Comments on Legislation and Judicial Decisions

Chronique de législation et de jurisprudence

RECEPTION OF ENGLISH LAW—CONSTITUTIONAL LAW—LIMITATION OF CIVIL ACTION AFTER SUMMARY CRIMINAL PROCEEDINGS FOR COMMON ASSAULT—AN ASSAULT ON AN OLD ENGLISH STATUTE.—The Court of Queen's Bench for Saskatchewan held in *Stevens* v. *Quinney*[1] that the Offences Against the Person Act, 1861, an imperial statute,[2] is not in force in Saskatchewan.[3] This decision was upheld by the Saskatchewan Court of Appeal without written reasons.[4] The Offences Against the Person Act, 1861 (or equivalent legislation) has yielded prolific and often inconsistent judicial comment regarding its enforcement and its application in several provincial jurisdictions. The decision of the Honourable Mr. Justice MacDonald in the case of *Stevens* v. *Quinney* therefore deserves some consideration.

The provision of the relevant Imperial legislation considered in the *Stevens* v. *Quinney* case is:

> Section 45. If any person against whom any such complaint as in either of the last three preceding sections mentioned shall have been preferred by or on the behalf of the party aggrieved shall have obtained such certificate, or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment or imprisonment with hard labour awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause.

Briefly, section 45 purports to preclude the civil right of a common assault victim to sue the offender for damages where the latter has

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[1] (1980), 101 D.L.R. (3d) 289, [1979] 5 W.W.R. 284, (1980), 5 Sask. R. 219.

[2] 1861, 24 & 25 Vict., c. 100.

[3] *Supra*, footnote 1, at p. 288 (W.W.R.). See also *Mochoruk* v. *Lindquist* (1981), 12 Sask. R. 249 (Q.B.), a recent decision of McIntyre J. When the defendant's counsel applied, at the commencement of trial, for leave to amend the Statement of Defence to permit the defendant to plead the Offences Against the Person Act, 1861 (Imp.), c. 100, s. 45, the plaintiff's counsel opposed the application. McIntyre J., without reasons, expressed the view that that Act does not apply in Saskatchewan. The defendant abandoned his application to amend the Statement of Defence.

[4] The appeal was dismissed with costs on Sept. 18th, 1979.

been charged with assault "by or on behalf of" the victim, has been convicted, and has paid the penalty.

The facts in the *Stevens* v. *Quinney* case are summarized by MacDonald J. in his decision.[5] The defendant, Quinney, pleaded guilty on June 30th, 1978, before Schollie J.M.C. to a charge of common assault under section 245(1) of the Criminal Code. The charge arose upon the complaint to the R.C.M.P. by the plaintiff, Stevens. The information laid charged Quinney under section 245(2)(a) (assault causing bodily harm) of the Criminal Code. The Crown applied to reduce the charge to the included offence of common assault, to which Quinney pleaded guilty. Quinney was fined $25.00 and paid this penalty. Subsequently the plaintiff initiated a civil action against Quinney based upon the same incident. Quinney applied under Queen's Bench Rules 188 and 189 on a point of law for an order dismissing the plaintiff's action, contending that the civil action by the plaintiff was barred by section 45 of the Offences Against the Person Act, 1861. Quinney argued that this provision is still part of the law of Saskatchewan by virtue of section 16 of The Saskatchewan Act, 1905[6] and section 11 of the North West Territories Act.[7]

MacDonald J. dismissed Quinney's application, having concluded that the Offences Against the Person Act, 1861, is not in force in Saskatchewan.[8] MacDonald J. followed neither the previous Saskatchewan decisions on the issue nor the British Columbia case law. Instead he followed *Schultz* v. *Wolske*,[9] a decision of the Alberta Supreme Court, and also referred to section 35 of the Interpretation Act[10] and to section 10 of the Criminal Code[11] to support his decision.[12] The writer submits that the decision is open to question.

The Saskatchewan View.

MacDonald J. considered two Saskatchewan cases but did not follow them. In *Nykiforuk* v. *Kohut*[13] Mills D.C.J., dealing with the

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[5] *Supra*, footnote 1, at p. 285 (W.W.R.).

[6] 4-5 Edw. 7, c. 42 (Can.).

[7] R.S.C., 1886, c. 50, as am.

[8] *Supra*, footnote 1, at p. 288 (W.W.R.).

[9] (1966), 75 W.W.R. 411.

[10] R.S.C., 1970, c. I-23.

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

[12] *Supra*, footnote 1, at pp. 287-288 (W.W.R.).

[13] [1949] 1 W.W.R. 709 (Sask. D. Ct).

constitutional validity of section 734[14] of the Criminal Code[15] held unequivocally that section 45 of the Offences Against the Person Act, 1861 was "unrepealed law in force in" Saskatchewan.[16] MacDonald J. also considered *Monk* v. *Fortney*[17] which held that relevant Imperial legislation still exists in Saskatchewan. In *Monk* v. *Fortney*, apparently due to counsels' error, Moore D.C.J. (as he then was) inadvertently considered the Imperial legislation that was in force in British Columbia rather than the relevant legislation alleged to be in force in Saskatchewan. The decision rendered was gravely affected as a consequence, because the plaintiff apparently could not satisfy the requirements imposed by the British Columbia legislation.

The mistake encountered in *Monk* v. *Fortney* points to the necessity of determining the body of English law received in a particular province. By The Saskatchewan Act, 1905[18] the law existing in the territories was to continue in Saskatchewan until modified by the Parliament of Canada, or by the Legislature of the Province according to the authority of Parliament or of the provincial Legislature. Thus, section 11 of the North-West Territories Act[19] which appointed July 15th, 1870 as the "cut-off" date for the reception of English law into Saskatchewan, was in force in Saskatchewan. That section provided:

> Subject to the provisions of this Act the laws of England relating to civil and criminal matters, as the same existed on the fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy, shall be in force in the Territories, in so far as the same are applicable to the Territories and in so far as the same have not been, or are not hereafter, repealed, altered, varied, modified, or affected by any Act of the Parliament of the United Kingdom applicable to the Territories, or of the Parliament of Canada, or by any ordinance of the Lieutenant-Governor in Council, or of the Legislative Assembly.

However, the "cut-off" dates for the various provinces differ.[20] The "cut-off" date for the introduction of English law into British

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[14] See, *infra*, footnotes 28 and 43. S. 734 (repealed in 1955) which was derived from s. 45 of the Offences Against the Person Act, 1861, is in the following terms: "If the person against whom any such information has been laid, by or on behalf of the person aggrieved, obtains such certificate, or, having been convicted, pays the whole amount adjudged to be paid or suffers the imprisonment, or imprisonment with hard labour, awarded, he shall be released from all further or other proceedings, civil or criminal, for the same cause."

[15] R.S.C., 1927, c. 36.

[16] *Supra*, footnote 13, at p. 717.

[17] [1976] W.W.D. 41 (Sask. D. Ct).

[18] *Supra*, footnote 6.

[19] *Supra*, footnote 7.

[20] See generally: J. C. Bouck, Introducing English Statute Law Into the Provinces: Time for a Change (1979), 57 Can. Bar Rev. 74; E. G. Brown, British Statutes in the Emergent Nations of North America: 1606-1949 (1963), 7 Am. J. of Leg. Hist. 95; J. E. Côté, The Introduction of English Law into Alberta (1964), 3 Alta L. Rev. 262; J. E. Côté, The Reception of English Law (1977), 15 Alta L. Rev. 29.

Columbia is November 19th, 1858.[21] Section 2 of The Law and Equity Act[22] states:

> . . . the Civil and Criminal laws of England, as they existed on November 19, 1858, so far as they are not from local circumstances inapplicable, are in force in the Province; but those laws shall be held to be modified and altered by all legislation having the force of law in the Province or in any former Colony comprised within its geographical limits.

Therefore, the Offences Against the Person Act, 1828[23] was the relevant Act in force in British Columbia considered in the British Columbia cases referred to by MacDonald J. in *Stevens* v. *Quinney*, while it is the Offences Against the Person Act, 1861[24] that was alleged to be in force in Saskatchewan.[25]

The British Columbia View.

MacDonald J. in *Stevens* v. *Quinney* stated:[26]

> The British Columbia courts have held that the repeal of the [Criminal] Code sections renewed the former Imperial Act, and that as a result the Offences Against the Person Act now is effective in British Columbia: *Sharkey* v. *Robertson* (1969), 67 W.W.R. 712, 3 D.L.R. (3d) 745; *McIntyre* v. *Moon*, [1971] 4 W.W.R. 148, 20 D.L.R. (3d) 608; and *Kenmuir* v. *Huetzelmann* (1977), 3 C.C.L.T. 153 (Co. Ct.).

With deference, the writer submits that the learned judge erred in stating this proposition on the basis of the cases he cited. Ruttan J. in *Sharkey* v. *Robertson*[27] considered the Offences Against the Person Act, 1828 and stated the following in briefly reviewing similar law enacted as part of the Criminal Code:[28]

> After Confederation and the passing of the B.N.A. Act, 1867, and the enactment of the *Criminal Code*, certain sections were placed in the *Criminal Code* which referred to suspension of civil remedies in assault cases. These sections are very similar to the ones just quoted from the *Offences Against the Person Act, 1828*, and subsequent Imperial statutory enactments, including the *Offences Against the Person Act, 1861*, 24 & 25 Vict., ch. 100, secs. 42-45, and the *Summary Jurisdiction Act, 1879*, 42 & 43 Vict., ch. 49, especially sec. 16(2) dealing with the imposition of suspended sentences. The relevant sections in the *Criminal Code*

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[21] See Governor Douglas' Proclamation, dated Nov. 19th, 1858.

[22] R.S.B.C., 1979, c. 224.

[23] 9 Geo. 4, c. 31.

[24] *Supra*, footnote 2.

[25] The Law Reform Commission of British Columbia, in its "Report on Offences Against the Person Act, 1828, section 28, No. 35 (1977), recommended a repeal of that section which was effected by S.B.C., 1978, c. 11. (See The Law and Equity Act, R.S.B.C., 1979, c. 224). However query some of the reasoning in that Report. For the disposition of similar legislation in some of the Eastern provinces, see the summary by Chisholm J. in *Rice* v. *Messenger*, [1929] 2 D.L.R. 669 (N.S.S.C.), at pp. 679-680.

[26] *Supra*, footnote 1, at p. 286 (W.W.R.).

[27] (1969), 67 W.W.R. 712 (B.C.S.C.).

[28] *Ibid.*, at p. 718.

> prior to 1955 were secs. 732 to 734, and sec. 748, a section which grants the right to the magistrate to impose, in lieu of fine or punishment, a suspended sentence.
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> There has been much controversy among the appellate courts in this country concerning the validity of these sections of the *Criminal Code*. In some jurisdictions it has been held these sections are *ultra vires* because their effect is to take away the individual's right to sue for damages in a civil court. So it is claimed the *Criminal Code* has invaded the field of property and civil rights reserved for the provinces. Other courts have held that the sections are completely *intra vires* and the whole subject falls under the federal jurisdiction for the administration of criminal justice. There has been no adjudication on this issue by the Supreme Court of Canada and in this province, in the only case I could find, *Kyle* v. *Jamieson*, [1939] 1 W.W.R. 10, 53 B.C.R. 309, 71 C.C.C. 342, a judgment by Robertson J. of this court, the court proceeded on the basis that sec. 734 of the *Criminal Code* was valid, though in the particular decision it was held that section was not a defence to the action in a civil court.

He went on to state:[29]

> After 1955, when the new *Criminal Code* was brought in, these sections disappeared completely so that the right to rely upon a bar to civil proceedings, if it exists, must rest on the *continuing jurisdiction* vested in this province by virtue of the *English Law Act* and the Imperial statute which is relied upon by the defendant in the present case. (emphasis mine)
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> . . . [the] repeal of secs. 732 to 734 of the *Criminal Code* did not thereby repeal such legislation as may have existed in this province before Confederation relating to the same subject matter.

Ruttan J. does not rely on a "renewal" of Imperial legislation as MacDonald J. would suggest but rather on the "continuing jurisdiction" of the province.

The respective legislature spheres of the federal Parliament and the provincial legislatures are set out in sections 91 and 92 respectively in the British North America Act, 1967.[30] Further, by section 129 of the Constitution Act, 1867, the entire body of pre-confederation provincial laws, both common and statute law, was continued at confederation and is alterable only expressly and according to the stipulations conferring jurisdiction on the provinces or the federal Parliament.[31]

While Ruttan J. in *Sharkey* v. *Robertson* did not decide the validity of the previous Criminal Code legislation, it is clear that he thought the relevant Imperial legislation was valid in the provincial domain. Even if the federal legislation were valid, if a conflict arose between validly enacted provincial and federal law, although the latter would prevail, the provincial law would not therefore be *ultra vires*. It would merely be suspended and inoperative while the federal law would remain in effect because of the federal paramountcy indicated by the concluding words of section 91 of the Constitution Act.[32]

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[29] *Ibid.*

[30] 30 & 31 Vict., c. 3 (U.K.), hereinafter referred to as the Constitution Act.

[31] See Hogg, Constitutional Law of Canada (1977), p. 95.

[32] *Ibid*, p. 102.

The British Columbia Supreme Court followed Ruttan J.'s view in three subsequent cases.[33] Verchere J. in *McIntyre* v. *Moon*[34] stated:[35]

> In *Sharkey* v. *Robertson* (1969), 67 W.W.R. 712, 3 D.L.R. (3d) 745 (B.C.), Ruttan J. had occasion to deal with an attack on those provisions similar to the one made here and, in the course of concluding that they were valid, he gave it as his opinion that the repeal of ss. 732-4 of the Criminal Code, R.S.C. 1906, c. 146 (which were first enacted in 1892 and continued until the present Code came into being, when ss. 733 and 734 were dropped but the provisions of s. 732 retained in what became s. 699) did not repeal such legislation as may have existed in the province before Confederation. I agree with that conclusion and with the further unstated, but I think, inherent conclusion that the enactment of ss. 732-4, or their predecessor sections in 1892, did not, by their enactment, procure the repeal of that legislation either.
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> To what has already been said I would add, however, that in my opinion: (a) this is not a case to which s. 22 of The Interpretation Act, R.S.B.C. 1960, c. 199, applies, because conflict between Canadian and provincial legislation serves only to suspend the legislative authority of the province in relation to the affected matter: see *Provincial Secretary of Prince Edward Island* v. *Egan*, [1941] S.C.R. 396 at 402, 76 C.C.C. 227, [1941] 3 D.L.R. 305.

The Alberta View.

MacDonald J., in *Stevens* v. *Quinney*, rather than following previous Saskatchewan cases or the logic of the British Columbia Supreme Court, instead followed the case of *Schultz* v. *Wolske*,[36] a decision of the Alberta Supreme Court.[37] With respect, the writer submits that Milvain J. in *Schultz* v. *Wolske* misapplied the doctrine of occupied field and paramountcy.[38] Milvain J. followed *Trinea* v. *Duleba*,[39] and stated:[40]

> . . .[T]he field having become occupied by valid Dominion legislation, the Imperial statute was ousted. The repeal of the Canadian legislation would not revive the Imperial legislation it had displaced.

Professor Bora Laskin (as he then was), in a case comment[41] on *Dawson* v. *Muttart*,[42] which held section 734 of the Criminal Code *ultra vires*, stressed the necessity at that time for the Supreme Court to

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[33] *McIntyre* v. *Moon*, [1971] 4 W.W.R. 148 (B.C.S.C.); *Sindaco* v. *Stupka* (1977), 74 D.L.R. (3d) 148 (B.C.S.C.); *Kenmuir* v. *Huetzelmann* (1977), 3 C.C.L.T. 153 (B.C. Co. Ct).

[34] [1971] 4 W.W.R. 148 (B.C.S.C.).

[35] *Ibid.*, at p. 151.

[36] *Supra*, footnote 9.

[37] *Supra*, footnote 1, at p. 287 (W.W.R.).

[38] Hogg, *op. cit.*, footnote 31, at p. 102.

[39] [1924] 2 W.W.R. 1177 (Alta S.C.).

[40] *Supra*, footnote 9, at p. 413.

[41] (1941), 19 Can. Bar Rev. 379.

[42] [1941] 2 D.L.R. 341 (P.E.I.S.C.).

decide the constitutional validity of section 734, since the appellate courts of the various provincial jurisdictions were divided on that point. Laskin had the opinion that section 734 was *ultra vires* and pointed out that the grounds for the decision in *Trinea* v. *Duleba* were untenable. Laskin stated:[43]

> Clearly, a provision releasing from civil proceedings a person tried on a criminal charge cannot be deemed legislation "in relation to" criminal law or procedure. Is then such a provision valid as being ancillary or necessarily incidental to legislation in relation to criminal law and procedure? Two Alberta cases, *Trinea* v. *Duleba* and *Dowsett* v. *Edmunds* have so held. In the first of them, Hyndman J.A. dealt with the constitutional point in a short paragraph:
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> > "As to the question of *ultra vires*: I content myself with saying that in my opinion the Dominion Parliament having declared that a common assault is a criminal offence, have the right, if they see fit, to occupy the whole field with respect thereto, and thus to forbid any civil or other proceeding respecting the same cause."
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> In the second case, Harvey C.J.A. for the Court said that the *Trinea Case* was binding and that s. 734 was valid on the sole ground of being properly ancillary legislation.
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> From several standpoints the grounds of decision in the Alberta cases are untenable. First it might be noted, as has been pointed out, that "at common law, a party's civil rights were not taken away by the fact that the wrong complained of amounted to a criminal offence or that the defendant has been convicted under criminal proceedings". And on any view of the authorities with respect to ancillary legislation, it cannot be said that the provision in s. 734 releasing from civil proceedings is "necessarily incidental to" or "reasonably necessary for" or "necessary to control effectively" the criminal offence of common assault. With respect too, Hyndman J.A.'s use of the term "occupy the whole field" seems hardly apt. As Lord Macmillan stated in *Forbes* v. *Attorney-General for Manitoba*, "the doctrine of the 'occupied field' applies only where there is a clash between Dominion legislation and provincial legislation within an area common to both". Moreover, if the Alberta cases are right, the Dominion power of enacting legislation ancillary to the criminal law would enable it to forbid so many civil proceedings as in effect to transfer control thereof from the provinces to the Parliament of Canada. There is respectable authority against such a position.
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> In fine, there seems to be no adequate answer to the judgments of Paton and Chisholm JJ. of the Supreme Court of Nova Scotia in *Rice* v. *Messenger*, holding that s. 734, as it now stands, is *ultra vires*, and that the matter of civil proceedings is within exclusive provincial competence under s. 92(13) of the B.N.A. Act, "property and civil rights in the province".[43]

In the *Dowsett*[44] case, also criticized by Laskin in his comment, Harvey C.J.A. simply followed *Trinea* but stated:[45]

> In view of the difficulty of the question and room for difference of opinion leave to appeal to the Supreme Court of Canada is granted if desired but inasmuch as it was pointed out in the argument that a similar provision existed in the English law before 1870 when that law was introduced into the North-West Territories and that if sec. 734 is invalid because it is a civil matter the same provision may be, in

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[43] *Op. cit.*, footnote 41, at pp. 380-382.

[44] [1926] 3 W.W.R. 447 (Alta S.C.).

[45] *Ibid.*, at p. 450.

> effect, as part of the law of England, so introduced, the plaintiff may not desire to carry the case further.

It would therefore appear that Harvey C.J.A. held that the gist of the legislation was civil, in any case, and belonged to the province.

Except in *Schultz* v. *Wolske* and *Stevens* v. *Quinney*, one factor does emerge from the case law: the doubt of the courts appears to be with the constitutional validity of the federal legislation (now repealed) and *not* with the relevant Imperial legislation.

Section 35 of the Interpretation Act.

Certainly section 35 of the Interpretation Act has no application in the *Stevens* v. *Quinney* case, and it is not clear why MacDonald J. referred to this provision. Section 35 states:

> Where an enactment is repealed in whole or in part, the repeal does not
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> (a) revive any enactment or anything not in force or existing at the time when the repeal takes effect.

There is no question of "revival" of any law. It is clear that, as mentioned, the British Columbia Supreme Court did not hold that relevant Imperial legislation was in force by process of "renewal" or "revival". Conflict between validly enacted federal and validly enacted provincial legislation serves only to suspend the provincial legislation in relation to the affected matter.[46]

Section 10 of the Criminal Code.

Section 10 of the Criminal Code referred to by MacDonald J. in *Stevens* v. *Quinney* also has no application in that case. Section 10 states: "No civil remedy for an act or omission is suspended or affected by reason that the act or omission is a criminal offence." At common law, a party's civil rights were not taken away by the fact that the wrong complained of amounted to a criminal offence or that the defendant had been convicted under criminal proceedings. In addition, however, the rule which prevailed before the enactment of section 10 was that when the wrong amounted to a crime the civil remedy could not be pursued until the defendant had been prosecuted.[47]

Section 10 would seem to have the following import only: the fact that an act is a criminal offence does not per se take away or affect a civil remedy, if the latter exists. In *Illingworth* v. *Coyle*,[48] D.A. MacDonald J. stated regarding section 10:[49]

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[46] Hogg, *op. cit.*, footnote 31, p. 102.

[47] *Withers et al.* v. *Bulmer* (1921). 61 D.L.R. 642 (Sask. C.A.), at p. 644.

[48] [1933] 3 W.W.R. 607 (B.C.S.C.).

[49] *Ibid.*, at p. 608.

> Even assuming that it be *intra vires*, it can surely mean only what it says; and it does not purport to take away the right of any civil Court to control its own proceedings. It is a mere statement that the fact of the act constituting a criminal offence does not of itself operate as a stay.

Indeed the constitutional validity of section 10 has been doubted in a number of cases.[50] Even if section 10 were *intra vires* of the federal Parliament, it does not declare that there shall be a civil remedy immediately exercisable notwithstanding the crime, although that result, as a practical matter, may follow in most provinces and in most cases because of each province's respective existing civil law. Section 10 deals only with the effect of a crime on whatever civil remedy the provincial law may allow. It still remains for the respective provincial legislature to declare, if it chooses, the conditions precedent to any civil remedy or to declare that there shall be no civil remedy for a tort which amounts to a crime.[51]

Conclusion

In summary, the British Columbia cases held that relevant Imperial legislation was in force in that province at the time those cases were decided. British Columbia has since repealed such law.[52] The Saskatchewan case law prior to *Stevens* v. *Quinney* held that relevant Imperial legislation is in force in Saskatchewan. (British Columbia: the Offences Against the Person Act, 1828; Saskatchewan: the Offences Against the Person Act, 1861.) Applying the doctrine of paramountcy, the enactment of sections 732-734 in the Criminal Code and their predecessor sections, and subsequent repeal of sections 732-734 in 1955, did not repeal Imperial legislation in force in the province. Sections 92 and 129 of the Constitution Act, 1867, the North-West Territories Act, 1886, and The Saskatchewan Act, 1905 preserved section 45 of the Offences Against the Person Act, 1861 for the Province of Saskatchewan; the provision has never been repealed, abolished or altered by the Saskatchewan Legislature.[53]

Laskin, in his case comment[54] on *Dawson* v. *Muttart*,[55] pointed to the suggested intention of provisions like section 734, which was

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[50] See annotations following s. 13 in Tremeear's Criminal Code, Canada (5th ed., by A. B. Harvey, 1944).

