforcement of the Act to the Federal Court of Canada.

The Proceedings

Vapor Canada Ltd brought proceedings in the Trial Division of the Federal Court of Canada against a former employee, MacDonald, and a corporation controlled by MacDonald. Vapor sought an injunction, damages and an accounting of profits from the defendants, alleging a variety of causes of action. For our purposes it is only necessary to note that Vapor obtained an interlocutory injunction, prohibiting the defendants from making use of confidential information or material obtained by MacDonald while he was employed by Vapor and ordering the defendants to deliver up documentation belonging to Vapor. The basis for the injunction was that the use of confidential information was a "business practice contrary to honest industrial or commercial usage in Canada" within the meaning of section 7(e) of the Trade Marks Act.

The defendants appealed from the Trial Division of the Federal Court to the Federal Court of Appeal, and the main issue on the appeal was the constitutionality of section 7(e) of the Trade Marks Act. The Attorney General for Canada intervened in support of Vapor's contention that section 7(e) was valid; the Attorneys General for Ontario and Quebec intervened in support of the defendant's contention that section 7(e) was invalid. The Federal Court of Appeal held that section 7(e) was valid as an exercise of the federal Parliament's trade and commerce power, and accordingly affirmed Vapor's injunction (with minor variations).[4] The defendants appealed to the Supreme Court of Canada,

[4] (1972), 33 D.L.R. (3d) 434.

which allowed the appeal and discharged Vapor's injunction on the ground that section 7(e) was invalid.[5] In the Supreme Court of Canada the principal opinion was written by Laskin C.J. and concurred in by Spence, Pigeon, Dickson and Beetz JJ. A separate concurring opinion was written by de Grandpré J. and concurred in by Martland and Judson JJ.; de Grandpré J.'s brief opinion did not indicate any disagreement with Laskin C.J.'s reasoning and did not really do much more than repeat Laskin C.J.'s conclusions.[6]

The reasons for judgment dealt with three heads of federal power: the criminal law power, the trade and commerce power and the treaty power. I shall consider each of these in turn.

The Criminal Law Power and the Civil Remedy

The federal Parliament has the power, under section 91(27) of the British North America Act,[7] to make laws in relation to "the criminal law".

The argument that section 7 of the Trade Marks Act could be sustained as a criminal law had to overcome an insuperable difficulty: the Trade Marks Act did not impose any criminal sanction for breach of section 7. The only sanctions were the civil ones of injunction, damages or an accounting of profits. However, it was apparently argued that section 115 of the Criminal Code[8] converted section 7 of the Trade Marks Act into a criminal law. Section 115 of the Criminal Code imposes a criminal sanction for the breach of any federal statute which does not contain its own criminal sanction, and no doubt this would include section 7 of the Trade Marks Act. If this argument were accepted, however, virtually any federal law could be upheld as a criminal law. Laskin C.J. accordingly dismissed the argument quite easily as an "extravagant posture".[9]

It is perhaps unfortunate that his lordship did not leave the criminal law argument at that point. But he went on to say that the *Goodyear Tire* case,[10] which upheld federal legislation author-

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[5] *Supra*, footnote 1.

[6] The remaining member of the court, Ritchie J., did not participate in this decision.

[7] 1867, 30 & 31 Vict., c. 3 (U.K.).

[8] R.S.C., 1970, c. C-34, as am.

[9] *Supra*, footnote 1, at p. 10.

[10] *Goodyear Tire and Rubber Co. of Canada Ltd* v. *The Queen*, [1956] S.C.R. 303.

izing the issue of a prohibitory order in connection with a conviction of a combines offence, "does not, in any way, give any encouragement to federal legislation which, in a situation unrelated to any criminal proceedings, would authorize independent civil proceedings for damages and an injunction".[11] This statement is perfectly correct in the sense that the Supreme Court in *Goodyear Tire* did not have to decide the point, and did not say anything about it.[12] But in the *Direct Lumber* case[13] Judson J. for the Supreme Court "doubted whether any constitutional principle is raised when dominion criminal legislation is silent upon the question whether a civil action arises upon breach of its terms". In context, what Judson J. was suggesting was that there was no constitutional impediment to the courts implying a civil right of action for breach of a federal criminal law. If this is correct, then surely the federal Parliament could expressly confer a civil right of action for breach of a federal criminal law.[14] Such a right of action would of course be unrelated to and independent of any criminal proceedings.

Laskin C.J.'s dictum in the *Vapor* case, if read broadly, does appear to be inconsistent with Judson J.'s dictum in the *Direct Lumber* case. Since Laskin C.J. made no reference to the *Direct Lumber* case, or to the commentary on this issue (which includes a passage in the best-known casebook),[15] it seems safest to read his language narrowly, as made in the context of a statutory provision which itself contained no criminal sanction.[16] The point is important, because in certain areas of economic regulation

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[11] *Supra,* footnote 1, at p. 11.

[12] Locke J. did however say that the criminal law power could be used to prevent as well as punish crime: [1956] S.C.R. 303, at p. 309; and he could be read as contemplating a broader range of remedies than the prohibitory order in issue in that case.

[13] *Direct Lumber Co. Ltd* v. *Western Plywood Co. Ltd,* [1962] S.C.R. 646, at p. 650.

[14] I appreciate that this conclusion does not follow inexorably since it could be argued that an express right of action arises from the statute, whereas an implied right of action arises from the common law: Laskin, Canadian Constitutional Law (4th ed. rev., 1973), p. 834. But even if this distinction is valid for some purposes (which is not clear), it is unlikely to be good constitutional law that Parliament can do indirectly what it cannot do directly.

[15] *Ibid.*

[16] That this is indeed the correct reading is strongly indicated by Laskin C.J.'s next paragraph which emphasizes that s. 115 of the Criminal Code is a "default" provision rather than the primary means of enforcement of s. 7(e).

it is considered sound policy to supplement a criminal sanction with a civil right of action.[17] It would be unfortunate if the federal Parliament were to be precluded from providing the civil sanction.

The question about the federal Parliament's competence to allow a civil remedy for breach of a federal law is a question about the scope of the criminal law power. It is only the criminal law power which by its very nature contemplates primarily public rather than private enforcement. There is no reason to suppose that the Parliament's other heads of power place any limits on the mode of enforcement which Parliament may adopt. Laskin C.J.'s dictum, even read in its broadest sense, does not suggest any doubt about the federal Parliament's competence to provide a civil remedy in support of a federal law which is constitutionally valid under some head of power other than criminal law.[18] Indeed, far from questioning this proposition, Laskin C.J. pointed out that federal Trade Marks legislation had always provided "for enforcement of its *trade mark* provisions at the suit of an injured person".[19] The emphasis on trade mark is Laskin C.J.'s, not mine. He made a point of distinguishing the longstanding trade-mark civil remedy from the more recently-enacted civil remedy for breach of section 7, and he clearly assumed that the trade-mark civil remedy was valid.[20]

The Trade and Commerce Power

The federal Parliament has the power, under section 91(2) of the British North America Act, to make laws in relation to "the regulation of trade and commerce".

It was this power which afforded the best argument for the validity of section 7(e) of the Trade Marks Act, an argument

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[17] The Competition Bill which has just been enacted by Parliament (Combines Investigation Act Amendment Act, S.C., 1974-75-76, c. 76), by s. 31.1, affords a civil remedy in damages to a person who has suffered loss or damage as a result of (among other things) the commission of an offence under the Act. Of course, the criminal law power is not the only possible constitutional basis for s. 31.1: see generally Hogg and Grover, The Constitutionality of the Competition Bill to be published in (1976), 1 Can. Bus. L.J.

[18] In a later part of the opinion Laskin C.J. said that the mode of enforcement of a federal enactment would have a bearing on whether it could be characterized as a law in relation to trade and commerce: *supra*, footnote 1, at p. 25. Public enforcement by a regulatory agency would make a law easier to characterize as in relation to trade and commerce than an isolated civil remedy: *infra*, footnote 22 and accompanying text.

[19] *Ibid.*, at p. 7.

[20] *Ibid.*, at pp. 7, 23, 24, 26, 43.

which (as noted above) had been accepted by the Federal Court of Appeal. In rejecting the argument Laskin C.J. pointed out that the various prescriptions of paragraphs (a) through (d) of section 7 were simply enactments (with minor modifications) of existing civil causes of action known both to the common law and the civil law. While paragraph (e) of section 7 (the provision in issue) went beyond existing causes of action, when read in its context as following paragraphs (a) through (d), paragraph (e) was really only an extension of existing tortious or delictual liability. Laskin C.J. said that it was "simply a formulation of the tort of conversion, perhaps writ large and in a business context".[21] In the result, therefore, Laskin C.J. regarded section 7 as doing no more than supplementing or extending civil causes of action which were within provincial legislative competence under the rubric of property and civil rights in each province. It followed that section 7 as a whole and section 7(e) taken alone were unconstitutional.

The position might well have been different, Laskin C.J. said several times, if section 7 had been part of a "regulatory scheme" administered by a "federally-appointed agency".[22] But section 7 did not establish "any regulatory scheme", and its enforcement was "left to the chance of private redress without public monitoring by the continuing oversight of a regulatory agency".[23] Such a "detached provision" could not "survive alone unconnected to a general regulatory scheme to govern trading relations going beyond merely local concern".[24]

These dicta raise some intriguing questions as to the attitude of the present Supreme Court to the trade and commerce power. It will be recalled that the Privy Council in *Citizens Insurance Co.* v. *Parsons*[25] suggested that, in addition to interprovincial or international trade, the trade and commerce power might extend to "general regulation of trade affecting the whole dominion". But, later on, when the Privy Council fell under the influence of Lord Haldane, both suggested categories of power were severely attenuated.[26] After Lord Haldane's death in 1928 the doctrine

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[21] *Ibid.*, at p. 15.

[22] *Ibid.*, at pp. 13, 23, 25-26, 33-34, 36. The precise language varies from place to place.

[23] *Ibid.*, at pp. 33-34.

[24] *Ibid.*, at p. 34.

[25] (1881), 7 App. Cas. 96, at p. 113.

[26] *The Insurance Reference*, [1916] 1 A.C. 588; *The Board of Commerce* case, [1922] 1 A.C. 197; *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396.

of precedent led the Privy Council to preserve the substance of the Haldane decisions.[27] But since the abolition of appeals to the Privy Council we have witnessed a steady and hitherto unbroken expansion of the interprovincial and international category of trade and commerce at the hands of the Supreme Court of Canada.[28] This has been accomplished without any open avowal of departure from the Privy Council precedents, although in my opinion the recent decisions are inconsistent with the Privy Council precedents.

What has not yet emerged clearly is the office (if any) for the second "general" category of trade and commerce. This is the important feature of the *Vapor* case, for it was not possible to point to an interprovincial flow of goods akin to the trade in grain or oil in support of the provisions of section 7 of the Trade Marks Act. Section 7 simply prohibited certain unfair competitive practices regardless of whether they had an interprovincial or international element — and, of course, the proscribed practices would normally have no such element. The nature of section 7 therefore compelled a consideration of the general category of trade and commerce. In the Federal Court of Appeal, Jackett C.J., who wrote the opinion of the court (consisting of himself, Thurlow J. and Choquette D.J.), reviewed all of the slender case-law on the "general" trade and commerce power and concluded that "a law laying down a set of general rules as to the conduct of businessmen in their competitive activities in Canada" was within the general trade and commerce power.[29] He held that section 7 of the Trade Marks Act was valid as fitting that description.

Jackett C.J.'s decision went a long way, because the only federal aspect which could really be claimed for section 7 was the fact that it applied throughout Canada; and nation-wide

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[27] The extreme view that the trade and commerce power had no independent content and could be invoked only as ancillary to other federal powers was repudiated by Lord Atkin in *Proprietary Articles Trade Assn* v. *A.-G. Can.*, [1931] A.C. 310, but the trade and commerce power was still held insufficient to sustain the regulation of the grain trade in *The King* v. *Eastern Terminal Elevator Co.*, [1925] S.C.R. 434, the regulation of the marketing of natural products in the *Natural Products Marketing Reference*, [1937] A.C. 377, and the prohibition of margarine in the *Margarine Reference*, [1951] A.C. 179.

[28] *E.g.*, *Murphy* v. *C.P.R.*, [1958] S.C.R. 626; *R.* v. *Klassen* (1959), 20 D.L.R. (2d) 406 (Man. C.A.; leave to appeal refused by S.C. Can.); *Caloil Inc.* v. *A.-G. Can.*, [1971] S.C.R. 543.

[29] *Supra*, footnote 4, at p. 449.

application has never been enough by itself to shift a law dealing with property and civil rights into a federal head of power. As Laskin C.J. said, "It is not a sufficient peg on which to support the legislation that it applies throughout Canada when there is nothing more to give it validity".[30] But if generality of application is not enough, what is the "something more" which would make the difference? Laskin C.J. implies that it is the existence of a regulatory scheme administered by a federally-appointed agency.[31] This suggestion finds no basis in the previous case law. On the contrary, many of the federal statutes which were held unconstitutional by the Privy Council established some form of regulatory scheme administered by a federally-appointed official or agency. The *Insurance Act Reference*[32] (regulation of insurance industry), the *Board of Commerce* case[33] (regulation of monopolies, combines, hoarding, profiteering), *Toronto Electric Commissioners* v. *Snider*[34] (labour relations), *The King* v. *Eastern Terminal Elevator Co.*[35] (regulation of grain trade) and the *National Products Marketing Reference*[36] (regulation of natural products marketing) are the obvious examples.[37] But it may well be that the correct inference from the *Vapor* judgment is that the Privy Council decisions are not necessarily a reliable guide to the current law. There are a number of hints to that effect in Laskin C.J.'s reasons for judgment,[38] of which the clearest is the treatment of the *Labour Conventions* case, to be considered next.

The Treaty Power and Stare Decisis

The final argument which was addressed in support of section 7(e) of the Trade Marks Act was that it had been enacted to implement the obligations of Canada under a treaty, the Inter-

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[30] *Supra*, footnote 1, at p. 23.

[31] *Supra*, footnote 22.

[32] *Supra*, footnote 26.

[33] *Ibid.*

[34] *Ibid.*

[35] *Supra*, footnote 27.

[36] *Ibid.*

[37] Laskin C.J., appeared to place in a special category the cases which involved "marketing regulation". In those cases (of which the last two footnotes are examples) regulation by a public authority is not alone sufficient, but the regulation must apply "to the flow of interprovincial or foreign trade": *supra*, footnote 1, at p. 32. Why these cases should be special is not explained, although of course marketing cases are very numerous and the doctrine is therefore deeply entrenched.

[38] *Ibid.*, at pp. 28, 32.

national Convention for the Protection of Industrial Property, to which Canada had acceded in 1951. The Trade Marks Act had been enacted shortly after Canada's accession to the treaty, and the treaty contained stipulations very similar to paragraphs (a), (b) and (e) (but not (c) and (d)) of section 7 of the Trade Marks Act. However, the Trade Marks Act did not recite that it had been enacted to perform the treaty, and indeed did not make any reference to the treaty. The Supreme Court held that the absence of any reference to the treaty in the Trade Marks Act precluded the court from holding that the Act had been enacted to perform the treaty. The argument accordingly failed

The argument based on the treaty was a bold one, for it involved persuading the Supreme Court of Canada to refuse to follow the decision of the Privy Council in the *Labour Conventions* case.[39] That case, it will be recalled, decided that Canada's accession to a treaty did not confer upon the federal Parliament the power to enact any laws necessary to perform the treaty. The power to enact such laws was allocated either to the federal Parliament or the provincial Legislatures depending upon the ordinary distribution of powers according to subject matters. Thus, if the treaty dealt with a subject matter which would ordinarily be within provincial legislative competence, the treaty could only be implemented by the provincial Legislatures. So long as this was the constitutional situation, the plaintiff in *Vapor* could not succeed in founding the Trade Marks Act on the treaty power for the compelling reason that there was no treaty power in the sense of an independent head of federal power to perform treaties.

The Supreme Court's finding that the Trade Marks Act was not enacted to perform a treaty relieved the court from the task of considering the *Labour Conventions* case. But Laskin C.J., in an extended *obiter* dictum, referred to some of the criticism which had been levelled at the case and said that "the foregoing references would support a reconsideration of the *Labour Conventions* case".[40] He then explained that it was not necessary to do that in this case. De Grandpré J., in his very brief reasons, said that he had been "attracted by" the treaty argument, but had rejected it because the statute did not coincide with the text of the treaty.[41] He did not refer to the *Labour Conventions* case, but he could hardly have been attracted to the treaty argument

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[39] [1937] A.C. 326.

[40] *Supra*, footnote 1, at p. 39.

[41] *Ibid.*, at p. 4.

unless he was prepared to refuse to follow the *Labour Conventions* case. In this comment I do not propose to embark on the long discussion which would be required for an examination of the *Labour Conventions* case.[42] The only point I wish to make is that *Vapor* contains clear indications, concurred in by all present members of the court (except Ritchie J. who did not participate in the case), that the Supreme Court of Canada will be willing in appropriate circumstances to refuse to follow decisions of the Privy Council in constitutional cases.

Before 1949, when appeals lay to the Privy Council, the Supreme Court of Canada was lower in the judicial hierarchy, and was therefore bound by decisions of the Privy Council. During that period too, there were dicta to the effect that the Supreme Court of Canada was also bound by its own prior decisions. This again is a comprehensible posture for a court which is subject to a further appeal. But it is natural that the Supreme Court's accession to final appellate status should have changed the binding force of both the Privy Council's and its own prior decisions. The Supreme Court of the United States, the High Court of Australia, the House of Lords (since 1966) and the Privy Council itself each has the power to depart from its own prior decisions. The Supreme Court of Canada should undoubtedly allow itself the same freedom as these other final appellate courts, and it should not accord to the decisions of the Privy Council any greater status than its own decisions. There have been since 1949 a few suggestions that the Supreme Court of Canada has the power to depart from prior Supreme Court and Privy Council decisions,[43]

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[42] My own view, for what it is worth, is that, at the technical level of interpreting the B.N.A. Act, *supra*, footnote 7, the *Labour Conventions* case, *supra*, footnote 39, is one of the worst reasoned decisions of the Privy Council and is almost certainly wrong. But, at the level of federal policy, it must be remembered that the contrary result would greatly augment federal legislative power, having regard to the modern proliferation of multilateral treaties concerning health, education, welfare, labour relations, human rights and other matters within provincial jurisdiction. It is therefore arguable that there is advantage in the *Labour Conventions* doctrine, requiring the federal government to secure provincial co-operation in the implementing (and therefore increasingly in the making) of many treaties.

[43] *In re Storgoff*, [1945] S.C.R. 526, at p. 538, per Rinfret C.J.; *Francis* v. *The Queen*, [1956] S.C.R. 618, at p. 621, per Kerwin C.J.; *Reference re Farm Products Marketing Act*, [1957] S.C.R. 198, at p. 212, per Rand J.; Laskin, The Supreme Court of Canada: A Final Court of and for Canadians (1951), 29 Can. Bar Rev. 1038, at pp. 1069-1076. For general discussion, see Laskin, *op. cit.*, footnote 14 (3rd ed. rev., 1969), pp. 191-196 (not in the 4th ed. prepared by Abel).

but *Vapor* is the clearest and most authoritative confirmation of that power.

Conclusion

The pattern of consistent upholding of federal statutes by the Supreme Court of Canada has now been broken. Before *Vapor* it was very hard to tell whether the pattern was caused by the court's belief that federal legislative power was unlimited, or simply by an absence of important federal legislative initiatives. Certainly, it was possible to suspect before *Vapor* that virtually any federal statute could find a home in the peace, order, and good government power, or the trade and commerce power, or the criminal law power. The court had used very vague language in defining these powers, and it had tended simply to ignore the principal decisions of the Privy Council, many of which were of course unfavourable to federal power.

The present federal Liberal government under Prime Minister Trudeau has been more committed than its predecessors to a strong federal presence in the economic life of the nation. This has produced major new legislative programmes to regulate foreign investment,[44] to restrain anti-competitive combinations and practices,[45] and to control wages, prices and profits.[46] Other programmes are under study. Each of these programmes is likely to be challenged as unconstitutional, and Privy Council precedents will be available in support of the challengers. These challenges will force the court to confront the old Privy Council decisions, and to give some real definition to the major federal legislative powers. It seems likely that the constitutional law which was written by the British law lords will now be re-written by Canadian judges in a series of new leading cases. The *Vapor* decision is, if not the first chapter, at least the preface of that re-writing. The case rejects the view that the imposition of standards of business conduct is by itself within the trade and commerce power, while leaving the court free to reach a different conclusion in respect of the more comprehensive and publicly administered regulatory regimes which have recently been enacted. The case also suggests the possibility of a change in the constitutional law concerning the implementation of treaties, and in so doing, shows that the court will be willing to reconsider the Privy Council precedents.

P. W. HOGG*

[44] Foreign Investment Review Act, S.C., 1973-74, c. 46.

[45] Combines Investigation Act Amendment Act, *supra*, footnote 17.

[46] Anti-Inflation Act, S.C., 1974-75-76, c. 75.

* P. W. Hogg, of Osgoode Hall Law School, York University, Toronto.

CONSTITUTIONAL LAW—POWER OF PROVINCIAL COURTS TO DETERMINE CONSTITUTIONALITY OF FEDERAL LEGISLATION.—Before the enactment of the Federal Court Act[1] there was never any doubt that all courts in every province had the power to determine the constitutional validity of both federal and provincial legislation when dealing with matters otherwise within their jurisdiction. Sections 17 and 18 of that Act contain provisions which could be interpreted as restricting that power so far as federal legislation is concerned, however, and two decisions of the Ontario courts have so interpreted them. The purpose of this comment is to question those decisions. The cases will first be dealt with individually, and then the constitutional problem common to both will be discussed.

Denison Mines Ltd v. *Attorney-General of Canada*[2]

The plaintiff sought a declaration from the Ontario High Court that the federal Atomic Energy Control Act[3] was outside the constitutional competence of the Parliament of Canada. The action was dismissed on the ground, *inter alia*,[4] that provincial courts,[5] no longer have the power to determine such questions. This holding was based on section 17(1) of the Federal Court Act which reads as follows:

> Crown litigation
> 17.(1) The Trial Division has original jurisdiction in all cases where relief is claimed against the Crown and, except where otherwise provided, the Trial Division has exclusive original jurisdiction in all such cases.

Donnelly J. held that this provision wipes out the former jurisdiction of provincially-established courts to deal with claims of the type before him:[6]

> Section 17(1) of the Federal Court Act when read with s. 2(m) is adequate to clothe the Trial Division of the Federal Court with exclusive jurisdiction where a declaration is sought in a matter that

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[1] R.S.C., 1970, 2nd Supp., c. 10.

[2] (1973), 32 D.L.R. (3d) 419 (Ont. H.C.), per Donnelly J.

[3] R.S.C., 1970, c. A-19.

[4] The court also rejected the claim on its merits, holding that federal competence with respect to atomic energy resides in the general "peace, order and good government" clause of s. 91 of the British North America Act, 1867, 30 & 31 Vict., c. 3 (U.K.).

[5] The term "provincial courts" will be used in this comment to denote all courts, inferior or superior, created and administered by the provinces pursuant to their responsibility for "administration of justice in the province" under s. 92(14) of the British North America Act, *ibid.*

[6] *Supra*, footnote 2, at p. 426.

> affects the Crown as is done here and to exclude this Court from entertaining this case.