[51] *Ibid.*, at p. 50.

[52] See *supra*, footnote 25, regarding British Columbia reform.

[53] Besides the issue of the constitutional validity of the relevant provisions of the Offences Against the Person Act, 1861, the "applicability" of that law is also important regarding its enforcement. See *supra*, footnote 20 and the references cited therein regarding the principles governing whether a statute or part thereof is "applicable".

[54] *Op. cit.*, footnote 41.

[55] *Supra*, footnote 42.

derived from section 45 of the Offences Against the Person Act, 1861:[56]

> . . . [T]he intention seemed to be to take away the civil remedy in cases of mere common assault, where no serious injury or other aggravating circumstances existed, and in respect of which cases summary disposition by a justice would be adequate and the public interest would be served by having them disposed of once and for all. The present right of action for a technical assault causing no actual damages is, of course, a survival from the time when the matter was cognizable in the King's Courts under their jurisdiction, of a criminal character, to prevent breaches of the peace. Aside from any constitutional question, every relevant consideration would seem to favour a policy of dealing summarily with technical assaults and preventing further proceedings in respect thereof.

He mentioned further, however, Paton J.'s view in *Rice* v. *Messenger*:[57]

> . . . that it seems remarkable that common assault alone should be picked out as an offence for which the Dominion, in exercising its legislative authority in the field of punishment, has considered that the punishment under the Criminal Code is so sufficient that no other consequences should follow from that wrongful act; and yet if the accused is tried on indictment, and liable therefore to a greater punishment, the civil action is not barred. It is more than probable that the Dominion adopted the legislation of 1869, from which s. 734 stems, without giving serious consideration to its constitutionality.

The Province of Manitoba, as a result of recommendations by the Manitoba Law Reform Commission,[58] enacted section 3(4) of The Tortfeasors and Contributory Negligence Act[59] which effectively repeals section 45 of the Offences Against the Person Act, 1861 by negating its effect. The Manitoba Law Reform Commission in its report[60] stated:[61]

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[56] *Op. cit.*, footnote 41, at p. 380.

[57] *Ibid.*, at p. 382.

[58] Manitoba Law Reform Commission, Report on "Section 45 of the Offences Against the Person Act, 1861", Report #8, July 27th, 1972. See *supra*, footnote 25, regarding British Columbia reform.

[59] S.M., 1973, c. 13.

[60] The Manitoba Law Reform Commission, *op. cit.*, footnote 58, pp. 7-8, suggests that s. 45 of the Offences Against the Person Act, 1861 applies only in the case of "private prosecution". While it may be that previous provisions of the Criminal Code (ss 733-734, see *supra*, footnote 14) were so interpreted, it would seem that s. 45 should only logically be restricted in the sense that the complaint leading to an information being laid must be made "by or on behalf of" the victim of the assault; that is, the conditions of the section cannot be met if a stranger or a mere bystander as witness to the assault makes a complaint to initiate criminal proceedings. See *Rice* v. *Messenger*, [1929] 2 D.L.R. 669 (N.S.S.C.), regarding the meaning of "on behalf of". Even if a "complaint" in s. 45 more properly should read "information" (see *e.g.*, 25 Halsbury's Laws of England (3rd ed., 1958), p. 186) then where a police officer lays an information on the basis of a complaint by the victim of an assault, the information must be laid "on the behalf of the party aggrieved". See also *Kenmuir* v. *Huetzelmann*, *supra*, footnote 33, at p. 154, where it appears from the text of that case that a charge was laid as a result of the complaint of Kenmuir Sr. on behalf of his son. In *Nicholson* v. *Booth*, [1888] L.J. 43, 16 Cox C.C. 373, an information was laid under 24 & 25 Vict., c.

For footnote 61 see next page

> That the deprivation of a civil right of action, as attempted by the now repealed section of the *Criminal Code* and as effected by section 45 of the *Offences Against the Person Act* of 1861, is within the jurisdiction of the provincial Legislature hardly admits of doubt in our opinion. . . . Is section 45 of that 1861 statute still in force in Manitoba? We think so. We could find no legislative enactment of this province abolishing or repealing it.

Applying the comments of Paton J. in *Rice* v. *Messenger*[62] and Saunders J. in *Dawson* v. *Muttart*,[63] the Manitoba Law Reform Commission decided that an offender having answered society's charge in terms of criminal law should also be liable to compensate the victim for loss, damage and personal injury inflicted and therefore the victim should be allowed to pursue a civil right to personal compensation at the offender's personal expense.[64]

MacDonald J.'s reasoning in *Stevens* v. *Quinney*, the writer submits, is tenuous. Therefore, if it is the intention that the provisions of section 45 of the Offences Against the Person Act, 1861 should not be law in Saskatchewan, it would be wise for the Saskatchewan Legislature to repeal section 45.

The Law Reform Commission of Saskatchewan is examining the body of English statute law incorporated into Saskatchewan as of July 15th, 1870.[65] Perhaps the Commission will recommend the repeal of section 45 of the Offences Against the Person Act, 1861 and not rely

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100, s. 42 by a police constable on the basis of a complaint by Naylor, the person assaulted. Ultimately the conviction against Nicholson on the basis of the information laid was quashed, not because the information was laid by the police constable instead of Naylor, but because Naylor did not appear at Nicholson's trial and pursue his complaint; hence, there was no evidence to support the charge against Nicholson. Before the passing of the Act, in the case of common assault, apparently the plaintiff had two remedies: by action and by indictment. As stated by Maule J. in *Tunnecliffe* v. *Tedd* (1848), 5 C.B. 553, at p. 561, 136 E.R. 995, "the object of the act was, to put an end to action and prosecutions for assaults of an ordinary character, by substituting a cheaper and more speedy prosecution, which was to be a bar to all other proceedings, civil as well as criminal for the same offence". But the remedy is entirely at the option of the party aggrieved; he must initiate the proceedings which may be by complaint to the police who may in turn lay an information. (The legislation considered in *Tunnecliffe* was subsequently amended to include the words "on behalf of".)

[61] *Op. cit.*, footnote 58, p. 5.

[62] *Supra*, footnote 60.

[63] *Supra*, footnote 42.

[64] *Op. cit.*, footnote 58, pp. 7-8. The reform recommended by the Manitoba Law Reform Commission was neither effected nor obviated by The Criminal Injuries Compensation Act of Manitoba. Similar reasoning would apply in Saskatchewan regarding the effect of The Criminal Injuries Compensation Act, R.S.S., 1978, c. C-47. In addition, the scheme envisaged by that Act would seem to contemplate a co-existing cause of action in tort. One can sue in tort within two years of the cause of action. Indeed, one is precluded from invoking the benefits of the scheme after one year from the tort. (See s. 12).

[65] Law Reform Commission of Saskatchewan, Yearly Review, 1980, April 1981.

on the decision of MacDonald J. in *Stevens* v. *Quinney* regarding the status of that Act. The Saskatchewan Court of Appeal, having upheld MacDonald J.'s decision, is not necessarily bound by its previous decisions.[66]

Had MacDonald J. held that section 45 of the Offences Against the Person Act, 1861 was part of the law of Saskatchewan, the defendant Quinney of course would have had to satisfy the requirements set out in that provision. The plaintiff made a complaint to the Saskatoon R.C.M.P. The police laid the information on the basis of the plaintiff's complaint. The police had the discretion to lay the original information; *a fortiori*, the police had the power to reduce the original charge to a charge of common assault. The defendant was convicted summarily, by a judge having the power and the authority of two justices of the peace, of the charge of common assault, and the defendant paid the consequential fine of $25.00. Hence, according to section 45 of the Offences Against the Person Act, 1861, the defendant "shall be released from all further or other proceedings, civil or criminal, for the same cause".[67]

WILLA M. B. VORONEY*

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DROIT CONSTITUTIONNEL—INDÉPENDANCE DU POUVOIR JUDICIAIRE—SALAIRES DES JUGES—JUSQU'OÙ VA LA SOUVERAINETÉ DU PARLEMENT?—La Cour fédérale, division de première instance, a rendu en novembre 1981, sous la plume du juge Addy, une décision touchant la question de l'indépendance du pouvoir judiciaire au Canada.[1] Fait notable, c'était la première fois depuis 1867 qu'un tribunal canadien avait l'occasion d'exprimer un avis aussi élaboré sur ce sujet.[2] Il fallait déterminer si le parlement fédéral pouvait, au moyen d'un amendement à la Loi sur les juges[3] obliger les juges nommés par l'exécutif fédéral à contribuer financièrement à la pension devant leur

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[66] See Murphy, J. David and Rueter, Robert, Stare Decisis in Commonwealth Appellate Courts (1981), pp. 47-48.

[67] See *e.g.*, *Sharkey* v. *Robertson, supra*, footnote 27; *McIntyre* v. *Moon* and *Kenmuir* v. *Huetzelmann, supra*, footnote 33, where the defendant in each case was unable to meet the conditions of the relevant legislation. See also, *supra*, footnote 60.

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[1] *Marc Beauregard* c. *La Reine*, [1981] 2 C.F. 543.

[2] Toutes les décisions citées par le juge Addy traitent de la question du caractère discriminatoire ou non de la loi fédérale attaquée.

[3] S.R.C., 1970, c. J-1. La modification contestée se trouve dans la Loi de 1975 modifiant le droit statutaire, S.C., 1974-5-6, c. 81.

être payée à leur retraite, ou à leur conjoint survivant. Le juge Addy a décidé que le principe de l'indépendance du pouvoir judiciaire rendait invalide la loi fédérale contestée, du moins en ce qui concerne le demandeur. Selon lui, un juge, une fois nommé, a un droit absolu d'obtenir, à titre de rémunération, un montant jamais inférieur à ce qu'il était au moment de sa nomination.

Cette décision risque de laisser perplexes plusieurs juristes. Tous les constitutionnalistes affirment que le principe fondamental du droit constitutionnel canadien et britannique est celui de la souveraineté du parlement.[4] Les principes de légalité et, au Canada, de suprématie de la constitution n'en seraient peut-être que les corollaires. Si le parlement est souverain au point qu'il peut adopter toute loi sur quelque sujet que ce soit, comment en serait-il venu à ne pouvoir exiger des juges de fournir une contribution financière à leur propre régime de retraite? Selon le juge Addy, le parlement est certes souverain, mais ses pouvoirs en l'occurrence pourraient être limités par les éléments suivants:[5]

> . . . à moins que les juges des cours supérieures ne jouissent d'un statut spécial en vertu du principe de la séparation des pouvoirs entre le judiciaire, le législatif et l'exécutif ou en vertu de quelque autre empêchement constitutionnel d'ordre légal.

L'expression "quelque autre empêchement constitutionnel" laisse voir qu'à son avis toute limite aux pouvoirs du parlement ne peut prendre sa source que dans la constitution. Il paraît donc opportun de se demander s'il est exact que notre constitution, formelle ou matérielle, fait une place à part au pouvoir judiciaire, et si oui, quel est le statut juridique de ce pouvoir, particulièrement face au Parlement. C'est là toute la question soulevée dans cette affaire.

A) *La décision du tribunal.*

Les faits dans cette cause n'étaient pas contestés. Le demandeur a été nommé juge à la Cour supérieure en juillet 1975. Au moment de sa nomination la Loi sur les juges[6] prévoyait au chapitre des salaires et avantages sociaux, un traitement de base de $53,000.00 et les bénéfices marginaux suivants, sans participation financière des intéressés: une pension de retraite pour les juges, une autre pour leurs veuves et

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[4] Pour l'Angleterre, *cf.*, *inter alia*, E.C.S. Wade and G. G. Phillips, Constitutional and Administrative Law (1977), pp. 58-60. Au Canada, voir F. Chevrette et H. Marx, Droit constitutionnel (1981), pp. 83-84.

[5] *Supra*, note 1, à la p. 558. La version anglaise parle de "some similar legal constitutional impediment". A noter que le juge Addy supervise de très près la traduction de ses motifs, de sorte que le texte français publié dans les recueils officiels ne doit pas être considéré comme une simple traduction. C'est pourquoi nous citerons la version française de la décision.

[6] *Supra*, note 3.

leurs enfants, et des "prestations de retraite supplémentaires". En décembre 1975 cette loi fut modifiée par l'addition d'un article à l'effet que les juges nommés après le 16 février 1975 devraient contribuer les sommes prévues par la loi (exprimées en pourcentage du salaire) de façon à aider au financement de ces bénéfices. L'effet de cette modification pour le demandeur fut que son salaire net était réduit de sept pour cent. Il réclama un jugement déclaratoire à l'effet (a) que la modification de décembre 1975 à la Loi sur les juges était *ultra vires* du parlement fédéral, (b) ou subsidiairement *ultra vires* du parlement fédéral en ce qui le concerne, (c) ou subsidiairement inopérante en ce qui le concerne. C'est sa seconde prétention qui fut retenue. Il est important de noter que la Cour fédérale n'a pas affirmé que le parlement fédéral ne peut jamais réduire le traitement des juges. Sa conclusion est à l'effet qu'un juge, une fois nommé, est constitutionnellement assuré de recevoir, tant qu'il demeure en fonction, un traitement toujours égal ou supérieur à ce qu'il était au jour de sa nomination.[7] Dans le cas du demandeur l'effet de la loi, à cause de ces retenues additionnelles, était de réduire le salaire net à un montant inférieur à ce qu'il était en juillet 1975. Si le juge Beauregard avait reçu depuis sa nomination des augmentations de traitements suffisantes pour acquitter les nouvelles contributions exigées, le jugement de la cour aurait été autre.

Cette décision, qui couvre environ quarante-cinq pages, nous semble fondée sur trois principaux motifs. Un premier vient de la décision de la Cour suprême rendue en septembre 1981 concernant le projet fédéral de rapatriement de la constitution.[8] Elle y aurait reconnu que:

> . . . des droits, des pouvoirs, des privilèges de même que des principes constitutionnels pouvant être reconnus et sanctionnés légalement peuvent exister et existent de fait, même s'ils ne sont pas consacrés par une loi ou un texte législatif qui fait partie de notre Constitution.[9]

Un second est constitué par un article du professeur Lederman,[10] référant à l'Act of Settlement, de 1700,[11] l'Act for rendering more

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[7] *Supra*, note 1, à la p. 590: "je conclus que le Parlement . . . ne peut constitutionnellement, en droit, réduire, par toute loi portant sur des réductions ou des déductions de traitements des juges, la rémunération à laquelle ce juge avait droit au moment de sa nomination".

[8] (1981), 39 N.R. 1.

[9] *Supra*, note 1, à la p. 565.

[10] Le professeur Lederman a écrit l'article qui fait autorité sur la question de l'indépendance du pouvoir judiciaire: The Independence of the Judiciary (1956), 34 Can. Bar Rev. 769, 1139. Le reste de la littérature juridique est assez pauvre sur cette question. Mais on pourra consulter avec profit les quelques articles suivants: P. B. Mignault, L'indépendance des juges (1928), 6 R. du D. 475, W. Mulock, The Independence of the Judiciary (1934), 12 Can. Bar Rev. 406, et E. McWhinney, Constitutional Law—Judicial Independence—Tenure of Office by Judges—an Excursus in the Terrell Case (1954), 32 Can. Bar Rev. 94.

[11] 12 & 13 William III, c. 2.

effectual the provisions in the Act of Settlement relating to the commissions and salaries of judges, de 1760,[12] et à la Loi constitutionnelle de 1867. Le dernier motif touche à la forme fédérative du Canada et au partage des pouvoirs législatifs opéré par notre constitution.

Le juge Addy reconnaît d'abord que la décision de la Cour suprême du Canada ne lui fournit pas le motif principal de sa décision.[13] Mais il l'utilise pour montrer qu'il est possible pour un tribunal, dans le cadre d'un litige concernant le droit constitutionnel, de fonder sa décision sur autre chose qu'un texte législatif. Il en prend pour exemple la prérogative royale, dont la nature et l'étendue ont été définies par les tribunaux. Les juges dissidents en Cour suprême ont d'ailleurs écrit, en accord ici avec leurs collègues majoritaires, en parlant de la constitution canadienne:[14]

> Cette constitution repose donc sur des lois et des règles de common law qui disent le droit et ont force de loi. . . .

En l'occurrence, il s'agirait du principe de l'indépendance du pouvoir judiciaire. Il nous restera à voir s'il est véritablement prévu et protégé par la "common law" et s'il ne serait pas néanmoins battu en brèche par des textes législatifs.

C'est l'article du professeur Lederman qui fournit au tribunal la quasi-totalité de ses arguments. Il a effectué une étude historique exhaustive de la question de l'indépendance du pouvoir judiciaire. Il montre que l'Act of Settlement, de 1700, a été adopté pour stopper une fois pour toutes les abus commis par les souverains de la dynastie des Stuart qui, au XVIIe siécle, nommaient et démettaient de leurs fonctions les juges, de façon à s'assurer des jugements favorables dans leur lutte contre un parlement de plus en plus revendicateur de pouvoirs.[15] Le septième alinéa de l'article 3 de l'Act of Settlement a imposé au Roi que désormais:[16]

> . . . judges' commissions be made *quamdiu se bene gesserint* and their salaries ascertained and established.

On reconnaît là les deux assises de l'indépendance du pouvoir judiciaire: les juges ne demeurent plus en fonction durant bon plaisir, mais pendant bonne conduite; de plus leurs salaires leur sont assurés

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[12] 1 Geo. III, c. 23.

[13] *Supra*, note 1, à la p. 565.

[14] *Supra*, note 8, à la p. 287.

[15] *Supra*, note 10, aux pp. 779-782. Pour ne prendre que cet exemple, le juge Edward Coke fut immédiatement démis de ses fonctions en 1616 après avoir refusé d'admettre que le Roi pouvait de sa seule volonté ordonner la suspension de procédures judiciaires. Il fut même emprisonné en 1621. Voir T. F. T. Plucknett, Taswell-Langmead's English Constitutional History (1960), pp. 350 ss.

[16] *Supra*, note 1, à la p. 566.

tant et aussi longtemps qu'ils demeurent en poste; ils ne sont donc plus soumis à la discrétion du souverain.

La loi de 1760, comme son nom l'indique, vint préciser ce dernier point. Son article trois, qui est crucial, prévoit ceci:[17]

> That such salaries as are settled upon judges . . . shall, in all time coming, be paid and payable to every such judge . . . so long as the patent or commissions of them, or any of them respectively, shall continue and remain in force.

Le but visé par la loi était non seulement d'assurer une idépendance aux juges face au souverain, mais de faire en sorte que leurs salaires constituent une charge permanente pour les revenus de la Couronne.[18] Ceci fut réalisé quelques décennies plus tard. En 1787 le fonds du revenu consolidé fut créé, et, à partir de 1875, on ne modifia plus la pratique à l'effet de lui imputer automatiquement à chaque année les sommes nécessaires au paiement des salaires des juges. Ceci, au dire de Lederman, pour éviter des discussions annuelles au parlement sur cette question, discussions pouvant souvent prendre un caractère frivole ou même vexatoire.[19]

La Loi constitutionnelle de 1867 a importé ces garanties au Canada, en prévoyant au premier alinéa de son préambule que notre constitution repose sur des principes similaires à ceux existant en Angleterre. C'est aux articles 99 et 100 que l'on retrouve plus précisément les garanties accordées aux juges de façon à assurer leur indépendance. L'article 99 prévoit le maintien des fonctions durant bonne conduite, et l'article 100, plus important pour nous, est à l'effet suivant:

> . . . the salaries, allowances, and pensions of the Judges of the Superior . . . courts . . . shall be fixed and provided by the Parliament of Canada.

Le professeur Lederman estime que les mots "fixed and provided" sont essentiellement au même effet que l'expression "ascertained and established" contenue dans l'Act of Settlement.[20] Ils signifient que les salaires des juges nommés par le pouvoir exécutif fédéral sont déterminés par nul autre organisme que le parlement, et que c'est lui qui doit les payer. Ils accorderaient cependant aux juges canadiens une protection plus grande que celle dont jouissent leurs collègues anglais, vu leur inclusion dans la constitution formelle. En effet on pourrait se demander longuement si le parlement de Westminster peut modifier par simple loi l'Act of Settlement et la Loi de

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[17] *Ibid.*, à la p. 568.

[18] Lederman, *op. cit.*, note 10, aux pp. 791-792.

[19] *Ibid.*, à la p. 792. Le juge Addy s'appuie aussi sur la doctrine pour appuyer sa conclusion quant à la garantie des salaires. Ainsi Blackstone, qui était contemporain de l'adoption de la loi de 1760, écrit: " . . . and their full salaries are absolutely secured to them during the continuance of their commission." *Supra*, note 1, à la p. 569.

[20] *Op. cit.*, note 10, à la p. 1165.

1760 ou si les juges ne possèdent pas une juridiction innée, assurant l'existence continue de leurs fonctions. Au Canada la situation est beaucoup plus simple car le parlement fédéral ne pouvait, en vertu de l'article 91(1) de la Loi constitutionnelle de 1867, modifier seul les articles 99 et 100 de cette loi.[21] Cet article 91(1) a été abrogé par la Loi constitutionnelle de 1981 mais la situation pratique reste la même, vu le libellé des articles 52 et 38 de cette loi. Le parlement fédéral ne conserve la possibilité de modifier unilatéralement une disposition de la "Constitution du Canada" que si elle concerne le pouvoir exécutif fédéral, le Sénat ou la Chambre des communes.