Apart altogether from the constitutional implications, which will be discussed later, this decision is mistaken for several reasons. Section 17(1) applies only to cases "where relief is claimed against the Crown", and the only claim involved in the *Denison* case was against the Attorney General of Canada. The mere fact that the outcome of the litigation might "affect" the Crown does not mean that relief is claimed against the Crown. Even if the court were right on that point it is difficult to see how "Crown" rights were involved in the case. The legislative powers of the Parliament of Canada were certainly involved, but it is one of the most fundamental principles of constitutional law that Parliament and the Crown are distinct legal entities. The former is a legislative body and the latter is an executive body. Reference to the Crown in section 17(1) of the Federal Court Act cannot reasonably be construed to mean Parliament; section 2(f) of the Act removes any possible doubt about that by defining "Crown" to mean "Her Majesty in right of Canada". Finally, even if there were an ambiguity which permitted more than one meaning to be assigned to the term "Crown", the ambiguity should have been resolved in favour of jurisdiction by the High Court, since, in the words of Maxwell:[7]

> A strong leaning exists against construing a statute so as to oust or restrict the jurisdiction of the superior court ... a statute should not be construed as taking away the jurisdiction of the courts in the absence of clear and unambiguous language to that effect.

The *Denison* approach received some support from the British Columbia Supreme Court in *Canex Placer Ltd* v. *Attorney-General of British Columbia*.[8] That case also involved a claim for a declaration that certain legislation was unconstitutional. Since the statute concerned was provincial, the meaning of the Federal Court Act did not arise. However, the case did deal with the question of whether an action to determine the constitutionality of legislation is a proceeding against the Crown. Verchere J. held that such an action cannot be brought against the Attorney General of the province because it is a "proceeding against the

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[7] Interpretation of Statutes (12th ed., 1969), p. 153.

[8] (1975), 56 D.L.R. (3d) 592 (B.C.S.C.). The decision of the Court of Appeal reversing the trial court was reported after this comment was written: (1976), 58 D.L.R. (3d) 241 (B.C.C.A.). Although this decision could be interpreted as supporting the view expressed in the comment, the Court of Appeal did not expressly deal with the point.

Crown", and provincial legislation requires that the Queen in the right of the province should be the designated defendant in such proceedings. The Appeal Division of the Nova Scotia Supreme Court reached a different conclusion, however, in *MacNeil* v. *Nova Scotia Board of Censors*.[9] The plaintiff in the *MacNeil* case sought a declaration that certain parts of a provincial statute were constitutionally invalid, and was met with the procedural defence that he had failed to obtain consent to sue the Crown as required by the provincial Proceedings Against the Crown Act[10]. The court rejected that defence, holding that an action for a declaration that provincial legislation is *ultra vires* is not a "proceeding against the Crown". The *MacNeil* case, the *Canex* case and the *Denison* case all involved somewhat different issues of course, and they can be formally distinguished for that reason. It is submitted, nevertheless, that they do represent opposing views as to whether an action for a declaration regarding the constitutional validity of legislation is an action against the Crown. The conclusion reached by the Nova Scotia Appeal Division in *MacNeil* is more consistent with principle than that reached by the British Columbia and Ontario trial courts in *Canex* and *Denison*.

In the unlikely event that the latter approach should ultimately be preferred by higher authority, the *Denison* case need not be treated as holding that all constitutional challenges to federal legislation must be determined by the Federal Court. Both that case and the *Canex* case involved proprietary rights of the Crown. The legislation in question in *Denison* vested in the Crown ownership of most of the shares of Atomic Energy of Canada Ltd, and the statutes attacked in *Canex* concerned mineral royalties and mineral tax revenues of the Crown. The holding in *Denison* could be restricted, therefore, to constitutional challenges of federal statutes that concern significant proprietary rights of the Crown. The next case to be discussed cannot be so easily dismissed, however.

Hamilton v. *Hamilton Harbour Commissioners*[11]

In this case the plaintiff city sought a declaration that it had land-use planning jurisdiction over property owned by a federal

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[9] (1975), 53 D.L.R. (3d) 259 (N.S.S.C.-App. Div.). Confirmed on appeal by the Supreme Court of Canada: #80/75 as yet unreported. This point was not dealt with by the Supreme Court.

[10] R.S.N.S., 1967, c. 239.

[11] (1972), 27 D.L.R. (3d) 385 (Ont. C.A.).

harbour commission. A significant question of constitutional law was involved. The Ontario Court of Appeal refused to consider the matter, on the ground that the Federal Court Act has removed such questions from the jurisdiction of provincial courts.

The provision relied on by the Court was section 18, which reads as follows:

Extraordinary remedies

18. The Trial Division has exclusive original jurisdiction
(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and
(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

This provision differs from the section on which the *Denison* case was based, in that it is not restricted to claims for relief against "the Crown". For that reason the *Hamilton* case is not as easy to criticize as the *Denison* case. The language of section 18 is clearly broad enough to embrace constitutional attacks on legislation relied upon by most administrative manifestations of the federal government. The only plausible basis for criticizing the *Hamilton* case is by asserting that the Parliament of Canada does not have the constitutional authority to prevent provincial courts ruling on the constitutionality of federal legislation. It is worth noting that at the conclusion of its reasons for judgment the court drew attention to the fact that "the constitutionality of the Federal Court Act, or of any of its sections, was not raised before us on the hearing of this appeal".[12] The constitutional question will be considered next.

The Constitutional Issue

There has been considerable opposition by at least some provinces to the removal of jurisdiction from the provincial superior courts to the Federal Court of Canada. The government of British Columbia, for example, has expressed the view that it "will result in serious practical disadvantages in the administration of justice in the Province not conducive to the public interest".[13]

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[12] *Ibid.*, at p. 386.

[13] The Development of the Federal Court of Canada, submission to the Federal-Provincial Conference of Attorneys General and Ministers of Justice, Ottawa, March 12th-13th, 1975, by Hon. Alex. B. Macdonald, Attorney General for British Columbia, p. 9.

In the same statement, the British Columbia government argued that sections of the Federal Court Act which "purport to confer exclusive jurisdiction on the Federal Court to entertain questions relating to the constitutional validity of the federal legislation under which the board, commission or tribunal is purporting to take action", are unconstitutional.[14] Although they were not fully developed in the British Columbia statement, there are at least three arguments that could be advanced in support of that conclusion. They will be examined in inverse order of plausibility.

1. Section 101 of the British North America Act,[15] which is the authority for creating the Federal Court, refers to "... *additional* courts for the *better* administration of the laws of Canada". It is possible to interpret this as meaning that while such courts may *supplement* existing provincial courts, they may not *supplant* them. The difficulty with this argument is that "additional" may merely mean additional to the Supreme Court of Canada, which is also provided for by section 101. Such an interpretation finds support in an article by Professor D. J. Mullan,[16] as well as in the Supreme Court of Canada's decision in *Pringle* v. *Fraser*.[17] In that case the Supreme Court held that a section of the Immigration Appeal Board Act[18] which gave "sole and exclusive" jurisdiction over certain matters to an appeal board thereby deprived provincial superior courts of their former jurisdiction in such matters. Although no constitutional arguments were raised in the case, it is reasonable to regard it as impliedly rejecting the "additional courts" argument.

2. Neither the federal Parliament nor a provincial Legislature has the power to prevent adjudication of its statutes on constitutional grounds. As Middleton, J.A., said in *Ottawa Valley* v. *Hydro Electric Power Commission*:[19]

> ...the Legislature cannot... usurp... substantive rights over which it has by the Canadian Constitution no jurisdiction and then protect its action in that regard by enacting that no action can be brought in the Courts of the Province to inquire into the validity of its legislation, thus indirectly destroying the division of powers set forth in the

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[14] *Ibid.*, p. 6.

[15] *Supra*, footnote 4.

[16] The Federal Court Act (1973), 23 U. of T.L.J. 14, at pp. 17-21.

[17] (1972), 26 D.L.R. (3d) 28 (S.C.C.).

[18] R.S.C., 1970, c. I-3, s. 22.

[19] [1936] 4 D.L.R. 594, at p. 603 (Ont. C.A.).

> British North America Act. In other words, it cannot by such indirect means destroy the constitution under which it was created and now exists.

The basis for this constitutional limitation on legislative power is not to be found in the text of the British North America Act. It is, rather, a kind of second-order implication arising from the even more fundamental implication of all federal constitutions that the courts are charged with supervising the agreed distribution of powers.[20] Although the cases in which the principle has been applied in Canada have all dealt with provincial legislation, there can be little doubt that it would also apply to attempts by the Parliament of Canada to protect its legislation from judicial scrutiny. As B. L. Strayer has said:[21]

> ... Parliament, like the legislatures, is precluded from limiting the jurisdiction of its courts to the extent that it is thereby enabled to evade effectively the constitutional limitations on its own jurisdiction. This exception to its power under section 101 is necessarily implied in the existence of a federal division of legislative power.

It is true that the Federal Court Act provisions involved in the *Denison* and *Hamilton* cases could not be construed as completely preventing judicial consideration of the constitutionality of federal statutes; they merely restrict such adjudication to a particular court. Nevertheless, it may be possible to apply the same reasoning to those provisions, because by removing all such questions from provincial courts they seriously *impair* the citizen's right to challenge the validity of federal statutes. As the Government of British Columbia asserted in the statement referred to above:[22]

> It is axiomatic that neither the Legislature of a Province nor the Parliament of Canada can deny access to the Superior Court of a Province to determine the constitutional validity of legislation enacted either by Parliament or the Legislature.

The trouble with axioms is that they cannot be proved. The courts could, consistent with previously recognized constitutional principles, refuse fully to accept British Columbia's assertion. No one familiar with Canadian constitutional law would be very surprised by a judicial ruling to the effect that the implicit require-

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[20] The classic statement of the fundamental principle is that of Marshall C.J., in *Marbury* v. *Madison* (1803), 1 Cranch 137, 5 U.S. 87 (U.S.S.C.). An excellent discussion of the idea, in a Canadian setting, will be found in B.L. Strayer, Judicial Review of Legislation in Canada (1968).

[21] *Op. cit., ibid.*, pp. 59-67.

[22] *Op. cit.*, footnote 13, p. 6.

ment of judicial review does not prevent a legislature from directing constitutional disputes to particular courts, unless the direction amounts to a "colourable device" designed in reality to frustrate the determination of such disputes. The courts have it in their power to adopt the British Columbia position, however. The constitution has been found to contain an implied prohibition against preventing the adjudication of constitutional challenges, and it would be a relatively short further step to hold that it also prohibits all other substantial limitations on the right to make such challenges.

3. The constitutional argument with the greatest chance of success is founded on the provincial "administration of justice" power. By virtue of section 92(14) of the British North America Act, the provinces have exclusive jurisdiction over:

> The administration of justice in the Province, including the constitution, maintenance and organization of provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts.

The question of whether someone should have the right to attack the constitutionality of federal statutes in the provincial courts certainly relates in pith and substance to "administration of justice in the province". Legislation removing the power of provincial courts to deal with the constitutional validity of federal legislation would deprive litigants of a complete range of judicial remedies in the provincial courts. Therefore, the exclusivity feature of sections 17 and 18 of the Federal Court Act unquestionably concern "administration of justice in the Province".

To this argument, those who seek to uphold the provisions can be expected to raise two responses: (a) that this is an area of overlapping jurisdiction and federal paramountcy, and (b) that in any event the exclusivity provisions are necessarily incidental features of otherwise valid federal legislation. It is submitted that neither response is valid.

(a) Several possible bases for overlapping federal jurisdiction might be advanced. At first glance, the sections in question might seem to concern the Federal Court of Canada, which is certainly under federal jurisdiction by reason of section 101 of the British North America Act. But this argument overlooks the fact that it is only the *exclusivity* feature of those sections that is in issue. To give the Federal Court jurisdiction in the various matters listed in those sections is undeniably within Parliament's competence. But to make that jurisdiction *exclusive* is not so, it is submitted, because such a provision does not add to the powers

of the Federal Court; it merely takes powers away from the other courts. Assume that the Federal Court and the provincial superior courts have concurrent jurisdiction over a certain matter, and that the arrangement is then amended to make the Federal Court's authority exclusive. Such a change does not alter the Federal Court's scope; it still has exactly the same powers it always had in cases coming before it. What is changed is the jurisdiction of the provincial courts, which may no longer deal with such matters. The provision is about what the provincial courts may not do, rather than about what the Federal Court may do. Therefore the exclusivity feature of sections 17 and 18 relates in pith and substance to administration of justice in the provinces rather than to the jurisdiction of the Federal Court of Canada.

Parliament's power to remove constitutional disputes about its legislation from the provincial courts might alternatively be thought to stem from its jurisdiction over the particular legislation in question. The right to limit challenges to criminal statutes, for instance, would by this view be based on federal responsibility for "criminal law" under section 91(27) of the British North America Act. The fallacy here is that it is not possible to determine whether the legislation does fall within the scope of the claimed federal power until after the constitutional dispute has been resolved. If an alleged criminal statute is found *not* to concern criminal law in pith and substance, and therefore to be beyond Parliament's powers, the basis for the legislation preventing provincial courts from considering the constitutional challenge will also have disappeared. In other words, Parliament can no more justify limiting constitutional challenges to its legislation by its asserted jurisdiction over the subject matter of the legislation, than a man can lift himself by his own bootstraps.

It might, finally, be argued that Parliament derives overlapping jurisdiction to decide how constitutional disputes should be resolved from its residual authority with respect to "peace, order and good government".[23] This argument has even less cogency than the previous ones, however. The residual power only comes into play when a matter is not provided for by the express heads of legislative jurisdiction under the British North America Act, and the judicial resolution of constitutional disputes is fully provided for by sections 92(14) ("administration of justice in the province") and 101 (creation of the Supreme Court of Canada and other federal courts).

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[23] British North America Act, 1867, *supra*, footnote 15, s. 91.

(b) Apart from the denial of jurisdiction to provincial courts, sections 17 and 18 of the Federal Court Act are undoubtedly valid. If that aspect of the provisions is *ultra vires*, as has been contended above, supporters of the legislation would probably assert that it is "necessarily incidental" to the provisions, and is thereby legitimized. This approach would likely fail in the courts, because although the exclusivity requirement is undeniably "incidental" to the main purpose of these sections, it is hard to see how it is "necessarily" so. It is not essential to granting jurisdiction to the Federal Court that jurisdiction over similar matters be denied to the provincial courts. There is no reason to believe that if Parliament had recognized its inability to tamper with provincial court jurisdiction in constitutional matters, it would have altered the Federal Court's competence in any way. The exclusivity provisions cannot, therefore, be saved by the "necessarily incidental" argument.

Conclusion

While the virtue of preventing provincial courts from dealing with the constitutionality of federal statutes has yet to be explained, the disadvantages are obvious. Whenever a possible constitutional issue was raised by the parties or the judge in litigation before a provincial court, proceedings would have to be suspended to await the decision of the Federal Court of Canada. The unavoidable delay and expense involved would deter many litigants from exercising their constitutional rights. And the effect of placing so much constitutional decision-making exclusively in the hands of Ottawa-based judges would probably be to push an already over-centralized constitution much further in the direction of unitary government. Healthy federalism cannot result from a monolithic system of constitutional adjudication.

Fortunately, in my view, it is beyond the constitutional reach of federal authorities to bring about this undesirable result. It is submitted that both the *Denison* and *Hamilton* cases were wrong in this regard, and it is to be hoped that the Supreme Court of Canada will find an early opportunity to review those decisions.

DALE GIBSON*

* Dale Gibson, of the Faculty of Law, University of Manitoba, Winnipeg.

CONSTITUTIONAL LAW—RIGHTS OF CANADIAN CITIZENS—ALIENS —NON-RESIDENTS—DISCRIMINATION—ROLE OF SUPREME COURT OF CANADA—STARE DECISIS.—Anyone who knows the delightful scenery of tiny Prince Edward Island will appreciate the legitimate desire of the provincial legislature to prevent non-resident control of large tracts of its fertile land. These *cognescenti* — together, perhaps, with the increasing number of Canadian nationalists alarmed by the wholesale bartering of our patrimony to non-residents[1] — will undoubtedly hail the unanimous decision of the Supreme Court of Canada in *Morgan and Jacobson* v. *The Attorney General for Prince Edward Island*.[2] Yet neither the reader's approval of the policy of the legislation nor the elegance of the court's judgment should hide the very important questions raised by this decision. What is the proper constitutional theory for determining the division of powers between Parliament and provincial legislatures? What are the inherent rights of Canadian citizens? How far can a province discriminate against citizens, and on what bases? What is the role of the Supreme Court of Canada — to decide a particular case on the shortest possible grounds, or to consider broader questions of policy? Is the Supreme Court of Canada bound by its own decisions, or those of the Privy Council before 1949? Is it desirable for there to be a unanimous judgment in a constitutional (or any other type of) case?

In 1972, the Legislature of Prince Edward Island amended section 3 of the Real Property Act to provide, *inter alia*, as follows:[3]

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[1] A number of recent federal Acts place restrictions on the activities of either non-residents or non-Canadians or both. For example, s. 100 (3) of the new Canada Business Corporations Act, S.C., 1974-75, c. 33 requires the majority of directors of federal corporations to be "resident Canadians". Similarly, s. 3(1) of the Foreign Investment Review Act, S.C., 1973-74, c. 46, defines a "non-eligible person" so as to include: (i) certain Canadian citizens not ordinarily resident in Canada (as prescribed by regulation), and (ii) landed immigrants resident in Canada more than one year after they are entitled to apply for citizenship. This type of drafting not only puts a premium on Canadian citizenship, but also requires a physical presence within the body politic. On the legal aspects of such restrictions, the reader might refer to: John Spencer, The Alien Landowner in Canada (1973), 51 Can. Bar Rev. 389; and E. James Arnett, Canadian Regulation of Foreign Investment: The Legal Parameters (1972), 50 Can. Bar Rev. 213.

[2] (1975), 55 D.L.R. (3d) 527 (S.C.C.); (1974), 42 D.L.R. (3d) 603, (1974), 5 Nfld & P.E.I.R. 129 (P.E.I.S.C.).

[3] R.S.P.E.I., 1951, c. 138, as am. by S.P.E.I., 1972, c. 40, s. 1, now R.S.P.E.I., 1974, c. R-4.

> 3(2) Unless he receives permission so to do from the Lieutenant-Governor-in-Council no person who is not a resident of the Province of Prince Edward Island shall take, acquire, hold or in any other manner receive, either himself, or through a trustee, corporation, or any such the like, title to any real property in the Province of Prince Edward Island the aggregate total of which exceeds ten (10) acres, nor to any real property in the Province of Prince Edward Island the aggregate total of which has a shore frontage in excess of five (5) chains.

The plaintiffs, citizens of the United States and assumed[4] to be residents there, sought a declaration that this section was *ultra vires* the provincial legislature on the following grounds:

1. That the legislation in pith and substance is legislation in relation to aliens;[5]
2. That the impugned legislation conflicts with section 24(1) of the Canadian Citizenship Act;[6] and
3. That the impugned legislation conflicts with the provisions of a Convention with the United States because is attempts to discriminate with regard to the rights and privileges of persons covered by the treaty contrary to the obligations of the treaty.[7]

The Supreme Court of Prince Edward Island, *en banc*, rejected these attacks. First, the court said, the treaty "does not purport to confer on aliens any right to acquire title to real estate in Canada, but [rather] enables them to have the financial benefits intended by the law of inheritance".[8] Secondly, section

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[4] Both Laskin C.J.C., *supra*, footnote 2, at p. 528 (D.L.R.) and Trainor C.J. P.E.I., *supra*, footnote 2, at p. 604 (D.L.R.), simply assert that the appellants are resident in the U.S.A., without considering the legal concept of "residence". *Quaere* whether, if the point had been at issue, the common law tests applied in taxation cases would have been relevant? See *H.M. The Queen* v. *Reeder*, [1975] C.T.C. 256, (1975), 75 D.T.C. 5160 (F.C.); [1975] C.T.C. 2022, (1975), 75 D.T.C. 17 (T.R.B.); *Erikson* v. *H.M. The Queen*, [1975] C.T.C. 624, (1975), 75 D.T.C. 5429 (F.C.); *Thomson* v. *M.N.R.*, [1946] S.C.R. 209, [1946] C.T.C. 51, (1941-46), 2 D.T.C. 812 (S.C.C.).

[5] (1974), 42 D.L.R. (3d) 603, at p. 607. In fact, the provincial Attorney General had also pleaded that he was not a proper party to the action as no fiat had been granted for a Petition of Right, but this ground was abandoned before the Supreme Court of Prince Edward Island: *ibid.*, at p. 605. For a case where this defence was successfully argued, see *Calder* v. *A.G. (B.C.)*, [1973] S.C.R. 313.

[6] R.S.C., 1970, c. C-19.

[7] Real and Personal Property Convention 1899 between Her Majesty and the United States, S.C., 1901, p. ix.

[8] (1974), 42 D.L.R. (3d) 603, at p. 608.

3(2) does not deal with "aliens and naturalization"[9] *or any other head of legislative competence given to the federal Parliament* by section 91 of the British North America Act, 1867.[10] Finally, section 24(1) of the Canadian Citizenship Act "merely purport[s] to confer on an alien the same rights as are enjoyed by a Canadian citizen . . . [and] . . . there cannot be found any federal legislation attempting to determine what the rights of Canadian citizens are with respect to the holding of property".[11]

It should be pointed out that the last two grounds adopted by the court are based on two different (and inconsistent) contitutional theories. On the one hand, when the court says that the impugned legislation does not deal with *any* head of federal power, it necessarily assumes that there is a mutually exclusive distribution of legislative power between Parliament and the provincial legislatures. Therefore, if the attributes of citizenship fall within the legislative competence of Parliament, no provincial legislature can act in this field at all. Nor is such provincial legislation valid even if Parliament has not yet exercised its exclusive jurisdiction. On the other hand, when the court points out that Parliament has *not yet* determined the rights of Canadian citizens with respect to property, it implies that Parliament *could* indeed do so — even though the provincial legislature has already entered the field. Presumably, if future federal legislation conflicts with the present provincial legislation, the former will be paramount: *Provincial Secretary of P.E.I.* v. *Egan*,[12] *O'Grady* v. *Sparling*,[13] and *Reference re Section 12(4) of the Vehicles Act 1957 (Saskatchewan)*.[14]

The choice between these two constitutional doctrines likewise permeates Chief Justice Laskin's judgment in the Supreme Court of Canada. After tracing the history of legislative attempts

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[9] S. 91 (25) of the British North America Act, 1867, 30 & 31 Vict., c. 3 (U.K.).

[10] (1974), 42 D.L.R. (3d) 603, at p. 609, where Trainor C.J., specifically refers to Parliament's general power to legislate with respect to "peace and good government" as well as the federal power over naturalization and aliens under s. 91(25) of the British North America Act, 1867.

[11] (1974), 42 D.L.R. (3d) 603, at p. 611.

[12] [1941] S.C.R. 396.

[13] [1960] S.C.R. 804.

[14] [1958] S.C.R. 608.

in Prince Edward Island to prevent absentee landowners,[15] the Chief Justice points out that the present legislation (unlike that of 1939[16]) does not purport to distinguish between aliens (wherever resident) and Canadian citizens (whether naturalized or natural-born[17]) — which effectively eliminates any argument that section 3(2) invades the exclusive domain of Parliament to legislate with respect to aliens and naturalization. Rather, if section 3(2) applies to non-resident aliens like Morgan and Jacobson, it applies *a fortiori* to Canadian citizens resident outside of the province. This, in turn, squarely raises the question of what are the limitations on provincial legislation affecting the attributes of Canadian citizenship:

> ...the attack on this provision was based initially on an allegedly unconstitutional discrimination between resident and non-resident Canadian citizens, at least those residing elsewhere in Canada. Citizenship, it was urged, involved being at home in every Province, it was a status that was *under exclusive federal definition and protection*, and it followed that a residential qualification for holding land in any Province offended against the equality of status and capacity that arose from citizenship and, indeed, inhered in it.[18]

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[15] (1975), 55 D.L.R. (3d) 527, at p. 529, referring to S.P.E.I., 1859, c. 4 (abolishing the common law disability of aliens to hold land, but limiting their holdings to a maximum of 200 acres); S.P.E.I., 1939, c. 44, s. 4 (permitting larger holdings by aliens "with the consent of the Lieutenant-Governor in Council"; S.P.E.I., 1964, c. 27, s. 1 (reducing the maximum to 10 acres). Chief Justice Trainor referred to the original division of the entire Island after the cession in 1763 into 3 townsites and 67 townships alloted by chance to friends of the British Government (1974), 42 D.L.R. (3d) 603, at p. 606. Various attempts were made in the first half of the 19th century by the colonial legislature to expropriate these absentee landlords, but were disallowed by the Imperial Government. For an interesting account see Jasper Ridley, Lord Palmerston (1972), pp. 688-91 and 785.