Le dernier motif du juge Addy repose sur l'existence d'un partage des pouvoirs législatifs au Canada. Il estime, pour les motifs que nous venons d'expliquer, qu'il relève de l'autorité des provinces de créer les tribunaux et de légiférer sur l'administration de la justice, et qu'elles sont en droit de s'attendre à ce que le parlement central se catonne dans l'exercice de ses pouvoirs, qui sont ici de nommer et payer les juges des cours supérieures. Il s'exprime comme suit sur ce sujet:[22]

> Il semble donc clair qu'il existe une exigence de droit constitutionnel découlant de la nature fédérale de notre constitution et qui veut que les droits des juges nommés par le fédéral, tels qu'ils existaient au moment de la Confédération, ne puissent être abrogés, diminués ou modifiés sans un amendement de la Constitution.

Ce dernier argument, on le voit immédiatement, n'est applicable que si la loi fédérale contestée a pour effet d'abroger ou de modifier, en tout ou en partie, l'article 100. Le juge Addy semble prendre cela pour acquis, car il n'en traite pas davantage. Nous aurons pour notre part à revenir sur cette question.

B) *La place du pouvoir judiciaire dans la constitution.*

Nous ne pouvons malheureusement partager toutes les conclusions du juge Addy. A notre avis le principe de souveraineté du parlement a une prééminence telle en droit constitutionnel canadien qu'il l'emporte sur tous les autres, sauf celui de la suprématie de la constitution. La règle de l'indépendance du pouvoir judiciaire est peut-être reconnue dans notre droit, mais elle ne peut, dans l'état actuel de notre constitution, faire conclure à l'invalidité d'une loi du parlement comme celle en litige. Un bref rappel des grands concepts de droit constitutionnel peut nous être utile.

Le principe de la souveraineté parlementaire fut élaboré en Angleterre au cours des siècles et connut le point culminant de son développement en 1688 dans le Bill of Rights. La "lutte à finir" entre

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[21] *Ibid.*

[22] *Supra*, note 1, à la p. 588.

le Roi et les représentants du peuple pour la possession du pouvoir politique fut résolue en faveur de ceux-ci. Le principe traduit l'idée qu'il n'y a rien ni personne dans l'Etat pouvant faire obstacle à ce que les représentants de la population désirent lorsqu'ils l'expriment dans une loi. Dicey a exprimé cette double signification dans la phrase suivante:

> Parliament can legally legislate on any topic whatever which, in the judgment of Parliament, is a fit subject for legislation. There is no power which, under the English Constitution, can come into rivalry with legislative sovereignty of Parliament.[23]

Il n'y aurait donc rien d'illégal dans le fait, du moins en Angleterre, de l'adoption d'une loi rétroactive, ou visant une personne en particulier, abolissant les religions, changeant l'ordre de succession au trône, ou, en matière criminelle, autorisant l'arrestation sans mandat, la détention pour une période illimitée, l'abolition de la présomption d'innocence, etc.[24] Le parlement est souverain, et c'est pourquoi il n'y a pas et ne peut y avoir de séparations des pouvoirs: il transcende les autres pouvoirs. Face au pouvoir exécutif en effet le parlement est souverain car l'exécutif ne peut s'opposer à sa volonté. L'exécutif n'a d'autres pouvoirs que ceux que le parlement a bien voulu lui laisser (la prérogative royale) ou lui déléguer (le pouvoir réglementaire). Face au pouvoir judiciaire la position des tribunaux britanniques est à l'effet que leur rôle se limite à vérifier s'ils sont en présence d'une loi ou d'un simple projet. S'il s'agit d'une loi, ils n'ont qu'à s'y plier, comme tout autre citoyen.[25] Il ne servirait à rien de prétendre que le parlement a erré ou a été induit en erreur lorsqu'il a adopté le texte d'une loi.[26] En Angleterre il n'y a pas de loi invalide. Il ne peut pas y en avoir. Le parlement britannique serait donc légalement justifié d'abroger l'Act of Settlement et la Loi de 1760.

On pourrait cependant prétendre que tant que le parlement n'a pas agi de la sorte ces deux lois créent une indépendance pour le pouvoir judiciaire et qu'il est lié par elles. Deux remarques doivent être faites à ce sujet. La première est que ces lois ne cherchent peut-être même pas à limiter la souveraineté parlementaire. Nous ne voulons ni ne pouvons reprendre l'étude exhaustive qu'a faite le professeur Lederman. Mais nous croyons pouvoir affirmer que, quant à l'Act of Settlement, l'étude du contexte historique de son adoption montre qu'on a simplement voulu enlever au roi son pouvoir de déterminer les

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[23] Introduction to the Study of the Law of the Constitution (10th ed., 1961), p. 69.

[24] *Ibid.*, pp. 39 ss.

[25] *Edinburg & Dalkeith Railway* v. *Wauchope* (1842), 8 E.R. 279, voir aussi Wade and Phillips, *op. cit.*, note 4, p. 52: "The courts are constitutionally subordinate to Parliament."

[26] *Lee* v. *Bude & Torrington Railway Co.* (1871), L.R. 6 P.C. 576.

salaires des juges sans limiter pour autant les pouvoirs du parlement.[27] Son libellé permet une conclusion semblable: affirmer que leurs salaires seront "ascertained and established" signifie simplement qu'ils auront un caractère de fixité et ne seront plus laissés à l'arbitraire du souverain. La loi de 1760 par contre appuie davantage la position défendue par le juge Beauregard, car elle prévoit que les traitements seront payables et payés "so long as the patent or commission of them, shall continue and remain in force". Elle garantit aux juges qu'ils vont continuer à recevoir leurs traitements tant qu'ils restent en poste, c'est-à-dire durant bonne conduite. Mais encore ici une étude historique laisse voir qu'elle cherchait essentiellement, comme son titre l'indique d'ailleurs, à confirmer et renforcer ce que l'Act of Settlement avait établi, à savoir que le souverain ne peut modifier les salaires des juges selon son bon plaisir et (c'est l'élément nouveau) devra les payer de façon continue.[28] On voit donc qu'elle ne vise pas nécessairement à restreindre le pouvoir du parlement quant à la détermination de ces traitements. Nous différons ici d'avis avec le juge Addy. Sa position est à l'effet que ces lois ont créé un fossé infranchissable entre le souverain et le parlement d'une part, et le "pouvoir" judiciare d'autre part. Il écrit:[29]

> Ces deux lois constitutionnelles prévoyaient un moyen très pratique d'assurer que ni le Roi ni le Parlement ne serait capable d'atteindre ses objectifs ou ambitions politiques respectifs en exerçant un contrôle sur les décisions de la magistrature.

Elles interdiraient au roi de réduire la durée des fonctions des juges, et au parlement de diminuer arbitrairement et péremptoirement leurs salaires. Nous les interprétons pour notre part simplement comme limitant le pouvoir discrétionnaire de l'exécutif.

Une autre remarque doit être faite relativement aux lois de 1700 et 1760. Même en admettant que celle de 1760 puisse recevoir deux interprétations valables, nous croyons que son statut constitutionnel face au parlement ne pose pas de difficulté lorsqu'on se rappelle qu'il ne peut se lier pour l'avenir, du moins sur une question de fond.[30] Même si le parlement britannique d'alors avait voulu limiter ses pouvoirs de façon à sécuriser les juges, il peut toujours passer outre aux dispositions prévues dans ces deux lois en adoptant une autre loi plus récente, les abrogeant spécifiquement ou contenant simplement des dispositions contradictoires avec elles.

Qu'en est-il au Canada? L'Act of Settlement et la Loi de 1760 s'appliquent-elles ici? Nous le croyons, vu le premier alinéa du préambule de la Loi constitutionnelle de 1867, à l'effet que notre

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[27] Lederman, *op. cit.*, note 10, aux pp. 789-790.

[28] *Ibid.*, à la p. 791.

[29] *Supra*, note 1, à la p. 560.

[30] *Ellen Street Estates* v. *Minister of Health*, [1934] 1 K.B. 590.

constitution repose "sur les mêmes principes que celle du Royaume-Uni". Mais elles ne sont pas à l'abri de modifications éventuelles. Le Statut de Westminster de 1931 a précisé dans son article 2 que le Colonial Laws Validity Act de 1865 n'était plus applicable au Canada. Les lois canadiennes ne peuvent donc plus être déclarées invalides au motif de non-conformité avec une loi britannique. On constate que la seule limite législative encore applicable aux parlements canadiens provient de la constitution formelle, c'est-à-dire la Loi constitutionnelle de 1867 et la Loi constitutionnelle de 1981. Que contiennent ces textes législatifs britanniques à l'égard du sujet qui nous concerne? A première vue, seule la Loi constitutionnelle de 1867 contient deux dispositions pertinentes: les articles 99 et 100, que nous avons cités précédemment.

Nous nous devons d'insister sur ce point: alors que le parlement britannique pourrait en tout temps modifier ou abroger l'Act of Settlement et la Loi de 1760, au Canada les provinces et le parlement ont toute latitude de faire la même chose, à moins que dans la constitution formelle on retrouve une limite expresse à leurs pouvoirs. La Cour suprême avait raison d'affirmer qu'une règle de common law pouvait être source de droit, mais il nous paraît impossible de prétendre qu'une telle règle puisse servir à invalider une loi fédérale ou provinciale respectant les prescriptions de la constitution.

Le principe de la séparation des pouvoirs n'est pas reconnu dans notre constitution formelle et n'a jamais été appliqué rigoureusement en Angleterre ou au Canada. La doctrine est unanime sur ce sujet.[31] C'est simplement une façon commode de représenter les différents organes et fonctions existant dans l'État. Il est vrai que la Loi constitutionnelle de 1867 a une section intitulée "pouvoir exécutif" et une autre "pouvoir législatif".[32] Mais son texte même ne reconnaît pas le principe de la séparation des pouvoirs, et il n'y a pas de chapitre ou section réservée exclusivement au "pouvoir judiciaire". Seule la section 7, traitant des juges et des tribunaux, s'intitule "Le système judiciaire". Pour réaliser que le principe de la séparation des pouvoirs n'est pas applicable parfaitement au Canada, il suffit de constater que si c'était le cas, il devrait exister une séparation absolue entre les organes, les fonctions, et les personnes oeuvrant dans l'appareil étatique. Or il est manifeste qu'il existe une certaine confusion entre le

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[31] Pour deux exemples entre plusieurs, voir G. Pépin et Y. Ouellette, Droit administratif (1982), p. 77: "Le principe de la séparation des pouvoirs n'est pas sanctionné par la constitution canadienne", et P. B. Mignault, *op. cit.*, note 10, aux pp. 496-497: "La Constitution anglaise . . . se développe de jour en jour de manière progressive à mesure que de nouveaux problèmes de gouvernement se présentent, mais tout le monde sait très bien aujourd'hui que la séparation des pouvoirs n'y existe en aucune façon".

[32] Il s'agit des ss 3 et 4.

pouvoir législatif et le pouvoir exécutif, du moins quant aux personnes, vu que les ministres ont d'abord été élus à titre de députés au parlement. Il n'y a pas non plus de séparation absolue entre la fonction législative et la fonction judiciaire. En effet les juges exercent une fonction législative lorsqu'ils adoptent les règles de pratique applicables devant les tribunaux; pour sa part le parlement empiète en toute légalité sur la fonction judiciaire lorsqu'il fait comparaître devant lui une personne soupçonnée d'avoir violé les privilèges et immunités des parlementaires, et lui impose des sanctions.[33] A notre avis un principe qui n'est pas reconnu dans la constitution formelle et qui n'est pas respecté en pratique ne peut tout simplement pas limiter la souveraineté parlementaire.

Même si l'on admettait un instant que le principe de la séparation des pouvoirs existait au Canada, il est loin d'être certain que la loi fédérale contestée en l'occurrence y fasse violence. A quoi sert précisément cette "règle", que certains ont considérée constituer un "pilier du temple de la justice"?[34] Le juge Addy nous en donne un indice lorsqu'il écrit que sa fonction consiste à

> . . . garantir et préserver le respect dû à notre système judiciaire ainsi que l'observation et l'application efficace de nos lois.[35]

et plus loin:[36]

> . . . toute relâche dans l'adhésion stricte à ce principe met en péril non seulement le statut et le rôle de la magistrature, mais, ce qui est plus important, l'essence même de notre système parlementaire et la préservation de toutes nos libertés fondamentales.

Il nous est difficile de voir comment une législation exigeant des juges des sacrifices financiers analogues à ceux demandés aux autres citoyens peut heurter de front l'un des quatre éléments mentionnés par le juge Addy. Cette loi va-t-elle diminuer le respect des citoyens face au système judiciaire (ou ne serait-ce pas plutôt le contraire)? Va-t-elle empêcher l'application efficace des autres lois? Le système parlementaire s'en trouvera-t-il diminué? Les libertés fondamentales?

Nous sommes bien loin ici de la situation envisagée par le Conseil privé dans l'affaire *Liyanage*.[37] Il s'agissait d'une tentative du parlement du Ceylan de modifier plusieurs lois en vigueur de façon à

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[33] Voir par exemple la Loi de la législature, S.R.Q., 1977, c. L-1, arts 43 et 51.

[34] Per Lord Atkin, dans *Toronto Corporation* v. *York Corporation*, [1938] A.C. 415, à la p. 426.

[35] *Supra*, note 1, à la p. 552.

[36] *Ibid.* Nous serions plutôt enclin à épouser la pensée de Sir William Holdsworth à l'effet que le principe de l'indépendance du pouvoir judiciaire sert à assurer aux juges l'impartialité dont ils ont besoin, et leur permet de protéger les citoyens contre les abus possibles de l'exécutif, et ce faisant de faire triompher la "rule of law": A History of English Law, vol. 10, (1968), pp. 644 et ss.

[37] *Liyanage* v. *R.*, [1967] 1 A.C. 259.

assurer la condamnation des personnes soupçonnées d'avoir participé à un coup d'État manqué en 1962. Le Conseil privé y a reconnu que le parlement pouvait adopter des lois à effet rétroactif, et visant des individus en particulier.[38] Mais il y avait bien plus: les lois légalisaient *ex post facto* l'arrestation et la détention sans mandat, abolissaient pour les détenus visés le droit au procès devant jury, créaient rétroactivement le crime dont ils furent accusés, reconnaissaient l'admissibilité en preuve de tout aveu, même obtenu par l'usage de la force, abolissaient la présomption d'innoncence, de même que tout droit d'appel, etc. . . .

Dans un passage crucial, le Conseil privé dit, à leur sujet:[39]

> Ces modifications constituaient une intrusion grave et délibérée dans le domaine judiciaire. Exprimé très directement, leur but était de faire en sorte que les juges appelés à juger ces individus particuliers sur ces accusations particulières soient privées de leur pouvoir discrétionnaire habituel de rendre les sentences qui s'imposaient.

Voilà donc ce qui fut jugé condamnable dans les lois spéciales: elles empiétaient sur la fonction judiciaire, définie à juste titre comme le rôle des juges de déterminer qu'une violation de la loi a été commise, et, en l'occurrence, appliquer les sanctions prévues. Or, un article de la constitution du pays leur assignait exclusivement cette fonction. L'article 4 de la Charter of Justice de 1833 prévoyait que:[40]

> Notre volonté et notre bon gré sont . . . que toute l'administration de la justice, tant civile que pénale, en celle-ci, soit confiée exclusivement aux tribunaux créés et constitués par notre présente charte.

La situation est bien différente au Canada. Il n'existe d'abord aucune juridiction exclusive garantie aux tribunaux par la constitution formelle. Bien aux contraire, la Loi constitutionnelle de 1867 confie l'"administration de la justice" au pouvoir législatif "exclusif" des provinces[41] et ne garantit même pas l'existence continue de la Cour suprême.[42] D'autre part la loi dont la validité constitutionnelle est attaquée par le juge Beauregard est loin d'empiéter sur l'une des deux fonctions généralement dévolues aux juges, soit de dire le droit, et d'appliquer le droit à des faits.

Notre position ne semble pas contredite par les vues du professeur Lederman. Il laisse entendre qu'il est d'accord avec la position selon laquelle les juges auraient des pouvoirs "autonomes" et "inhérents", mais il devient beaucoup plus circonspect lorsqu'il s'agit de

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[38] *Ibid.*, à la p. 289 *in fine*.

[39] *Ibid.*, à la p. 290 *in fine*.

[40] *Ibid.*, à la p. 286.

[41] Art. 92(14).

[42] Art. 101: ". . . le Parlement du Canada pourra, à l'occasion, pourvoir à l'institution, au maintien et à l'organisation d'une cour générale d'appel pour le Canada."

traiter spécifiquement du pouvoir du parlement vis-à-vis les salaires des juges. A son avis il y aurait deux limites aux pouvoirs du parlement. La première est exprimée en ces termes:

> . . . the balance of authority definitely favours the view that it is unconstitutional to cut the salary of an individual judge of a superior court during the currency of his commission.[43]

Le parlement ne pourrait ainsi diminuer le salaire d'un juge en particulier. On comprend comment cette interdiction vise à assurer l'indépendance nécessaire aux juges face à des mesures de pression pouvant venir du pouvoir exécutif ou législatif. Ce n'est pas ce que le parlement fédéral a voulu faire dans le cas qui nous concerne. D'autre part:

> It would seem to be unconstitutional also for Parliament to attempt a general reduction of the judicial salary scale to an extent that threatens the independence of the judiciary.[44]

Une réduction générale des salaires ne serait donc pas invalide. Seule pourrait être contestée une réduction d'une telle ampleur (ou une série de réduction suivant de très près le prononcé des jugements impopulaires) qu'elle laisserait clairement entendre aux juges qu'ils sont à la merci du pouvoir législatif et qu'il n'ont de choix que de se plier à ses volontés exprimées dans les textes législatifs adoptés. En somme, même une interprétation large des articles 99 de la Loi constitutionnelle de 1867, comme incorporant au Canada l'ensemble du principe de l'indépendance du pouvoir judiciaire, ne devrait pas suffire à faire déclarer invalide l'article 29.1 de la Loi sur les juges.

Enfin, le second argument constitutionnel évoqué par le juge Addy pouvant faire conclure à l'invalidité de l'article 29.1 de la Loi sur les juges est l'existence du partage des pouvoirs législatifs. A son avis cette disposition constituerait une tentative d'amender l'article 100 de la Loi constitutionnelle de 1867. Or les provinces seraient en droit de s'attendre à ce que les juges des cours supérieures soient nommés et payés par les autorités fédérales pertinentes:

> En vertu de la Constitution, la nomination et le paiement des juges des cours supérieures provinciales et le droit criminel qu'ils appliquaient relevaient de la compétence fédérale. . . . Il semble donc clair qu'il existe une exigence de droit constitutionnel découlant de la nature fédérale de notre constitution et qui veut que les droits des juges nommés par le fédéral, tels qu'ils existaient au moment de la Confédération, ne puissent être abrogés, diminués ou modifiés sans un amendement de la Constitution.[45]

Il est hors de doute que l'article 100 ne puisse être modifiée par le parlement central seul. Cela résulte de l'application des articles 52,

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[43] *Supra*, note 10, à la p. 795.

[44] *Ibid.*

[45] *Supra*, note 1, à la p. 588.

alinéa 3 et 38 de la Loi constitutionnelle de 1981. L'article 52, alinéa 3 prévoit que la "Constitution du Canada" ne peut être modifié que conformément aux pouvoirs conférés par elle, et l'article 38 précise le degré de consentement provincial requis pour effectuer des modifications constitutionnelles. A notre avis cependant la véritable question qui se pose ici est de savoir si l'article 29.1 de la Loi sur les juges constitue un amendement de l'article 100 de la Loi constitutionnelle de 1867. Nous ne le croyons pas. Imaginons un instant qu'un tribunal déclare que l'article 29.1 n'enfreint pas le principe de l'indépendance du pouvoir judiciaire. Quel serait son effet vis-à-vis l'article 100? Pourrait-on dire que les salaires des juges cesseraient pour autant d'être "fixés et fournis par le parlement du Canada"? Le seul argument possible consiste à prétendre que ces mots "fixés et fournis" impliquent une obligation de ne jamais payer aux juges un salaire inférieur à ce qu'il était au moment de leur nomination. Nous croyons que c'est une interprétation trop large de l'expression "fixés et fournis" et une restriction indue au principe de la souveraineté du parlement.

Ainsi donc l'article 29.1 de la Loi sur les juges ne nous paraît pas invalide (1) parce qu'il ne constitue pas une modification de l'article 100 de la Loi constitutionnelle de 1867, (2) parce que le principe de la séparation des pouvoirs n'est pas prévu dans notre constitution formelle, (3) parce que le principe de l'indépendance du pouvoir judiciaire est reconnu de façon partielle seulement aux articles 99 et 100 de la Loi constitutionnelle de 1867. Même si on devait les interpréter comme instituant une séparation entre la fonction judiciaire et la fonction législative, cette séparation semble avoir été respectée en l'occurrence. Quoi qu'il en soit, cette affaire est à suivre: elle a été portée en appel à la Cour d'appel fédérale. Il sera intéressant de voir comment ce tribunal, et peut-être la Cour suprême, la traiteront.

RENÉ PEPIN*

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DROIT CRIMINEL—INTERPRÉTATION—CHARTE DES DROITS ET LIBERTÉS DE LA PERSONNE—LE SECRET PROFESSIONNEL: UN DROIT FONDAMENTAL.—La Cour suprême rendait le 23 juin 1982 une décision unanime reconnaissant au secret professionnel de l'avocat le rang de droit fondamental. Ce jugement rendu par M. le juge Antonio Lamer, au

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nom de la Cour, dans l'affaire *Descôteaux* c. *Mierzwinski*[1] est important à plus d'un point.

Les faits sont simples. Un mandat de perquisition fut émis par un juge de paix permettant de saisir un formulaire de demande d'aide juridique dans un bureau local du Centre communautaire Juridique de Montréal. Cette formule contenait des renseignements financiers déclarés par une personne accusée d'avoir menti quant à ses revenus réels pour pouvoir bénéficier de l'aide juridique. Une requête en certiorari fut présentée par le directeur du bureau où la saisie fut pratiquée afin de faire casser la saisie et récupérer les documents.

Le juge Lamer rejetta la requête mais pour des motifs bien différents de ceux invoqués par la Cour d'appel[2] et par la Cour supérieure.[3] Il profita de l'occasion pour "constater les carences de la loi sur le sujet et la limite qu'a le pouvoir judiciaire d'y suppléer du fait que son rôle n'est pas primordialement législatif".[4]

La Cour supérieure

M. le juge Jean-Guy Boilard de la Cour supérieure, avait rejeté la requête en niant que le contenu du formulaire d'aide juridique puisse contenir des renseignements confidentiels; cette formule n'étant qu'une "fiche signalétique" complétée, selon lui, avant la naissance de la relation avocat-client.[5] Tout en convenant, par ailleurs, qu'il n'était pas nécessaire d'attendre la tenue du procès pour s'objecter à la production d'un document soumis au privilège avocat-client.[6]

La Cour d'appel

M. le juge Bélanger de la Cour d'appel avait ajouté aux raisons du juge de la Cour supérieure que la formule d'aide juridique n'était pas confidentielle, puisqu'elle avait servi à tromper le bureau d'aide juridique pour obtenir frauduleusement des services de celui-ci:

> . . . je ne crois pas que les fausses communications faites à la victime éventuelle qui aura à assumer le coût des services jouissent d'aucun caractère confidentiel.[7]

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[1] Cour suprême du Canada, Ottawa le 23 juin 1982; MM. les juges Lamer, Martland, Ritchie, Dickson, Beetz, Estey et Chouinard; J.E. 82-659.

[2] Cour d'appel n° 500-10-000260-784 et n° 500-10-000233-781, Montréal le 19 mars 1980, MM. les juges Bélanger, Bernier et Paré, jugement non-publié.

[3] [1978] C.S. 792.

[4] *Supra*, note 1, à la p. 2.

[5] V° *contra*, une décision subséquente de la Cour d'appel de l'Alberta dans *R.* v. *Littlechild* (1980), 11 C.R. (3d) 390, 51 C.C.C. (2d) 406.

[6] *Supra*, note 3, à la p. 799.

[7] *Supra*, note 2, à la p. 6.

La Cour suprême

La Cour suprême a reconnu que la relation avocat-client commence dès qu'une personne sollicite que l'aide juridique lui soit accordée, et ce même avant l'existence du mandat comme tel. De plus, en principe, les renseignements contenus dans un formulaire de demande d'aide juridique sont confidentiels et soumis au privilège avocat-client.

Ce principe souffre toutefois d'une exception lorsqu'une communication a été faite en vue de faciliter un crime:[8]

> À fortiori en va-t-il de même lorsque, comme en l'espèce, la communication elle-même est l'élément matériel (actus reus) du crime et c'est d'autant plus évident lorsque la victime du crime est précisément le bureau de l'avocat à qui la communication a été faite.[9]

Le secret professionnel

L'existence du secret professionnel de l'avocat n'est plus à démontrer.[10] En 1975, le Québec élevait le secret professionnel au statut de *droit fondamental de la personne* en l'incluant à la Charte des droits et libertés de la personne:[11]

> Chacun a droit au respect du secret professionnel. Toute personne tenue par la loi au secret professionnel et tout prêtre ou autre ministre du culte ne peuvent, même en justice, divulguer les renseignements confidentiels qui leur ont été révélés en raison de leur état ou profession, à moins qu'ils n'y soient autorisés par celui qui leur a fait ces confidences ou par une disposition expresse de la Loi.
>
> Le tribunal doit, d'office, assurer le respect du secret professionnel.

Toutefois, comme l'avait réaffirmé la Cour d'appel[12] et la Cour supérieure[13] dans cette affaire, il s'agit d'interpréter le droit criminel selon la législation fédérale ou le common law et non en vertu du droit civil provincial:

> Je conclus donc que ni la *Loi de l'aide juridique* non plus que la *Loi du Barreau* ou toute autre Loi d'une législature provinciale ne peut déterminer la nature non plus que l'étendue du privilège avocat-client qui, en réalité, est une règle d'exclusion

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[8] Sur l'application du privilège voir une décision récente de la Cour supérieure *Mourelatos* c. *Sous-Procureur Général du Canada* décision inédite de M. le juge en chef adjoint James K. Hugessen (500-26-000734-826), Montréal le 7 avril 1982; J.E. 82-603; sur l'exception au privilège *Annesley* v. *Earl of Anglesea* (1748), 17 How., St. Tr. 1241; *Russel* v. *Jackson* (1851), 9 Hare 387; *R.* v. *Cox and Railton* (1884), 14 Q.B.D. 153; *O'Rouke* v. *Darbishire*, [1920] A.C. 581; *R.* v. *Giguère* (1979), 44 C.C.C. (2d) 525; *R.* v. *Coffin* (1954), 19 C.R. 222.

[9] *Supra*, note 1, à la p. 19.

[10] Alain Cardinal, Les communications privilégiées avocat-client (1981), 59 R. du B. can. 652.

[11] L.R.Q., 1977, c. C-12, a. 9 qui doit être lu avec la Loi sur le Barreau, L.R.Q., 1977, c. B-1, a. 131.

[12] *Supra*, note 2, à la p. 6.

[13] *Supra*, note 3, à la p. 796.

de preuve dont la portée sera déterminée par la législation fédérale ou le "*common law*".[14]

Or, il n'existe pas[15] en droit fédéral ou en common law de principe juridique donnant au secret professionnel une garantie semblable à un droit fondamental. Jusqu'à cet arrêt de la Cour suprême, aucun tribunal n'avait osé prétendre que le secret professionnel de l'avocat était un principe fondamental permettant de revendiquer les documents soumis au privilège à titre de *propriétaire des confidences*.

Les tribunaux ont toujours affirmé que le secret professionnel de l'avocat était un privilège d'exclusion de la preuve assujetti à une détermination judiciaire.[16] Toutefois, une certaine tendance se dessinait récemment alors que certains juges des Cours supérieures et plusieurs Cours d'appel[17] cassaient des mandats de perquisition en invoquant qu'un mandat ordonnant la saisie de documents protégés par le privilège avocat-client et qui ne pourront conséquemment être produits en preuve était nul.

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[14] *Ibid.*

[15] A noter toutefois que depuis le 17 avril 1982, la Charte canadienne des droits et libertés incluse dans la constitution par la Loi constitutionnelle de 1982 prévoit au paragraphe (b) de l'article 10 que "Chacun a le droit en cas d'arrestation ou de détention . . . d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit"; alors que le paragraphe (c) de l'article 11 prévoit que "Tout inculpé a le droit . . . de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche". Or le cinquième amendement de la Constitution américaine énonce le même principe à peu près dans les mêmes mots: "No man shall be compelled in any criminal case, to be a witness against himself" et a servi aux U.S.A. de base à revendication du secret professionnel comme droit fondamental. V° McCormicks, On Evidence (2nd ed., 1972), aux pp. 175 *et seq*; David E. Seidelson, The Attorney-Client Privilege and Client's Constitutional Rights (1978), 6 Hofstra L. Rev. 693; Harvey J. Kirsh, Solicitor-Client Privilege as it Relates to Accountants (1973), 21 Chitty's L. J. 191; Notes, The Attorney-Client Privilege: Fixed Rules Balancing and Constitutional Entitlement (1977), 91 Harv. L. Rev. 464, à la p. 485; Stephen A. Saltzburg, Privileges and Professionals: Lawyers and Psychiatrists (1980), 66 Virginia L. Rev. 597, à la p. 603.

[16] *R.* v. *Colvin; Ex parte Merrick*, [1971] 1 C.C.C. 8; *Attorney-General of Quebec* v. *T.G.W.R. and C.*, [1978] 2 C.R. (3d) 30; *Bullivant* v. *Attorney-General for Victoria*, [1901] A.C. 196; *Descôteaux* c. *Mierzwinski*, *supra*, note 3, à la p. 792. En doctrine v° notamment J.-L. Baudouin, Secret professionnel et droit au secret dans le droit de la preuve (1965), p. 180 ainsi que P. Robert, Le secret professionnel de l'avocat en droit criminel canadien (1979), 39 R. du B. 473, à la p. 475.

[17] *Re Director of Investigation and Research and Shell Canada Ltd* (1975), 22 C.C.C. (2d) 70; *Re Director of Investigation and Research and Canada Safeway Ltd* (1972), 26 D.L.R. (3d) 745; *Re Presswood et al. and Int'l Chemalloy Corp.* (1975), 65 D.L.R. (3d) 228; *Re Borden and Elliot and The Queen* (1975), 30 C.C.C. (2d) 337, *sub nomine R.* v. *Froats* (1977), 36 C.R.N.S. 334; *Re B.X. Development Inc. and 9 others and The Queen* (1976), 31 C.C.C. (2d) 14; *Re B. and the Queen* (1977), 36 C.C.C. (2d) 235. En doctrine v° notamment A. Kasting, Recent Developments in the Canadian Law of Solicitor-Client Privilege (1978), 24 McGill L.J. 115 et Chassé, The Solicitor-Client Privilege and Search Warrants (1977), 36 C.R.N.S. 349.

> If the privilege could not be invoked to prevent the seizure and examination of documents under a search warrant, the Crown would be free in any case to seize and examine the files and brief of defence counsel in a criminal prosecution. It would be small comfort indeed to the accused and to his counsel to discover that his only protection in such a case was to prevent the introduction into evidence of the documents that had been seized and examined. Such a result, in my view, would be absurd.[18]

Paradoxalement, la Cour suprême vient d'approuver cette façon de procéder des tribunaux et déclarer que le secret professionnel est un droit fondamental, en citant un *obiter* dictum de M. le juge Dickson dans l'arrêt *Solosky* v. *The Queen*:[19]

> One may depart from the current concept of privilege and approach the case on the broader basis that (i) the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client, and (ii) a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law.

alors que paradoxalement dans un autre dictum du même arrêt, celui-ci déclarait:[20]

> . . . it is suggested that the privilege has come to be recognized as a "fundamental principle". . . . Chassé, in his annotation at (1977), 36 C.R.N.S. 349 (The Solicitor-Client Privilege and Search Warrant) asserts that the privilege is being looked upon "as more akin to a rule of property rather than merely as a rule of evidence" (p. 350), but the privilege, in my view, is not yet near a rule of property.

La Cour suprême affirme qu'il faut distinguer la règle de fond de la règle de preuve. Jusqu'à ce jour, depuis les arrêts *Berd* v. *Lovelace*,[21] *Dennis* v. *Codrington*[22] et *Kelway* v. *Kelway*,[23] les tribunaux se sont surtout arrêtés à la règle de preuve, ce qui n'empêche pas la règle de fond d'exister:[24]

> S'attachant à la personne dans ses rapports avec tous autres, y compris avec l'État, il ne fait aucun doute que ce droit fait partie de notre droit public québécois ainsi que de la common law.[25]

et d'être ainsi exprimée par M. le juge Lamer:[26]

> (1) La confidentialité des communications entre client et avocat peut être soulevée en toute circonstance où ces communications seraient susceptibles d'être dévoilées sans le consentement du client;

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[18] *Ibid.*, à la p. 342.

[19] (1980), 50 C.C.C. (2d) 495, à la p. 510, [1980] 1 R.C.S. 821, à la p. 839.

[20] *Ibid.*, à la p. 508 (C.C.C.).

[21] (1577), 21 E.R. 33.

[22] (1580), 21 E.R. 53.

[23] (1580), 21 E.R. 47.

[24] *Supra*, note 1, à la p. 13.

[25] *Ibid.*, à la p. 10.

[26] *Ibid.*, à la p. 13.

(2) A moins que la loi n'en dispose autrement, lorsque et dans la mesure où l'exercice légitime d'un droit porterait atteinte au droit d'un autre à la confidentialité de ses communications avec son avocat, le conflit qui en résulte doit être résolu en faveur de la protection de la confidentialité;

(3) Lorsque la loi confère à quelqu'un le pouvoir de faire quelque chose qui, eu égard aux circonstances propres à l'espèce, pourrait avoir pour effet de porter atteinte à cette confidentialité, la décision de le faire et le choix des modalités d'exercice de ce pouvoir doivent être déterminés en regard d'un souci de n'y porter atteinte que dans la mesure absolument nécessaire à la réalisation des fins recherchées par la loi habilitante;

(4) La loi qui en disposerait autrement dans les cas du deuxième paragraphe ainsi que la loi habilitante du paragraphe trois doivent être interprétées restrictivement.

La Cour suprême n'en suggère pas moins aux juges de paix et aux forces policières d'agir avec précaution lorsqu'il s'agit d'effectuer une persquisition dans un cabinet d'avocat. Bien qu'une véritable *marche-à-suivre* soit proposée par la Cour suprême, celle-ci ne recommande pas moins de respecter "en les adaptant bien sûr à chaque cas d'espèce"[27] les dispositions de l'article 232 de la Loi de l'impôt sur le revenu.[28] Lorsqu'un officier du ministère du revenu se présente chez un avocat pour saisir des documents se rapportant à l'un des ses clients, il doit donner à l'avocat l'occasion d'invoquer son privilège au nom de son client. Dans ce cas, l'officier doit mettre sous scellés et confier à une gardien choisi d'un commun accord (qui pourrait être le syndic du Barreau) les documents saisis. Dans les quatorze jours qui suivent, l'avocat peut, par requête à un juge de la Cour supérieure lui demander de se prononcer quant à l'application du privilège aux documents saisis. Si le ministre réussit à prouver *prima facie* une allégation de fraude, le privilège tombe; un avocat qui invoque le privilège ne peut être trouvé coupable d'avoir refusé de remettre les documents.[29]

En reconnaissant qu'un juge de paix n'a pas compétence pour émettre un mandat de saisie de documents inadmissibles en preuve, la Cour suprême tranche un long débat jurisprudentiel et cherche à protéger, comme l'affirme Me Robert Décary dans un article sur cette décision,[30] le droit à la propriété et le respect de la vie privée.

ALAIN CARDINAL*

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[27] *Ibid.*, à la p. 29.

[28] S.C., 1970-71-72, c. 63.

[29] Cardinal, *op, cit.*, note 10, à la p. 662.

[30] La perquisition et le droit à la confidentialité, le National, juillet-août 1982, p. 5.

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HUMAN RIGHTS—DISCRIMINATION—AGE—WHEN MAXIMUM IS MINIMUM.—Can a maximum age of an applicant for a position be a minimum qualification for that position? The answer would appear to be that it cannot for otherwise it amounts to saying that to succeed the candidate must be at least at the point of having to retire from the job he seeks, which is nonsense. The question may be put in other words: does it make sense to say that one of the minimum qualifications for a given position is that the applicant shall be not less than twenty-three years of age and not more than fifty years of age? There would be no difficulty if this range of ages were stated to be merely a qualification for the position but if the range is stated to be a *minimum* qualification doubts surely arise. In the context of a complaint of discriminatory practice under human rights legislation I would submit that those doubts are to be resolved in favour of the complainant.

It was thus that a Human Rights Tribunal[1] appointed under the Canadian Human Rights Act,[2] concluded on July 28th, 1980 that: ". . . the Governor in Council acted beyond the authority given by Parliament in purporting to fix a maximum age for employment when it was authorized only to fix a minimum one."[3]

The case concerned a marine pilot who on reaching the age of fifty had been removed from the Authority's eligibility list. The tribunal ordered his reinstatement. The Authority then applied to the Federal Court of Appeal for a review of that decision. The application was allowed.[4] The maximum age in question was that set down in section 4(1) (a) of the General Pilotage Regulations,[5] which reads as follows:

> 4.(1) Every applicant for a licence shall be
>
> (a) not less than 23 years of age and not more than 50 years of age; . . .

These are subtitled Regulations Respecting Minimum Qualifications for Licences and Pilotage Certificates, Hearings by Authorities and Uniform Financial and Reporting Procedures and were adopted by the Governor in Council pursuant to section 42(a) of the Pilotage Act:[6]

> 42. The Governor in Council may make regulations
>
> (a) prescribing for any region or part thereof the minimum qualifications respecting the navigational certificates, experience at sea, age and health of an

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[1] R.G. Herbert.

[2] S.C., 1976-77, c. 33.

[3] *In the Matter of The Canadian Human Rights Act and in the Matter of a Complaint by Kenneth Arnison Against the Pacific Pilotage Authority*, 1980, unreported, at p. 12.

[4] *Pacific Pilotage Authority* v. *Kenneth Arnison and the Canadian Human Rights Commission*, [1981] 2 F.C. 206. Application for leave to appeal to the Supreme Court of Canada refused.

[5] C.R.C., 1978, vol. XIII, c. 1263.

[6] S.C., 1970-71-72, c. 52.

applicant that an applicant shall meet before he is issued a licence or pilotage certificate;

The Authority relied on the Canadian Human Rights Act[7] which says in section 14(b):

14. It is not a discriminatory practice if . . .

(b) employment of an individual is refused or terminated because that individual

(i) has not reached the minimum age, or

(ii) has reached the maximum age that applies to that employment by law or under regulations, which may be made by the Governor in Council for the purposes of this paragraph:

In the court's view the question of validity turned on the sense in which the word "minimum" is used in section 42(a). The court said that the tribunal had taken the view that a maximum age could not be a minimum qualification respecting age within the meaning of the section. Le Dain J. said:[8]

In my opinion it was wrong.

The court found that in the section the word "minimum" qualifies the word "qualifications" and not the word "age" and the sense in which the expression "minimum qualifications" is used is to be seen in section 14(1) (f) of the Act. Yet it should be noted that the expression in its larger form is "minimum qualifications respecting . . . age" and does not occur in this same form in section 14(1) (f) which reads:

14.(1) An Authority may, with the approval of the Governor in Council, make regulations necessary for the attainment of its objects, including, without restricting the generality of the foregoing regulations

(f) prescribing the qualifications that a holder of any class of licence or any class of pilotage certificate shall meet, including the degree of local knowledge, skill, experience and proficiency in one or both of the official languages of Canada required in addition to the minimum qualifications prescribed by the Governor in Council under section 42;

The court considered there was a significant distinction between the power of the Governor in Council to prescribe pilotage qualifications and the power of an Authority to do so. Those prescribed by the Governor in Council are, said the court, the basic ones or, in the words of section 14(1) (f), the "minimum" ones.

Le Dain J. said:[9]

The words "in addition to the minimum qualifications prescribed by the Governor in Council under section 42" indicate, in my opinion, that the word "minimum" is used in the sense of basic, to indicate the relationship of the power of the Governor in Council to prescribe qualifications to that of a Pilotage Authority. It is this distinction, drawn in section 14(1) (f), that indicates the reason for the use of the word "minimum" in section 42(a). Otherwise, it would have been sufficient

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[7] *Supra*, footnote 2.

[8] *Supra*, footnote 4, at p. 208.

[9] *Ibid.*, at p. 209.

> in section 42(a) to use the word "qualifications" without a modifier, since in the absence of a power to prescribe additional or stricter qualifications the word "minimum" would add nothing to what is ordinarily conveyed by the word "qualifications".

I have difficulty following this argument, for two reasons. First because the number of regulatory sources seems to be beside the point and secondly because the "power to prescribe additional or stricter qualifications" is surely the very power of the Governor in Council granted by section 42(a): how can it be argued that in the absence of section 42(a) there would have been no need to use a modifier for the word "qualifications" in that same section? I suggest that what the court may have had in mind was that there would have been no need to mention the word "minimum" in section 14(1) (f)—not section 42(a)—since in the absence of a higher power that word would add nothing to what is ordinarily conveyed by the word "qualifications". By the same token there would have been no need to include any of the words in section 14(1) (f) after the words "required". I submit with respect that on this point the court has erred.

I would argue that among the qualifications listed in section 42(a) for persons seeking a pilotage certificate or a licence age is the only one that lends itself to the fixing of a maximum level as well as a minimum level. In the General Pilotage Regulations[10] section 4(1) (b) says every applicant for a licence shall be medically fit and section 5 says every holder of a licence shall, during the time he is such holder, continue to be medically fit. Sections 7 and 10 prescribe minimum competency in navigation and minimum experience at sea. Taking the court's view, however, I believe one is led to the conclusion that Parliament contemplated regulations prescribing qualifications that embraced not only maximum ages but maximum health, navigational competence and experience at sea. Thus, I believe one arrives at a situation in which, apart from any considerations of human rights, a regulation on pilotage which provided that applicants could be denied licences because their health was too good or because they had had too much experience at sea or even because their navigational certificates were too numerous or too advanced was a regulation validly prescribing minimum qualifications within the meaning of section 42(a). I would suggest that the very absurdity of these examples points up the unique feature of age—that its advance is outside the applicant's control—when contrasted with the other qualifications named in the section.[11]

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[10] *Supra*, footnote 5.

[11] As stated by McIntyre J. of the Supreme Court of Canada on February 9th, 1982 in *Ontario Human Rights Commission et al.* v. *The Borough of Etobicoke* (1982), 132 D.L.R. (3d) 14, at p. 20, a case involving the retirement age of firefighters: "We all age chronologically at the same rate. . . ."

Assuming there is no actual occasion for pilotage qualifications to be framed so as to screen out applicants who are too healthy, and so on, and assuming that Parliament nevertheless desires that there be an age beyond which applicants are to be excluded no matter what their other qualifications then clearer legislative language is called for and, I submit with respect, the tribunal was right in deciding as it did.

JAMES D.M. BRIERLEY*

* * *

CRIMINAL LAW—BAIL—OLD AND NEW LEGISLATION—BAIL REFORM ACT—CAN A PERSON NOT IN CUSTODY BE DETAINED ON FIRST APPEARANCE BEFORE A JUSTICE?— A practice has evolved in some Provincial Court Judge's Courts or Magistrate's Courts, that when a person appears before a justice and has an information read to him, if he pleads not guilty or asks to have the matter set over without plea, the judge inquires of the prosecutor whether there is any objection to the person's release. If the prosecutor objects, the accused is remanded to jail until a bail hearing can be held.

The object of this comment is to determine whether such a practice is authorized by the Criminal Code,[1] and if so, under what circumstances.

For the purpose of this comment, the specific provisions of the Criminal Code which require the detention of an accused for certain offences will not be considered.[2] Consideration will be restricted to the provisions of the Code relating generally to summary conviction offences, offences for which there can be prosecution by indictment or on summary conviction, and indictable offences with a penalty not exceeding five years imprisonment, as described in sections 451, 452 and 453 of the Criminal Code.

One must first appreciate the situation before the Bail Reform Act of 1970[3] was passed by Parliament.

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[1] Criminal Code of Canada, R.S.C., 1970, c. C-34, as am.

[2] S. 457.7 provides in certain cases for interim release only by a Superior Court judge. S. 457(5.1) provides for a reverse onus of proof upon the accused to show cause why his detention is not justified in certain circumstances including certain violations of the Narcotic Control Act, R.S.C., 1970, c. N-1, as am.

[3] R.S.C., 1970, c. C-2 (2nd Supp.).

At common law, the sole object of the arrest was to ensure the appearance of the accused before the court.[4] Bail was not to be withheld as punishment, but merely to secure the attendance of the prisoner at the trial.