[16] S.P.E.I., 1939, c. 44, s. 4 amending pre-Confederation legislation. Since the 1939 legislation permitted an alien to hold more than the 200 acres (allowed by the pre-Confederation legislation) with the consent of the Lieutenant-Governor in Council, it is not difficult to see why its validity was never challenged: an alien granted such permission would clearly not complain; one refused permission to hold more than 200 acres would be caught by the valid pre-Confederation Act.

[17] As Chief Justice Laskin points out: "Section 3 ... does not distinguish between natural-born and naturalized Canadian citizens in making provincial residence the relevant factor for holding land. *If it did*, a different question would be presented, and account would have to be taken of the effect of s. 22 of the Canadian Citizenship Act which prescribes equality of status and equality of rights and obligations for all citizens, whether natural-born or naturalized." (1975), 55 D.L.R. (3d) 527, at p. 531. Emphasis mine.

[18] *Ibid.*, at p. 531.

Although Chief Justice Laskin agrees that it is for Parliament alone[19] to define citizenship and how it may be acquired or lost, he does not then proceed to consider criteria for determining when subject-matters not listed in sections 91 and 92 of the British North America Act lie within the exclusive jurisdiction[20] of Parliament.[21] Nor does he at this point[22] examine what attributes of citizenship (if any) are essential to the workings of the body politic, and thus (one might think) necessarily ancilliary to the exclusive power of Parliament over citizenship. Rather, the Chief Justice utterly rejects the plaintiffs' attempt to rely on Rand J.'s dictum in *Winner v. S.M.T. (Eastern) Ltd*[23] about the right to work being a constituent element inherent in the nature of citizenship. Not only does the Chief Justice decline to accept the analogy between the right to work or remain in a province and the right of a Canadian citizen to own land, he points out that Rand J.'s dictum specifically refers to the Privy Council's decisions in *Union Colliery* v. *Bryden*[24] and *Cunningham* v. *Tomey Homma*.[25] These, he indicates (both here and later in the judgment), may not be a strong foundation for Rand J.'s dictum — let alone for any implied Bill of Rights of a Canadian citizen. Finally, the Chief Justice points out that even Rand J. expressly acknowledged that the rights of a citizen (beyond the right to work) "may be regulated . . . by valid provincial law in other respects".[26] Therefore, the Chief Justice totally rejects the plaintiffs' attempt to characterize the restrictions contained in section 3(2) of the Prince Edward Island legislation as dealing in pith and substance with citizenship, and hence *ultra vires*.

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[19] *Ibid.*

[20] Instead, the Chief Justice poses the problem thus, *ibid.*, at p. 532: "How far beyond this Parliament may go in investing citizenship with attributes that carry against provincial legislation has not been much canvassed in this Court; nor, on the other hand, is there any large body of case law dwelling on the limitation on provincial legislative power arising from a grant of citizenship or the recognition thereof in a natural-born citizen or arising from federal power in relation to naturalization and aliens under s. 91(25) of the British North America Act, 1867." *Cf.* Laskin's Canadian Constitutional Law (3rd ed., rev., 1969), p. 991; (4th ed. by Abel, 1973), p. 864.

[21] On the point raised in the text, see Lederman, Unity and Diversity in Canadian Federalism (1975), 53 Can. Bar Rev. 597, particularly at pp. 604-605.

[22] But see the first paragraph on p. 537 of (1975), 55 D.L.R. (3d), and footnote 40 *infra*.

[23] [1951] S.C.R. 887, at p. 920, [1951] 4 D.L.R. 529, at p. 559.

[24] [1899] A.C. 580.

[25] [1903] A.C. 151.

[26] *Supra*, footnote 23, at pp. 920 (S.C.R.) and 559 (D.L.R.).

An alternative approach, of course, would be to characterize the impugned legislation as dealing solely with property and civil rights, and hence within the exclusive jurisdiction of the provincial legislature. Indeed, a casual reader might think that Chief Justice Laskin does precisely this when he refers with approval to the previous judgment of the Supreme Court of Canada in *Walter* v. *A.G. Alberta*,[27] which upheld the validity of a provincial prohibition on the holding of land by religious orders. Although a purist might argue that the legislation in *Walter* was not *in pari materia* with section 3(2), Chief Justice Laskin says:[28]

> ... if the Province could determine who could hold or the extent to which land could be held according to whether a communal property regime was observed, it is difficult to see why the Province could not equally determine the extent of permitted holdings on the basis of residence.

Nevertheless, the Chief Justice goes on to quote from Martland J.'s judgment in *Walter* to the effect that the impugned Alberta legislation was valid *only if* it was not "in relation to a class of subject specifically enumerated in s. 91 of the *B.N.A. Act or otherwise within exclusive federal jurisdiction*".[29] Since Chief Justice Laskin has already held that the alleged right of a non-resident Canadian citizen to own land in Prince Edward Island is not an inherent constituent of citizenship (and hence not within the exclusive jurisdiction of Parliament), and since the legislation clearly deals with property and civil rights within the province, this surely should have been the end of *Morgan*.

The only *tertium quid* between characterizing the impugned legislation as being within the exclusive jurisdiction of either Parliament or the legislature is to adopt a model of constitutional consensualism. Thus either level could legislate on the rights of citizens to own property, with some rule to avoid actual conflicts. If a conflict does arise, the provincial legislation (not being within the exclusive jurisdiction of the province, *ex hypothesi*) must yield to the paramount federal provision. Chief Justice Laskin, in a long passage which strangely deals only with aliens and not citizens, adopts this approach:[30]

> It appears to me that it was open to a Province after Confederation to remove the disability of an alien to hold land in the Province without the need for prior or supporting federal legislation *unless, of course, the Parliament of Canada*, having legislative jurisdiction in relation to aliens [and citizens?], *had expressly retained or imposed the disability*.

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[27] [1969] S.C.R. 383, (1969), 3 D.L.R. (3d) 1.

[28] *Ibid.*, at pp. 389 (S.C.R.), 5 (D.L.R.).

[29] *Ibid.*

[30] (1975), 55 D.L.R. (3d) 527, at pp. 534-535. Emphasis mine.

> Legislation of a Province dealing with the capacity of a person ... to hold land in the Province is *legislation in an aspect open to the Province* because it is directly concerned with a matter in relation to which the Province has competence. Simply because it is for Parliament to legislate in relation to aliens [and citizenship?] *does not mean that it alone* can give an alien capacity to buy or hold land in a Province.... *No doubt, Parliament alone may withhold or deny capacity of an alien* [or citizen?] to hold land or deny capacity to an alien [or citizen?] in any other respect, *but if it does not, I see no ground upon which provincial legislation recognizing capacity in respect of holding land can be held invalid.*

This view clearly rejects entirely any argument in this case about exclusive, water-tight legislative compartments. The only question becomes: has section 24(1) of the Canadian Citizenship Act so occupied the field as to prevent discrimination by a province against aliens or citizens? Since no possible reading of section 24(1) — no matter how minute — can eke out any reference therein to the consequences to a citizen or alien of residence in a particular part of Canada, Parliament obviously has not even purported to enter the field. On this analysis, the provincial legislation must necessarily be valid. Why, then, does *Morgan* not end here?

After a paragraph marked by considerable obscurity,[31] Chief Justice Laskin then embarks on a lengthy and detailed analysis of previous decisions of the Privy Council and Supreme Court of Canada dealing with alienage. Is this an attempt by him

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[31] *Ibid.*, at p. 535, as follows: "In approaching this question [*viz.*, whether s. 24(1) of the *Canadian Citizenship Act* obliges a Province to treat non-resident aliens on a basis of equality with resident aliens] I make nothing of the fact that s. 3(2) [of the Real Property Act, as amended] speaks in terms of residency and non-residency *as if these words carried some connotation that set aliens and citizens apart so that the legislation did not touch them.* I am prepared to treat it by extrapolation as referring expressly to resident aliens and citizens and to non-resident aliens and citizens; there are certainly no other classes so distinguishable. On this view of s. 3(2), I turn to a consideration of *Union Colliery* ... and ... *Tomey Homma.*" Emphasis mine. S. 3(2) only refers to *persons* who are not resident in Prince Edward Island. Who, then, is the "them" referred to by the Chief Justice? Aliens? Non-resident aliens? Is it correct to say that prior parts of the judgment have held that the legislature is constitutionally able to discriminate against (non-resident) Canadian citizens, and that this paragraph (and almost all of the remainder of the judgment) is directed to show why it is competent for the legislature also to discriminate against (non-resident) aliens? Does this interpretation explain the Chief Justice's remark in the previous paragraph that "citizens can surely be no worse off"? In short, is the subsequent analysis of *Union Colliery* and *Tomey Homma* relevant only to show the extent to which a legislature can determine the consequences of alienage? Or is it also relevant to the consequences of citizenship?

to demonstrate authority for the proposition that Parliament may only define who is an alien, not attach consequences thereto? If so, why is this relevant — given that section 24(1) of the Canadian Citizenship Act is valid, that it assimilates the rights of aliens to own land in Canada to those of citizens, and that it has already been decided that the right of a citizen to own land is not within the exclusive jurisdiction of Parliament? Whether or not this part of the judgment is simply *obiter*, its inclusion does raise two very important points.

First, how does the Chief Justice now regard previous judgments of either the Privy Council or the Supreme Court of Canada itself? Are they binding? Or is there at least some freedom in the court to deviate from previous authority? If so, under what circumstances? Certainly, long before he was on the Bench, Professor Laskin (as he then was) saw no reason why the Supreme Court should be so bound — particularly not by decisions of the Privy Council:[32]

> ... since neither the Privy Council nor the House of Lords can dictate to the Supreme Court for the future, is the Court none the less going to hold itself bound by the decisions of those tribunals given in the past? At the best or worst, it can treat these decisions as its own, and we are thus back to our starting point, namely, whether the Supreme Court will continue to subscribe to *stare decisis* in respect of its own decisions. There is also the subsidiary question of how ready it will be to break a three-fourths century habit of obedience and uncritical deference to English decisions, regardless of the removal of compulsion to that end.
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> It is worth remembering that for a final court consistency in decisions is merely a convenience and not a necessity. No one expects the Supreme Court to break out in a rash of reversals of previous holdings, even if it should formally dissociate itself from *stare decisis*. In my view, such a dissociation, whether formally expressed or not, is imperative if the Court is to develop a personality of its own.... What is required is the same free range of inquiry which animated the Court in the early days of its existence, especially in constitutional cases where it took its inspiration from Canadian sources. Empiricism not dogmatism, imagination rather than literalness, are the qualities through which the judges can give their Court the stamp of personality.

Laskin J.A. (as he then was) reiterated the same view eighteen years later in the 1969 Hamlyn Lectures:[33]

> The abolition of Privy Council appeals has, of course, on any rational assessment of Canada's position... freed Canadian courts of any obligation to respect English decisions, whatever be their level, except as a matter of their merit. Even so, there have been some cases in

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[32] The Supreme Court of Canada: A Final Court of and for Canadians (1951), 29 Can. Bar Rev. 1038, at p. 1075, footnote omitted.

[33] The British Tradition in Canadian Law (1969), p. 62.

> which Canadian judges have either forgotten or preferred to ignore their statutory liberation.

But the last third of Laskin C.J.C.'s judgment in *Morgan* is concerned almost entirely with attempting to reconcile the exact *ratios* of *Union Colliery*,[34] *Tomey Homma*,[35] *Quong Wing* v. *The King*,[36] and *Brooks-Bidlake & Whittall Ltd* v. *A.G. (B.C.)*[37] — without any acknowledgment of the Supreme Court's "liberation" from the binding effect of earlier decisions, nor any indication of the need to re-examine and justify the application of the principles contained in these earlier decisions in light of present social needs.[38] What a lost opportunity to clarify whether *stare decisis* still applies to the court!

Secondly, this lengthy examination of previous authorities contains several comments by the Chief Justice about the ability of provincial legislatures to discriminate against various groups:

> I am not concerned in the present case with the question whether the franchise . . . has such a special relationship to naturalization and to natural-born status as to preclude provincial discrimination against certain racial groups. The Privy Council obviously thought not. Its reasons suggested a distinction between a *privilege, e.g.*, the franchise, which the Province could grant or withhold from aliens or naturalized or even natural-born citizens, and what appeared to it to be the draconian prohibition [from working] involved in the *Union Colliery Co.* case.[39]

If Chief Justice Laskin is indicating that he would have decided *Tomey Homma* differently, is racial discrimination any more objectionable than any other type? If the Chief Justice agrees that a province may discriminate in granting "privileges", how are these to be defined? Is it a "privilege" or a "right" for an anglophone to be educated in English schools in Quebec? Is it different for an Italian immigrant, or for his Canadian-born child? When does the withholding of a "privilege" amount to a "draconian prohibition"? Alas, Chief Justice Laskin provides no clues to these conundrums, except to indicate that fewer prohibitions may be draconian than other people (including judges) may have thought:

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[34] *Supra*, footnote 24.

[35] *Supra*, footnote 25.

[36] (1914), 49 S.C.R. 440, (1914), 18 D.L.R. 121, (1914), 23 C.C.C. 113.

[37] [1923] A.C. 450, [1923] 2 D.L.R. 189, [1923] 1 W.W.R. 1150.

[38] *Cf.* the position now of the House of Lords, as set out in the Practice Statement of July 26th, 1966. See also the reasoning of Lord Morris of Borth-y-Gest in *Conway* v. *Rimmer*, [1968] A.C. 910, at p. 957; and generally see Cross on Precedent in English Law (2nd ed., 1968), pp. 107-108, and Ch. VII.

[39] (1975), 55 D.L.R. (3d) 527, at p. 537. Emphasis mine.

> I would not myself have thought that the mere prohibition against employment of Chinese persons in underground mining could be taken to be a general prohibition against their earning a living in British Columbia and, *however distasteful such legislation was*, that it was beyond provincial competence.[40]

Certainly, as the Chief Justice points out, discrimination is not *ipso facto* a valid ground for striking down provincial legislation.

> I do not think federal power as exercised in ss 22 and 24 of the Citizenship Act, *or as it may be exercised beyond those provisions*, may be invoked to give aliens, naturalized persons or natural-born citizens any immunity from provincial regulatory legislation otherwise within its constitutional competence, simply [1] because it may affect one class more than another or [2] may affect all of them alike by what may be thought to be undue stringency. The question that would have to be answered is whether the provincial legislation, though apparently or avowedly related to an object within provincial competence, is not in truth directed to, say, aliens or naturalized persons so as to make it legislation *striking at their general capacity* or legislation so discriminatory against them as in effect to amount to the same thing.[41]

It may well be that section 3(2) does not sterilize the general capacity of an alien or citizen who is a non-resident of Prince Edward Island either to buy a limited amount of land therein, or to enter the province. But suppose section 3(2) had prohibited a non-resident from owning any land — even though no attempt is made to prevent his entry into the province, or taking up residence there?[42] At what point does such "regulatory" legislation impair a citizen's "general capacity"? Would it be relevant to know that non-residents own only approximately six per cent of the surface area of the province?[43] Indeed, is this type of

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[40] *Ibid.*

[41] *Ibid.*, at p. 538.

[42] The fact that the legislation did not attempt to prevent persons entering Prince Edward Island was clearly important to Chief Justice Laskin, since he mentions it at least twice: See, *ibid.*, the last paragraph on p. 533, and the second last paragraph on p. 539. If restrictions on the free entry of persons (and, presumably, goods) are definitely *ultra vires* the province, would the same hold true of exit from a province? What, for example, is the constitutional validity of the order which the Government of Quebec issued under the Cultural Property Act, S.Q., 1972, c. 19, purporting to prevent the moving of the library of the Arctic Institute of North America from Montreal to Calgary? In fact, the library had already been removed from the province when the order was made.

[43] Approximately 3% is owned by non-Canadians, and 3.1% by Canadians resident outside the province according to S. McFadyen, The Control of Foreign Ownership of Canadian Real Estate (1976), 2 Can. Pub. Pol. 65, referring at footnote 1 to Caveat on Non-Resident Owner-

empirical evidence even admissible in a constitutional case before the Supreme Court — or is it tied to *a priori* analysis?[44]

No matter how much one appreciates the desire of the legislature of Prince Edward Island to control absentee landlords, the legal reasoning of the Supreme Court in *Morgan* is extremely troubling. The actual architecture of the judgment will be difficult for constitutional scholars to decipher, let alone find a clear *ratio decidendi*. Worse, the judgment contains dangerous *obiter* dicta which are bound to reach beyond this case to plague more contentious future litigation. Civil libertarians should be alarmed at the court's diminished antipathy towards discrimination and infringements on basic civil rights. Canadians who value the concept of one country *a mare usque ad mari* should be upset that their constitution permits provinces to discriminate against Canadian citizens resident elsewhere in Canada. *Morgan* is undoubtedly an important case — perhaps too important for a unanimous judgment,[45] even of the Supreme Court of Canada.

DAVID PHILLIP JONES*

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ship, Prince Edward Island, Land Registration Service, Council of Maritimes Premiers, Fredericton, N.B. See also the Report to the First Ministers of the Federal Provincial Committee on Foreign Ownership of Land, Information Canada (1975).

[44] Cf. Laskin J.'s comments in *A.-G. for Manitoba* v. *Manitoba Egg and Poultry Association*, [1971] S.C.R. 689, at p. 704, (1971), 19 D.L.R. (3d) 169, at p. 181, [1971] 4 W.W.R. 705, at p. 717: "The utility of the Reference as a vehicle for determining whether actual or proposed legislation is competent under the allocations of power made by the British North America Act is seriously affected in the present case because there is no factual underpinning for the issues that are raised by the Orders of Reference. Marketing data to illuminate those issues might have been set out in the Order itself . . ., or in an agreed statement of facts, or, indeed, might have been offered to the court to indicate the circumstances which prompted the questions addressed to it." To what extent do these comments apply to a normal case which is not a Reference?

[45] Would the issues before the court, and its reasoning, have been any clearer if there had been more than one judgment (whether or not these were dissents)? In the Hamlyn Lectures, *op. cit.*, footnote 33, p. 62, Laskin J.A. clearly thought that multiple opinions were useful to the judicial process: "When the abolition measure was pending there was considerable discussion — how barren it looks today — about the continuing force of past Privy Council decisions and a proposal that the Supreme Court of Canada adopt the Privy Council's then one-judgment rule. . . . The second matter of discussion was not adopted; and it did not need the hindsight of the Privy Council's own rejection of the one-judgment rule to certify to the bankruptcy of such a proposal for a final court in a federal system."

* David Phillip Jones, of the Alberta and Northwest Territories Bars, and of the Faculty of Law, McGill University, Montreal.

THE SIMULTANEOUS DISSOLUTION OF BOTH HOUSES OF THE AUSTRALIAN FEDERAL PARLIAMENT, 1975.—The Australian federal legislature is bicameral. The voters of each of the six Australian states elect that proportion of the total number of the members of the lower house, the House of Representatives, which their state's population bears to the population of all six states together. The upper house, the Senate, is also elected, but to that chamber an equal number of senators is returned by each state's voters. Elections for both houses are not normally held simultaneously. While the lower house has a maximum life of three years, senators are elected for six-year terms, with half of the senators retiring every three years. It is possible, however, for the terms of all the senators to be cut short and an election for the entire Senate to take place simultaneously with a general election for the House of Representatives in circumstances to be discussed subsequently. In that case half of the senators are returned for terms of three years only, while the other half are returned for six years.

By convention the Governor-General appoints a member of the lower house as his Prime Minister. Under normal circumstances the appointment is made on the basis of the latter's ability to command the confidence of the house. Other ministers can be appointed from the upper house as well as from the lower house.

In May, 1974, an election was held simultaneously for both the upper and the lower houses and the Labour party, obtaining a majority in the lower house, formed the government. It did not, however, obtain a majority in the upper house and in the ensuing months a significant number of its non-money bills were refused passage by the Senate, many on more than one occasion.

Then, on October 16th, 1975, the Senate refused to pass two appropriation bills for ordinary government services which the lower house had already passed.[1] The Senate's action was taken with the stated intention of forcing the government to the polls. By November 11th, 1975, the Senate had not retreated from its refusal. On that date Sir John Kerr, the Governor-General, dismissed his Prime Minister, Mr. Gough Whitlam, because the latter had refused to advise an election either for the lower house alone or for both houses simultaneously and called on the Leader of the Opposition in the lower house, Mr. Malcolm Fraser, to form a government. Mr. Fraser accepted this offer, whereupon

[1] Such bills must, by s. 53 of the constitution, originate in the lower house.

the Senate immediately passed the two appropriation bills it had earlier refused to pass. Mr. Fraser then immediately advised an election for both houses simultaneously and the Governor-General naturally acted on this advice. Mr. Whitlam's refusal to advise an election had undoubtedly resulted from his fear that his party would lose one if it were held, a fear which subsequent events showed was well founded. In the elections on December 13th, 1975, his party won a majority in neither house of the legislature.

The Governor-General's action of forcing the election has been criticized on the ground that it will lead to political instability in the country in future. Whether that is so or not, the Governor-General's action does suffer from at least one defect — that of having been illegal.

The framers of the Australian constitution were concerned to provide a mechanism for the resolution of legislative deadlocks between the two houses of the proposed federal Parliament. The mechanism which they provided is contained in section 57 of the constitution. That section provides in part:

> If the House of Representatives passes any proposed law, and the Senate ... fails to pass it ... and if after an interval of three months the House of Representatives ... again passes the proposed law ... and the Senate ... fails to pass it ... the Governor-General may dissolve the Senate and the House of Representatives simultaneously.

The words of this section are wide enough to cover refusal by the Senate to pass appropriation bills and, what is more, history discloses that this is the very situation with which the section was intended primarily to deal.[2] Indeed, Mr. (later Sir) Edmund Barton, the leader of the Federal Convention of 1897-98, went so far as to express the view that a deadlock provision was necessary to deal only with that situation. He said:[3]

> "Deadlock" is not a term which is strictly applicable to any case except that in which the constitutional machine is prevented from properly working. I am in very grave doubt whether the term can be strictly applied to any case except the stoppage of legislative machinery arising out of a conflict upon the finances of the country. A stoppage which arises on any matter of ordinary legislation, because the two Houses cannot come to an agreement at first, is not a thing which is properly designated by the term "deadlock" — because the working of the Constitution goes on — the constitutional machinery proceeds notwithstanding a disagreement. It is only when the fuel of the machine of government is withheld that the machine of government comes to a stop, and that fuel is money.

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[2] See Richardson, Federal Deadlocks: Origin and Operation of Section 57 (1962), 1 Tasmanian U. L. Rev. 706, at pp. 712-713.

[3] Quoted in Odgers, Australian Senate Practice (4th ed., 1972), p. 23.

That the scope of section 57 is wider than that which Barton thought necessary is clear,[4] but the fact remains that the prime function of the section was intended to be to deal with the situation Barton described.

In order for the Governor-General to have been able to invoke section 57 in respect of the two appropriation bills which the Senate had refused to pass on October 16th, 1975, those bills would have to have been refused passage by the Senate on a second occasion, having been re-passed by the House of Representatives in January, 1976. However, as mentioned above, the Governor-General did not allow this sequence of events to occur in respect of the bills.

In dismissing Mr. Whitlam preparatory to dissolving both houses simultaneously on November 11th, 1975, the Governor-General issued a public statement which said in part:[5]

> Section 57 of the Constitution provides a means, perhaps the usual means, of resolving a disagreement between the Houses with respect to a proposed law. But the machinery which it provides necessarily entails a considerable time lag which is quite inappropriate to a speedy resolution of the fundamental problems posed by the refusal of Supply. Its presence in the Constitution does not cut down the reserve powers of the Governor-General.

It is worth pausing at this point to note that the second sentence of this passage, while undoubtedly true, is just as undoubtedly irrelevant as a justification for the Governor-General's action. The reason why the machinery which section 57 provides is "quite inappropriate to a speedy resolution" of a Supply deadlock is that the framers of the constitution did not intend such a deadlock to be speedily resolved, at least not by the Governor-General's forcing an election. They intended that the Senate should be obliged to starve the government of funds for a substantial period of time if it wanted to force an election. The length of this period, three months, would of itself be enough to resolve most Supply deadlocks speedily once begun, because the Senate would quickly have brought home to it the consequences throughout the country of its action and would not be prepared to continue it for the required period of time. The Governor-General's words stand section 57 on its head, implying that its machinery was primarily intended to deal with non-money deadlocks, while in fact the contrary is true.

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[4] *Op. cit.*, footnote 2, *ibid.* See also *Cormack* v. *Cope* (1974), 48 Aust. L.J. Rep. 319 (H.C.); *Victoria* v. *Commonwealth* (1975), 7 Aust. L. Rep. 1 (H.C.); *Western Australia* v. *Commonwealth* (1975), 7 Aust. L. Rep. 159 (H.C.).

[5] Quoted in (1975), 49 Aust. L.J. 645, at p. 648.

But the crux of the matter lies in the Governor-General's assertion that section 57 does not provide the only means of dealing with a deadlock between the houses, that its existence "does not cut down the reserve powers of the Governor-General".

If no other attribute of this assertion, then at least its novelty can be immediately gauged by referring to the report of the Joint Parliamentary Committee on Constitutional Review which in the late 1950's considered, among other matters, section 57. One of its criticisms of that section so far as it concerned money bills related to what it described as the section's "leisurely processes"[6] and it reported that it considered that "the time which has to elapse under the provisions of the present section before a deadlock arises is unduly long in the case of financial measures".[7] It therefore recommended that the three-month period referred to in section 57 be shortened to one month in the case of such bills. Surely, if the prospect of the Governor-General's dissolution of the lower or of both houses as a means of resolving a Supply deadlock in less than the three months referred to in section 57 had occurred to the Committee, the language which it used would have been much different.

Leaving that point aside, however, there are two senses in which the Governor-General's assertion that the existence of section 57 does not cut down his reserve powers could be understood.

The first is that the Governor-General has some prerogative power to dissolve both houses simultaneously quite apart from the statutory power conferred on him to do so by section 57 of the constitution. It is inconceivable, however, that this was the sense in which the Governor-General intended his assertion to be understood. On this point, one need merely quote the leading decision of the House of Lords on the driving out of prerogative powers by the passage of a statutory provision on the same subject matter.[8]

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[6] Report from the Joint Committee on Constitutional Review (1959), para. 181.

[7] *Ibid.*, para. 182.

[8] *A.-G.* v. *De Keyser's Royal Hotel*, [1920] A.C. 508, at pp. 539-540, per Lord Atkinson. See also Goldring, The Royal Prerogative and the Dissolution of the Commonwealth Parliament (1975), 49 Aust. L.J. 521. In *Victoria* v. *Commonwealth*, *supra*, footnote 4, at p. 11, Barwick C.J. said of s. 57 in *obiter*: "Any prerogatives in relation to the dissolution of Parliament which otherwise have been thought to exist would be conditioned and controlled by the express terms of the Constitution." In *Western Australia* v. *Commonwealth*, *supra*, footnote 4 at p. 165, Barwick C.J. said in *obiter* that the power of simultaneous dissolution was "statutory and not prerogative".

> It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do. One cannot in the construction of a statute attribute to the Legislature (in the absence of compelling words) an intention so absurd... after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been.

The other sense in which the Governor-General's assertion can be understood is that when the Senate refuses the government Supply he can, within three months of that refusal, exercise his statutory powers under the constitution either of dissolving the House of Representatives alone[9] or of dissolving both houses simultaneously, relying, if doing the latter, on the existence of at least one bill which has met the time requirements of section 57. Either of these powers can presumably be exercised in order either to attempt to resolve the deadlock over the appropriation bills which themselves do not yet satisfy the time requirements of section 57 or, if those bills have been passed by the upper house after the dismissal of the government because it has refused to advise an election, to seek the electorate's view on which party should now govern the country.

This seems to be the sense in which the Governor-General intended his assertion to be understood, since he did dissolve both houses simultaneously relying formally on the existence of other bills which did satisfy the time requirements of section 57.[10] Yet, when understood in this sense, the Governor-General's assertion is just as false as if it were understood in the first sense.

Its legal error when it relates to a dissolution at a time when a Supply deadlock is still unresolved is exposed by the words of the great former Chief Justice of the High Court of Australia,

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[9] See ss 5 and 28 of the constitution.

[10] See Aust. Gov't Gazette, No. S 229, Nov. 11th, 1975. Twenty-one bills were referred to therein. However, in his public statement of reasons for dismissing Mr. Whitlam, *op. cit.*, footnote 5, at p. 646, made the same day as the dissolution proclamation, the Governor-General stated that he was dissolving both houses simultaneously in order to "permit the people of Australia to decide as soon as possible what should be the outcome of the deadlock which developed over Supply...".

Sir Owen Dixon, when discussing a constitutional power, not to dissolve Parliament, but to make laws. He said:[11]

> It is hardly necessary to say that when you have . . . an express power, subject to a safeguard, restriction or qualification, to legislate on a particular subject or to a particular effect, it is in accordance with the soundest principles of interpretation to treat that as inconsistent with any construction of other powers conferred in the context which would mean that they included the same subject or produced the same effect and so authorized the same kind of legislation but without the safeguard, restriction or qualification.

In the context of the Governor-General's power to force an election, the point is as follows: it would have been illegal for the Governor-General to dissolve both houses because of a deadlock over appropriation bills which had not met the time requirements of section 57 by using a statutory power which was available because of the existence of other bills which had met these time requirements. *A fortiori*, it was illegal for him to dissolve both houses when the Senate had already passed the appropriation bills it had earlier refused to pass, because section 57 can only be used when a deadlock exists and such a deadlock no longer existed in respect of the appropriation bills. The Governor-General's dissolving of both houses on November 11th, 1975, made the Opposition's task of forcing an election through the Senate's blocking of Supply far easier than the constitution requires it to be.

This view of the Governor-General's power under section 57 has received judicial support in the High Court of Australia recently in *Western Australia* v. *Commonwealth*.[12] This case arose after the simultaneous election for both houses in 1974, which, incidentally, was the third time the power of dissolution in section 57 had been used in Australian history, the first having occurred in 1914 and the second in 1951.

Obviously, a simultaneous election for both houses over a legislative deadlock will not necessarily ensure passage of the deadlocked bill or bills, because the former Opposition may obtain control of either or both houses at the election. However, if the houses do remain as before the election, section 57 provides

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[11] *Re Dohnert Muller Schmidt & Co., A.-G. Commonwealth* v. *Schmidt* (1961), 105 Cth. L. Rep. 361, at p. 371. See also Wade, Administrative Law (3rd ed., 1971), pp. 79-80.

[12] *Supra*, footnote 4. The written reasons for judgment in this case were published by the judges on Oct. 17th, 1975, the day after the Senate's first refusal to pass the appropriation bills.

another mechanism whereby the bill or bills may become law, assuming the new Senate again refuses to pass it or them — a joint sitting of both houses acting as a single chamber which can vote on the bill or bills which precipitated the election. The bill or bills are likely to be passed at such a sitting, because the chances are that the government's majority in the lower house will be greater than the Opposition's majority in the upper. This flows from the facts that the constitution requires the Senate to have half as many members as the lower house and that the Senate is elected by the single transferable vote, while the lower house is elected by the alternative vote.[13]

At the joint sitting which followed the 1974 elections, the elections not having changed the political complexion of the houses and the new Senate having taken the same attitude as its predecessor, six bills were passed. In *Western Australia* v. *Commonwealth*, the validity of three of these statutes was challenged on the ground that so much time had elapsed between the Senate's second refusal to pass them and the simultaneous dissolution that they could not themselves have formed the basis of a simultaneous dissolution and therefore were not validly voted on at the joint sitting. This challenge was rejected by the entire court, by Barwick C.J. on the ground that the delay in question was not undue and by the other six judges on the ground that there was no implied temporal limitation on the Governor-General's power to dissolve simultaneously once a deadlock had arisen.

In *obiter*, some of the judges expressly considered whether there was an implied limitation of another sort than temporal on the simultaneous dissolution power in section 57, namely, that any such dissolution must have been intended by the Governor-General to resolve the deadlock over the bill or bills which satisfied the time requirements of section 57. Mason J., with whom McTiernan J. concurred, said:[14]

> ... the power to dissolve can be exercised even in circumstances in which the Government and the House of Representatives lose their enthusiasm for the proposed law and desire a double dissolution for other reasons having no connection with the Senate's rejection of the proposed law.

This dictum apparently supports the Governor-General's action in the situation under discussion, although it can be argued

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[13] Details of these methods of voting can be found in Lakeman, How Democracies Vote: A Study of Electoral Systems (4th ed., 1974).

[14] *Supra*, footnote 4, at p. 203.

that the learned judge was obviously directing his mind only to the situation in which the Governor-General was acting on the advice of a government which had the confidence of the House of Representatives and that he was therefore influenced by the consideration that in that situation it would be impossible as a practical matter to discover any ulterior purpose for which the dissolution could have taken place.

Whether that is so or not, it is submitted that the views expressed by Barwick C.J. and Stephen J. are preferable to those of Mason J., because they are more in accordance with the law in analogous situations and with sound policy. Barwick C.J. said:[15]

> ... proposed laws which twice have not been passed by the Senate ... may not be laid aside against the possibility of a double dissolution founded on some event ... unrelated to the situation in which the ... bill was [*sc.* bills were] twice rejected by the Senate. ...

Stephen J.'s remarks were more elaborate. He said:[16]

> ... dissolution ... must have been preceded by a twice repeated rejection (or its equivalent) by the Senate; this is the condition precedent to the exercise of the power. But the power may also only be exercised in reliance upon the fact of that twice repeated rejection and not in purported reliance upon some quite different event. If it should appear, perhaps from some recital in the dissolution proclamation, that His Excellency has purported to dissolve both chambers for some other reason, not itself involving satisfaction of the necessary condition precedent called for by s. 57, the fact that there did also exist circumstances which would have provided a proper ground for dissolution will not make the dissolution one authorized by s. 57. ... The power ... of dissolution ... is conferred for the purpose of the resolution of a legislative deadlock, the existence of which has been attested by the happening of the events which I have described as the condition precedent. That power may only be employed, like other statutory powers, for the purpose for which it was conferred and where ... it appears that it has been employed for quite other purposes its exercise will be unauthorized by s. 57.

In this passage Stephen J. was unconsciously anticipating the very situation under discussion herein.

The question now remains, "What is the consequence of an illegal dissolution?"

The question is one which the High Court considered in *obiter* in *Victoria* v. *Commonwealth*.[17] In that case the validity

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[15] *Ibid.*, at pp. 167-168.

[16] *Ibid.*, at pp. 199-200.

[17] *Supra*, footnote 4. The written reasons for judgment in this case were published by the judges on Sept. 30th, 1975.

of another of the six statutes passed at the joint sitting which followed the 1974 election was challenged on the ground that it had not satisfied the time requirements of section 57 prior to the simultaneous dissolution of both houses. By a majority, the court upheld the challenge.

Since the dissolution had been based on the existence of six bills believed to have met the time requirements and the challenge had only been mounted in respect of one, the question as to the consequence of there having been no bill in existence which would have justified the Governor-General's simultaneous dissolution of both houses was hypothetical. Nevertheless, the court did consider what the situation would have been in that event.

Gibbs J. took the view, without giving reasons therefor, that if an election took place as a result of an illegal dissolution, it would have to be considered valid, but that if a challenge were mounted before the election the court would grant an injunction restraining it.[18] The other judges, except for Jacobs J., who expressed no view, certainly agreed that a challenge after the election would fail.[19] McTiernan J. would obviously reject a challenge before an election as well, since his decision was based on the non-justiciability of any claim with respect to the Governor-General's dissolution.[20] The dicta of the other judges, Barwick C.J., Stephen and Mason JJ., are ambiguous, but they seem to have rejected, without giving reasons therefor, the possibility of a challenge to a dissolution even prior to the election.[21]

So far as a challenge after the election is concerned, I believe the court's view to be the proper one, not because allowing such a challenge would threaten the validity of any law made by a new Parliament prior to the challenge,[22] but because by not acting

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[18] *Ibid.*, at p. 42.

[19] *Ibid.*, at pp. 12, per Barwick C.J.; 24, per McTiernan J.; 59, per Stephen J.; 63, per Mason J.

[20] *Ibid. Cf.*, Hogg, Judicial Review of Action by the Crown Representative (1969), 43 Aust. L.J. 215.

[21] *Ibid.*

[22] The members of the new Parliament would surely be treated as *de facto* officers and all their legislation held valid accordingly. On the topic of *de facto* officers, see Dixon, *De Facto* Officers (1938), 1 Res Judicatae 285; Pannam, Unconstitutional Statutes and *De Facto* Officers (1966), 2 Fed. L. Rev. 37; Rubinstein, Jurisdiction and Illegality (1965), pp. 205-208. In *Ex rel. McKinlay* (1975), 7 Aust. L. Rep. 593, the High Court treated some "members" of the House of Representatives in former Australian Parliaments as *de facto* legislators. See my discussion of the case in *Ex p. Daniells* and the Operation of Inoperative Laws, to be published in the June, 1976, issue of the Fed. L. Rev.

prior to the date of the election prospective litigants should be deemed to have precluded themselves by their conduct from suing.[23] So far as a challenge before the election is concerned, I believe the view of Gibbs J. to be preferable. However, as no challenge was made to the simultaneous dissolution of November 11th, 1975, prior to the elections on December 13th, 1975, the new Parliament must be considered to be validly constituted and the Governor-General's illegality cured.

L. KATZ*

* * *

CONTRACTS ENTERED INTO BY GOVERNMENT—PUBLIC LAW—AGENCY.—In 1973, Professor de Smith wrote:[1]

> It is thought that the general rules of agency apply in public law, except that an agent (a) cannot bind his principal to do what is *ultra vires* and probably (b) cannot bind his principal by exceeding his own authority if that authority is circumscribed by statute; but the existing case-law on agency in public law is equivocal.

And in 1974, after an exhaustive review of the English and Canadian authorities on agency in public law, Réné Dussault stated:[2]

> ... l'on ne peut conclure que, de façon générale, le mandat apparent est reconnu et qu'un agent sans habilitation initiale peut conclure un contrat valide.

This is now changed by the recent Supreme Court decision in *J. E. Verrault et Fils Ltée* v. *Attorney General for Quebec*[3] which unequivocally declares that the ordinary rules of agency, including the doctrine of ostensible authority, apply to agents of the Crown contracting on its behalf.

The facts of the case were simple. Section 10 of the Quebec Department of Social Welfare Act[4] provided:

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[23] See de Smith, Judicial Review of Administrative Action (3rd ed., 1973), pp. 372-374.

* L Katz, of the Faculty of Law, The University of Sydney, Sydney, N.S.W.

[1] Judicial Review of Administrative Action (3rd ed., 1973), p. 89.

[2] Dussault, Traité de droit administratif canadien et québécois (1974), p. 898.

[3] Reported in English at (1975), 57 D.L.R. (3d) 403; in French at (1975), 5 N.R. 271.

[4] R.S.Q., 1964, c. 212.

> 10. The Lieutenant-Governor in Council may authorize the Minister of Social Welfare, upon such conditions as he determines, to organize schools and other institutions administered by the Department of Social Welfare.
> He may also authorize him to acquire, by agreement or expropriation, lands or immovables necessary for such purposes.

On June 7th, 1960, an order in council was passed, purportedly under this section, authorizing the Minister of Social Welfare to sign an agreement to purchase a certain piece of land "en consideration de la somme nominale de $1.00, et en vue de l'érection d'un foyer pour personnes âgées". The same day, the Deputy Minister of Social Welfare, on behalf of the Minister,[5] entered into an agreement with the appellant for the construction of a home for the aged on the acquired land, payment to be on a "cost plus" basis. Elections were held on June 22nd and, as is known, a new provincial government took office. On August 3rd the appellant was advised to stop all work on the home immediately. On the same day a newspaper published a statement by the new minister declaring that he had given orders to cancel various contracts,[6] including the appellant's, and that public tenders would be called to bid for the work. The appellant was not allowed to continue with the construction, though the Department of Social Welfare did pay him for the work he had done. He brought an action for damages.

At first instance he was awarded $40,000.00 for his loss of profit and $5,000.00 for damages to reputation. On appeal, the Crown contended that there was no order in council authorizing or ratifying the building contract[7] and that it was therefore not binding on the Crown. This contention succeeded. On further appeal, Pigeon J., speaking for a five-man court, held that the contract was valid and binding and restored the award of the Quebec Superior Court, except for the award for damages to reputation.

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[5] As he was authorized to do by s. 8 of the Department of Social Welfare Act, *ibid.*

[6] The French is: "... portant qu'il avait donné ordre de *résilier* divers contrats..."

[7] The argument was that there was no order in council as required by 1958-59, 7-8 Eliz. II, c. 6 (entitled "An Act to facilitate the establishment of homes for the aged") now R.S.Q., 1964, c. 226, s. 12. Pigeon J., *supra*, footnote 3, at p. 406 (D.L.R.), held that this Act was irrelevant in the circumstances. Neither the order in council of June 7th, 1960, nor the contract referred to it. Therefore, the main question before the Supreme Court was whether an order in council was required by general principles of law.

In the Supreme Court, the respondent relied on this statement of the law:[8]

> ... l'agent qui veut contracter pour le compte de l'Administration doit être spécifiquement habilité à le faire: si la loi est la source des pouvoirs de l'Administration, elle en constitue aussi le cadre hors duquel celle-ci ne peut agir. Comme le soulignait le juge Thurlow, de la Cour de l'Echiquier du Canada (*Walsh Advertising Co. Ltd* v. *R.*, [1962] R.C.E. 115, 123-124):
> "It appears to be established as a general proposition that a minister of the Crown has no authority to enter into contracts on behalf of the Crown unless he has been authorized by a statute or by order-in-council so to do."

Pigeon J. rejected this formulation of a general rule and said that he felt that the correct principle was stated in the following passages from Griffith and Street, *Principles of Administrative Law*:[9]

> The United States is not liable on a contract made by its agent unless he has express statutory authority to make it or there is an appropriation adequate to its fulfilment.[10] In England, on the other hand, the ordinary principles of agency apply to public officers. They are not required to have express authority in order to bind their principals, and they are not themselves liable on contracts unless they have contracted personally.
> ... It is usually stated that Crown contracts are invalid if Parliament has not made an express appropriation for the purposes of the contract. This is a misreading of the authorities, as an Australian decision has recognized.[11] It rests chiefly on an *obiter* dictum of one judge in *Churchward* v. *Reg.*[12] which has been considerably modified by several decisions in this century in which Viscount Haldane played a prominent part.[13] It is submitted that the law is as follows: a contract made by an agent acting within the scope of his ostensible authority is a valid contract by the Crown; in the absence of a Parliamentary appropriation either expressly or impliedly referable to the contract, it is unenforceable.

Pigeon J. proceeded:[14]

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[8] Dussault, *op. cit.*, footnote 2, p. 888, cited in translation in (1975), 57 D.L.R. (3d), at p. 407.

[9] He cited from the 3rd ed. (1963), pp. 269-271. The same passage will be found in the 5th ed. (1973), pp. 260-262.

[10] R.S. §3732, June 12th, 1906. See 41 U.S.C. §11.

[11] *New South Wales* v. *Bardolph* (1934), 52 C.L.R. 455.

[12] (1865), 1 Q.B. 173, at p. 209, per Shee J.

[13] *Commercial Cable Co.* v. *Government of Newfoundland*, [1916] 2 A.C. 610; *Mackay* v. *A.-G. for British Columbia*, [1922] 1 A.C. 457; *Auckland Harbour Board* v. *R.*, [1924] A.C. 318; *A.-G.* v. *Great Southern and Western Ry. Co. of Ireland*, [1925] A.C. 754; *Commonwealth of Australia* v. *Kidman*, [1926] A.L.R. 1.

[14] *Supra*, footnote 3, at p. 408 (D.L.R.).

> Her Majesty is clearly a physical person, and I know of no principle on the basis of which the general rules of mandate, including those of apparent mandate, would not be applicable to her.

As regards the *Walsh Advertising* case, the leading authority on which Dussault had relied, he said:[15]

> Turing again to *Walsh Advertising Co. Ltd* v. *The Queen*, it must be noted that the judgment was rendered after the coming into force of the Financial Administration Act, R.S.C., 1952, c. 116. In this kind of code on the subject of Government contracts, restrictive provisions were to be found which had to be applied, without it being really necessary to have resort to general principles.

This distinction of the *Walsh Advertising* case may not be particularly felicitous, as it is hard to see why the relevant section of the Financial Administration Act[16] under which the contract was purportedly made in *Walsh Advertising* was any more "restrictive" than section 10 of the Quebec Department of Social Welfare Act. It is submitted that the *Walsh Advertising* case is an example of the rule, discussed below, that where a statute actually regulates a power to make contracts, the statutory conditions and procedures must be followed. But there can be no doubt that the rule as stated by Thurlow J. was too narrow, though it had all the weight judicial repetition could give. As Pigeon J. observes,[17] in almost all the cases it was an *obiter* observation and not the *ratio*.[18] Furthermore, in view of the large numbers of contracts that governments enter into as a matter of course today, the rule would be undesirable and unworkable

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[15] *Ibid.*, at p. 409.

[16] R.S.C., 1952, c. 116, s. 42; now s. 37 of the Financial Administration Act, R.S.C., 1970, c. F-10, as am. by 1970-71, cc. 42 and 55.

[17] *Supra*, footnote 3, at p. 408 (D.L.R.).

[18] In the leading case of *The Quebec Skating Club* v. *R.* (1893), 3 Ex. C.R. 387, for example, the Minister of the Interior wanted to dispose of certain federal land. However, part of the land was inalienable and in any case, according to the relevant statute, public land had to be offered for sale at public auction. To meet these difficulties it was proposed that an Act of Parliament be procured and an order in council was passed approving a recommendation of the Minister that Parliament should be invited, at its next session, to authorize a free grant to the suppliants of the land in question. They later contended that the order in council was a binding contract. The court held, first, that there was no contract because of lack of intention and uncertainty, and secondly, that in any case the Governor in Council had no authority to enter into such a contract and evade "in that indirect way the settled and well understood rules of law governing the disposition of such lands". See also *R.* v. *McCarthy* (1919), 18 Ex. C.R. 410; *R.* v. *Vancouver Lumber Co.* (1920), 50 D.L.R. 6; *Mackay* v. *A.-G. for British Columbia*, *supra*, footnote 13.