Prior to 1970, if a person was arrested, there was technically no way in which he could be released, until after an appearance before a justice of the peace. Once an arrest was effected, the peace officer was required to bring the accused before a justice and no release could be effected until a justice dealt with the matter.[5]

In fact, in many instances, the peace officer released the accused on posting of cash bail which was established as a *de facto* type of bail without legal authority. This *modus operandi* for effecting the release of persons after being arrested for many minor crimes, existed in most areas of the country although the procedure was not authorized by the Code or any other law nor was the procedure uniform among police forces throughout Canada.

The procedure by which an accused could be compelled to appear before a justice without an actual arrest was very limited. The procedure for causing the appearance of an accused who had not been arrested was by way of summons.[6] If the person was arrested either with or without a warrant, he had to be brought (taken physically) before a justice.[7] There was no provision for the issuance of a promise to appear or an appearance notice prior to the changes in the Criminal Code, effected in 1970, by the Bail Reform Act.

Prior to the Bail Reform Act, once an appearance was made before a justice, regardless of how the accused got there, two different procedures were applicable.

If the charge was for a summary conviction offence, the accused was arraigned and if he pleaded not guilty, the court was to proceed with the trial.[8]

The court had jurisdiction before or during the trial to adjourn the trial and where the trial was adjourned the court could,

(a) permit the accused to be at large,

(b) commit the accused to prison,

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[4] *R.* v. *Rose* (1898), 18 Cox C.C. 717.

[5] See ss 451 and 710 of the Criminal Code prior to the 1970 amendment.

[6] S. 440 of the Criminal Code prior to the 1970 amendment.

[7] S. 438(2) of the Criminal Code prior to the 1970 amendment.

[8] S. 707(1) of the Criminal Code prior to the 1970 amendment.

(c) discharge the accused upon his recognizance with or without securities or upon depositing such sum of money as the court directed.[9]

However, if the charge was for an indictable offence, a different procedure was followed. When the accused came before a justice irrespective of whether he was brought there while under arrest, came as a result of a summons or happened to be there per chance, the justice had to inquire into the charge.

The justice then had jurisdiction at any time before the accused was committed for trial as the result of a preliminary inquiry to admit the accused to bail,[10]

(a) upon entering into a recognizance with securities,

(b) upon entering into a recognizance and depositing an amount directed by the justice,

(c) upon entering into a recognizance without more.

There were limitations upon the power of a justice and when an accused was charged with certain offences, only a judge of a superior court could grant bail.[11] It is important to appreciate that bail granted by a justice only lasted until the completion of a preliminary inquiry.

If an accused was committed to stand trial following a preliminary inquiry, there had to be a new application for bail. This had to be done before a magistrate or a judge being judicial officers who were at least one step higher in the judicial hierarchy than the justice.[12]

A judge or magistrate could order the accused be admitted to bail,

(a) upon entering into a recognizance, with security,

(b) upon entering into a recognizance with cash deposit, or

(c) upon entering into a recognizance without more.

There was considerable case law which developed respecting the bail procedures and the principles applicable.

The basic object of bail was to ensure the appearance of the accused at his trial.[13]

At common law in the case of misdemeanours equivalent to the present summary conviction offences, the accused was entitled to bail as of right. For indictable offences, the propriety of bail was to be determined with reference to the accused person's probability of

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[9] S. 710(1) of the Criminal Code prior to the 1970 amendment.

[10] S. 451 of the Criminal Code prior to the 1970 amendment.

[11] S. 464 of the Criminal Code prior to the 1970 amendment.

[12] S. 463(i) of the Criminal Code prior to 1970 amendment.

[13] *McIntyre* v. *Recorders Court*, [1947] R.L. 357 (Que.).

appearing to take his trial, which was the object of bail and not with reference to his supposed guilt or innocence.[14]

As far back as 1854, Coleridge J. said:[15]

> The sole test as to whether or not an accused shall be admitted to bail is the consideration as to whether he is likely to appear at the trial.

Notwithstanding this basic principle, there appears a trend by the courts to equate refusal of bail with considerations other than the probability of appearance which considerations include probability of guilt, severity of the crime and the possibility of further criminal or unlawful action.

Some courts also endeavoured to develop a distinction between granting bail prior to a preliminary hearing and granting bail after the accused has been committed for trial.[16]

The doctrine of refusing bail or release from arrest because of the possibility of endangering the public peace was first discussed but not determined in *R.* v. *Russell.*[17]

Gradually the concept of grounds other than the probability of appearance crept into the judicial system as reasons for refusing bail. These grounds included the probability of a danger to the public.[18] The processes were therefore variable and subject to much unregulated discretion leading to uncertainty and differing chances of release across the country.

The Bail Reform Act was intended to make fundamental changes in the bail procedure and in the rights of individuals by providing for uniformity of the principles of arrest and release, by endeavouring to avoid imprisonment before trial, and by providing for only one release instead of two successive bail applications. The basic premise on which the release provisions are founded is that the suspect is an innocent person until proven guilty. However, there is a statutory change which allows a person to remain in custody after arrest if there are grounds for believing a further crime might be committed by him.

The prevailing practice of detaining an accused until an appearance was made before a justice was virtually reversed. The principle was adopted that a suspect was not to be arrested, and if arrested, was to be released, if at all possible, prior to appearance before a justice and in any event before his preliminary inquiry or trial.

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[14] *Ex Parte Fortier* (1902), 6 C.C.C. 191 (Que. C.A.).

[15] *Re Robinson* (1854), 23 C.J.Q.B. 286.

[16] *R.* v. *Hawken* (1944), 81 C.C.C. 80 (B.S.S.C.) where the basic concept of assurance of appearance was acknowledged but the trend of the courts to differentiate was recognized.

[17] (1919), 32 C.C.C. 66, 29 Man. R. 511, 50 D.L.R. 624 (Man. C.A.).

[18] *Re N.* (1945), 87 C.C.C. 377 (P.E.I.S.C.); *R.* v. *Russell, ibid.*

Since the Bail Reform Act, there appears to be no reported decision in relation to an improper refusal to release a person arrested by a peace officer. This is probably due to the short time lapse before an actual appearance before a justice, which has resulted in a time insufficient to enable a person arrested or detained in violation of the Code to apply for a *habeas corpus* or other remedy.

However, the philosophy behind the changes effected by the Bail Reform Act, has been discussed by several courts when dealing with a refusal to release an arrested person by a justice.

Mr. Justice Anderson of British Columbia, in *R.* v. *Thompson*,[19] when dealing with a review of a refusal to grant bail in a possession of narcotics charge stated in 1972:

> In my opinion the legislation should be interpreted in a liberal manner because. . . .
>
> (3) The legislation when read as a whole seems to indicate that all accused persons should be released pending trial except where it is clearly shown by the Crown that it is necessary that an accused should not be released,
>
> (4) When the new legislation (Criminal Code, Sec. 457 to 457.8 inclusive) is compared to the old legislation, as interpreted in decided cases, it would appear that the new legislation should be construed with a view to preventing unnecessary detention pending trial. The legislation appears to give greater consideration to the offender and less to the nature of the offence.

He continued:

> Parliament must be taken to have assumed the risk that under the new legislation it would be to some degree less likely that as many accused persons would appear for trial as would be the case under the old system. Parliament must also be taken to have assumed that it was better to take the aforesaid risks than keep large numbers of accused persons in custody pending trial. It is not, therefore for this Court to substitute its views for those of Parliament by applying the old rules to avoid the risk which meant having been foreseen by Parliament prior to the enactment of the Bail Reform Act.

This is a positive and perceptive declaration respecting the fundamental changes which were made.

In *R.* v. *Quinn*,[20] in 1977, Anderson Co. Ct J. of Nova Scotia on an appeal from a refusal to grant bail by a Justice where the accused was charged with possession of narcotics stated:

> It is my opinion that the basic philosophy that prior to conviction all those persons who do not constitute a danger to the public and who will show up for trial ought not to be detained in custody is still the underlying principle of the relevant sections of the Code which prompted Parliament to enact the Bail Reform Act.

It is clear a major change has been effected in relation to arrests. While the former section 435, which allowed a peace officer to arrest without warrant a person who had committed an indictable offence, or

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[19] (1972), 7 C.C.C.(2d) 70, 18 C.R.N.S. 102 (B.C.S.C.).

[20] (1977), 34 C.C.C.(2d) 473 (N.S. Co. Ct).

who on reasonable and probable grounds he believed had committed or was about to commit an indictable offence, or whom he found committing an indictable offence, was re-enacted as section 450(1) in 1970, new provisions were added which limit such rights of arrest. Section 450(2) qualifies section 450(1). It provides that a peace officer shall *not* arrest a person without a warrant for,

(a) an indictable offence mentioned in section 483 (those over which a magistrate has absolute jurisdiction),

(b) an offence for which a person may be prosecuted by indictment or for which he is punishable on summary conviction,

(c) an offence punishable on summary conviction, in any case where,

(d) he has reasonable and probable grounds to believe that the public interest, having regard to all the circumstances including the need,

(i) to establish the identity of the person,

(ii) to secure or preserve evidence of or relating to the offence, or,

(iii) to prevent the contravention or repetition of the offence or commission of another offence,

may be satisfied without so arresting the person, and

(e) he has no reasonable grounds to believe that if he does not so arrest the person, the person will fail to attend in court, in order to be dealt with according to law.

Section 451 provides that when, by virtue of section 450(2), the peace officer does not arrest a person, he may issue an appearance notice.

According to section 452(1), where notwithstanding section 450(2), the peace officer arrests a person for an offence described in that section, he shall release the person from custody with the intention of compelling his appearance by summons, or issue an appearance notice and thereupon release him, unless he has reasonable and probable grounds to believe that it is necessary in the public interest that the person be detained in custody or his release be dealt with under another provision or he has reasonable and probable grounds to believe that if the person is released by him from custody, the person will fail to attend in court.

To secure the attendance of an accused who had not been arrested a new concept of an appearance notice issued by a peace officer before arrest was instituted.

Subsequent sections of the Criminal Code gave directions respecting the release prior to their being brought before a justice of the persons who have been arrested.

These sections provide that if a peace officer feels arrest is necessary he must still release the person arrested after giving him an appearance notice except in certain cases. Where a peace officer has not released a person arrested, or when a person has been arrested by any person other than a peace officer and delivered to a peace officer, there is provision for an officer in charge to effect a release.[21]

If a person has been arrested and not released on an appearance notice, either because it is an indictable offence, for which the peace officer is not authorized to effect a release, or the arresting officer is of the belief it is not in the public interest so to do, there is in effect a review by a superior.

Section 453(1) provides for release after arrest for indictable offences, punishable with imprisonment for five years or less, and also after refusal of release by a peace officer, or after arrest by a civilian and delivery to a peace officer.

In such cases, the officer in charge, who is defined as the person in command of the police force responsible for the lockup to which the person arrested is taken on his arrest, shall release the person with the intention of having a summons issued, or upon his giving a promise to appear or upon entering into a recognizance or for a person not an ordinary resident upon entering into a recognizance with a cash deposit unless the officer in charge has reasonable and probable grounds to believe it is necessary in the public interest, that the person be detained in custody or his release should be dealt with under another provision, or that if released, he will fail to attend in court.

The Criminal Code clearly indicates that only in a limited number of situations is a person to be arrested and detained in custody. A person is to be released on an appearance notice or a promise to appear, or on the basis that there will be a summons issued, or on a recognizance with or without sureties or a cash deposit.

However, in those situations where the person has not been released but has been detained in custody, the Code requires a prompt appearance before a justice.[22]

When a person has been arrested and not released by a peace officer or officer in charge under the provisions of sections 451, 452 or 453, then section 454(1) comes into effect. This section provides that when a person is arrested, the peace officer shall cause the person to be

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[21] S. 453(1).

[22] S. 454(1)

detained in custody and to be taken before a justice unless he has been otherwise released.

The same principle that a person who is arrested should not be detained in custody is applicable when he is taken before a justice.

The duty of a justice before whom a person in custody is taken is set forth in section 457(1). The justice shall order the accused to be released upon his giving an undertaking unless the prosecution, having been given a reasonable opportunity to do so, shows cause otherwise.

It is clearly the intent of the Code that a person arrested and in custody is to be taken before a justice and shall be released unless cause is shown. It is this provision which results in the justice directing an inquiry to the prosecution if there is any objection to the release. If there is an objection the justice must give the prosecution an opportunity of showing cause which of necessity normally results in the remand of the accused to await a show cause hearing.

However, the question which is the subject of this comment is what can happen to a person who appears before a justice for a reason other than being taken there while in custody?

It appears there are a number of different situations which result in a person *appearing* before a justice although *he is not taken* before a justice while in custody.

The first is where the person happens to be before the justice when the charge is read. An example is the accused who believes a charge will be made or an information has been laid before a justice and he voluntarily attends before the justice.

A second is after a summons is issued, either without an arrest (section 455), or after his arrest, and subsequent release (section 453.1(2)).

A third is after an appearance notice before an arrest (section 451).

A fourth is after an appearance notice has been issued after his arrest with a subsequent release (section 452(1)).

A fifth is after a promise to appear has been given after his arrest with a subsequent release (section 354(1)(f)).

A sixth is after a recognizance has been given after his arrest with a subsequent release (section 453(g)).

A seventh is after a recognizance has been given, and a cash deposit is made after his arrest with a subsequent release.

The purpose of this comment is to show that if a person has not been arrested or if he has been arrested and released, there is neither a

right nor jurisdiction for a justice on the initial appearance of the person to interfere with his freedom by ordering his detention or even asking the prosecutor if he objects to his release.

It is submitted that from a reading of sections 452(1) and 453(1) one can consider that when a person is arrested, he is automatically in custody. However, upon his release for whatever reason, he is no longer in custody.

Black's *Law Dictionary*, defines the terms, "arrest", "custody", and "release" as follows:[23]

> "arrest"—the apprehending or detaining of a person in order to be forthcoming to answer an alleged or suspected crime.
>
> "custody"—actual imprisonment or physical detention.
>
> "release"—the relinquishment, concession, or giving up of a right, claim, privilege, by the person in whom it exists or to whom it accrues to the person against whom this right, claim or privilege could have been enforced.
>
> "liberation"—discharge, setting free from confinement.

It is submitted that the power of the Crown to object to a person's release, only arises where a person has been "taken before" a justice (section 457). To be "taken before" a justice it follows that a person must at the time be in "custody" that is, he is actually detained or imprisoned. A person who has been arrested and released on an appearance notice or promise to appear is not in custody merely because he must appear in court, nor is he in custody when he actually appears in court and is charged with the offence. It is submitted that he is not *taken* before a justice within the meaning or intent of sections 454(1) or 457(1). It follows that since he is not in "custody" there is nothing from which he can be released.

This conclusion is supported by section 453.3(3) of the Criminal Code which specifically provides that a person at large on an appearance notice or promise to appear is deemed to be in custody for a specific purpose only.

> 453.3(3). An appearance notice or promise to appear or a recognizance entered into before an officer in charge may, where the accused is alleged to have committed an indictable offence, require the accused to appear at a time and place stated therein for the purposes of the Identification of Criminals Act, and a person so appearing is deemed for the purposes only of that Act to be in lawful custody charged with an indictable offence.

It follows that this section recognizes that a person who has been released is not in custody at all, and creates a legal fiction of custody for a particular purpose only.

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[23] (4th ed., 1968)

It is also clear that once an appearance notice or promise to appear is given or a summons is issued, it continues until the trial of the accused is completed (section 457.8(1)).

This situation covers both the person who has not been arrested, and the person who is arrested and released before appearing before a justice.

Similarly, if a summons to appear is given by a justice under section 455.3, it requires an accused to appear in court in answer to a suit which has begun against him, but he is not taken before the justice pursuant to section 457(1).

It is therefore obvious that the *prosecution may only* object to a person's release, where a person is in custody at the relevant time and is taken before a justice. The prosecution cannot object where a person appears pursuant to an appearance notice, or promise to appear, recognizance or summons, since the person is not in custody, nor is he being taken before a justice.

When a person has been taken before a justice and released, pursuant to section 457(1), (2), (5-1) or (5.3), section 457.8(2) makes provision for a cancellation of such release. This must be after cause has been shown by the prosecution. The justice is entitled to substitute a form of release order different from the original release if he chooses.

The relevant provision, section (2) 457.8(2) reads as follows:

(a) the court, judge or justice before whom an accused is being or is to be tried,

(b) the justice presiding at the preliminary inquiry in relation to an offence with an accused is charged, other than an offence mentioned in Section 455.7 or,

(c) with the consent of the prosecutor and the accused,

(i) the justice whom an order was made under this part or any other justice or,

(ii) where the accused is charged with an offence mentioned in Section 458.7, a judge presiding in a superior court of criminal jurisdiction for the province,

may upon cause being shown at any time, vacate any order previously made under this part for the interim release or detention of the accused and make any other order provided for in this part for the detention of the accused and make any other order provided for in this part for the detention or release of the accused until his trial is completed that the court, judge to justice considers to be warranted.

The scope of part 2 of the section only extends to the situation where a justice has made an order for the detention or release of an accused. It does not give a justice the authority to order the detention of an accused to whom an appearance notice has been given or who is compelled to appear in court by way of summons.

The distinction between an appearance before a justice or judge by a person who has not been arrested or has been arrested and

released prior to appearance before a justice, and appearance by a person who has been arrested and released by order after appearance before a justice is clearly set forth in *R.* v. *Agawa*.[24] This case established that when the accused has been released by reason of an *order* made by a justice under section 457, the order of release may be revoked. However, where an accused is before the court not by reason of an order but pursuant to an appearance notice (or presumably any other reason), he is not there by virtue of an order of release and section 457.8(2) does not apply. Thus the justice cannot revoke his release.

The question may then be asked is there any control over a person who has been released prior to his court appearance or has not been arrested at all prior to his court appearance? If there is no control, how does a court protect society if a person at large on an appearance notice or after a summons is about to break the law? This is covered by section 458 which allows a justice to issue a warrant of arrest under certain circumstances.

Section 458(1) provides that where a justice is satisfied that there are reasonable and probable grounds to believe that an accused has violated or is about to violate any summons, appearance notice, undertaking or recognizance, he may issue a warrant for this person's arrest. Upon the arrest and appearance of this person in court, the judge shall then cancel the summons, appearance notice, undertaking or recognizance and order that this person be detained in custody. Before this order is made, the accused must be given a reasonable opportunity to show why his detention in custody is not justified (section 458(4)).

It follows then that a justice may only cause the detention of a person in three situations:

First, when he is brought before the justice after arrest and while in custody and the Crown establishes his detention is required (section 457(1)).

Second, if there has been arrest and an order for interim release, when the prosecution has satisfied the court or a justice, after a hearing and proper grounds have been shown, that an order for interim release should be vacated (section 457.8(2)).

Third, when a justice is satisfied that there is the probability of a violation of the summons or appearance notice, or an indictable offence has been committed after a summons, appearance notice, promise to appear, undertaking or recognizance, and he has issued a warrant for the arrest, and opportunity has been given to the accused to show cause why the detention is not justified (section 458).

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[24] (1977), 36 C.C.C.(2d) 444 (Ont. Prov. Ct).

It is submitted that it is clear a justice does not have the authority in the first instance to order the detention of an accused who has been given an appearance notice, or promise to appear, or summons, and is not still under arrest.

It is submitted the intent of the Bail Reform Act as manifested in these sections is, first to avoid arrest, by providing for no arrest except under certain circumstances.

Second, if arrest is required, to avoid keeping a person in custody by providing a peace officer shall release, or in more serious cases, his supervisor shall release. Third, if a person is in custody, to minimize the length of custody by providing he must be released on appearance before a justice unless there is cause shown against his release.

To direct a peace officer not to arrest a person or to release him after arrest, and then have him subject to incarceration pending a hearing on an objection by the prosecution is to defeat the entire purpose of the legislation.

Therefore, it appears clear that if any practice exists whereby persons who appear before a justice and who are not in custody are subject to a prosecutor's request to "show cause", such practice is unwarranted and contradicts both the intent and the wording of the Criminal Code.

It can be argued this may produce the anomalous situation that a person who appears before a justice voluntarily without the requirement of an appearance notice, promise to appear, or summons, cannot be detained by a justice under the Criminal Code. It certainly appears it would be improper to arrest him as he is already before the court, and the basic purpose of an arrest which is to ensure his appearance before a justice is already fulfilled. It would be unreasonable to request a summons as he is in fact already before the court. One might argue that the justice could direct a peace officer to effect the arrest of the accused whom he finds before him voluntarily, but it is submitted such action would be contrary to the intent of the Criminal Code and probably would constitute a false arrest. Clearly, if the object of arrest is to ensure the appearance before a justice and the person is already before the justice without an arrest, the object of the arrest has been fulfilled and any arrest would be redundant.

It remains but to point out a further anomalous situation which can occur when a person who is under arrest and in custody and is before the court, finds the original charge for which he was arrested or brought before the court is withdrawn and a new information preferred.

An example of a situation where an accused is before a justice voluntarily is illustrated as follows: "A" is summoned or arrested and

released on an appearance notice for a charge of a violation of the Criminal Code.

On his appearance before the justice, the prosecutor withdraws the information before plea and prefers a new information with a different charge.

It is submitted once the initial information is withdrawn the effect of a summons, notice to appear or promise to appear, ceases. Any appearance notice or promise to appear is spent once the information to which they relate is terminated. Therefore, when the new information is laid and the accused is asked to plead, he is in the situation of being before the justice, not by virtue of any requirement, but in effect at that moment voluntarily or per chance.

In such a situation, it is submitted the justice has no authority to require his detention for a "show cause".

In effect the Bail Reform Act has made fundamental changes in the concept and administration of the arrest procedure. It has perhaps unwittingly established a sound and fundamental principle for Canadians that arrest and detention before conviction is to be avoided and in some instances cannot be effected. This is surely a positive position and one which should place Canada in the forefront of those nations that value the liberty of the individual and subscribe to the policy of innocent until proven guilty by due process of law, with a full freedom based on the innocent concept.

The legislators have established the policy, it now behooves those who administer the criminal justice system to fully honour the policy in practice, to discard the old concept of freedom as a privilege and recognize lawful detention only when both authorized by law and warranted by fact.

It is hoped this comment will convince those who have been asking for a "show cause" when the accused is not in custody to cease and desist from such practice in the future.