— imposing unreasonable obligations on both the contractor (to determine, before entering into a contract with an agent of the Crown, whether his contracting partner has actual authority under a statute or order in council) and on the government agent (to secure such authority). The rule overlooks the fact that, in English-derived parliamentary systems at least, the Crown does not require statutory authority to make contracts, at least in the ordinary course of administering a recognized part of the government of the State, and that this power devolves on individual ministers in relation to their various spheres of activity.[19] This being so, then, except perhaps in unusual circumstances, a minister[20] does not require special authority to enter into binding contracts. In *Verrault*, Pigeon J. implicitly recognizes the existence of the general Crown power to contract.[21]

If the rule stated in *Walsh Advertising* is thus too narrow, it may well be asked if the rule in *Verrault* is not too wide. That will be for later courts to decide. It is, however, submitted that certain qualifications to the general rule of Crown power to contract and to the doctrine of ostensible authority in public law need to be considered.[22]

(1) The first of these is a necessary corollary to Crown power to contract, in a system which recognizes the legislature as the supreme source of law (subject only, perhaps, to constitutional restraints). It was formulated by Rich J. in the leading Australian case of *New South Wales* v. *Bardolph* in the following terms:[23]

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[19] *New South Wales* v. *Bardolph*, *supra*, footnote 11, at p. 508, per Dixon J. See also at pp. 474, 496, and 502-503. The limitation of "ordinary course of government" is criticized by Enid Campbell (1970), 44 A.L.J. 14 and P.W. Hogg, Liability of the Crown (1971), pp. 120-121. Colin Turpin, Government Contracts (1972), p. 19, states, without citing authority, that "the Crown possesses a general capacity to make contracts which rests on no statutory authority" and that "the existence of this power cannot now be realistically controverted".

[20] Or departmental officials acting as his "alter ego": see *Carltona Ltd* v. *Commissioner of Works*, [1943] 2 All E.R. 560, at p. 563, per Lord Greene M.R.; de Smith, *op. cit.*, footnote 1, pp. 271-272.

[21] *Supra*, footnote 3, at pp. 406-408 (D.L.R.).

[22] I will say nothing of the practical qualification imposed by the second limb of Pigeon J.'s adopted rule, *viz.* the unenforceability of contracts lacking parliamentary appropriation. But see the Financial Administration Act, *supra*, footnote 16, especially s. 33; and Dussault, *op. cit.*, footnote 2, pp. 936-951.

[23] *Supra*, footnote 11, at p. 496; *Commercial Cable Co.* v. *Government of Nefoundland*, *supra*, footnote 13; *Mackay* v. *A.-G. for British Columbia*, *supra*, footnote 13.

> When the administration of particular functions of government is regulated by statute and the regulation expressly or impliedly touches the power of contracting, all statutory conditions must be observed and the power no doubt is no wider than the statute contemplates.

This passage was recently cited with approval by Lord Wilberforce in the Privy Council.[24] It is submitted that it forms the true *ratio* of many of the cases which are said to establish the rule stated in *Walsh Advertising*.[25] If the statutory requirements are mandatory, then a contract made in breach of those requirements will be *ultra vires* and invalid.

Two questions may be asked after *Verrault*.[26] First, can the doctrine of ostensible authority be used to validate such an *ultra vires* contract? This is considered under headings (2) and (3) below. Secondly, is the principle stated by Rich J. compatible at all with dicta in the *Verrault* case?

Pigeon J.'s comments on this point are not entirely clear. He notes that section 10 of the Quebec Department of Social Welfare Act is not "restrictive" in form but permissive ("an enabling statute").[27] He continues:[28]

> It may have restrictive effect only to the extent that, under general principles, a legislative authorization is required. Such is the case for expropriation: the right to expropriate is exceptional, and accordingly exists only by virtue of an express provision.

The maxim *expressio unius est exclusio alterius* is, in his view, inapplicable in these circumstances.[29]

It is hard to see why the principle formulated by Rich J. should be limited to "exceptional" powers. The argument in favour of the principle applies equally to all powers, that is, that it would be idle for legislation to provide that in certain situations and on certain conditions a minister can enter into a contract if a broader general power to enter into the contract continued to exist independently of the statute.[30] Insofar as Pigeon J.'s comments suggest that no restriction *can* flow from permissively

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[24] *Cudgeon Rutlie (No. 2) Pty Ltd* v. *Chalk*, [1975] A.C. 520, at p. 533.

[25] *Supra*, footnote 18.

[26] *Mackay* v. *A.G. for British Columbia*, *supra*, footnote 13; *Cudgeon Rutlie* v. *Chalk*, *supra*, footnote 24.

[27] *Supra*, footnote 3, at p. 406 (D.L.R.). The French is: "une loi d'autorisation".

[28] *Ibid.*

[29] *Ibid.*, at p. 407.

[30] *Walsh Advertising Co. Ltd* v. *R.*, [1962] Ex. C.R. 115, at pp. 124-125.

worded statutes, unless authorization is necessary under the general principles of law, it is submitted that they are incorrect. The analysis must go deeper. In *Verrault*, section 10 said nothing about building contracts. It did provide that: "The Lieutenant-Governor in Council may authorize the Minister of Social Welfare, upon such conditions as he determines, to organize schools and other institutions administered by the Department of Social Welfare." It would be carrying the principle too far to say that this general provision implicitly touched the power of making contracts for the construction of homes for the aged and that therefore an order in council was needed. This would paralyze the Minister. But had the Lieutenant-Governor prescribed certain procedures or conditions pertaining to building contracts (there was no suggestion in *Verrault* that he had), then surely the Minister would have been bound to follow them.[31]

The argument that the maxim *expressio unius est exclusio alterius* is inapplicable is a red herring. The point is not that because Parliament has said that the Governor in Council may authorize a minister to do A, the minister can no longer do B, C, and D. It is rather that where Parliament, directly or by delegation to the Governor in Council, has set out certain procedures with respect to A, the minister's former power to do A must be regarded as having been superseded. What other purpose can be attributed to the words of Parliament?[32]

(2) The second qualification to the general rule of Crown power to contract and to the doctrine of ostensible authority in public law emerges from *The Queen* v. *Woodburn*. Sedgwick J., speaking for the Supreme Court, said:[33]

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[31] Apart from permitting the Lieutenant-Governor in Council to regulate the way the Minister carries out his business, there would seem to be little scope for s. 10. It would be startling if, as a result of the section, it were held that the Minister could not even formulate a general policy with regard to institutions of social welfare without an order in council. Again, however, if the Lieutenant-Governor did set out procedures and conditions pertaining to policy formulation in an order in council, the Minister would presumably have to follow them.

[32] The position is analogous to that regarding prerogative powers. A statute covering the sphere of a prerogative power supersedes it and suspends its operation: *Attorney-General* v. *De Keyser's Royal Hotel*, [1920] A.C. 508. *Cf.* Maitland, Lectures on the Constitutional History of England (1908), p. 420.

[33] (1898), 29 S.C.R. 112, at p. 123; cited by Thurlow J. in *Walsh Advertising* v. *R.*, *supra*, footnote 30, at p. 124. See also *Commercial Cable Co.* v. *Government of Newfoundland*, *supra*, footnote 13, at p. 616, per Lord Haldane.

> It is prefectly clear that a contractor dealing with the Government is chargeable with notice of all statutory limitations placed upon the power of public officers. Where a statute expressly defines the power, it is notice to all the world.

It might be asked whether this rule still holds and whether it is compatible with the principle that the doctrine of ostensible authority applies to the Crown. The question did not arise in *Verrault* and Pigeon J. did not comment on it. But there seems to be no reason why it should not still be good law. The doctrine of ostensible authority[34] requires one to ask two questions. Was there a "holding out" by the principal that his agent was authorized to act on his behalf? If so, can the other contracting party rely on it? The answer given by the law to the second question is that he cannot rely on the "holding out" if the limitation on the agent's power is contained in a statute. Any other rule would make startling circumventions of Parliament's will possible.[35]

(3) This leads on to the third qualification, perhaps the crucial question in this area of law — whether the doctrine of ostensible authority can be used to validate an *ultra vires* contract.[36] Certain dicta of Lord Denning seem to indicate that it can.[37] However, his view was condemned by the House of Lords in *Howell* v. *Falmouth Boat Construction Co. Ltd*[38] and is generally admitted to be too wide.[39] As Lord Greene M.R. said in *Minister of Agriculture and Fisheries* v. *Hulkin*:[40]

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[34] 1 Halsbury's Laws of England (4th ed., 1973), p. 434.

[35] Furthermore, it seems that no representation made solely by the agent as to the extent of his authority can amount to a holding out by the principal: *A.G. for Ceylon* v. *Silva*, [1953] A.C. 461; see also Treitel, [1957] Pub. L. 321, at pp. 335-339. It is not clear whether the doctrine of "usual authority" has any application at all in public law.

[36] In principle one should distinguish between the case where the contract to be validated is *ultra vires* the agent but not *ultra vires* the principal and the case where it is *ultra vires* both. De Smith, in the passage quoted at the beginning of this comment, seems to notice the distinction. In practice, however, the two cases run together since the limit of a minister's authority will often be the limit of the Crown's. The cases do not seem to draw the distinction.

[37] *Robertson* v. *Minister of Pensions*, [1949] 1 K.B. 227, at p. 232; *Falmouth Boat Construction Co.* v. *Howell*, [1950] 2 K.B. 16, at p. 26.

[38] [1951] A.C. 837, at pp. 845, per Lord Simonds, 847, per Lord Normand.

[39] De Smith, *op. cit.*, footnote 1, p. 90; Dussault, *op. cit.*, footnote 2, pp. 895-898; Treitel, *op. cit.*, footnote 35, p. 337; Fazal, [1972] Pub. L. 43.

[40] Unreported; cited in *Minister of Agriculture and Fisheries* v. *Matthews*, [1950] 1 K.B. 149, at p. 154.

> The power given to an authority under a statute is limited to the four corners of the power given. It would entirely destroy the whole doctrine of *ultra vires* if it were possible for the donee of a statutory power to extend his power by creating an estoppel.

This lies most uneasily with the doctrine of ostensible authority, which is based on an idea akin to estoppel,[41] if one takes the doctrine to the length of validating contracts that would otherwise be void for *ultra vires*. One hesitates to say that Pigeon J. meant to go beyond the statement of law in the *Howell* and *Hulkin* cases without discussing or even mentioning them.

In the *Verrault* case itself, the Minister's act was clearly not *ultra vires*, that is, it related to a subject-matter for which he was responsible and, in the absence of statutory regulation, it was within his general contracting power. Will the decision in *Verrault* be invoked in future to bind the Crown to *ultra vires* contracts entered into by its agents? One hopes not. The better course, it is submitted, is to compensate the disappointed contractor who enters into a contract with the Crown that turns out to be *ultra vires* rather than to permit the laws regulating the public administration to be evaded. The general rule is, and should be, that the ambit of a public authority's powers can neither be enlarged nor abridged by its own conduct or the conduct of its agents or servants. Exceptions have been engrafted onto the rule in order to mitigate the hardship that may be suffered by members of the public who have been misled. These exceptions should stop where the doctrine of *ultra vires* begins.

Although the *Verrault* decision is to be welcomed for setting the narrow rule stated in *Walsh Advertising* v. *The Queen* to rest and for establishing the general principle that the ordinary rules of agency apply to the Crown, it is unfortunate that some of the possible limitations on the principle were not discussed. We may now have an unequivocal statement of the law, but we do not have a complete one.

ASHLEY HILLIARD*

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Growing state intervention in the economy makes imperative the clarification of a hitherto inchoate area of law — that of the conclusion of contracts by the Crown. It is of great interest both to the civil servants and to the "other parties" to Crown contracts

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[41] Halsbury, *op. cit.*, footnote 34.

* Ashley Hilliard, B.A. (McGill), B.A. (Oxon.), B.C.L. candidate at Magdalen College, Oxford.

(not to mention students of law) to know when the Crown becomes bound by the word of one of its servants. Until this year, it has been possible only to point to contradictory authorities. Now, with the *Verrault*[1] case behind us, we may be ready for a synthesis.

The most fundamental issue involved is perhaps the key dispute in all of administrative law. Is the government a person like any other, subject to certain special statutes, or is it an *a priori* different and usually privileged entity? In the realm of contract this brings us to an issue on which a major difference exists between English and French law. There is in French law a concept of "contrat administratif", that is, a contract with the administration which is governed by different rules than private contracts. As the late Wolfgang Friedmann put it:[2] "The fundamental characteristics of a contrat administratif is the recognition of certain unilateral powers of control by the administration in the public interest." The same writer said of English law:[3] "... the alternative is between contract according to the common law or no legal tie at all." Since many writers assume that the *contrat administratif* in some form exists in Canada or at least in Quebec,[4] the question is of more than mere academic interest.

The policy issues can also be expressed in very general terms which find an echo in most areas of present-day law. To what extent should the common good prevail over private claims? How far should the public treasury be protected from abuse by unscrupulous private interest and by corrupt or lazy officials?

It is the goal of this comment to analyze the state of the law and to suggest answers in this narrow area of law, the formation of government contracts. While it would be possible to construct very complicated constitutional arguments based on the distinction between the Crown, the government and other public bodies, this tempting diversion will be avoided in the interest of simplicity and the state will be treated, as much as possible, as one entity.

Two clashing currents of jurisprudence have competed in this sphere of law. The first, considered until this year as the

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[1] *J. E. Verrault et Fils Ltée* v. *Attorney General for Quebec* (1975), 57 D.L.R. (3d) 403 (S.C.C.).

[2] Law in Changing Society (1972), p. 400.

[3] *Op. cit., ibid.*, p. 406.

[4] R. Dussault, Traité de droit administratif canadien et québécois (1974), p. 866. But Dussault is well aware that our system differs radically from that of France, pp. 876-877.

dominant one, is admirably stated as the *deuxième règle* in Patrice Garant's analysis of the law:[5]

> Un organe administratif ne peut lier contractuellement l'administration sans être expressément autorisé par la loi, par arrêté en conseil ou par résolution validement adoptée.

This view would deny the possibility of the government becoming bound by estoppel, by a doctrine of ostensible authority or indeed in any way other than by a process sanctioned by a specific law.[6] The logical conclusion of this is that no authority generally exists for any given man to bind the administration, and therefore when such authority is granted to him, it is an exception to the norm and is narrowly construed.

The second view is that the Crown is akin to all other persons and therefore its liability in contract arises under the same conditions. As the Honourable Mr. Justice Pigeon put it recently:[7]

> Her Majesty is clearly a physical person, and I know of no principle on the basis of which the general rules of mandate, including those of apparent mandate, would not be applicable to her.

The first school of thought can boast some notable precedents in its favour. One could argue, for instance that one of the lessons to be drawn from the celebrated but arcane case of *Rederiaktiebolaget Amphitrite* v. *The King*,[8] is that a government is not bound by a "mere expression of intention". However, those wishing so to invoke this case would have to explain the following words:[9]

> No doubt the Government can bind itself through officers by a commercial contract and if it does so it must perform it like anybody else....

A far more powerful authority for the "restrictive" theory of the formation of government contracts can be found in the Privy Council judgment of *A.G. for Ceylon* v. *Silva*.[10] In that case a sale of Crown goods by an unauthorized official was held to be null. Their Lordships included in their opinion the following words:[11]

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[5] Les Contrats des Autorités Publiques (1975), 35 R. du B. 275, at p. 283.

[6] *Op. cit., ibid.*, at pp. 284-285.

[7] *Verrault, supra,* footnote 1, at p. 408.

[8] [1921] 3 K.B. 500.

[9] *Ibid.*, at p. 503.

[10] [1953] A.C. 461.

[11] *Ibid.*, at p. 479.

> It is a simple and clear proposition that a public officer has not by reason of the fact that he is the service of the Crown the right to act for and on behalf of the Crown in all matters which concern the Crown. The right to act for the Crown in any particular matter must be established by reference to statute or otherwise.

The first sentence of this proposition goes without saying. The second is a powerful support for Garant's views. Despite the ambiguity of the expression "or otherwise", the case would be very persuasive if it stood alone.

A seeming confirmation of all this is to be found in the relatively recent decision of the Quebec Court of Appeal in *Simard* v. *Procureur Général*.[12] In the reasons for judgment of Mr. Justice Taschereau we read:[13]

> ... suivant une jurisprudence bien établie un mandat apparent ne pouvait lier le Gouvernement de la Province, puisque comme nous venons de le voir, il faut un texte formel pour engager l'Etat.

Unfortunately, the nature of the "well-established jurisprudence" is not revealed to us. Furthermore, the passage refers to the rest of the judgment which dealt with a particular Quebec statutory requirement for the signing of government contracts and not with the common law. The case is therefore less forceful after reflection than it initially appears. Nevertheless, many deeply learned authors accepted it (and other similar decisions) as conclusive,[14] and until 1975, the "restrictive" theory remained the established dogma.

What counter-arguments could the dissenters present? Obviously, estoppel or "ostensible authority" would be central to their theme because if the government could be bound without a text their case would be largely proved.

First, they could point to the enigmatic passage from the *Amphitrite* case.[15] More significant by far would be a well-known decision rendered by Denning J. (as he then was) in *Robertson* v. *Minister of Pensions*.[16] This was a judgment in which an assurance by the War Office to the plaintiff that he would be awarded a pension, estopped the Crown as represented by the Minister of

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[12] [1970] C.A. 1026.

[13] *Ibid.*, at p. 1029.

[14] *E.g.*, Ouellette et Pépin, Précis de Contentieux Administratif (1974), p. 242; Dussault, *op. cit.*, footnote 4, p. 888.

[15] *Supra*, footnote 8.

[16] [1949] 1 K.B. 227.

Pensions (presumably the proper authority under statute) from later denying it to him. The decision was pithy and blunt:[17]

> The Crown cannot escape by saying that estoppels do not bind the Crown, for that doctrine has long been exploded.

Perhaps the *Robertson* case is weakened a little by the fact that Denning J. had not yet worked out all the details of his doctrine of "promissory estoppel" and even in private law the characterization of *Robertson's* problem as a case of promissory estoppel may have been wrong.[18]

Nevertheless, the basic statement about government undertakings and estoppel stands.

A recent judgment in the same vein was rendered by Noel A.C.J. of the Federal Court in *Transworld Shipping Ltd* v. *The Queen*.[19] Basing himself on old but prestigious Canadian precedent, Noel A.C.J. said:[20]

> ... when, in the ordinary course of business it is the practice of the trade to deal on a verbal basis which makes the strict application of section 15 incompatible with standard practice, then the officers of the Crown should be able to legally bind the Crown if they have followed fundamental procedures.

Advocates of this view could also take some comfort from two tangential issues resolved in their favour. In *Bank of Nova Scotia* v. *R.*, Thorson P.[21] of the Exchequer Court held that the benefit of a Crown contract was assignable like any other. This meant that the Crown could be in debt under a contract to an individual to whom it had not bound itself. Moreover, quasi-contract was recognized with respect to the Crown[22] and it would surely be absurd to allow quasi-contract but insist on strict observance of the formalities for contracts.

Verrault[23] seems to be a final vindication of the view that in the absence of statute the Crown is no more than a normal person

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[17] *Ibid.*, at p. 231.

[18] See, for instance *Combe* v. *Combe*, [1951] 2 K.B. 215, [1951] 1 All E.R. 767; *Tool Metal Manufacturing Co. Ltd* v. *Tungsten Electric Co. Ltd*, [1955] 2 All E.R. 657, [1955] 1 W.L.R. 761.

[19] [1973] F.C. 1274.

[20] *Ibid.*, at p. 1292.

[21] (1961), 27 D.L.R. (2d) 120.

[22] *E.g.*, *Walsh Advertising Co. Ltd* v. *The Queen*, [1962] Ex. C.R. 115; *La Corporation Municipale de Havre St-Pierre* v. *Brochu*, [1973] C.A. 832; *National Dock and Dredging* v. *The King*, [1929] Ex. C.R. 40.

[23] *Supra*, footnote 1.

for contractual purposes. Despite Garant's claims that the decision is heretical[24] and *obiter*,[25] it is difficult to close one's eyes to the scope and to the directness of the judgment. It is perhaps regrettable that among the many authorities distinguished or disapproved by Mr. Justice Pigeon, we cannot find the decision of *Simard* v. *Procureur Général*.[26] We can safely assume, however, that where a Supreme Court judgment conflicts with a more or less contemporary decision of a Court of Appeal, the Supreme Court view prevails

What then did the *Verrault* judgment decide? In the first place it must be made clear that it did *not* purport to say that appropriate legislation could not restrict the manner in which government contracts are concluded. Both the *Verrault* and the *Robertson*[27] cases explicitly recognize that statutes may derogate from the general rule that the Crown is merely another person.[28] In Quebec, the statutory provision which applied to the *Simard*[29] case could have allowed the Court of Appeal to decide in the same way without commenting on the applicability of the doctrine of apparent mandate. But what is made clear is that such statutes are the exception and that they must therefore be relatively strictly interpreted. Anything not mentioned in such a statute is deemed excluded. In the *Verrault* case itself the issue was not the identity of the signatory but the extent of the power to contract. The government argued that the power to contract should be limited to objects actually spelled out in the empowering Act. Therefore, it was argued, power to enter into a contract for the purchase of land did not imply the power to enter into a construction agreement. If the *Silva* view[30] of the law were correct, this would be valid logic. The Supreme Court dismissed that view and, for Canada at least, the debate seems to be terminated.

One cannot, of course, foresee all the myriad situations in which this decision will have practical effects. The extent of the power to contract is an obvious case, since this was the basis of

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[24] Garant, *op. cit.*, footnote 5, at p. 285.

[25] *Ibid.*, at p. 286.

[26] *Supra*, footnote 12.

[27] *Supra*, footnote 16.

[28] The *Transworld* case, *supra*, footnote 19, goes somewhat further with its notion of "standard practice", but surely it, too, does not purport to attack the doctrine of supremacy of Parliament, but only to create another presumption.

[29] *Supra*, footnote 12.

[30] *Supra*, footnote 10.

the decided dispute. Another possibility is the situation in which an official empowered by statute to sign a contract is improperly appointed or lacks the capacity to hold his office. Under *Silva*[31] or *Simard*,[32] a contract signed by him would be null and void. Now it will be considered valid.

The rules in force in Canada following *Verrault*, could perhaps be summarized as follows:

1) As a general rule, the Crown is an ordinary person for contractual purposes;
2) The government may derogate from this rule by legislation but such laws will be treated as exceptions with all the consequences that follow (for instance, reasonably narrow construction);
3) "Ostensible authority", "apparent mandate", estoppel and the rules of quasi-contract apply to the government.

Is the solution reached by the Supreme Court desirable? It is suggested that, given the government's growing role in the economy, it is the only reasonable one.

Most of the government's co-contractants will be far weaker parties than the government and will be more easily ruined or seriously injured by a single contract. The argument that "common interests" are more important than private ones[33] cannot prevail. It may have a certain force in extreme circumstances,[34] but to use it in everyday economic relations would play havoc with our entire notion of civil rights and weaken the honoured doctrine that the state is subject to the law, by making the law a servant of the state.

The state has one fundamental weapon with which it can defend itself — the power to pass statutes which modify the law.[35] It needs no further presumptions and aids from the courts.

In discussing Crown privilege, Lord Hodson spoke of:[36]

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[31] *Ibid.*

[32] *Supra*, footnote 12.

[33] See Dussault, *op. cit.*, footnote 4, p. 878, where this argument is elaborated.

[34] *E.g.* war; see *Amphitrite, supra*, footnote 8, for such a situation.

[35] The judgment of Thorson P. in *Bank of Nova Scotia* v. *The Queen, supra*, footnote 21, shows that courts are not unaware of this power.

[36] *Conway* v. *Rimmer*, [1968] A.C. 40, at p. 977. This remark was an approval of a Privy Council ruling in *Robinson* v. *State South of Australia*, [1931] A.C. 704.

> The fact more obvious today than in 1931, that in view of the increasing extension of state activities into the sphere of trading, business and commerce ... his [namely Turner L.J.'s][37] observations stand on record to remind the courts that while they must duly safeguard genuine public interests they must see to it that the scope of the admitted privilege is not, in such litigation extended.

This type of reasoning is both possible and desirable in the sphere of government contracts. It would therefore be unwise and unjust to import a continental notion of *contrat administratif* into our law and to strengthen the government further vis-à-vis its co-contractants. The Supreme Court has, it seems, recognized this and has acted accordingly.

JULIUS H. GREY*

* * *

DOWER—COMPUTATION OF VALUE—USE OF CAMERON'S TABLES —ELECTION UNDER THE DEPENDANTS' RELIEF ACT.—Dower,[1] it is almost universally agreed, is a moribund institution. Properly speaking, it forms part of the law of succession rather than of the law of matrimonial property,[2] since historically it provided the wife with much-needed protection at a time when she could not inherit from her husband by will or on his intestacy. Accordingly, it became unnecessary when the rules of succession were changed to provide for the wife on her husband's death.[3]

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[37] *Wadeer* v. *East India Co.* (1856), 8 De G.M. & G. 182, at p. 189, to the effect that Crown privilege should rarely be sustained in peace-time.

* Julius H. Grey, of the Bar of the Province of Quebec, Montreal.

[1] Whereby a widow is entitled to a life estate in one-third of the freehold estates of inheritance of which her husband was solely seised at any time during the marriage (at common law) or to which he died beneficially entitled (by statute, the first being the English Dower Act, 1833, 3 & 4 Will. 4, c. 105. See for example, s. 3 of The Dower Act, R.S.O., 1970, c. 135).

[2] While it is true that dower does perform some of the functions of the modern homestead legislation — in that it protects the matrimonial home by preventing the husband from disposing of it (except subject to dower) without his wife's consent (see Hogg, Distribution on Intestacy in Ontario (1973), 11 Osgoode Hall L.J. 479, at p. 484) — this apparent protection is often illusory because the husband can easily defeat his wife's right by such devices as the deed to uses.

[3] By giving the wife a share, indeed a substantial share, in her husband's estate should he die intestate (see for example, The Devolution of Estates Act, R.S.O., 1970, c. 129); by admitting the right to leave property to her by will (Statute of Wills, 1540, 32 Hen. 8, c. 1; Tenures Abolition Act, 1660, 12 Car. 2, c. 24); and by giving the wife the right to request further relief if the husband has not made adequate provision for her in his will (see, for example, The Dependants' Relief Act, R.S.O., 1970, c. 126).

Some jurisdictions have recognized this interrelationship and, as part of or along with a general revision of the rules governing the devolution of estates, have abolished dower,[4] without at the same time giving the wife any particular rights in the matrimonial home.[5] In Ontario, however, dower was retained[6] when the succession laws were changed, although the widow is, generally speaking, put on her election between her dower rights and other rights of succession.

And now, in spite of its original role, dower has come to be regarded as part of the matrimonial property régime, as an existing right affording some real protection to the wife. Thus, its abolition, wished for by most, has become intertwined with the thorny question of the reform of family property law: dower cannot be abolished so long as there is no agreement on its

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[4] In England, dower inchoate was abolished in 1833 (Dower Act, 1833, *supra*, footnote 1) and dower consumate in 1925 (Administration of Estates Act, 1925, 15 & 16 Geo. 5, c. 23). In Canada, dower has been abolished in the four western provinces and the Yukon and Northwest Territories (probably because English law was received after dower inchoate had been abolished) as follows: Manitoba, 1885; Alberta, Saskatchewan, Yukon Territory and Northwest Territories, 1887; and British Columbia, 1925. See now The Law of Property Act, R.S.M., 1970, c. L-90, s. 9; The Transfer and Descent of Land Act, R.S.A., 1970, c. 368, s. 4; Land Titles Act, R.S.C., 1970, c. L-4, s. 5; The Devolution of Real Property Act, R.S.S., 1965, c. 125, s. 18; and Administration Act, R.S.B.C., 1960, c. 3, s. 112.

As well, the civil law of Quebec recognized a right of dower having certain similarities with the common law notion. See Castel, The Civil Law System of the Province of Quebec (1962), pp. 128-129. In practice, however, it was virtually obsolete because most couples "contracted out" of it as a matter of course. It was abolished in 1969 as part of a general revision of the matrimonial property régime. See An Act respecting matrimonial régimes, L.Q., 1969, c. 77, s. 88.

[5] Such as that given by the various homestead Acts in the western provinces, all of which were introduced some years after the abolition of dower: in 1915 in Saskatchewan, 1917 in Alberta, 1918 in Manitoba and 1948 in British Columbia. See now The Homestead Act, R.S.S., 1965, c. 118; The Dower Act, R.S.A., 1970, c. 114; The Dower Act, R.S.M., 1970, c. D-100; and Wife's Protection Act, R.S.B.C., 1960, c. 407. The only possible exception to this is in British Columbia, where some additional protection was afforded the wife by legislation introduced in 1867 (hence, before the abolition of dower). This legislation, The Homestead Ordinance, 1867, was enacted principally to protect the homestead from seizure for debts; but it incidentally prevents the husband from dealing with it without the wife's consent and for its devolution to her if he dies intestate. See now, Homestead Act, R.S.B.C., 1960, c. 175. The principal difference between this Act and the legislation cited above is that the wife's rights arise only if the *husband* registers the property under the Act.

[6] The Dower Act, *supra*, footnote 1. Dower also continues to exist

"substitute", be it community of property or co-ownership of the matrimonial home.[7]

In the meantime, dower continues to exist in Ontario with all its anomalies, for there seems little point in amending legislation destined for repeal.

This is why the Ontario Court of Appeal decision in *Re Casselman*[8] is so welcome. It indicates, most of all, a willingness to remove anomalies — in this case, the continued use of Cameron's Tables[9] to calculate the value of dower — by judicial means where possible. As well, the decision helps clarify the question of when a widow has disentitled herself to dower by virtue of an application under The Dependants' Relief Act.[10]

Mr. and Mrs. Casselman were married in January, 1971, and separated shortly thereafter. Mr. Casselman died in May, 1973, leaving a will in which he made no provision for his wife because, as he alleged, she had "deserted me during our honeymoon". Mrs. Casselman then brought an application under The Dependants' Relief Act, in August of the same year. Although her application was adjourned, the judge made an interim order

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in the Maritimes, where it is regulated by the following statutes: Dower Act, R.S.N.B., 1973, c. D-13; Dower Act, R.S.N.S., 1967, c.79; Dower Procedure Act, R.S.N.S., 1967, c. 80; and The Dower Act, R.S.P.E.I., 1974, c. D-17. In Newfoundland, where the governing statute is presumably the English Dower Act, 1833, *supra*, footnote 1, only dower consumate continues.

[7] See, *e.g.*, the Ont. Law Reform Commission Report on Family Law, Part IV: Family Property Law (1974), where the abolition of dower is treated at a "consequential" or "necessary" change following the adoption of the major reforms. At p. 183, it is stated: "The proposals made in ... this report will prevent disposition or encumbrance of the matrimonial home by one spouse without the consent of the other spouse; they will give both spouses a proprietary interest in the home. In the light of these developments in the law, both dower and curtesy will become superfluous. The Commission therefore recommends that the legislation creating the new matrimonial home law should specify that the doctrines of dower and curtesy are abolished."

[8] (1974), 6 O.R. (2d) 742, 54 D.L.R. (3d) 37 (C.A.), per Schroeder, Brocke and Arnup, JJ.A.

[9] These Tables appear as appendices to his Treatise on the Law of Dower, and contain a number of tables setting out life expectancies and the present and future values of dower. The Treatise was published in 1882, but counsel for Mrs. Casselman had submitted that the Tables themselves were actually based on much earlier tables, one of which came into existence at some time prior to 1813.

[10] *Supra*, footnote 3.

in her favour of an immediate payment of $7,500.00 with subsequent monthly payments of $1,500.00. The executors appealed this order and, at the time of the dower application, no money had been paid out of the estate pursuant to it.[11]

The question of dower arose upon the application by the executors for permission under section 10 of The Devolution of Estates Act[12] to sell certain property free of dower. The property in question was a business premise valued at $250,000.00. Mrs. Casselman agreed with the wisdom of the sale and the amount of the sale price; she argued, however, that she was entitled to payment in lieu of dower, to be calculated according to modern actuarial principles. The executors, on the other hand, submitted that her application under The Dependants' Relief Act, previously mentioned, had disentitled her to dower or, alternatively, that if she were entitled to dower, the amount should be computed on the basis of Cameron's Tables.

The trial judge, Moorhouse J, directed that the property be sold without any allowance to the widow in respect of her dower because, in his view, she had disentitled herself by electing to proceed under The Dependants' Relief Act.[13] Therefore, he was not required to decide the "interesting question" of the method of computation of dower, although he did say: "I have grave doubt that I should here and now on the evidence before me, though it is not entirely disputed, say they [Cameron's Tables] are obsolete. It may well be a matter for legislation."[14]

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[11] The executors also applied to the Assistant Registrar for a certificate that execution of this interim order be stayed pending the hearing of the appeal. The Assistant Registrar issued his certificate accordingly, but this was set aside by the Divisional Court. *Re Casselman (No. 2)* (1974), 6 O.R. (2d) 750.

Other litigation between the parties involved an action by the wife shortly after their separation for alimony. In February, 1973, she was awarded $2,000.00 per month. Mr. Casselman appealed but died before the appeal was heard. It was dismissed in February, 1974. See *Casselman* v. *Posluns et al.* (1974), 3 O.R. (2d) 132, 44 D.L.R. (3d) 652; the executors' appeal to the Supreme Court of Canada was still pending at the date of the hearing of the dower application.

[12] *Supra*, footnote 3. This section permits the personal representative to make a summary application to a judge if he wishes to sell property free of dower. Where such a conveyance is ordered, the judge may direct that the wife be given some payment in lieu of dower, such as a lump sum payment or an annual sum.

[13] (1974), 4 O.R. (2d) 166, 17 R.F.L. 233, 47 D.L.R. (3d) 354, at p. 358.

[14] *Ibid.*, at p. 357 (D.L.R.).

The Court of Appeal reversed Mr. Justice Moorhouse and, after a review of the authorities,[15] held that a mere application under The Dependants' Relief Act does not constitute an election to seek relief under that Act and to give up dower rights. There is no inconsistency between the two rights "so long as the Judge who hears the application under The Dependants' Relief Act takes into account the existence and value of dower".[16] And since Mrs. Casselman's application had not yet been heard, she could not be said to have elected to give up her dower rights, notwithstanding the interim order.

Of greater interest is the Court of Appeal's decision as to how the amount of dower should be calculated. The court accepted the submission that Cameron's Tables "are completely out of date and should not be used in 1974".[17]

> We think we are entitled to take judicial notice of the obvious fact that the life expectancy of a female in Ontario is substantially greater in 1973 than it was in 1867 or 1882, let alone 1813. Similarly, while we do not take judicial notice of the precise current interest rate, we are entitled to take judicial notice of the obvious fact that interest rates have increased very sharply, particularly in the last year or two, and further, that interest rates which were current in the 1950s no longer have any reality in the 1970s.[18]

The court relied instead upon modern evidence, in the form of an affidavit from a highly qualified actuary, as to life expectancies and current interest rates. The affidavit gave sample calculations using the 1965-67 Canadian Life Tables (Statistics Canada) and rates of interest varying from six to ten percent.[19] The court selected ten percent as the appropriate rate of interest and awarded Mrs. Casselman $80,650.00 as representing the present

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[15] *Re Neiman et al. and Borovoy*, [1954] O.W.N. 527, [1954] 2 D.L.R. 732 (C.A.); *Re Greisman*, [1954] O.W.N. 793, [1955] 1 D.L.R. 741 (Surr. Ct). These cases, together with *Re Casselman*, were recently discussed in *Re Lynch* (1975), 56 D.L.R. (3d) 510 (N.S.S.C.-App. Div.).

[16] *Supra*, footnote 8, at p. 41 (D.L.R.).

[17] *Ibid.*, at p. 42.

[18] *Ibid.*

[19] As dower is a *life interest* in one-third of her husband's real estate, in calculating its value one considers both her life expectancy and the amount of income that can reasonably be expected to be generated throughout her life. In other words, the higher the annual income, the greater the present value of dower.

This affidavit seems to be an up-to-date version of Cameron's Table G "Showing the value of a Widow's Dower in the Income of $100, at every age, calculating the interest at 5 and at 6 per cent, according to Dr. Wigglesworth's Table of Mortality".

value of her dower — some $30,000.00 more than she would have been entitled to under Cameron's Tables.[20]

The major problem facing the court was that the use of Cameron's Tables had been specifically approved by the Court of Appeal in *Re Smith*,[21] which had been cited as recently as 1971 in *The Queen* v. *Sonnenberg*[22] as authority for the proposition that "those tables are still usable in Ontario for calculating dower values".[23] However, the court distinguished these two cases by emphasizing that in each, the judge had decided to apply Cameron's Tables because no alternative method of calculation had been presented. In *Re Smith*, it had been suggested in argument that the Ontario Succession Duty Department tables should have been used instead; but this had been rejected by the trial judge on the ground that those tables had been devised for a totally different purpose.[24] And in the *Sonnenberg* case, the use of Cameron's Tables was not questioned by counsel.[25] In *Re Casselman*, however, an alternative method had been led in evidence, which the court felt free to accept.

Two specific points of practice thus emerge from *Re Casselman*. Firstly, claims to dower are still possible notwithstanding a prior application for relief under The Dependants' Relief Act. Secondly, dower can be calculated according to modern actuarial methods *provided that* the court is supplied with evidence as to these methods; but in the absence of such evidence, it appears the court will still have resort to Cameron's Tables.

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[20] Under Table G, Mrs. Casselman, who was 52 years old at the time of her husband's death, would have been entitled to $46,450.00 (calculated at five percent) or $50,875.00 (at six percent).

[21] [1952] O.R. 135, [1952] 2 D.L.R. 104 (C.A.).

[22] [1971] F.C. 95, 2 L.C.R. 298 (Trial Div.).

[23] *Ibid.*, at p. 99 (F.C.). As might be expected, Cameron's Tables were used without question in earlier cases, when there was less divergence between their calculations and reality. See *Re Pettit* (1902), 4 O.L.R. 506 (using Schribner's Tables, one of the sources of Cameron's Tables); *Re Lesperance*, 61 O.L.R. 94, [1927] 4 D.L.R. 391; *Re Robinson*, [1938] O.W.N. 361. Unfortunately, insufficient information is given to determine the basis for the calculation of dower in the more recent cases of *Re Davis*, [1954] O.W.N. 187 and *Re Taylor and Taylor*, [1971] 1 O.R. 715.

Of special interest is the Prince Edward Island case of *Re McWilliams* (1963), 49 M.P.R. 47, at p. 48, where, without discussion, the wife's life expectancy was determined according to "the latest available official tables".

[24] *Supra*, footnote 21, at p. 109 (D.L.R.).

[25] *Supra*, footnote 22, at p. 99 (F.C.).

The case is noteworthy also on more general grounds. It shows that, with some imagination, the courts can indulge in law reform. In *Re Casselman*, the Court of Appeal managed by its own devices to bring one aspect of the law of dower into the twentieth century.

JANE MATTHEWS GLENN*

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DISCOVERY—PRODUCTION OF DOCUMENTS—CLAIM OF PRIVILEGE TO PREVENT DISCLOSURE.—One of the most troublesome questions relating to the permissible limits of discovery is the extent to which a party may obtain production of documents developed in the course of his opponent's preparation of the case. The issue has been sharpened in the context of attempts by one party to examine prior to trial the statement that he had earlier given to the other party or his agent when the latter was investigating the incident in question. The point has occupied the attention of Canadian courts over the past few years,[1] the most recent contribution to the jurisprudence being the decision of the Alberta Supreme Court, Appellate Division, in *Strass* v. *Goldsack, Dux and Gosset and Canadian Indemnity Company (Third Party)*.[2] The plaintiff in that action sued for damages for personal injuries incurred when the automobile in which she was a passenger was involved in an accident with another vehicle. The defendants were the owners and drivers of both automobiles. The insurer of two of the defendants was added as a third party pursuant to the Alberta Insurance Act,[3] thereby permitting it to defend against the plaintiff's claim without admitting liability on the policy to its insured. Upon completion of the pleadings, a notice to produce documents was served on the defendants and the insurance company. The latter refused to produce a statement made by the plaintiff herself on the ground that there existed a privilege in respect of it. The insurer had engaged an adjuster to

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* Jane Matthews Glenn, of the Faculty of Law, McGill University, Montreal.

[1] *Flack* v. *Pacific Press Ltd* (1970), 74 W.W.R. 275, 14 D.L.R. (3d) 334 (B.C.C.A.); *Wasilkowsky* v. *Borysowich*, [1972] 2 O.R. 621 (H.C.J.), aff'd without written reasons, June 22nd, 1972 (C.A.); *Bourbonnie* v. *Union Insurance Society of Canton Ltd* (1959), 19 D.L.R. (2d) 445 (Alta S.C., App. Div.); also see *Britten* v. *F. H. Pilcher & Sons*, [1969] 1 All E.R. 491 (Q.B.D.).

[2] [1975] 6 W.W.R. 155, (1976), 58 D.L.R. (3d) 397.

[3] R.S.A., 1970, c. 187, s. 306(14).

investigate the accident, in the course of which, he obtained a written statement from the plaintiff as to the circumstances of the accident.

It was common ground that the statement was taken by the adjuster in anticipation of possible litigation arising out of the automobile collision and for the use and advice of solicitors. The sole question for decision by the court was whether any privilege prevented the plaintiff from securing production of the statement. In a four-to-one decision, the court held that a statement given by one party to his adversary was not protected by any privilege. The result is not surprising as it is in accord with recent decisions in British Columbia[4] and Ontario.[5] What makes the case interesting is the unique reasoning which led the court to its conclusion. The court failed to honour the clearly defined border separating a party's right to discovery and production, from the countervailing claim of privilege by his opponent. In keeping with the modern general trend to broaden the scope of discovery and production of documents,[6] this court ran roughshod over some of the well-established principles of legal professional privilege.

The solicitor-client privilege is the oldest of the privileges for confidential communications, dating back to the sixteenth century.[7] Originally rooted in the tenet that the integrity and honour of the solicitor should not be tarnished by forcing disclosure of professional communications made to him, the rationale gave way to the view that the privilege was necessary, not for the preservation of the solicitor's reputation, but for the protection of the client.[8] It was based on the assumption that full, frank and candid disclosure by the client to his solicitor was necessary for effectual legal assistance which could be guaranteed only if the client's confidences were protected from disclosure.[9] As the rule of privilege developed, however, the breadth of protection

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[4] *Flack* v. *Pacific Press Ltd*, *supra*, footnote 1.

[5] *Wasilkowsky* v. *Borysowich*, *supra*, footnote 1.

[6] *Perini Ltd* v. *Parking Authority of Toronto* (1975), 6 O.R. (2d) 363, 52 D.L.R. (3d) 683 (C.A.); *Duncan* v. *Royal Bank of Canada*, [1971] 3 W.W.R. 311, 19 D.L.R. (3d) 334, at p. 338 (B.C.S.C.); *Rubinoff* v. *Newton*, [1967] 1 O.R. 402 (H.C.J.); *Turta* v. *C.P.R. et al.* (1951), 2 W.W.R. (N.S.) 628, at p. 631 (Alta S.C.).

[7] Wigmore, on Evidence, Vol. VIII (McNaughton Rev., 1961), §2290.

[8] *Ibid.*, McCormick on Evidence (1972), p. 175.

[9] See the cases collected in Sopinka and Lederman, The Law of Evidence in Civil Cases (1974), p. 158.

took on different dimensions. It expanded beyond just communications passing between the client and solicitor and their respective agents, to encompass communications between the client or his solicitor and third parties if made for the solicitor's information for the purpose of pending or contemplated litigation.[10] Although this extension was spawned out of the traditional solicitor-client privilege, the policy justification for it differed markedly from its progenitor. It had nothing to do with clients' freedom to consult privately and openly with their solicitors; rather, it was founded upon our adversary system of litigation by which counsel control fact-presentation before the court and decide for themselves which evidence and by what manner of proof they will adduce facts to establish their claim or defence, without any obligation to make prior disclosure of the material acquired in preparation of the case.[11] Accordingly, it is somewhat of a misnomer to characterize this aspect of privilege under the rubric, "solicitor-client privilege", which has peculiar reference to the professional relationship between the two individuals.

Although long steeped in Anglo-Canadian jurisprudence, it was only in 1947, in the case of *Hickman* v. *Taylor*,[12] that the Americans firmly developed something comparable to this second branch of the legal professional privilege, (hereinafter, for convenience, referred to as the "anticipation-of-litigation" privilege) which they termed the "work-product" doctrine. Murphy J. explained its basis in the following oft-quoted passage:[13]

> In performing his various duties, ... it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.... This

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[10] *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644, at pp. 649-650; *Southwark & Vauxhall Water Co.* v. *Quick* (1878), 3 Q.B. 315, at pp. 321-323; *Re Strachan*, [1895] 1 Ch. 439, at pp. 444-445; *Wheeler* v. *Le Marchant et al.* (1881), 17 Ch. D. 675, at p. 682; *Susan Hosiery Ltd* v. *M.N.R.*, [1969] 2 Ex. C.R. 27, at pp. 31, 33-34; *Flack* v. *Pacific Press Ltd. supra*, footnote 1, at p. 336; Cross on Evidence (4th ed., 1974), p. 249.

[11] Cross, *op. cit.*, *ibid.*, p. 253.

[12] (1974), 67 S.Ct. 385, 329 U.S. 495.

[13] *Ibid.*, at pp. 510-511 (U.S.). Some judges have imported the "work-product" rule into the Canadian context although the "anticipation-of-litigation" privilege is sufficiently broad to envelop all the material protected by the *Hickman* doctrine: See *Re Evans and Banffshire Apartments Ltd* (1968), 70 D.L.R. (2d) 226, at p. 228 (B.C.S.C.).

> work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways — aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer". Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

It must be recognized that the protection given by the United States federal courts to a lawyer's work product arose in the context of the procedural principles of discovery and did not fall under the umbrella of the traditional attorney-client privilege.[14] The Supreme Court of the United States in *Hickman* v. *Taylor*, while acknowledging that information obtained by an attorney in preparation of his case was outside the limited scope of the American attorney-client privilege, held that such information may nevertheless have a qualified immunity from discovery under this newly articulated doctrine. The protection was qualified in that such material would be discoverable only upon a substantial showing of a necessity or justification.[15]

The strictures of the adversary system have been considerably loosened by the modern practice of discovery and production. There has been an increasing tendency to allow for greater disclosure at the discovery stage so as to lessen the degree of surprise at trial and to bring to light all facts to be considered in a decision of a case upon the merits.[16]

It is in this context that *Strass* v. *Goldsack et al.* should be considered, for the conflicting policies behind discovery and priv-

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[14] "... the protective cloak of [attorney-client privilege] does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories." Per Murphy J. in *Hickman* v. *Taylor*, *ibid.*, at p. 508 (U.S.).

[15] *Ibid.*, at pp. 509-510. Now see R.26(b)(3) of the Federal Rules of Civil Procedure, as set out in (1970), 48 F.R.D. 457.

[16] For example, see *Ohl et al.* v. *Cannito*, [1972] 2 O.R. 763 (H.C.J.) and *Spatafora* v. *Wiebe*, [1973] 1 O.R. 93 (H.C.J.) in which it was held that a defendant in a personal injury case must disclose observations made of the injured plaintiff.

ilege collided in that case without successful resolution by the court.