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CONTRACTS—FRANCHISE AGREEMENT—EXCLUSION CLAUSE—ECONOMIC DURESS—INEQUALITY OF BARGAINING POWER—LONG LIVE FREEDOM OF CONTRACT!—Astute observers of contract law jurisprudence emanating from the Supreme Court of Canada over the past few years will be neither surprised nor cheered by the decision in *Ronald Elwyn Lister Ltd* v. *Dunlop Canada Ltd*[1] which had all the makings of a "landmark judgment"[2] but which was reduced to insignificance by the technical application of contract textbook law. The issues raised by the case were important and numerous and potentially afforded the learned justices yet another opportunity to clarify the present difficulties and to formulate imaginative and realistic solutions to problems relating, *inter alia*, to exclusion clauses, economic duress, unconscionability or inequality of bargaining power, misrepresentation and parol evidence. By devious avoidance of the real issues raised by the case in a manner not entirely dissimilar to a magician's sleight-of-hand, the decision rendered by Estey J. for the full court was characterized less by glittering revelations than by deliberate obtuseness in the face of a self-evident need for new policy directions from the top court in handling contract law cases. The inadequacies of the Supreme Court's approach are all the more serious because the main contract in the *Lister* case was a franchise agreement which is one of the fastest growing forms of commercial enterprise today and one by which small and often inexperienced businessmen can be trapped and impoverished.

The well-known facts of the *Lister* case are reminiscent of law school examination questions, so numerous and inter-related are the issues. Mr. and Mrs. Lister incorporated their wholly owned company, Lister Ltd, which operated a Dunlop franchise outlet for tires and related products in Guelph, and later in Orangeville. Security for the franchise agreement included a floating charge debenture for $175,000.00, a demand promissory note for the same amount and a joint and several personal guarantee given by the Listers. The trial judge found that several representations were made to the Listers in the course of negotiation including an undertaking by Dunlop to refer to its new franchisee the wholesale accounts which it had previously supplied for the area, a promise that Lister Ltd would be the exclusive Dunlop franchisee for a large part of south-western Ontario and an

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[1] (1982), 135 D.L.R. (3d) 1; (1979), 105 D.L.R. (3d) 684 (Ont. C.A.), rev'g. in part (1978), 85 D.L.R. (3d) 321 (Ont. H.C.). For comments on the decision of the Ontario Court of Appeal see M. H. Ogilvie, Comment, (1981), 59 Can. Bar Rev. 179; J. B. Hartley, *Ronald Elwyn Lister Ltd* v. *Dunlop Canada Ltd*: How to Set a Trap for an Unwary Franchisee (1981), 7 Queen's L.J. 95; and John Swan and Barry J. Reiter, The Effectiveness of Contractual Allocations of Risk: *Carmen Construction Ltd* v. *C.P.R.*; *Ronald Elwyn Lister Ltd* v. *Dunlop Canada Ltd* (1982), 6 C.B.L.J. 219.

[2] Hartley, *op. cit.*, *ibid.*, at p. 95.

undertaking that unsold inventory could be returned to Dunlop for a full refund. The Listers were also shown a financial projection by Dunlop which forecast a profitable operation. When asked at trial why they would sign the standard form proferred by Dunlop which either made no reference to these representations or flatly contradicted them, the Listers responded that Dunlop's representatives had informed them that the standard form could not be altered but nevertheless the undertakings would be honoured. They signed although their solicitor told them that they were "taking an awful chance".[3] Subsequently, Mr. Lister, personally, became an authorized dealer for "Autopar" automobile parts under another franchise agreement with Chrysler Canada Ltd.

After an initially encouraging period of about five months, the sales turnover at the Dunlop outlets declined considerably, partly because Dunlop failed to supply Lister with the requested inventory. Thus, on March 20th, 1972, less than two years after the arrangement had been agreed to, Dunlop requested that the sum owing of $127,000.00 be paid, that Mr. Lister honour his personal guarantee for that amount, and further informed the Listers that a receiver was to be appointed and the assets seized. Dunlop seized the Autopar inventory worth about $100,000.00 as well. On May 31st, 1972 a settlement was reached. At that time Dunlop was still in possession of the Autopar inventory which if it had been released to Chrysler would have retired Lister's indebtedness to them. Instead, Dunlop's retention of the inventory prompted Chrysler to file a bankruptcy petition against Lister. By the settlement, Dunlop agreed to restore the Autopar inventory to Chrysler in full satisfaction of Chrysler's claim, and Chrysler and Dunlop did not oppose Mr. Lister's application for dismissal of the bankruptcy petition. In addition the Listers granted mortgages for three properties which they owned to Dunlop to secure payment of their outstanding indebtedness in two years and Dunlop promised not to enforce the personal guarantees provided the mortgages were not in default. Mrs. Lister also provided a certificate of independent legal advice in respect to her execution of the three mortgages. In 1973 the Listers and Lister Ltd filed an action against Dunlop on a number of grounds.

The Listers' case was comprised of two thrusts: arguments to avoid the effects of the original Dunlop franchise agreement and also the settlement. At trial,[4] they argued that they had been induced to enter the franchise by oral collateral warranties and fraudulent and negligent misrepresentations; however, Rutherford J. found that although the representations had indeed been made by Dunlop,

[3] (1978), 85 D.L.R. (3d) 321, at p. 332.

[4] This summary of the findings of the trial and appeal courts is based on my earlier comment, *op. cit.*, footnote 1.

fraudulent intent was not proven; moreover, even if there was a breach of collateral warranties and negligent misrepresentation, clause 11 expressly excluded liability for all statements, parol or in writing, not within the four corners of the franchise agreement.[5] He added that he reached that conclusion with reluctance because he found the Listers to be sincere and internally consistent in their testimony in contrast to Dunlop.[6] While the majority of the Court of Appeal[7] tended to accept that conclusion, Wilson J.A. did not, and instead distinguished Lister Ltd from the Listers personally to find that while Lister Ltd may have been induced to enter the franchise agreement by the representations and be bound by virtue of clause 11, Mr. and Mrs. Lister should not necessarily be bound by their guarantee which was also induced by the misrepresentations but which did not contain an exclusion clause.[8] In the Supreme Court Estey J. avoided the question by determining that if the settlement agreement could be upheld the alleged invalidity of the personal guarantees would be irrelevant. The settlement acknowledged the Listers' liability as guarantors to Dunlop.[9]

The enforceability of the guarantee was one of the two main issues argued in the Court of Appeal. The Listers argued in response to the trial judge's enforcement of the personal guarantee that Dunlop was estopped from its enforcement by virtue of the assurance given to the Listers on March 20th that it would not be enforced. However, the majority found that Dunlop had a contractual right to enforce their possession and that the Listers had suffered no detriment in reliance on the statement.[10] The Listers further argued, as already stated, that they were not personally bound by an exclusion clause in the franchise agreement, but the majority found that they were precluded by the settlement from pursuit of that argument now.[11] The Supreme Court agreed.[12]

The third issue related to the seizure of the Dunlop inventory and as well the Autopar inventory. The Listers argued that Dunlop had

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[5] *Supra*, footnote 3, at pp. 331-339. Clause 11 provided: "Dunlop and the Dealer agree that, except as herein expressly stated, no representation, statement, understanding or agreement has been made or exists, either oral or in writing, and that in entering into this Agreement the Dealer has not relied upon any presumption of fact or of law which in any way affects this Agreement, or any provision of the consideration for, or the validity of, this Agreement, or which related to the subject matter hereof or which imposes any liability upon Dunlop in connection with this agreement."

[6] *Ibid.*, at p. 332.

[7] (1979), 105 D.L.R. (3d) 684, per Weatherston J.A., at p. 693 (Lacourciere J.A. concurring).

[8] *Ibid.*, at pp. 698-699.

[9] *Supra*, footnote 1.

[10] *Supra*, footnote 7, at p. 692.

[11] *Ibid.*, at p. 693.

[12] *Supra*, footnote 1, at pp. 12-13.

failed to give them reasonable notice prior to seizure of the Dunlop inventory, and Rutherford J. agreed and awarded damages for any loss between the prices realized and those that would have been realized in a proper sale, damages for loss of future income and as well exemplary damages for the manner of Dunlop's seizure, armed guard and all.[13] The Court of Appeal agreed that reasonable notice must be given but found that such notice had been given here so that the Dunlop seizure was unobjectionable. The trial judge had said that Lister Ltd should have been permitted time to raise funds to meet the request that the debt be reduced, however the Court of Appeal thought that unreasonable in the circumstances since the Listers personally had the necessary assets and Mr. Lister had some seven months earlier told Dunlop that he would not invest further in the franchise.[14] In a somewhat inconclusive discussion of the issue Estey J. appears initially to agree with the Court of Appeal that Dunlop was not obliged to give Lister Ltd time to arrange a loan, particularly since time was not asked for, and that therefore in the circumstances reasonable time had been given. However, he concludes that reasonable notice prior to seizure ought to have been given and that Dunlop was guilty of trespass and conversion.[15] All three courts agreed that seizure of the Autopar parts was wrongful.

The seizure of the Autopar assets is the key to the fourth issue, and arguably the next fundamental one raised by the case, that is, the validity of the settlement agreement reached on May 31st, 1972. The Listers argued that the agreement and the three mortgages were executed as a result of duress or coercion placed upon them by the seizure of the Autopar inventory and subsequent bankruptcy petition filed by Chrysler, or in other words, they had unequal bargaining power in contrast to Dunlop. This argument failed. The trial judge, Rutherford J., found with reluctance that while the Listers' bargaining power was grievously impaired and that they had no real alternative, they had taken independent legal advice and therefore made an independent and informed decision to accept Dunlop's terms. He further suggested that given Mr. Lister's experience with commercial matters a similar decision might have been made in the absence of legal advice.[16] The majority in the Court of Appeal agreed.[17] Wilson J.A., in her partial dissent, did not address the issue but regarded the settlement agreement to be void because it was entered into under a mistake which went to its root that the personal guarantee was enforceable; and second, because she thought that Dunlop's forbearance to

[13] *Supra*, footnote 3, at p. 343.

[14] *Supra*, footnote 7, at pp. 690-691.

[15] *Supra*, footnote 1, at pp. 7, 17.

[16] *Supra*, footnote 3, at p. 349.

[17] *Supra*, footnote 7, at p. 696.

sue the Listers to enforce the guarantee was not good consideration.[18] However, the majority after consideration of previous cases on economic duress determined that the court should not interfere with commercial arrangements made between businessmen simply because one party was the victim of a hard bargain.[19] Predictably, Estey J. showed no inclination to interfere with this finding.[20]

The final issue assumed greater significance in the Supreme Court's decision that in those of the lower courts, that is, consideration for the settlement agreement. If the settlement agreement could be found to be independently enforceable then the validity of the guarantees would become irrelevant. In the Court of Appeal Wilson J.A. thought that the settlement was not valid for the two reasons stated above. However, Estey J. rightly correcting her assertion that forbearance to sue in a cause believed in good faith is not valid, found that there was good consideration for the settlement.[21]

The decision of the Supreme Court of Canada in *Ronald Elwyn Lister Ltd* v. *Dunlop Canada Ltd* is a classic example of the numerous shortcomings which commentators have observed in other contract cases decided by the highest court in the land in that it demonstrates the court's eschewal of bold leadership in the development of the substantive law in favour of narrow technical decisions which appear increasingly unreal and unrelated to the actualities of contractual obligations today.[22] Particularly tragic in *Lister* is the total failure to come to terms with the fact that the contractual relationship between the parties was founded on a franchise agreement which was entered into against a background of factors of which the court took little, if any, regard, and which predetermined the ongoing nature of the relationship in which the Listers got into increasing difficulties yet elicited decreasing sympathy from Estey J.

Franchises are an increasingly attractive way for an aspiring small businessman to establish his "own" company and to become his "own" boss.[23] The fundamental exchange in the franchise rela-

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[18] *Ibid.*, at pp. 699-700.

[19] *Supra*, footnote 7, at p. 696.

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

[21] *Ibid.*, at pp. 13-14.

[22] A detailed analysis of the problems may be found in the excellent analysis of Barry J. Reiter and John Swan, Developments in Contract Law: The 1980-81 Term (1982), 3 Supreme Court L. Rev. 115; see also their earlier reviews of the 1978-79 and 1979-80 Terms in (1980), 1 Supreme Court L. Rev. 137 and (1981), 2 Supreme Court L. Rev. 125 respectively.

[23] For what follows see Hartley, *op. cit.*, footnote 1, at pp. 95-102. See also Allen Karp, Franchising Today: A Specialized Contract, [1975] L.S.U.C. Special Lectures 387; J. George Vesely, Franchising as a Form of Business Organization—Some Legal Problems (1977), 2 C.B.L.J. 34; Frank Zaid, Franchising and Competition Law in Canada—Catch a Tiger by the Tail (1978), 34 Bus. L. 193.

tionship is of a recognized product and trademark and a monopoly for a specified area granted to the franchisee in return for the franchisor's quick market penetration with a small capital outlay. From start to finish the franchise relationship is marked by considerable bargaining inequalities which are reflected in the standard form agreement proferred to the franchisee on a take-it-or-leave-it basis. The fundamental nature of the franchise relationship was best stated in the United States Supreme Court:[24]

> The franchise method of operation has the advantage, from the standpoint of our American system of competitive economy, of enabling numerous groups of individuals with small capital to become entrepreneurs. . . . If our economy had not developed that system of operation these individuals would have turned out to have been merely employees.

Despite the manifest unfairness and inequalities in the franchise relationship there is virtually no statutory regulation of them in Canada, with several notable exceptions including the British Columbia Trade Practices Act which includes franchise agreements among those transactions regulated by the act against deceptive and unconscionable practices;[25] the Alberta Franchises Act which requires disclosure of all facts material to a franchise;[26] and the Combines Investigation Act which provides some regulation but is effectively meaningless.[27] In Ontario recommendations for regulation of franchise agreements have been made but never implemented.[28]

Nor have Canadian courts been quicker to redress the balance.[29] One exceptional case was *A & K Lick-a-Chick* v. *Cordiv Enterprises Ltd*[30] in which Richard J. of the Nova Scotia Trial Division held that a contract was unenforceable on grounds of unconscionability. In contrast the Supreme Court of Canada upheld a decision of the Ontario Court of Appeal in *Jirna Ltd* v. *Mister Donut of Canada Ltd* that a franchise agreement was valid on the footing that both parties were experienced commercial men dealing at arm's length.[31] In that case the franchisor had made secret profits in the purchase of materials from suppliers designated by him by the franchisee who was not aware

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[24] *United States* v. *Arnold Schwinn & Co.* (1967), 388 U.S. 365, per Stewart J., at p. 386, cited in *Jirna Ltd* v. *Mister Donut of Canada Ltd* (1970), 13 D.L.R. (3d) 645, at p. 646 and in *Ronald Elwyn Lister Ltd* v. *Dunlop Canada Ltd* (1978), 85 D.L.R. (3d) 321, per Rutherford J., at p. 328.

[25] R.S.B.C., 1979, c. 406, s. 1(a).

[26] S.A., 1971, c. 38.

[27] R.S.C., 1970, c. C-23, as am.

[28] Report of the Minister's Committee on Franchising, Department of Financial and Commercial Affairs (1971), (the "Grange Report").

[29] See *op. cit.*, footnote 23.

[30] (1981), 119 D.L.R. (3d) 440 (N.S.S.C. — T.D.).

[31] (1970), 13 D.L.R. (3d) 645 (Ont. H.C.), rev'd (1972), 22 D.L.R. (3d) 639 (Ont. C.A.), aff'd (1975), 40 D.L.R. (3d) 303 (S.C.C.).

that the suppliers rebated to the franchisor a percentage of the price paid by the franchisee. Stark J. held that a quasi-fiduciary duty arose from the very close relation of franchisor and franchisee and that there was a breach of this duty in the light of a parol representation that the franchisee would receive the benefit of the bulk-buying power of the franchisor. The Court of Appeal disagreed. It relied on an exclusion clause in the franchise agreement which the trial judge had discounted because of the unequal bargaining positions of the parties. The Supreme Court agreed.

The judicial approach to the *Lister* case exhibits the time-worn technique of avoiding the real issues by deciding the case on the narrowest possible grounds thereby circumventing these issues. Thus, Estey J. focused on the validity of the settlement agreement and the finding of good consideration for it, thereby failing to come to terms with the reasons for the settlement and the entire set of circumstances which necessitated its execution. Nowhere does his judgment consider the unbridled contractual freedom which the unregulated law of franchises bestows on a franchisor and his standard form contract. It may well be that he has considered carefully the unequal bargaining positions of the parties in coming to the conclusion that both the Listers, and particularly Mr. Lister, were sufficiently experienced to deal with Dunlop, although a statement such as the following might cause one to doubt that such was the case:[32]

> Where parties experienced in business have entered into a commercial transaction and then set out to crystallize their respective rights and obligations in written contract drawn up by their respective solicitors, it is very difficult to find or to expect to find a legal principle in the law of contract which will vitiate the resultant contracts. Certainly where the parties have capacity in law to enter into a contract, where the terms of the contract are clear and unambiguous, where there is valid consideration passing between the parties, and where there is no evidence of oppression or operative misrepresentation, the law recognizes no principle which fails to enforce the validity of such a contract. No doubt the law of contract in this connection reflects the needs for certainty in commerce. This is particularly true where, as here, the two contracts, at the time of commencement of action, are not executory, but have been acted upon and performed by the parties. Where, as here, the persons engaged in the commerce at hand were fully and continuously in contact with their legal advisors, there is neither need nor warrant for the intervention of the courts to remake or set aside these contracts.

The passage is perfectly unobjectionable but for its context. Estey J. was speaking of the settlement agreement which was indeed drawn up after negotiation by solicitors for both sides but which was merely part of an ongoing relationship in which the parties began from markedly different power positions and in the course of which the Listers were distanced even further from Dunlop. It may well be, of course, that the Supreme Court proceeded on the unwritten assump-

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[32] *Supra*, footnote 9, at p. 15.

tion that here the Listers were roughly equal to Dunlop prior to entering the franchise, although it is doubtful, as is the possibility that once embarked on the relationship that they remained roughly equal partners. To focus on the settlement agreement as a discrete transaction is tantamount to a deliberately obtuse unwillingness of the Supreme Court to come to terms with the real world of unfairness in franchise relationships. It fails to realize that franchisees are, as the United States Supreme Court has stated, effectively employees, indeed employees who are required to finance their own employment without the legal protections normally afforded other employees or consumers generally. As I have argued elsewhere,[33] "commercial experience" comes in many manifestations and the corporate experience of a multi-national such as Dunlop is unlikely to be matched by the business experience of small town traders. Thus, arguably the *prima facie* assumption on which a court should proceed in dealing with franchise cases is that there are significant bargaining inequalities from the start. Subsequent examination of the facts, may, of course, displace this assumption.

Almost as equally disturbing as the failure of the Supreme Court to characterize and analyze accurately the entire transaction is the increasing reliance by the courts on the presence of independent legal advice as the *sine qua non* for the transformation of a lesser contractual bargaining position into an equal bargaining position vis-à-vis a large company proferring a standard form contract. Without wishing to do a disservice to the Listers' counsel or to legal advisers generally, it not infrequently happens that, as with the independent legal advice given to the Listers in respect to the settlement, the advice given may simply be to accept the inevitable. Estey J.'s comment disguises the fact that once a particular contractual relationship is undertaken the options for salvaging the inequitable position of a party may be limited and while lawyers may be involved in negotiation and drafting an agreement, their role, if acting for the disadvantaged party, may be simply that of trying to make the best of a bad situation. In *Lloyd's Bank* v. *Bundy*, itself, Lord Denning M.R. stated that the presence of legal advice was merely one factor which should be taken into account in determining whether there was inequality calling for judicial redress, not the only factor.[34] Solicitors have varying degrees of experience in particular areas of practice and few would necessarily have the same skills as the corporate counsel who draft specific standard form contracts for individual large companies. Indeed, even where a lawyer warns a client, as the Listers' did when cautioning them in regard to

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[33] *Op. cit.*, footnote 1, at pp. 184-186; see also M. H. Ogilvie, Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract (1981), 26 McGill L.J. 289.

[34] [1974] 3 All E.R. 757 (C.A.), per Lord Denning M.R., at pp. 765-766.

the differences between the representations made by Dunlop and the written terms of the franchise agreement, that may not be enough to warrant the conclusion that the client freely willed to enter the contract. The interplay of "relational" factors as suggested by Professor Macneil may be more important in impelling the party with lesser bargaining power into the contract.[35]

The first issues circumvented by the Supreme Court's focus on the legal validity of the settlement were the oral collateral warranties and fraudulent and negligent misrepresentations which induced the Listers to enter the franchise in the first place. The significance of these parol representations was considered in relation to the franchise agreement itself and to the guarantee. In regard to the franchise the trial judge found not only that no fraudulent intent was proven but that the exclusion clause, clause 11, barred claims based on the representations. The matter was not considered by the other courts except that the Court of Appeal apparently agreed with the trial judge. Wilson J.A. ascribed greater importance to the representations in order to decide that the guarantee was not binding but the Supreme Court avoided the issue by reference to the settlement instead.

Yet, it seems reasonably clear that the representations were of the greatest importance in inducing the Listers to enter the franchise agreement, persuading them to disregard their solicitor's warnings, but only one judge, Wilson J.A., was seriously willing to consider that fact. Had the courts undertaken the usual analysis of the relationship of parol representations and a standard form contract, they would have discovered that even the technical common law arguments favoured the Listers. First, clause 11 was sufficiently ambiguous as to justify the application of the *contra proferentem* rule against Dunlop.[36] Second, it is not unknown for the courts to acknowledge the realities of the circumstances in which standard form contracts are "negotiated" by reliance on the oral undertakings rather than the written terms even where clearly inconsistent or repugnant to one another. Although Canadian courts have apparently not been as keen to ignore the parol evidence rule in this regard as have the English courts, *Lister* was arguably a case in which this was justifiable.[37]

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[35] The New Social Contract: An Inquiry into Modern Contractual Relations (1980); see also Reiter and Swan, *op. cit.*, footnote 22, (1982), 3 Supreme Court L.Rev. 115, at pp. 153-170.

[36] Clause 11 provided, *inter alia*, that, "no representation . . . has been made or exists". Representation did exist, however. *Verba chartarum fortius accipiuntur contra proferentem*: Bac. Max. 3.

[37] *Couchman* v. *Hill*, [1947] K.B. 554 (C.A.); *Webster* v. *Higgin*, [1948] 2 All E.R. 127 (C.A.); *City and Westminster Properties (1934) Ltd* v. *Mudd*, [1959] Ch. 129; *Mendelssohn* v. *Normand*, [1969] 2 All E.R. 1215 (C.A.); *J. Evans & Son (Portsmith) Ltd* v. *Andrea Merzario*, [1976] 2 All E.R. 930 (C.A.); *Davidson* v. *The Three Spruces Realty Ltd* (1977), 79 D.L.R. (3d) 481 (B.C.S.C.); *Tilden Rent-A-Car* v. *Clendenning* (1978), 83 D.L.R. (3d) 400 (Ont. C.A.).

Third, perhaps the trial judge would have been less reticent in regard to finding negligent misrepresentation in the face of the exclusion clause had he been reminded that there is also sound judicial authority for the proposition that negligent misrepresentations override exclusion clauses in written agreements.[38] Other overriding factors have also found curial recognition including unconscionability, reasonableness and inequality of bargaining power, although it would perhaps be too much to expect Canadian courts to invoke these doctrines in other than blatant cases of unfairness. Fourth, *Lister* could also have been decided as a case of negligent misrepresentation but for the problematic opinion of Pigeon J. in *J. Nunes Diamonds Ltd* v. *Dominion Electric Protection Co.*[39] which suggested that tort liability could not arise where there is a contract. That proposition has been rightly criticized,[40] and disguises the trite fact that legal liability should rest not on the characterization of a dispute as contractual or tortious, rather should arise on the basis of the expectations created and reliance upon these by the respective parties to the agreement.[41]

While it is clearly possible, then, to criticize the *Lister* decision from the technical contractual standpoint in regard to the relationship of the parol representations and the franchise agreement itself and thereby to discredit the courts' decision by the rules of the game which it played, more fundamental was the blindness of the courts to the real significance of the representations and of the Lister's willingness to rely on them which Wilson J.A. alone acknowledged. Despite the Lister's business experience and their solicitor's warning, the personal and commercial dynamics of their entry into the ongoing contractual relationship meant that they *really* believed the unauthorized statements made to them by the Dunlop employees and that they *really* believed that Dunlop as an old and highly reputable British firm would honour the undertakings. Surely the onus on the courts is to say why such reliance should not be upheld?

These remarks are equally applicable to the courts' failure to come to terms with the argument that the parol representations also vitiated the personal guarantees, and while it is easy to be critical of Wilson J.A.'s approach because it lacked legal precedent and showed insufficient appreciation of the parasitic nature of the guarantee in relation to the franchise agreement, conversely her analysis suggested

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[38] *Curtis* v. *Chemical Cleaning and Dying Co. Ltd*, [1951] 1 K.B. 805 (C.A.).

[39] (1972), 26 D.L.R. (3d) 699 (S.C.C.), per Pigeon J., at pp. 727-728; *cf. Couchman* v. *Hill*, *supra*, footnote 37; *Esso Petroleum Co. Ltd* v. *Mardon*, [1976] 2 All E.R. 5 (C.A.). See also Brian Morgan, The Negligent Contract-Breaker (1980), 58 Can. Bar Rev. 299.

[40] By virtually every writer on the subject, for example, Morgan, *op. cit.*, *ibid.*

[41] Swan and Reiter, *op. cit.*, footnote 1, at pp. 226-227. They also note that the same fundamental issue is raised by the parol evidence rule applications.

her appreciation of the real nature of the contractual relationship and was unfortunate only insofar as she was constrained to adopt the somewhat artificial distinction between the corporate person, Lister Ltd, and the natural legal persons, the Listers, in order to achieve some measure of justice in the adjudication of the dispute.[42]

To this point the analysis of the relationship of the parol representations and the exclusion clause has focused on the representations, however some comment is also called for with respect to the exclusion clause. In all three courts no special function or rules were applied to the exclusion clause, although as suggested earlier a simple reading of the clause may have resulted in adjudication for the Listers in respect to the validity of the franchise agreement. This judicial approach is in line with the view which an increasing number of academic commentators have advocated in recent years that exclusion clauses per se should be treated no differently than other terms of a written contract.[43] Interpretation rules and substantive principles for exclusion clauses in the past have disguised the facts that courts have attempted to redress bargains in which they perceive the allocation of risk is unfair or in which the contractual relationship is inherently unjust to one of the parties. Commendable though that procedure may have been, it is submitted that it is preferable that the courts openly interpret an exclusion clause according to its literal meaning and then equally honestly ask whether in the entire circumstances of the case the allocation of risk is fair and should be upheld. In purely commercial transactions between parties of equal bargaining power there is likely to be no reason to intervene, however if judicial intervention is deemed appropriate the reasons should be explicit and fully explored in the decisions so as to give certainty and guidance for future negotiators in similar circumstances. If the Ontario courts and the Supreme Court were, in *Lister*, implicitly restoring common sense to the interpretation of exclusion clauses then the decision is commendable on that point if not so in regard to the second step of examining the exclusion clause in the context of the entire contractual relationship.

Avoidance of the essential issues of *Ronald Elwyn Lister Ltd* v. *Dunlop Canada Ltd* is nowhere more apprent than in the manner by which the Supreme Court dealt with the interrelationship of the unlawful seizure of the Autopar parts and the settlement agreement, indeed with the entire context within which the settlement was negotiated. While Estey J. rightly restored the decision of the trial judge in respect to reasonable notice of the seizure of the Dunlop parts, he showed

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[42] *Cf. MacKenzie* v. *Royal Bank of Canada*, [1934] A.C. 182 (P.C.).

[43] See M. H. Ogilvie, The Reception of *Photo Production Ltd* v. *Securicor Transport Ltd* in Canada: *Nec Tamen Consumebatur* (1981), 27 McGill L.J. forthcoming; see also Swan and Reiter, *op. cit.*, footnote 1, at pp. 221-224 and (1982), 3 Supreme Court L. Rev. 115 *passim*.

considerably less sympathy for the Listers in regard to the Autopar seizure with which, given the different circumstances of the seizure, he ought to have shown greater sympathy. Indeed, in discussing the Dunlop seizure he makes a remark which can only be labelled as a piece of coy cruelty when he says, "Failure to give such reasonable notice places the debtor under economic, but nonetheless real duress, often as real as physical duress to the person . . .".[44] The learned justice thus acknowledged the existence of economic duress as a possible tool for relieving the Listers from their predicament but cynically and in the context of the wrong seizure.

The Listers argued that they had been coerced into the execution of the settlement with Dunlop because of the pressure exerted on them by Dunlop's unlawful seizure of the Autopar parts and Chrysler's resultant filing of a petition in bankruptcy against them. It seems quite clear that Dunlop's continued retention of the goods, which if restored to Chrysler would have fully satisfied Chrysler's claim, and the promised *quid pro quo* evidenced in the settlement agreement that if the Listers gave the three mortgages to Dunlop as security for the agreement the bankruptcy proceedings would be called off were significant factors in "persuading" the Listers to enter the settlement agreement, as if their mere indebtedness to Dunlop alone were not enough.

It may be, of course, that the Supreme Court, for reasons which do not appear in the judgment, regarded the *Lister* case as one in which there was no inequality of bargaining power calling for judicial intervention. If that were so then it is unfortunate that the opportunity afforded by the facts of the case did not elicit from the court analytical discussion of the scope and definition of the concept and of one aspect of it which arguably was applicable, that is, economic duress.[45] The trial judge and the Court of Appeal expressly addressed the issue but found that the presence of independent legal advice and Mr. Lister's business experience were impediments to deciding the case on economic duress grounds. Yet, the absence of viable alternatives other than the settlement agreement for the Listers would seem to bring their case squarely within the test proposed by Lord Scarman in *Pao On et al.* v. *Lau Yiu et al.*[46] that there be coercion of the will so as to vitiate

[44] *Supra*, footnote 1, at p. 16.

[45] For a discussion of the recent English case law and of the relevant issues see Ogilvie, *op. cit.*, footnote 1 and footnote 33 and the literature cited in the footnotes in those articles. Subsequent articles include Aleck Dadson, The Atlantic Baron: Consideration, Economic Duress and Coerced Bargains (1980), 38 U. of T. Fac. L. Rev. 223; G. England and N. Rafferty, Contractural Variations: Consideration and Duress (1980), 18 O.H.L.J. 627; Alan Evans, Economic Duress, [1981] J.B.L. 188 ; Nicholas Rafferty, The Element of Wrongful Pressure in a Finding of Duress (1980), 18 Alta L. Rev. 431.

[46] [1979] 3 All E.R. 65, at p. 78 (P.C.).

real consent.[47] Nowhere does the Supreme Court address the issue, other than in the context referred to earlier, although it was argued before the learned justices. Rather, they merely adopted the view expressed by the lower courts. Once more fundamental policy issues were avoided. Once more refuge was taken in the adoption of a technical legal way out by citing the view that independent legal advice precluded economic duress. Putting aside the fact that Lord Denning M.R. in *Lloyd's Bank* v. *Bundy*,[48] had suggested that independent legal advice was one possible way of offsetting a conclusion of bargaining inequality, the notable characteristic of the Supreme Court's handling of the issue is not just avoidance of it, but the avoidance of appreciation of the entire context of the settlement in which the Listers were throughout disadvantaged in respect to Dunlop. The settlement was merely the last injustice in a course of unfairness. Not only was the utility and proper definition of a doctrine of economic duress avoided, but so too was acknowledgement that a modern law of contract requires renewed perceptions and policy directions to cope with the bargaining realities of the late twentieth century. The English and especially the American courts[49] have begun to face these challenges, but the Supreme Court of Canada is still floundering in the nineteenth century world of discrete transactions between individual merchants and the myth of freedom of contract.

Indeed, as if to confirm the validity of historical determinism in modern contract law, the Supreme Court finally determined the issue between Dunlop and the Listers on the basis of whether there was good consideration for the settlement agreement. Predictably it finds consideration, and with the assistance of several problematic nineteenth century cases on forbearance to sue where there is believed to be a valid legal claim.[50] Thus, the case is decided on the narrow basis of finding consideration for the settlement, and not on such "narrow facts"[51] as the exclusion clause or the validity of the guarantee, and certainly not on the basis of the validity of the entire contractual relationship.

The adjudication of the fact situation in the Lister case is a tragedy of lost opportunity. Rarely do cases with such a rich mix of important policy issues go to the Supreme Court. Too few will venture there in the immediate future. The obstinate refusal of the court to cast aside outdated contractual principles and to explore instead new

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[47] *Cf.* Ogilvie, *op. cit.*, footnote 33 *passim.*

[48] *Supra*, footnote 34.

[49] See Ogilvie, *op. cit.*, footnote 33 *passim.*

[50] *Callischer* v. *Bischoffsheim* (1870), L.R. 5 Q.B. 449; *Miles* v. *New Zealand Alford Estate Ltd* (1885), 32 Ch. D. 266.

[51] *Supra*, footnote 1, at p. 16.

concepts and policy directions deprives the highest court of the respect and integrity which it ought rightfully to have in the determination of the future development of the law of contract. Avoidance of the real issues and the incantation of narrowly conceived and applied principles of yesteryear suggests a lack of self-confidence and jurisprudential maturity in the top court which is beginning to produce stagnation and chaos in Canadian curial contractual analysis. This need not be so; even in *Lister* the Supreme Court acknowledged the existence of inequality of bargaining power and of economic duress, if in the wrong contexts, and in the past the court has developed new themes in contract law. Unfortunately, however the decision of the Supreme Court of Canada in *Ronald Elwyn Lister Ltd* v. *Dunlop Canada Ltd* looks backward rather than forward and reminds one of the dictum ascribed to Talleyrand in describing the Bourbons, "They have learned nothing, and forgotten nothing".

M. H. OGILVIE*

* * *

BANKING—CHEQUES—PRESENTATION FOR PAYMENT—INSUFFICIENT FUNDS—REVOCATION OF PAYMENT AND RETURN OF CHEQUES—TIME LIMIT—EFFECT OF CLEARING HOUSE RULE.—A judgment rendered on September 15th, 1981 by the Court of Appeal of Quebec in the case of *Stanley Works of Canada Ltd* v. *The Banque Canadienne Nationale and The Royal Bank of Canada*[1] has received wide attention in the press. Numerous newspapers throughout Canada have published reports of the decision condemning The Royal Bank of Canada to pay to its customer, Stanley Works of Canada Ltd, the amounts of two cheques for $22,000.00 each which the bank had debited to its client's account after the cheques had been presented for payment to the drawer's bank. Banque Canadienne Nationale, who had received the cheques for payment, was exonerated of responsibility.

The interest of this decision results from the fact that it is the first time that a bank has been held responsible to its customer for having charged back the amount of cheques which had been forwarded for clearing to the drawer's bank and returned after an undue delay.

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[1] C.A., Montréal, no. 09-001397-769, not yet reported.

The facts which gave rise to this action were summarized as follows in the notes of Montgomery J.A. whose judgment forms the basis for the decision of the court:

> There is little dispute as to the facts. Appellant was at all material times carrying on a manufacturing business in the City of Hamilton, Ontario, where it maintained an account with the Royal Bank of Canada (to which I shall hereinafter refer as "the RBC"). In 1974, it was given a series of postdated cheques by a customer that owed it money, Daly & Morin Limited, of Lachine, Québec. These cheques were drawn upon the Montréal branch of the Banque Canadienne Nationale (to which I shall hereinafter refer as "the BCN"), with which Daly & Morin did its banking business. As the due date of each cheque approached, Appellant deposited it in its account with the RBC.
>
> A number of the Daly & Morin cheques were duly paid by the BCN when presented, and difficulties did not arise until the cheque dated 25th July (Exhibit P-1) was presented by the RBC to the BCN in accordance with normal banking practice. While the cheque was immediately debited to the account of Daly & Morin, it remained in the hands of the BCN, which had apparently conceived doubts as to its customer's solvency. Then, another cheque for $22,000 was presented by RBC, this one dated 1st August (Exhibit P-2). The BCN finally took action. It returned the two cheques to the RBC, marked "not sufficient funds", reversed the charges that it had made to its customer in respect of them, and took steps to realize its security, thereby forcing Daly & Morin into bankruptcy.
>
> The RBC accepted the return of the two cheques from the BCN and debited Appellant's account accordingly. However, at the instigation of Appellant, which was clearly dissatisfied, the RBC on 12th August wrote to the BCN asking for an explanation of the delay. No satisfactory reply was received, and on 28th August the RBC sent copies of this correspondence to Appellant. (These letters were filed *en bloc* by the RBC as Exhibit DW-1.)

At the outset of the litigation, the plaintiff-appellant, Stanley Works of Canada Ltd, took action only against the Banque Canadienne Nationale claiming the amounts of the two cheques. It blamed the Banque Canadienne Nationale for its delays in returning the cheques, which amounted to eleven days in the case of the first cheque and four days in the case of the second. The plaintiff's action was based on the clearing house rule then in force between banks which stipulated that the drawer's bank must act within forty-eight hours of the time it received cheques for payment. The rule now calls for one clear business day after the receipt of an instrument.

Following the Banque Canadienne Nationale's contestation to the effect that the clearing house rule applicable to payments did not constitute a custom but only regulated such matters between banks, the plaintiff company impleaded its own bank and concluded for a condemnation to pay the amounts by which its account had been debited.

The plaintiff company, whose action had been dismissed by the trial court against both banks, won the appeal against the Royal Bank of Canada because the appellate court found that the Royal Bank of Canada had been neglectful in having accepted the return of the

cheques from the Banque Canadienne Nationale, and thereby contravened its mandate; the plaintiff was not able to succeed against the Banque Canadienne Nationale for the reason that there was no *lien de droit* (privity) between it and the plaintiff company and furthermore, that the clearing house rule was not evidence of a custom but rather should be construed as a rule applicable only between the financial institutions adhering thereto.

The judgment of the Court of Appeal was not appealed to the Supreme Court as the Royal Bank of Canada accepted to pay the amount of the judgment. One can, however, wonder what would have been the judgment of the Supreme Court on the issues which were raised throughout by counsel for the plaintiff company, namely:

a) Whether or not the clearing house rule is evidence of a custom and usage and should receive recognition as such and, in the affirmative, whether the violation of the rule by the Banque Canadienne Nationale would have created the *lien de droit* (privity) between the plaintiff and the drawer's bank.

b) Whether or not, by the lapse of the forty-hour delay stipulated in the clearing house rule, the Banque Canadienne Nationale was deemed to have paid the said cheques, and, consequently, could not revoke payment.

The judgment of the Court of Appeal fills part of the gap which exists in our law on this subject but does not complete it to the extent that is the case in England or the United States.

The law in England has been stated as follows:[2]

> A paying banker "must either pay cheques or refuse payment at once".

As concerns the law in the United States:[3]

> The usage of trade or business includes the usage of banks relating to presentment of cheques for payment.

The case law in the United States has been codified in the Uniform Commercial Code,[4] and was applied in *National City Bank of Rome* v. *Motor Truck Contract Company of Rome*,[5] where it was held that: "if an item is presented on and received by a payer bank, the bank is accountable for the amount of a demand item, if the bank retains the item beyond midnight of the banking day of receipt without settling

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[2] Halsbury's Laws of England (4th ed., 1973), vol. 3, para. 50, p. 38, citing *Bank of England* v. *Vagliano Brothers*, [1891] A.C. 107, at p. 141, where Lord Bramwell said: "I do not agree with the notion that a banker is entitled to make inquiries as to whether he should pay, as there suggested. He must honour or dishonour the bill on presentment."

[3] Brannan, Negotiable Instruments Law (7th ed., 1948), p. 998.

[4] S. 4-302.

[5] (1969), 6 U.C.C. Reporter Services 376.

for it or does not pay or return the item or send notice of dishonour until after his midnight deadline''.

We will have to wait for subsequent decisions to know if the courts will go further than the Court of Appeal of Québec in the *Stanley Works of Canada Ltd* case.

JÉRÔME CHOQUETTE*

* * *

PROPERTY LAW—INSURANCE—CRIMINAL LAW—THEFT—CLAIM OF RIGHT AND PROPERTY INSURANCE.—The recent decision of the Ontario Court of Appeal in *McElhiney* v. *Wawanesa Mutual Insurance Co.*[1] provides another striking example of the difficulties which can confront a civil court deciding a matter of property insurance when there is dispute over whether or not the property was lost through ''theft'' (the peril insured against). Diversity of approach is revealed in previous cases, on both sides of the Atlantic.[2]

The facts of this case were that the plaintiff married in June 1978 but the marriage was not a success. By August of that year communications between the spouses had broken down, and in September the plaintiff commenced divorce proceedings. The wife then assaulted the plaintiff, who left the matrimonial home. He brought proceedings against his wife to exclude her from the home. In October she did leave, but took with her a substantial amount of the furniture including beds, television set, chesterfield, antique clock, spinning wheel, cutlery and paintings. The plaintiff called the police, alleging theft of these items. The police soon found them, on open display at the wife's new address. She explained that she had taken the goods acting on legal advice and that she felt entitled to them since her husband had

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[1] (1982), 130 D.L.R. (3d) 404.

[2] *Saqui and Lawrence* v. *Stearns*, [1911] 1 K.B. 426; *Debenhams Ltd* v. *Excess Insurance Co.* (1912), 28 T.L.R. 505; *Pawle* v. *Bussell* (1916), 85 L.J.K.B. 1191; *London and Lancashire Fire Insurance* v. *Bolands*, [1924] A.C. 836; *Boyle* v. *Yorkshire Insurance Co.*, [1925] 2 D.L.R. 596; *Lake* v. *Simmons*, [1927] A.C. 487; *Ford Motor Co.* v. *Prudential Insurance Co.* (1958), 14 D.L.R. (2d) 7; *Nishina Trading Co.* v. *Chiyoda Fire and Marine Insurance Co.*, [1969] 1 Lloyds Rep. 293 (C.A.); *Richmond Metal Co.* v. *Coates*, [1970] 1 Lloyds Rep. 423; *Pan Am* v. *Aetna*, [1974] 1 Lloyd's Rep. 207; [1975] 1 Lloyds Rep. 77; *Grundy* v. *Fulton*, [1981] 2 Lloyd's Rep. 666.

previously withdrawn the total sum from their joint bank account.[3] The wife was subsequently charged with theft, but the case was dismissed, apparently as a result of the judge's ruling that the husband was not competent to give evidence against his wife on the matter. The husband then turned to his insurance policy with the defendants, which provided in part:

> The insurance provided by Section 1 of this policy is against direct loss or damage caused by the following perils as defined and limited: . . . (8) Theft or attempt thereat. . . .

Theft is defined in section 283(1) of the Criminal Code of Canada as follows:[4]

> Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything whether animate or inanimate, with intent, (a) to deprive, temporarily or absolutely, the owner of it or a person who has a special property or interest in it, of the thing or of his property or interest in it. . . .

Further, although section 289(1) of the Criminal Code provides that no husband or wife, during cohabitation, commits theft of anything that is by law the property of the other, section 289(2) states the exception that:

> A husband or wife commits theft who, intending to desert or on deserting the other or while living apart from the other, fraudulently takes or converts anything that is by law the property of the other in a manner that, if it were done by another person, would be theft.

Two points were clear from the outset. The first was that when the wife removed the property she was living apart from her husband and thus section 289(2) and section 283(1) would, in principle, apply to her conduct. The second point was that although on a prosecution for theft the various elements of that offence have to be established beyond reasonable doubt, on the insurance matter it was for the plaintiff claiming on the policy to show, on a balance of probabilities, that the peril insured against, namely "theft", had indeed taken place. In the absence of a ruling on the matter by a criminal court, it seems right that the civil court, while seeking to do justice for the plaintiff, should be cautious in imputing criminality to a party not before the court.[5]

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[3] According to the Report (at p. 406), the police informed the wife of the provisions of s. 9 of the Family Law Reform Act 1978 (Ont.), now R.S.O., 1980, c. 152, which gives to the court the power to issue an order for possession, delivering up, safekeeping and preservation of property where division thereof or claims thereto are disputed by the spouses. In response to this, the wife said: "If he comes over here he'll say everything is his and he'll take everything and leave me with nothing, like he left me with an empty bank account."

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

[5] *Cf.* the remarks of Phillimore L.J. in *Nishina Trading Co.* v. *Chiyoda Fire and Marine Insurance Co.*, *supra*, footnote 2, at p. 301, adopted by Stuart-Smith J. in *Grundy* v. *Fulton*, *supra*, footnote 2, at p. 669.