Three sets of concurring reasons favouring disclosure of the party's statement were delivered. Clement J.A. pointed to the expansive provisions of the Alberta Rules of Practice relating to discovery and production of documents. They, of course, promote the general interest in the administration of justice giving a litigant access to all relevant and material facts thereby ensuring that parties have an opportunity to put before the court everything which will assist it in resolving the dispute. The only impediment at the discovery stage to full disclosure is the claim of privilege of which both Clement and Moir JJ.A. took a restrictive view. Clement J.A. acknowledged that direct communications between a client and his solicitor, as well as documents created by the solicitor himself in the course of his professional duties to his client, are privileged and need not be revealed. That is where he would end the shield. Because a statement taken from the opposite party falls outside the ambit of privilege as defined by Clement J.A., then *prima facie*, no privilege attaches to it. In his rush, however, to limit the obstacles in the way of a party seeking production, he completely ignored the well-entrenched "anticipation-of-litigation" privilege. Instead, without explanation, he relegated it to the ash can, saying that privilege for any other type of communication, including documents gathered by or for a solicitor from other sources, will be recognized only if they now satisfy the conditions for the establishment of a privilege as laid down by Wigmore as follows:[17]

1) The communications must originate in a *confidence* that they will not be disclosed.
2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Because the claim of privilege did not satisfy any of these conditions, he ordered production. Looking ahead, he added:[18] "Former decisions on privileged documents must now derive their authority or guidance from their apparent conformity to the conditions, and on this view many must be passed over."

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[17] Wigmore, *op. cit.*, footnote 7, §2285.

[18] *Supra*, footnote 2, at p. 160.

D. C. McDonald J. (*ad hoc*) in his thorough and carefully developed reasons, expanded upon this new test under which communications are henceforth to be examined whenever a claim of privilege is raised. Sanction for the use of Wigmore's four criteria in Canada, he said, was given by the Supreme Court of Canada in *Slavutych* v. *Baker*,[19] although conceding that Spence J. who delivered the judgment in that case, dealt with a claim of privilege over a communication entirely different from the kind of statement confronting him. He inferred that because Spence J., in *obiter* dicta, considered the communication in question in *Slavutych* v. *Baker* in light of the Wigmore test, therefore in the future, "in deciding whether or not a privilege attaches to a particular communication or class of communication Canadian courts not only may but ought to consider whether Wigmore's four conditions are satisfied".[20]

Issue may be taken with this conclusion. To begin with, the Supreme Court of Canada did not expressly sanction the use of Wigmore's criteria in determining in *all* cases whether or not a claim of privilege over a communication will succeed. The circumstances were so different that a transposition of the principles from that case to the *Strass* situation is misleading.

Slavutych dealt with the situation where B who has received a communication in confidence from A attempts to use the confidential information in proceedings against A. The case centred around a tenure form sheet which Slavutych, an Associate Professor at the University of Alberta had filled out. He had been requested to give his opinion of another professor who was being considered for tenure. An arbitration board then used the information which Slavutych submitted as the basis for his own dismissal, holding that he was guilty of a serious misdemeanour in using intemperate language against a fellow faculty member. Slavutych appealed on the ground that the tenure form sheet was to have been kept strictly confidential and was to have been destroyed after the Tenure Committee had met. The Supreme Court of Canada concluded that the tenure form sheet was inadmissible in evidence and accordingly quashed the ruling of the Arbitration Board. The court, however, spoke of the confidential privilege as existing apart from the law of evidence. Spence J.

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[19] [1975] 4 W.W.R. 620, 55 D.L.R. (3d) 224. Clement J.A. was of the same view. *Supra*, footnote 2, at p. 159 (W.W.R.).

[20] *Supra*, footnote 2, at pp. 166-167 (W.W.R.), 422 (D.L.R.).

paid lip service to Wigmore's four criteria but did not need to apply them to the case before him. He said:[21]

> ... [C]onsidering the matter only an evidentiary one and under the doctrine of privilege as so ably considered in Wigmore the confidential document should be ruled inadmissible, ... I am, however, of the opinion that this is not to be considered as a matter of the application of the doctrine of privilege in the light of evidence.

What Spence J. was alluding to was that the statements made in confidence by Slavutych were inadmissible not because of any evidentiary principle of privilege[22] but because of the equitable doctrine which may be invoked to prevent a breach of confidence by prohibiting the revelation of a confidential statement by one of the parties to the communication[23] or someone who has obtained a copy of it,[24] to the detriment of the party who initially made the statement. Injunctive relief may be obtained by a party to restrain another from using against him in a proceeding a confidential communication that he had made, or, to prevent its general publication.[25] The basis for this equitable principle relates

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[21] *Supra*, footnote 19, at pp. 626-627 (W.W.R.), 229 (D.L.R.).

[22] In fact, the House of Lords has refused to recognize confidentiality alone as comprising a separate head of evidentiary privilege: See *Alfred Crompton Amusement Machines Ltd* v. *Commissioners of Customs and Excise (No. 2)*, [1973] 3 W.L.R. 268, at p. 285, [1973] 2 All E.R. 1169, at p. 1184 (H.L.); *Norwich Pharmacal* v. *Commissioners of Customs and Excise*, [1973] 3 W.L.R. 164, at p. 190, [1973] 2 All E.R. 943, at p. 969 (H.L.); *Rogers* v. *Secretary of State for Home Department*, [1972] 3 W.L.R. 279, [1972] 2 All E.R. 1057, at pp. 1067, 1070 (H.L.); Cross, *op. cit.*, footnote 10, p. 249. Also see *Central Canada Potash Co. Ltd et al.* v. *Attorney General for Saskatchewan et al.* (1975), 57 D.L.R. (3d) 7, at pp. 39-40 (Sask. Q.B.).

[23] *Terrapin Ltd* v. *Builders' Supply Co. (Hayes) Ltd et al.*, [1960] R.P.C. 128 (C.A.).

[24] *Lord Ashburton* v. *Pape*, [1913] 2 Ch. 469. An anomaly in the law allows a party under this principle to enjoin someone into whose hands the communication has fallen from using it; yet if he delays until trial to object to the admissibility of this improperly obtained evidence, the courts will receive it: See Sopinka and Lederman, *op. cit.*, footnote 9, pp. 338-341; C. Tapper, Privilege and Confidence (1972), 35 Mod. L. Rev. 83.

[25] *Argyll* v. *Argyll*, [1965] 1 All E.R. 611 (Ch. D.); *Prince Albert* v. *Strange* (1849), 1 Mac. & G. 25; *Distillers Company Ltd* v. *Times Newspapers Ltd*, [1975] 1 All E.R. 41. (Q.B.D.); *Attorney General* v. *Jonathan Cape Ltd et al.*, [1975] 3 All E.R. 484, at pp. 494-495 (Q.B.D.). If, however, the disclosure relates to a matter of public concern or to crime, fraud and misdeeds, then the courts might, in the public interest, refuse to prohibit publication: *Initial Services Ltd* v. *Putterill*, [1967] 3 All E.R. 145, at p. 148 (C.A.); *Hubbard et al.* v. *Vosper et al.*, [1972] 1 All E.R. 1023 (C.A.); *Fraser* v. *Evans*, [1969] 1 All E.R. 8 (C.A.).

to the general duty to act in good faith.[26] As Lord Denning said in *Seager* v. *Copydex*,[27] this jurisdiction "does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent".[28] In addition to the general remedy of injunction, where the very parties to the proceeding have agreed in advance that communications or documents exchanged between them would be treated confidentially and not used for any other purpose, the court will rule against any attempt by one party to introduce such evidence against the party who made the communication in reliance upon the confidence.[29] That is what the Supreme Court of Canada did in *Slavutych* v. *Baker*.

Spence J. however, went further and said that if it had been necessary, Wigmore's prerequisites could have been successfully invoked so as to extend the cloak of evidentiary privilege over communications taking place within the private confines of the professor-tenure committee relationship. But, it is suggested that this observation by Spence J. has no relevance to the circumstances in the *Strass* case. It is true that the Supreme Court of Canada has, by this *obiter* dictum, implied that an evidentiary privilege may now cover communications within confidential relationships, other than that of solicitor-client which hitherto at common law, has been the only professional relationship protected from enforced disclosure.[30] Such claims to privilege will now be analyzed under the microscope of Wigmore's conditions and accordingly there may be a myriad of other relationships to

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[26] *Fraser* v. *Evans, supra,* footnote 25, at p. 11. There has been considerable conceptual uncertainty as to the basis on which this jurisdiction is exercised. In addition to good faith, the courts have, at different times, invoked principles of property, contract, bailment, trust, fiduciary relationship, and unjust enrichment as justification for the relief: See The English Law Commission, Working Paper No. 58, Breach of Confidence (London, 1974), pp. 10-11; G. Jones, Restitution of Benefits Obtained in Breach of Another's Confidence (1970), 86 L.Q. Rev. 463.

[27] [1967] 1 W.L.R. 923.

[28] *Ibid.*, at p. 931.

[29] *Terrapin Ltd* v. *Builders Supply Co. (Hayes) Ltd et al., supra,* footnote 23; *Bell* v. *University of Auckland,* [1969] N.Z.L.R. 1029.

[30] *Wheeler* v. *Le Marchant et al., supra,* footnote 10, at pp. 681-682.

which the courts may now accord privilege.[31] That is to be welcomed if one believes that privilege should not be the private preserve of the lawyer-client relationship and that others have a valid claim to it as well. It is submitted, however, that it is to a communication within an entirely different kind of relationship from that existing in *Strass* v. *Goldsack et al.* to which Wigmore's criteria have any application.

The policy bases behind the narrow solicitor-client privilege on one hand and the "anticipation-of-litigation" privilege or "work-product" rule on the other, are totally dissimilar and give rise to different considerations.[32] Although D. C. McDonald J. recognized and articulated the distinction, he failed to keep them separate when he applied Wigmore's conditions.

As mentioned at the outset of this comment, the modern justification for the limited solicitor-client privilege was to encourage freedom of consultation by clients with their lawyers which could be accomplished only if there was no fear that what transpired between them would be open to scrutiny. All four of Wigmore's conditions are met in respect of this relationship and justify the privilege for it. It was Wigmore's view that if the protection, which necessarily frustrates the ability of a court to have before it all possible relevant information, is to be extended to communications within other relationships, the four conditions which he propounded had to be present. It is important to note that the essence of this professional privilege is the confidentiality of communication which is necessary for the preservation of a socially beneficial relationship. In the crucible of Wigmore's four conditions, if that useful relationship can be maintained only upon the understanding that the communicant's confidences will be protected, then the courts should not insist upon disclosure. The focus of the protection, therefore, is upon the person making

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[31] "Not only does [Wigmore's test] provide a rationale: it also leaves room by the third and fourth conditions for adaptation of the principle to changing needs and conditions of society which is essential to the proper function of the common law." Per Clement J.A., *supra*, footnote 2, at pp. 160 (W.W.R.), 415 (D.L.R.). English courts have utilized a broad discretionary power to keep out confidential communications emanating from a particular relationship if "more harm than good would result from compelling a disclosure or punishing a refusal to answer". *Attorney-General* v. *Mulholland*, [1963] 1 All E.R. 767, at p. 773 (C.A.); *Attorney-General* v. *Clough*, [1963] 1 All E.R. 420, at p. 425 (Q.B.D.).

[32] J. A. Gardner, Privilege and Discovery: Background and Development in English and American Law (1965), 53 Geo. L. J. 585.

the confidential communication. The privilege is reposed in him and he is the only one who can waive it.[33]

To Wigmore, the phrase "privileged communications" was not to have reference to every communication but was intended to describe those taking place within special relationships, usually but not always professional, but always of value to society:

> *The privileged communication,* as universally conceded, are those made by persons holding a certain confidential relation — in particular, that of husband and wife, attorney and client, a fellow juror, and government and informer. To these are added, in some jurisdictions, the relations of priest and penatent, and physician and patient, and occasionally sundry other additions have been attended.[34]

He did not design his conditions with "anticipation-of-litigation" communications or "work-product" material in mind. His conditions were enunciated well before the "work-product" rule emerged from *Hickman* v. *Taylor* and when "anticipation-of-litigation" privilege was not recognized in the United States. In fact, McNaughton's 1961 revision of Wigmore's volume on the subject of privilege[35] stressed the importance of distinguishing between the principle of privilege for confidential attorney-client communications and the exemption of a party from discovery of certain documents and prospective witnesses' statements. This is the way it was put:[36]

> Thus, for example, two documents in the hands of an attorney may be beyond reach of the opposing party — One, because it is a confidential communication to the attorney by the client or his agent, and the other because it is a communication to the attorney by a prospective third-party witness. The reason for immunity in the former instance is the present privilege [attorney-client privilege]; the reason in the latter is the totally unrelated rule exempting certain matters from discovery.
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> Confusion can be avoided only if the two principles are kept within their proper dimensions.

Similarly, the Law Reform Commission of Canada in its *Report* to Parliament[37] has set out in its proposed draft legislation, as separate and distinct heads of privilege, a provision applicable to

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[33] With reference to the solicitor-client relationship, see *Bell et al.* v. *Smith et al.*, [1968] S.C.R. 664; *Stewart* v. *Walker* (1903), 6 O.L.R. 495; *Shedd* v. *Boland,* [1942] O.W.N. 316, aff'd at p. 346.

[34] Wigmore, *op. cit.*, footnote 7, §2197.

[35] *Ibid.*

[36] *Ibid.*, §2320.

[37] Law Reform Commission of Canada, Report on Evidence (1975).

professional relationships,[38] another for lawyer-client communications,[39] and yet another akin to the present "anticipation-of-litigation" privilege, or "work-product" rule.[40]

Wigmore's "privileged communications" test was aimed at protecting the individual who spoke in confidence in a particular relationship. It was not directed at the policy behind the "anticipation-of-litigation" or "work-product" rule which had its genesis in the adversary system, protecting not the communicant but the evidence-gathering solicitor and his client.[41]

The fundamental flaw in D. C. McDonald J.'s reasoning, therefore, is his conclusion that Canadian courts should now apply Wigmore's four criteria to *every* communication over which a privilege is sought, to determine whether a court should accede to it.

Having taken this position, he then proceeded to analyze the communication made by the party to the adjuster engaged by the insurer of two of the defendants. He said that no privilege attached because all four conditions had not been satisfied: the communication had not originated in confidence; there was no "relation" between a party and the solicitor of the opposite party whom the former may wish to sue; even if there were a "relation", it was not one of special importance to the community so as to be "sedulously fostered"; and again, even if there were a "relation", it could not be said that it would be "injured" to any great degree compared to the adverse effect upon the litigation if there were non-disclosure of the communication.

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[38] Criteria similar to Wigmore's are embodied in the Law Reform Commission of Canada, Report on Evidence, *ibid.*, Evidence Code, s. 41, which reads as follows: "A person who has consulted a person exercising a profession for the purpose of obtaining professional services, or who has been rendered such services by a professional person, has a privilege against disclosure of any confidential communication reasonably made in the course of the relationship if, in the circumstances, the public interest in the privacy of the relationship outweighs the public interest in the administration of justice."

[39] Evidence Code, *ibid.*, s. 42(1).

[40] Evidence Code, *ibid.*, s. 42(2), reads as follows: "A person has a privilege against disclosure of information obtained or work produced in contemplation of litigation by him or his lawyer or a person employed to assist the lawyer, unless, in the case of information, it is not reasonably available from another source and its probative value substantially outweighs the disadvantages that would be caused by its disclosure."

[41] Cross, *op. cit.*, footnote 10; Wigmore, *op. cit.*, footnote 7, §2319; McCormick, *op. cit.*, footnote 8, p. 201.

What D. C. McDonald J. has lost sight of is that it is not the party who made the communication who is claiming the privilege in the instant case. If it were, then perhaps Wigmore's criteria would have some relevance. The privilege that is being asserted here is the one vested in the defendants on whose behalf the insurance adjuster has secured the statement for the purposes of litigation. If there is a valid claim to privilege, it comes within the "anticipation-of-litigation" basis or the analogous "work-product" rule and not Wigmore's concept of privileged communications.

D. C. McDonald J. was aware of the ramifications of his analysis because he then felt it necessary to consider whether a Wigmorian privilege existed to protect statements made by a stranger-witness to a party or his agent and taken for the purposes of litigation. If it does not exist with respect to communications passing between the parties or their agents, why should it exist when a stranger-witness makes a statement to a party?

Although acknowledging that the "work-product" rule as enunciated in *Hickman* v. *Taylor* was sufficiently wide to encompass statements taken from witnesses in preparation for litigation, D. C. McDonald J. believed that the rule should be limited to the true "working papers"[42] of the solicitor, that is, his own notes, opinions, and memoranda to himself. Accordingly, he was of the opinion that with respect to all communications, if privilege for them is claimed, then it would be recognized only if Wigmore's four conditions were met. He then examined the situation where communications pass between a witness and a solicitor or his agent in the context of Wigmore's tests and concluded that there is good reason for a privilege to be recognized in such cases. His analysis again implied that it is the witness-communicant who has the privilege and that the rationale for protecting such communications is the encouragement it would give to witnesses to tell truthfully what they observed. Using Wigmore's criteria, D. C. McDonald J. suggested that such statements are given in confidence because witnesses would not otherwise wish to be exposed to the risk of defamation actions, or at the very least, embarrassment that would result from disclosure, and, furthermore unless such statements are kept confidential, witnesses will not be frank and candid in the information that they give. He also suggested that the witness-solicitor or witness-adjuster rela-

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[42] *Supra*, footnote 2, at pp. 171 (W.W.R.), 426 (D.L.R.).

tion is worth fostering and that the injury that would result to such relationship by forced disclosure would be greater than any benefit gained in furthering the administration of justice. But again, the misconception is that it is the witness who will be claiming the privilege. Quite the contrary. It is the adverse party who is alleging that in preparing his case for trial he must be free to investigate and collect his evidence without the prying eye of his opponent looking over his shoulder. The "anticipation-of-litigation" privilege would, of course, protect such statements and it was unnecessary, and indeed incorrect, to use Wigmore's test to come to the same conclusion.

It seems that D. C. McDonald J.'s reasoning resembles to a great degree the kind of explanation that is afforded when a court recognizes Crown Privilege, or more appropriately, a claim that the public interest will be impaired by disclosure. With respect to communications made to some department of the government, disclosure is often resisted on the basis that revelation will be injurious to the public interest or that it might frighten away important sources of information which must be kept secret for the proper functioning of the public service.[43] Unlike private privileges, this public privilege belongs not to any private party, nor to any witness. It is usually asserted by the government[44] but it would appear that even in the absence of governmental objection, the judge should prohibit disclosure if he feels it will be harmful to the fabric of the state.[45]

On the merits, it cannot reasonably be argued that there is a public interest at work when a witness makes a statement to a party or his solicitor. The element of confidentiality is missing entirely for the witness knows that he may find himself embroiled in ensuing litigation. No undertaking is ever given to the witness that his identity or his communication will be kept hidden. For otherwise, what value is there in taking his statement? It is to be used, to the witness' knowledge, in an attempt to resolve any impending dispute between the parties to the event. Furthermore, witnesses are cognizant of the fact that they can be subpoenaed by any party at trial and be forced to testify as to what they have observed. Thus there is no reason to believe that a

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[43] See S. I. Bushnell, Crown Privilege (1973), 51 Can. Bar Rev. 551.

[44] *Duncan* v. *Cammell, Laird & Co. Ltd*, [1942] A.C. 624, at p. 638 (H.L.).

[45] *Conway* v. *Rimmer et al.*, [1968] A.C. 910, at pp. 950-951 (H.L.); *Rogers* v. *Secretary of State for the Home Department, supra*, footnote 22, at p. 282 (W.L.R.).

witness, particularly to a motor vehicle accident, who generally has no interest in the outcome of the litigation, would be less than frank and candid in communicating with a party, his solicitor or his agent. It bears no similarity to the common law privilege which protects the identity of police informers which encourages citizens to apprise police authorities of illegal activities. Without the protection of anonymity, those vital sources, so necessary for law enforcement, would dry up. As Lord Reid has said in *Rogers* v. *Secretary of State for the Home Department*,[46] ". . . it is obvious that the best source of information about dubious characters must often be persons of dubious character themselves".[47] Witnesses to motor vehicle accidents are not generally people who frequent the fringes of the criminal underworld. No public interest is therefore involved in statements passing between a witness and a party or his solicitor or his agent.

Furthermore, D. C. McDonald J.'s application of Wigmore's criteria to protect statements given by stranger-witnesses creates another problem, if by so doing it is concluded that a witness has a privilege over communications that he makes to a party. It would mean that for all intents and purposes, since the witness has that privilege, he can assert it if he is subpoenaed to testify at trial and any attempt to cross-examine him on his own previous inconsistent statement would be foreclosed unless he waived the privilege. This would be the consequence of concluding that the privilege was reposed in the witness. That was obviously not meant to be. There is a privilege in the situation but, it is the traditional "anticipation-of-litigation" or "work-product" protection given to the adversary who is preparing his case for trial. Accordingly, it is the adversary who can assert the privilege, not the witness, and the adversary need not make prior disclosure to the opposite party of any evidence that he has secured in advance of trial. D. C. McDonald J.'s conclusion with respect to the privilege in this situation is correct; it is his reasoning that is questionable.

In his dissenting judgment Chief Justice McGillivray outlined the development of the "anticipation-of-litigation" branch of the legal-professional privilege and pointed out that any discussion as to whether the communicant made the statement in confidence or not is beside the mark, because it does not form the foundation

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[46] *Ibid.*

[47] *Supra*, footnote 22, at p. 1061 (All E.R.). Also see the speech of Lord Salmon, at p. 1071, *ibid.*

of the common law protection enshrouding statements from witnesses obtained in preparation for litigation. He said:[48]

> But at what point does the matter of confidentiality become of consequence? Surely it is not whether the witness, be he an opposing party or not, in giving a statement, or, indeed, an investigator in taking a statement, as between the investigator and the witness thought it was confidential. The confidentiality arises from the fact that the statement is, in fact, obtained on behalf of the client for the advice of a solicitor in connection with litigation anticipated or pending.
>
> The fact that the person giving the statement has no reason to think it confidential, has, in my view, precisely nothing to do with the matter.

He concluded that because the statements from the party were obtained for the advice of counsel in respect of anticipated litigation then there was a privilege against disclosure even though the party did not intend that his statement to the defendants' investigator be given in confidence.

Although McGillivray C.J.A.'s analysis is sound in distinguishing between the two types of privilege, he did not consider whether in the circumstances of the *Strass* case such privilege was waived. Privileges are not absolute and if the holder of the privilege makes a voluntary disclosure or consents to disclosure of any material part of a communication, then there will be waiver and the privilege is lost. It has been recognized that if documents otherwise protected by the "work-product" doctrine have been disclosed to others with an intention that an opposing party may see the documents, or by their disclosure have substantially increased the opportunity for the adversarial party to obtain the information, the party who permitted the disclosure should not be allowed at a later time to claim protection for the documents on the ground that they were prepared in preparation of litigation.[49] In the *Strass* case, as in all cases where a party makes a communication to the adverse party's agent, obviously the evidence obtained by the adverse party coincides with disclosure to the former. It is instantaneous waiver. As soon as the adversary obtains the statement he has disclosed it to the opposite party for it is that very party who has made the statement. Thus the majority holding in the *Strass* case that a statement made by a plaintiff to an adjuster of the insurer of the defendants must be produced to the plaintiff is consistent with the general prin-

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[48] *Supra*, footnote 2, at pp. 177 (W.W.R.), 402-403 (D.L.R.).

[49] C. A. Wright and A. R. Miller, Federal Practice and Procedure, Vol. 8 (1970), s. 2024; *Philadelphia Electric Co.* v. *Anaconda American Brass Co. et al.* (1967), 275 F. Supp. 146, at p. 148 (U.S.D.C.).

ciples of "anticipation-of-litigation" privilege or the "work-product" rule and the waiver thereof.

Within the adversary framework, McGillivray C.J.A. expressed another fear in permitting a party to have production of his own statement that he had earlier made to the other side:[50]

> Is it to be given to him before examination for discovery or trial so that he may tailor his evidence to be consistent? If he has been consistent in his version of the accident, his statement cannot hurt him. If he has a new version from that which he gave to investigators immediately following the accident, why should not his new version be tested by the production of the statement, not before he has given evidence, but after, by cross-examination? The proceedings are adversary proceedings.