The crux of the matter was then approached by counsel for the plaintiff, who argued that when construing an insurance contract, the word "theft" should not be used in its "narrow and technical" legal sense. This would entail, in the present case, that little attention need be paid to the details of any possible defence the wife might have to a criminal charge if outwardly the conduct might well be stigmatised as "theft" by an observer. This proposition derives from a dispute in the cases over whether the court trying the insurance question should enter into a detailed discussion of the law of theft in deciding whether the insurance claim succeeds or not. There are two competing attitudes evident in the decided cases. The first is founded in the principal rule of construction that technical terms in contracts always bear their technical meaning, unless there is some clear evidence to the contrary.[6] This means that if the word "theft" appears in the insurance contract, all the criminal law learning on the circumstances which constitute that offence must be regarded as crucial. This is a rigorous approach which in one way helps to reduce uncertainty in the interpretation of insurance contracts, but does make highly relevant the perhaps commensurate uncertainties of the modern law of theft.[7] It also opens up the possibility that the expectations of one or both of the parties to the insurance contract will be frustrated by the vagaries of the criminal law. A clear example of this approach is the observation of Hamilton J. in *Debenhams Ltd* v. *Excess Insurance Co.*:[8]

> The term "embezzlement" in this policy meant the same as it meant in an indictment. There was no reason for giving it any the less strict meaning in the policy by which the plaintiffs were insured than if a direct charge was being made.

The leading authority for the strict view is, however, the decision of the House of Lords in *London and Lancashire Fire Insurance* v. *Bolands*.[9] In that case the insurers sought to rely on an exclusion in the contract where the theft insured against took place in circumstances of "riot". Four armed men entered the assured's premises in daylight, held up the employees with revolvers, took all the money they could find, and then left. There was no actual violence, no "tumult" in the premises, and no other disturbance in the neighbourhood. The House held, strictly in accordance with the criminal law definition,[10] that this

[6] *Robertson* v. *French* (1803), 4 East 130, at p. 135. There was clear evidence to the contrary in *Re George and the Goldsmiths General Burglary Insurance Co.* (1899), 80 L.T. 248, where the policy covered burglary and housebreaking "as hereinafter defined".

[7] *Cf.* the problems encountered by Stuart-Smith J. in *Grundy* v. *Fulton*, *supra*, footnote 2, in resolving conflicting criminal law authorities on consent and appropriation in theft following *Lawrence* v. *M.P.C.*, [1972] A.C. 626.

[8] *Supra*, footnote 2.

[9] *Ibid.*

[10] *Field* v. *Metropolitan Receiver*, [1907] 2 K.B. 853. This definition still stands, but there is now a proposal for change: Law Commission Working Paper No. 82, Offences against Public Order (1982).

constituted a riot, notwithstanding that many people would learn with surprise that the legal definition of "riot" could extend to such a case. On the specific question of the interpretation of "riot", however, there is an important American authority which adopts a far more flexible approach. In *Pan Am* v. *Aetna*[11] an aeroplane had been hijacked and subsequently destroyed by terrorists. Insurance cover excluded damage by riot. The District Court for the Southern District of New York, in a decision later affirmed by the United States Court of Appeals, held that in this case the meaning of riot:

> . . .was intended by these parties in its popular and usual meaning. . . . It is the definition of riot which most accords to common sense. It is unlikely that these parties expected their dealings to be governed by artificial and technical definitions of riot.

This general approach, in contrast to the strict view in *Bolands*, takes the line that insurance contracts are business or commercial documents, not criminal indictments, and if it is clear that in using the word "theft" or "riot" in an insurance contract, the parties would expect certain conduct to be included or excluded by that term, then it should be included or excluded, whatever the criminal law might actually say. This view, whilst allowing the court full use of the principles of construction to determine the intentions of the parties, would leave out the additional complexities caused by a detailed analysis of the law of theft. What should matter, on this view, is what the parties (perhaps reasonably) *thought* the criminal law was, not what it turns out to be. Some English cases support this view, to some extent. They suggest that criminal law terms in insurance contracts should not be given their "full significance". There is a reference to this effect in *Pawle* v. *Bussell*.[12] The most striking example is the remark of Lord Denning M.R. in the *Nishina Trading* case:[13]

> The word "theft" is not used here in the strict sense of the criminal law. It does not bring in all the eccentricities of the law of larceny. It means only what an ordinary commercial man would consider to be "theft".

In the leading Canadian decision in this area of law, *Boyle* v. *Yorkshire Insurance*,[14] Middleton J.A. observed that:

> . . . in the construction of a policy such as this the word "theft" is not used in its narrow and technical sense. . . .

In general, it seems that the English courts and text-writers have argued for a strict approach, drawing on criminal law learning to determine the insurance matter, but in general the North American approach has been the more flexible one. This latter view can be

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[11] *Supra*, footnote 2, at p. 99; see Kemble, (1976), 126 N.L.J. 1133.

[12] *Ibid.*

[13] *Ibid.*

[14] *Ibid.*, at p. 598.

further supported by the canon of construction of insurance contracts that it is correct for the court to bear in mind the commercial object or function of the clause and its apparent relation to the contract as a whole.

To return to *McElhiney*'s case, then. Here, Goodman J.A. appeared to take the view that a middle course could be steered between these two approaches. He took as the essential starting point the definition of theft in section 283(1) of the Criminal Code and observed:[15]

> It should be noted at this point that the statutory definition of theft embodied in s. 283 includes the common law of larceny in all its forms. In my opinion, in construing the policy of insurance, the word "theft" must be deemed to be used in its broad sense in s. 283 but in so doing one cannot remove therefrom the necessity of showing that there was a taking or conversion of anything "fraudulently and without colour of right".

The judge's view, then, would be that even accepting that in some circumstances "theft" may be more generously interpreted for insurance purposes than for the purposes of an indictment, its fundamental character as an offence of dishonesty must be made out by the plaintiff on the insurance claim. The question was, then, whether the plaintiff could establish, on a balance of probabilities, that the taking of the goods from his house by his wife was done "fraudulently and without colour of right" or, in English terminology, "dishonestly".[16]

It is instructive at this point to compare *McElhiney*'s case with the decision of the English Court of Appeal in *Nishina Trading*.[17] In that case the plaintiff traders' cargo was shipped from Bangkok to Kobe and insured, *inter alia* against theft, with the defendant company. The ship's charterers, while substantially in arrears with hire charges, defaulted and closed their office. The master of the vessel, on instruction from the shipowners, did not take the ship into Kobe but went to Hong Kong instead, still with the plaintiff's goods on board. The cargo was there discharged, and the shipowners mortgaged it all to recoup their loss. The plaintiffs sued on their policy. Lord Denning M.R. was of the view that there had been no "theft" of the cargo:[18]

> It seems to me that the owners may have thought that they had some sort of lien on the cargo under which they could raise money on mortgage. That would be a

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[15] *Supra*, footnote 1, at p. 408.

[16] On Canadian law see *Medwedowsky and Boyman*, [1953] O.W.N. 510; *DeMarco* (1973), 13 C.C.C. (2d) 369. On English law see *Bernhard*, [1938] 2 K.B. 264 and Smith, The Law of Theft (1979), para. 110: "D is not dishonest if he believes, whether reasonably or not, that he has the legal right to do the act which is alleged to constitute an appropriation of the property of another. This is in accordance with the old law of larceny. . . . It is irrelevant that no such right exists in law." Theft Act, 1968, c. 60, s. 2(1)(a).

[17] *Supra*, footnote 2. This case was not cited to the court.

[18] *Ibid.*, at p. 298.

> mistake but, if they honestly believed it, they would not be guilty of theft. No ordinary person would call it "theft" if they honestly thought they had a right to do it. The learned Judge held that it was "theft". But I would not do so.

Edmund Davies L.J., however, found the evidence less than compelling, and dissented on the question of the "theft". He observed:[19]

> One must certainly import into this civil action the basic conception of theft, which is that it is an offence involving dishonesty. No man . . . could fail to recognise that unless dishonesty is shown, no one should be branded as having committed a theft.

On the facts, though, he regarded the contention that the owners thought they had a lien on the goods "incredible" and "merely the offspring of ingenious conjecture".

In *McElhiney* v. *Wawanesa Mutual Insurance* the evidence that the wife acted with a claim of right when she took the property was quite strong. First, she acted on legal advice. Second, she took no steps to conceal the property from the police. Third, she roundly asserted her moral claim on the property. It should be noted that, as far as the criminal law is concerned, the wife's *honest* belief would probably be enough to excuse her from liability.[20] The belief need *not* be reasonably held though, of course, its reasonableness or otherwise would provide evidence for or against its actually being held, whether the criminal charge or the insurance question was under investigation. The plaintiff, in seeking to establish before the court the occurrence of "theft" of the goods also succeeded in revealing his wife's belief that she was entitled to do what she had done. In the light of this, Goodman J.A. held that the plaintiff had indeed failed to establish "theft" on a balance of probabilities.

The conclusion to be drawn from the case seems to be that in determining whether "theft" has occurred, for insurance purposes, it is not necessary for the court to give meticulous attention to the criminal law, but it should certainly take the definition of the offence as its starting point. Then it should proceed with a degree of flexibility, but always preserving what may be called the "essential characteristics" of the offence, in particular that "theft" is an offence of "dishonesty". This sensible approach steers a path between the potential injustices of rigid adherence to criminal law definitions where it is clear that one or both of the contracting parties never appreciated that their contract would be so affected, and too much flexibility which cuts the parties adrift from the criminal law which they have, after all, expressly referred to in their contract of insurance.

M. WASIK*

[19] *Ibid.*, at p. 299.

[20] *Supra*, footnote 16; *Howson* (1966), 55 D.L.R. (2d) 582; *Murphy* (1973), 23 C.R.N.S. 49 (Ont. C.A.).

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SOME PRACTICAL GUIDELINES FOR INCORPORATING CODES INTO LEGISLATION.—There are many occasions when a jurisdiction, especially a small jurisdiction, wishes to make use of externally produced codes, incorporating them by reference into the jurisdiction's laws. A jurisdiction, for instance may wish to have all new buildings in the jurisdiction built in accordance with the National Fire Code of Canada standards. Other popular codes might include some of the following:

> Underwriters' Laboratories of Canada; Canadian Standards Association; Canadian Government Specifications Board; National Fire Codes—Recommended Practices and Manuals (National Fire Protection Association); National Building Code of Canada; American Society for Testing and Materials Standards.

Does a jurisdiction have to duplicate the code in its legislation? Are subsequent amendments to the code in force in the jurisdiction automatically?

The recent Ontario case of *Re Denison Mines Ltd and Ontario Securities Commission*,[1] a decision of the High Court of Justice (Divisional Court), offers some very practical guidelines concerning incorporation by reference. The decision was an appeal from an order of the Ontario Securities Commission (O.S.C.) refusing Denison Mines permission to file financial statements that differed from generally accepted accounting principles. Denison, an Ontario public corporation, is the owner of a uranium mine at Elliot Lake. This mine is Denison's principal profit centre. Its customers consist only of Tokyo Electric Power Company of Japan (TEPCO), Ontario Hydro and Empressa Nacional del Uraninio (ENUSA). TEPCO is by far its biggest client but Ontario Hydro will increase its purchases in future years. As a federal undertaking, this aspect of Denison's business is subject to the Atomic Energy Control Act.[2]

Since its shares are listed on the Toronto Stock Exchange, Denison is also subject to the Ontario Securities Act[3] and its regulations. Continuous disclosure provisions of the Act include a requirement that comparative financial statements be made up and certified in accordance with "generally accepted accounting principles". These statements are to be filed annually. The term "generally accepted accounting principles" is defined in section 1(3) of the regulation which is as follows:[4]

> 1(3) . . . for the purposes of the Act and this Regulation, where a recommendation has been made in the Handbook of the Canadian Institute of Chartered Accountants which is applicable in the circumstances, the terms "generally accepted accounting principles", "auditor's report" and "generally accepted

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[1] (1981), 32 O.R. (2d) 469.

[2] R.S.C., 1970, c. A-19, as am.

[3] R.S.O., 1980, c. 466, as am.

[4] O. Reg. 478/79.

auditing standards'' means the principles, report and standards, respectively recommended in the Handbook.

Although its statements conformed in the past, a provision of the *Handbook* now requires that Denison disclose its operations by industry, by geographic area and by export sales. Such a disclosure would result in Denison having to file its income from its uranium mine ''nakedly''. This information in Denison's view would give its clients an undue advantage in negotiating prices and terms.

The position advanced on Denison's behalf was as follows: Section 139 of the Securities Act[5] allows the Lieutentant-Governor in Council to, among other things, prescribe the form and content of financial statements and control the preparation and filing of financial statements. Instead of prescribing the form and content, the regulations simply provide that generally accepted accounting principles are those found in the Handbook of the Canadian Institute of Chartered Accountants. Such a delegation, Denison argues, violates the maximum *delegatus non potest delegare* and is thereby *ultra vires*.

In dismissing the argument of Denison, Robins J., delivering the judgment of the court notes firstly that the statements tendered by Denison do not meet generally accepted accounting principles without regard to the *Handbook*. In addition, the only way that they could be considered as generally accepted accounting principles is to rely on the section 1(3) delegation.

The court notes ''That submission, in my view, is sound and should be accepted as dispositive of the improper delegation argument''.[6] However, Mr. Justice Robins sets out, in *obiter*, some very specific tests for incorporation of regulations by reference.

1. [The regulation] . . . incorporates by reference the accounting and auditing standards . . . set by a professional governing body . . . [that] plays no independent decision-making role in relation to specific financial statements required by the Act . . . [and] exercises no discretionary power in regard to matters before the O.S.C. . . .[7]
2. Ultimate control over the form and content of financial statements remains with the Commission. Under s.2(4) [of the Regulations], for instance, the Director may in certain circumstances accept statements which have not been prepared in accordance with generally accepted accounting principles, and under s. 79 [of the Act] the Commission has a general jurisdiction to grant relief from the requirements of the Act and the Regulation.[8]
3. The Regulation does not constitute a broad or unstructured delegation of authority; the standards incorporated by it are not vague or uncertain; and it

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[5] *Supra*, footnote 3.

[6] *Supra*, footnote 1, at p. 475.

[7] *Ibid.*, at p. 417.

[8] *Ibid.*

> cannot be construed as encouraging discrimination, arbitrary action or subjective notions of policy.[9]

The dicta in the *Denison* case generally follows established case law. In *Attorney-General for Ontario* v. *Scott*[10] Ontario's Reciprocal Enforcement of Maintenance Orders Act[11] provided a mechanism for enforcing a duty in Ontario based upon an English maintenance order. Further, the Act provided that any defence could be raised in Ontario, if it could have been raised in the original application. Rand J. noted:[12]

> The action of each Legislature is wholly discrete and independent of the other, a relation incompatible with delegation; and that it is a case of adoption is clear. . . . There is no attempt to permit another Legislature to enact general, or generally, laws for a province: that would obviously be an abdication. . . .

In *Kingston* v. *Ontario Racing Commission*,[13] the Ontario Racing Commission adopted the rules of the Canadian Trotting Association. As the court noted:[14]

> Merely to embody the rules of another organization into its own rules is not in any way delegating the authority to make such rules.

In *Wright* v. *T.I.L. Services Property Ltd*[15] (approved by the court in the *Denison* case) paragraph 35(d) of regulations made pursuant to the Inflammable Liquid Act[16] provided as follows: "Electrical devices, including wiring and switches, shall comply with the relevant rules of the Standards Association of Australia relating to electrical equipment in hazardous locations, or be approved by the Chief Inspector." Walsh J. noted:[17]

> The general proposition that in no circumstances can a regulation incorporate by reference something not set forth in it is, in my opinion, unsound.

The Rule-Making Body.

What kind of bodies can make rules that are capable of being incorporated by reference? In the *Denison* case the body was the Canadian Institute of Chartered Accountants while in *Kingston* v. *Ontario Racing Committee*[18] it was the Canadian Trotting Association. From the *Denison* case it is apparent that the body would normally be a "professional governing body", one whose independence

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[9] *Ibid.*

[10] [1956] S.C.R. 137.

[11] R.S.O., 1980, c. 433.

[12] *Supra*, footnote 10, at p. 142.

[13] [1965] 2 O.R. 10.

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

[15] (1956), S.R. (N.S.W.) 413.

[16] 1915-1953.

[17] *Supra*, footnote 15, at p. 421.

[18] *Supra*, footnote 13.

from the regulated bodies is assured. The Canadian Institute of Chartered Accountants (CICA) in that case exercised "no discretionary power in regards to matters before the O.S.C.". In *Attorney-General for Ontario* v. *Scott*[19] the professional body was in fact a legislative body in its own right.

This was also the case in *R.* v. *Glibbery*[20] when it was held that Parliament could adopt provincial highway traffic legislation as it may exist from time to time. In the words of McGillivray J., delivering the judgment of the Court of Appeal:[21]

> . . . Parliament could validly have spelled out in its own regulations the equivalent of relevant sections of the *Highway Traffic Act* as they existed from time to time but it was more convenient to include them, as has been done, by reference to contemporary legislation in the Province. There should be no objection to delegation of this type made for a valid Federal purpose to save repetition in its own regulations of valid Provincial legislation.

Ultimate Control Over Subject Matter.

As noted in the *Denison* case, the code or standard adopted must be that of a professional governing body. This would include up to a legislative body according to the *Scott* and *Glibbery* cases. The code-making body can play no active role in the decision-making process under the Act. It is submitted here that a bit of flexibility in the system aids in keeping it *intra vires*. The regulation-enforcing body under the Act should be able to insert its own decisions on occasion for that of the code. This clearly puts the code in a supportive role to the rule-enforcing body allowing a presumption of administrative help only. In the *Denison* case the Commission, for instance, "had a general jurisdiction to grant relief from the provisions of the Act and regulations".

In the *Wright* case the electrical devices and so on were to be in accordance with the externally produced code or "be as approved by the Chief Inspector".[22] This is to be contrasted with the situation in *R.* v. *Sandler*.[23] The facts of the *Sandler* case are as follows: a municipality, under the Municipal Act[24] was allowed to make by-laws "requiring buildings . . . to be put in a safe condition to guard against fires",[25] authorizing appointed officers to inspect premises and to enforce the by-laws and "making such other regulations for prevent-

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[19] *Supra*, footnote 10.

[20] [1963] 1 O.R. 232.

[21] *Ibid.*, at p. 236.

[22] *Supra*, footnote 14, at p. 417.

[23] [1971] 3 O.R. 614.

[24] R.S.O., 1980, c. 302.

[25] *Ibid.*, s. 709(1).

ing fires . . . as the council may deem necessary''.[26] The Municipal Council empowered the fire chief ''to inspect the fire protection equipment in any premises and to make such orders for the installation, repair or replacement of fire protection equipment as he deems necessary''. On appeal to the Ontario Court of Appeal it was held that the appellant could not be convicted for refusing to comply with the fire chief's order to install sprinklers and extinguishers. The court noted:[27]

> . . . when the legislature gave the municipal councils a wide discretion as to the formulation of regulations for the prevention or spread of fires, it did not contemplate that any municipal council would attempt to evade its responsibility for making regulations, by substituting for its judgment that of a non-elected official in its fire department.

The *Sandler* case is easily distinguishable from the *Denison* case. In *Sandler* the municipal council is the external rule-making body while in *Denison* it was the Canadian Institute of Chartered Accountants. The CICA had a firm, fixed code that was adopted. There was no such fixed code in *Sandler*, merely a partial set of rules and a person charged with the prevention or spread of fires. Had the set of rules measured up (without the individual) then the *Sandler* case could have had an externally produced code capable of being adopted as in *Denison*.

No Vagueness or Uncertainty.

Denison also sets out requirements of reasonableness that is ''the standards . . . are not vague or uncertain . . . cannot be construed as encouraging discrimination, arbitrary action or subjective notions of policy''. We should perhaps review this in light of the words of Walsh J. in the *Wright* case:[28]

> If there is uncertainty as to what is the document to which reference is made, no doubt the regulations would be held to be bad, the true ground for doing so being that it is unreasonable rather than it is uncertain. . . .

Surely this simply provides that the code in question has to be just that—the code of a professional body, professionally produced and published—a reasonable set of standards for an industry or country. In the words of Mr. Justice Robins in *Denison*: ''It cannot be construed as encouraging discrimination, arbitrary action or subjective notions or policy.''

Amendments to Code.

There is no doubt at all that the foregoing applies to the adoption of a specific code, say for instance the 1980 National Building Code.

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[26] *Ibid.*

[27] *Ibid.*, at p. 619.

[28] *Supra*, footnote 15, at p. 422.

However, what about the situation similar to the *Attorney General for Ontario* v. *Scott*[29] or *R.* v. *Glibbery*.[30] In those two situations the code-producing body may amend the code at any time. Are these subsequent amendments automatically in force in the jurisdiction? Surely they should be treated similar to regulations. In such a case there appear to be several possibilities. In some jurisdictions regulations are not in force until registered with the appropriate officer.[31] In such a case, it is submitted that notice of an amendment to the code would have to be registered before the amendment would be in force. In a jurisdiction where regulations come into force upon gazetting[32] it is submitted that the code amendment would come into force when notice of the amendment is gazetted. In those jurisdictions where regulations come into force when made,[33] it is submitted that code amendments would also come into force when made, forcing people to check with the code-producing body for amendments.

Conclusion.

To legislative counsel the advice, it is submitted, probably should be in accordance with the following. A legislature may obviously delegate such a power to the Governor General in Council, a municipality, and so on. The body in question, in the course of making regulations, can adopt an externally produced code. There should of course be specific authority in the Act for this adoption.[34]

The code could be part of the laws of another jurisdiction. Does the code have to be a code that is widely available? There appears to be no requirement that the code in question has any definite requirement of availability. It is probably the better view that a legislature may, if it so chooses, adopt a code that has very limited distribution.

The body producing the code should not be involved with a regulation-making authority even marginally. There should be some discretion left within the regulation-making body, perhaps some discretion in some of their agents to vary from the code in specified circumstances.

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[29] *Supra*, footnote 10.

[30] *Supra*, footnote 20.

[31] See for instance the position in Ontario, Regulations Act, *supra*, footnote 3.

[32] See for instance the position in Manitoba, The Regulation Act, R.S.M., 1970, c. 224, s. 4(5), as am.

[33] See for instance the federal position, Regulations Act, R.S.C., 1970, c. R-5, s. 5, as am. On this point see also E. A. Driedger, Subordinate Legislation (1960), 38 Can. Bar Rev. 1, at p. 13.

[34] *E.g.*, the Lieutentant Governor in Council may adopt a code to be in force in (the province) and such code shall be in force not withstanding the fact that such code has not been reproduced in the ( ) Gazette.

The code need not be reproduced in the regulations.[35] Notice of adoption the code should be registered and gazetted. To be on the safe side, notice of amendments to the code should also be registered and gazetted.

DARE PEARCE*

[35] In the *Wright* case, *supra*, footnote 15, at p. 422, Walsh J. notes: "Subject to the considerations mentioned I can see no reason for holding that any uncertainty is created by the mere fact that the incorporated document is not set out in terms in the regulation itself".

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