This danger, however, is not just indigenous to production of a party's own statement, as D. C. McDonald J. rightly pointed out.[51] If this concern of a witness moulding his evidence to conform with statements and documents in the possession of the opposite side is to be viewed as a serious mischief, then, in order to eradicate it, much, if not all, of our machinery of discovery and production would have to be dismantled. One of the purposes of discovery and production is to reduce the element of surprise at trial by making both sides aware of the case each has to meet. Of necessity therefore, both parties are apprised of the existence of relevant documents which are exchanged before trial and thus, there always is the apprehension that a party might attempt to tailor his evidence to conform with the documents. It has, however, never overcome the value to be gained by full discovery and production.

Both Moir J.A. and Clement J.A. went farther in their criticism of McGillivray C.J.A.'s point, and emphasized the need to be fair to a witness and to promote the ascertainment of the truth. They suggested that a party should be allowed to use, as an aide-memoire, a document which he had previously made. That would be of particular assistance to "the illiterate, the uneducated or the disadvantaged or people whose native language is other than English"[52] who might not otherwise have retained a copy of the statement. If one was seriously troubled about such people then both of these judges, to be consistent, would have to advocate that all statements made by *all* witnesses, not just

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[50] *Supra*, footnote 2, at pp. 183-184 (W.W.R.), 408-409 (D.L.R.). Also see *Britten* v. *F. H. Pilcher & Sons*, [1969] 1 All E.R. 491, at p. 493.

[51] *Ibid.*, at pp. 172-173 (W.W.R.), 427-428 (D.L.R.).

[52] *Ibid.*, at pp. 160, 165 (W.W.R.), 416, 421 (D.L.R.).

those made by a party, should be disclosed prior to trial.[53] That would, of course, fly in the face of not only the "anticipation-of-litigation privilege" or "work-product" rule but D. C. McDonald J.'s application of Wigmore's conditions to the statements given by a stranger-witness.

Looking at the *Strass* case as a whole, the reasons of the majority judges were innovative in the sense that they implied, in *obiter* dicta that relationships other than solicitor-client may be considered by Wigmore's conditions as of such importance that confidential communications taking place within them will be privileged. D. C. McDonald J.'s judgment, in particular, perhaps best reflects the creativity of the common law in this respect. Rather than adhering to the traditional inflexible view of the law of privilege, he adopted an approach which allows a court to pragmatically examine the relationship in question to determine whether its societal benefit outweighs the harm resulting from the suppression of relevant and probative evidence. The one shortcoming of the majority judgments, however, is the failure to come to grips with the policies behind the different types of privilege and accordingly, this aspect of the law has been left in a state of conceptual confusion.

S. N. LEDERMAN*

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AIR LAW—WARSAW CONVENTION—INTERNATIONAL CONFERENCE—RECENT DEVELOPMENTS.—An international conference on air law was held at Montreal from September 3rd-25th, 1975, under the auspices of the International Civil Aviation Association.[1] The main item on the agenda was consideration of some draft articles designed to revise the cargo and mail provisions of the Warsaw Convention, 1929, as amended by the Hague Protocol, 1955.[2] The draft articles had been approved by the

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[53] Under R. 26(b)(3) of The Federal Rules of Civil Procedure, *supra*, footnote 15, a party, as of right, may obtain production of his own statement. Similarly, the statement of a non-party witness may be secured by that witness without any special showing of need.

* S. N. Lederman, of Osgoode Hall Law School, York University, Toronto.

[1] Hereinafter referred to as ICAO.

[2] Item 9, Provisional Agenda, W/H-CM Doc. No. 2. See also the Carriage by Air Act, R.S.C., 1970, c. C-14, Schedules I and III, for a text of the Warsaw Convention and the Hague Protocol.

Legal Committee of ICAO during the previous autumn and had been circulated to member states, as well as to interested organizations, prior to the conference.[3]

The Warsaw Convention, perhaps the most widely recognized international convention on a private law matter, provides, as its full title indicates, uniform rules on the international carriage by air of passengers, baggage and cargo. The Convention, in addition to providing rules regarding documentation of carriage, sets limits of liability in the event of accident occurring during international carriage by air that causes damage to a passenger or shipper of cargo. As a matter of proof, the Convention establishes, with respect to cargo, a presumption that the carrier is liable in the event of an incident during international carriage by air unless he can prove that he or his agents have taken all necessary steps to avoid the incident.

The Convention, which came into force for Canada on September 8th, 1947, remained unchanged until 1955 when the Hague Protocol was adopted. That Protocol simplified the documents of carriage, increased the limits of liability for passengers and restricted the conditions under which the carrier was entitled to limit his liability.[4]

Besides consideration of the draft articles, other items were added to the agenda of the conference, notably, the question of the substitution of Special Drawing Rights[5] of the International Monetary Fund[6] for the so-called Poincaré gold franc in the calculation of limits of liability under the Warsaw Convention. It will be recalled that article 22(4) of the Warsaw Convention, as amended by the Hague Protocol, expressed the limit of liability under the Convention in terms of the Poincaré gold franc which consists of a fixed quantity of gold.[7] With the fluctuating value of gold it had been apparent to many that some other unit of account must be sought that would give greater uniformity and consistency to the limits established by the Convention.

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[3] Draft articles, W/H-CM Doc. No. 4 (hereinafter referred to as the draft articles).

[4] For a summary of the amendments to the Warsaw Convention contained in the Hague Protocol, see G. F. FitzGerald (1956), 34 Can. Bar Rev. 326.

[5] Hereinafter referred to as SDRs.

[6] Hereinafter referred to as IMF.

[7] 65½ milligrams gold of millesimal fineness 900.

The question of consolidation of all instruments relating to the Warsaw system provoked much debate, being bound up with the question of the relationship between amendments adopted at this conference in respect of cargo and mail and those contained in the Guatemala City Protocol, 1971. The Guatemala City Protocol modified, *inter alia*, the passenger and baggage provisions of the Warsaw Convention, as amended by the Hague Protocol, increasing the limits of liability in respect thereof, but leaving the mail and cargo provisions unchanged.[8] Discussion was complicated by the fact that more states are parties[9] to the Warsaw Convention than are parties[10] to the Convention as amended by the Hague Protocol and that the Guatemala City Protocol is not yet in force.

The conference adopted four protocols, the first three dealing with the incorporation of SDRs in (1) the original Warsaw Convention, (2) the Warsaw Convention, as amended by the Hague Protocol and (3) the Warsaw Convention, as amended by the Hague Protocol and the Guatemala City Protocol and the fourth one, the Montreal Protocol No. 4, amending the cargo and mail provisions of the Warsaw Convention, as amended by the Hague Protocol, in addition to adopting SDRs. The conference also adopted a final act containing a resolution calling upon the Legal Committee of ICAO to produce a consolidated text for submission to an international conference as soon as possible.

Basically, discussion at the conference fell into four categories:

1. Amendments of the cargo provisions of the Warsaw Convention as amended by the Hague Protocol;
2. Substitution of SDRs for the Poincaré gold franc;
3. Revision of the mail provisions; and
4. The form of the instrument or instruments to be adopted at the conference.

1. *Cargo.*

(A) *Documentation*

The object of the draft articles was to modernize the provisions of the Warsaw Convention, as amended by the Hague

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[8] The Protocol increases the limit of liability from 125,000.00 francs to 1,500,000.00 francs in respect of damage suffered as a result of death or personal injury. See art. VIII.

[9] 101.

[10] 83.

Protocol, relating to documentation to permit the use of electronic data processing (EDP) in place of the air waybill on the ground that this would greatly simplify matters and result in a reduction of costs.[11] It should be noted, however, that it was not intended to abolish the air waybill but merely to provide an alternative ("other means") of recording the transaction.[12] Unfortunately, the use of computers as a means of preserving the record of the carriage of a cargo was not well received by some delegations at the conference, resulting in repeated attempts, some successful, to upgrade the goods receipt, the document that would be issued where electronic data processing had been used, by requiring it to include details that would also be stored in the computer. The objective of such attempts was, of course, to provide the consignor with a document containing a minimum of information to serve as proof in case of litigation.

By way of illustration, reference is made to the debate concerning article 8. That article, as originally approved by the Legal Committee in the draft articles, prescribed the contents of the air waybill only, presumably, because it was felt that a similar requirement in respect of the goods receipt was not necessary since the particulars of the transaction would be stored in the computer. At the suggestion of the French delegation, however, that article was made applicable also to the goods receipt.[13] Similar amendments were made to other articles, for example, article 7, which, in its original form, as approved by the Legal Committee, required the carrier to make out separate air waybills in those instances where there is more than one package, was made applicable, also, to the goods receipt by the addition of a further paragraph.[14] Similarly, article 10 of the draft articles, which dealt with the responsibility of the consignor for the correctness of particulars and statements relating to the cargo inserted by him in the air waybill, was made applicable to the goods receipt.

Another interesting subject of debate concerned the probative value in evidence to be given to the goods receipt and the record of the transaction produced by computer. Debate in

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[11] The air waybill is the document required to be made out by the carrier upon receipt of cargo for carriage by air to record the transaction.

[12] See, for example, art. 5(2) of the draft articles.

[13] Art. III, Montreal Protocol No. 4.

[14] *Ibid.*

this regard focused on article 11(1) of the draft articles. That article provided that the air waybill or the goods receipt would be *prima facie* evidence of the "conclusion of the contract, of receipt of the cargo and of the conditions of carriage mentioned therein". The object of an Australian-Brazilian amendment was to extend this rule to the record preserved in the computer in those instances where there was no goods receipt. The difficulty with this proposition was dealt with by a number of delegations. Thus, for example, one delegation pointed out the essential difference between the goods receipt and the computer record as far as the rules of evidence are concerned, submitting that while the rules of evidence of many states might be prepared to give to the goods receipt the value of *prima facie* evidence, since it is a document made out at the time of the delivery of the cargo to the carrier and prior to any litigation, it was doubtful if the same thing could be said with respect to the computer record. In the same vein, it was pointed out that the effect of the proposal would be to give to the carrier an undue advantage, since in many instances he would be responsible for producing the record from information stored in his computer after the commencement of litigation. Ultimately, the conference accepted article 11(1) largely in the form in which it had been approved by the Legal Committee. In article 11(2), however, the conference made a material change, at the instance of the delegation of Brazil, by adding reference to the goods receipts in the text so that, as in the case of the air waybill, the goods receipt would be *prima facie* evidence against the carrier of statements therein relating to weight, dimension, packing and number of packages.[15]

The debate on the revision of the cargo provisions relating to documentation also reflected the fear in certain quarters that, with the introduction of EDP, certain carriers might be inclined to refuse the carriage of a cargo where EDP was not available at all points of the carriage. This resulted in an amendment to article 5 of the draft articles by the addition of a further paragraph (3) which prohibits a carrier from declining to accept a cargo merely because EDP was not available at points of transit and destination.[16]

Thus, the conference, while clearing the way for the use of EDP in place of the air waybill, had only partial success in simplifying the provisions relating to documentation. Further

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[15] *Ibid.*

[16] *Ibid.*

amendments will probably be necessary once the use of EDP has been established and fears have been allayed by its obvious advantages in practice.

(B) *Liability*

The draft articles contained a revised regime of liability in respect of damage to a shipper of cargo resulting from the destruction or loss of or damage to the cargo during carriage by air, as well as damage caused by delay. The Warsaw Convention, as amended by the Hague Protocol, at present, provides that the carrier is liable in respect of such damage unless he can prove that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.[17] According to the revised article 18, contained in the draft articles, a carrier would only escape liability upon proof by him that damage to the cargo was due "solely" from one or more of the following causes:

(a) inherent defect, quality or vice of that cargo;
(b) defective packing of that cargo performed by a person other than the carrier or his servants or agents;
(c) an act of war, an armed conflict or civil disturbance;
(d) an act of public authority carried out in connection with the entry, exit or transhipment of the cargo.[18]

It was obvious from an early indicative vote that a significant number of states favoured retention of the present system (nineteen delegations were in favour of maintaining the existing system and thirty-five delegations were in favour of the new system).[19] The United Kingdom delegation even went so far as to submit that the new system had nothing to do with "strict" liability at all for it provided the carrier with no less than four defences. The new system, was, therefore, in their view, less strict than the system of presumed liability prevailing at the moment since under that system, the carrier can only escape liability if he proves that he or his agents and servants had taken all necessary measures to avoid damage or that it was impossible for him or them to do so. This amounts to proof of no negligence on the part of the carrier and his agents and servants. It was submitted that, for practical purposes, in most cases it was

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[17] See arts 18 and 20.

[18] Art. B (art. 18), of the draft articles.

[19] W/H-CM-SRC/11, p. 2.

impossible to prove that there was *no* negligence on the part of the carrier or his agents.

Another aspect, dealt with at length in debate, concerned the conflict between the opening lines of paragraph 2 of article 18 (article B) in the draft articles and the final lines of that paragraph. Whereas the opening lines allow the carrier to escape liability for the destruction, loss or damage to cargo if he can prove that it was due "solely" to one or more of the causes set out in subparagraphs (a) to (d) above, the concluding lines place an onus on the plaintiff to show that there was negligence on the part of the carrier in order to deprive him of the benefit of limitation.[20] Uultimately, the conference adopted the new concept of liability, as set out in article 18 (article B), but eliminated the concluding lines so as to remove any onus on the plaintiff to show that there was negligence on the part of the carrier.[21]

The conference also spent some time in debate on the question of the desirability of having breakable limits of liability. Some delegations felt that in certain circumstances the limits of liability should be breakable, namely, where gross negligence is proved. The conference finally accepted the principle of unbreakable limits, without any exception.[22]

Another item of debate worth noting was the question of liability for damage caused by a nuclear incident. It was contended by some states, principally from the western European community, that it was necessary for the new instrument, negotiated at Montreal, to include a "nuclear provision" in order to avoid a conflict between that instrument and the 1960 Paris Convention on Civil Liability for Nuclear Damage,[23] as well as the 1963 Vienna Convention on Civil Liability for Nuclear Damage.[24] The object was to exclude a claim resulting from a nuclear incident, if such a claim was covered by another convention. As pointed out by those who opposed such a move, the question of a nuclear provision was really only of concern for those states parties to the Paris Convention, a regional convention; as for the

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[20] See in this connection, for example, W/H-CM Doc. Nos 7, 28 and 35.

[21] Art. IV, Montreal Protocol No. 4.

[22] Art. VIII, Montreal Protocol No. 4.

[23] In J. Barros and D. M. Johnston, The International Law of Pollution (1974), p. 422.

[24] (1963), 37 Am. J. Int. L. 268.

Vienna Convention, no provision was necessary since it was not yet in force and it is not certain whether it will ever come into force. Ultimately, the conference abstained from adopting a "nuclear provision".[25]

2. *Special Drawing Rights.*

As was indicated at the outset, the Warsaw Convention fixes limits of liability in terms of the Poincaré gold franc, a unit of account that, in the opinion of many, has become totally unacceptable due to the fluctuating price of gold. Accordingly, the question was what unit of account could be substituted that would provide relative stability and be acceptable to as many states as possible. Norway, for example, had suggested the substitution of SDRs for the Poincaré gold franc.[26] Basically SDRs are calculated on the basis of a basket of currencies, in which each currency has a certain weight, thus avoiding the fluctuations of any one currency and thereby providing relative stability.

The substitution of SDRs for the gold franc, however, posed problems for states that are not members of the IMF, notably, the entire Soviet bloc.[27] Ultimately, after considerable debate, the conference accepted SDRs as the unit of account in calculating limits of liability. Perhaps to make the provision more palatable, the Belgian delegation presented an amendment, accepted by the conference, which allows those states that are not members of the IMF to continue to calculate limits of liability in gold in judicial proceedings within their jurisdiction at converson rates fixed by their national legislation.[28] The difficulty with the provision, however as the observer from the International Air Transport Association so aptly remarked, was that in effect such a provision allows for two limits of liability and will thus reintroduce the old evil of forum shopping. Suffice it to say that SDRs had thus been accepted for the first time in an international convention and their introduction, with or without a provision of the kind produced by the Belgian amendment, will undoubtedly follow in the years to come in other conventions. In this respect, therefore, the introduction of SDRs into the Warsaw system was a very significant result of the conference.

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[25] For a summary of the discussion, see W/H-CM-SRC/17 and W/H-CM-SRC/19.

[26] See W/H-CM Doc. No. 23, pp. 2 and 3.

[27] See W/H-CM Doc. No. 46.

[28] See art. II, Additional Protocol Nos 1, 2 and 3 and art. VII, Montreal Protocol No. 4.

3. *Mail.*

The revision of the mail provision really consisted in making the carrier liable for loss or damage in the carriage of mail, a liability that had not existed before, but to limit that liability to postal administrations. The conference did not accept entirely the language proposed by the draft articles. Article A (article 2(2)) of the draft articles provided that liability should be "governed by the rules applicable to the relationship between the carrier and the postal administration". The rules applicable to the relationship between the carrier and the postal administration, the conference was advised by the delegate from Finland, probably referred to the contractual relationship that exists between a national carrier and its postal administration. The conference contented itself with accepting a provision that makes the carrier "liable to postal administrations in accordance with the applicable rules".[29] The language adopted by the conference is undoubtedly briefer than that proposed in the draft articles but it remains to be seen whether it is not too vague.

4. *Form of the Instrument.*

The form of the instrument to be adopted by the conference produced some of the most crucial debate at the conference. Basically, the conference was faced with the following difficulty: it had to ensure that any revision of the cargo and mail provisions be accepted in such a form that no state found itself in the delicate position of having to ratify provisions that it did not accept in order to ratify other provisions that it did accept. The United States delegation had made it abundantly clear that the amendments of the cargo and mail provisions should become amendments, also, of the Guatemala City Protocol. It was pointed out by the United States delegation that if this objective could not be met the United States would not be able to ratify the Guatemala City Protocol, which, in view of the final clauses of that instrument, was tantamount to saying that it would never come into force.[30] There was also no question of the United States ratifying the Hague Protocol and certainly there was no intention to revert to the cargo and mail provisions of the original Warsaw Convention that had been incorporated directly or by reference into the Guatemala City Protocol.

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[29] Art. II, Montreal Protocol No. 4.

[30] See art. XX of the Guatemala City Protocol.

To achieve their objective, the United States had suggested that the revised cargo and mail provisions, adopted at the conference, should also become amendments to the Guatemala City Protocol and that the Guatemala City Protocol, as amended in the manner suggested above, could be adopted as a new, independent, document entitled "the Warsaw Convention as amended at the Hague, Guatemala City and Montreal".[31] As will be seen later, the United States received satisfaction through a somewhat different solution.

A joint European-Japanese proposal suggested a different approach, whereby various groups of provisions (for example, the passenger and baggage provisions of the Guatemala City Protocol and the cargo and mail provisions agreed to at this conference) would be put in different chapters of a consolidated instrument, thus enabling any party, under appropriately worded final clauses, to reserve on those chapters containing unacceptable provisions at the moment of ratification or accession of the new instrument or later.[32]

Finally, however, the conference disposed of the question by deciding against consolidation at this conference but adopting a resolution calling upon the Legal Committee to prepare a consolidated instrument for submission to a Diplomatic Conference as soon as possible.[33]

Further, the President of the conference had ruled that at least three protocols were necessary in order to introduce SDRs into the Warsaw system, one protocol to introduce SDRs into the original Warsaw Convention, 1929, a second protocol to introduce SDRs into the Warsaw Convention, as amended by the Hague Protocol, and a third protocol to introduce SDRs into the Warsaw Convention as amended by the Hague Protocol and the Guatemala City Protocol. It was then decided that a further protocol was necessary which would contain the revised cargo and mail provisions adopted at the conference together with the new SDR provisions.[34]

Accordingly, Additional Protocol No. 1, designed to amend the original Warsaw Convention to accommodate states who are not parties to the Hague Protocol or the Guatemala City Protocol and who do not intend to ratify the new cargo

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[31] W/H-CM Doc. No. 25.

[32] W/H-CM Doc. No. 36.

[33] Final Act, adopted Sept. 25th, 1975, at Montreal.

[34] See W/H-CM-SRC/23.

and mail provisions but wish to take advantage of the SDR provisions, contains, besides a revised article 22 replacing the gold franc with the SDRs, the usual final clauses. Additional Protocol No. 2, designed to amend the Warsaw Convention, as amended by the Hague Protocol, to accommodate states that are parties to the Warsaw Convention as amended by that Protocol, and who are not parties to the Guatemala City Protocol and who do not intend to ratify the new cargo and mail provisions but wish to take advantage of the SDRs provisions, likewise, contains a revised version of article 22 replacing the gold franc with the SDRs and the usual final clauses.

Additional Protocol No. 3 is designed to incorporate a revised version of article 22 in the Guatemala City Protocol to accommodate parties to the protocol who are not parties to the Hague Protocol. Two questions presented themselves for consideration of the conference, namely, could there be amendment of a protocol that was not yet in force and, secondly, if the answer to the first question was in the affirmative, could the amending protocol come into force before the protocol that it amended. The Director of the Legal Bureau submitted that there could be amendment of a protocol that is not in force and that proposition seemed to be acceptable without further discussion. As to the second question, no really satisfactory answer was given, except that a number of delegations did express the view that Additional Protocol No. 3 could not come into force before the Guatemala City Protocol that it sought to amend.

Perhaps, however, the question is academic in view of articles VII and VIII of the Additional Protocol No. 3. The latter prescribes that it shall come into force upon ratification by thirty states, whereas, the former prescribes, *inter alia*, that ratification of the protocol shall have the effect of accession to the Warsaw Convention, as amended at the Hague, at Guatemala City and by Additional Protocol No. 3. Article XX of the Guatemala City Protocol, it will be recalled, provides that it will only enter into force:

> (a) after the deposit of the thirtieth instrument of ratification, and (b) if five states which have ratified the Protocol represent at least 40% of the total international scheduled air traffic in terms of passenger-kilometres according to the statistics for the year 1970 published by ICAO.

The combined effect of articles VII and VIII of Additional Protocol No. 3 is, thus, a revision of article XX of the Guatemala City Protocol, since the terms of that protocol are brought into

force under different rules. The United States had thus achieved their object in effect, namely, that ratification of the Additional Protocol No. 3 would give "the kiss of life"[35] to the Guatemala City Protocol, bringing into force its passenger and baggage provisions.

The last piece in the puzzle, however, is provided by article XXIV of the Montreal Protocol No. 4 which is designed to take care of the situation where two or more states are party to that protocol and the Guatemala City Protocol or Additional Protocol No. 3 since these protocols contain conflicting provisions on cargo and postal items on the one hand, and passenger and baggage on the other. The essence of the provisions is that the Guatemala City Protocol will prevail as far as passenger and baggage are concerned and the Montreal Protocol No. 4 will prevail as far as cargo and postal items are concerned.

By a rather tortuous route of reservation clauses and what in domestic legislation would amount to deeming provisions, the conference arrived at its objective, namely, to revise the mail and cargo provisions, rewrite the rules relating to liability and adopt SDRs as the unit of account. The adoption of four protocols, in addition to those that already existed prior to the conference, serves to underline the necessity of a consolidated instrument to assist those that must apply the law. It remains to be seen, however, whether the enthusiasm of the conference in passing a resolution calling for consolidation will persist in the months to come and result in concrete action.

The ever growing number of amending protocols of the Warsaw Convention, it may be observed by way of closing comment, results of course from the fact that in order to survive the Warsaw system must continue to enable states "to apply in their relations between themselves the system of liability of the carrier which bests suits them . . .".[36] It is open to debate, however, to what extent the Warsaw system, with its proliferation of protocols to suit all tastes, provides unification of rules relating to international carriage by air.

A. H. E. POPP*

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[35] This is how one delegate described it to the writer in a "corridor" discussion.

[36] See working paper submitted by the Polish and Soviet delegations W/H-CM Doc. No. 41, p. 2.

* A. H. E. Popp, Legal Adviser, Department of Transport, Ottawa. The views expressed do not in any way purport to be those of the Department of Transport or the Department of Justice.