

## *Notes of Cases*

### *Jurisprudence*

CONSTITUTIONAL LAW—REARRANGING THE ADMINISTRATION OF CRIMINAL JUSTICE. —In *C.N. Transportation*<sup>1</sup> and *Kripps Pharmacy*<sup>2</sup> a majority of the Supreme Court of Canada decided that constitutional jurisdiction to supervise the conduct of criminal prosecutions belongs to the federal order of government. The purpose of this comment is to examine the principles enunciated by the majority in reaching this conclusion, and to consider the legal and political implications of their having done so.

### *Background*

The issue arose in *C.N. Transportation* from a prosecution brought under the Combines Investigation Act<sup>3</sup> and in *Kripps Pharmacy* from a prosecution brought under the Food and Drugs Act.<sup>4</sup> In both cases, conduct of the prosecutions was placed in the hands of counsel for the Attorney General of Canada in accordance with section 2 of the Criminal Code.<sup>5</sup> In neither case was the consent of the Attorney General of the respec-

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<sup>1</sup> *Attorney General of Canada v. Canadian National Transportation, Ltd. et al.*; *Attorney General of Canada v. Canadian Pacific Transport Company et al.*, [1983] 2 S.C.R. 206, (1983), 3 D.L.R. (4th) 16, [1984] 1 W.W.R. 193.

<sup>2</sup> *Regina v. Wetmore, Kripps Pharmacy et al.*, [1983] 2 S.C.R. 284, (1983), 2 D.L.R. (4th) 577, [1984] 1 W.W.R. 577.

<sup>3</sup> R.S.C. 1970, c. C-23.

<sup>4</sup> R.S.C. 1970, c. F-27.

<sup>5</sup> R.S.C. 1970, c. C-34. Section 2 in part provides:

“Attorney General” means the Attorney General or Solicitor General of a province in which proceedings to which this Act applies are taken and, *with respect to*

(a) the Northwest Territories and the Yukon Territory, and

(b) *proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of a violation of or conspiracy to violate any Act of the Parliament of Canada or a regulation made thereunder other than this Act,*

*means the Attorney General of Canada and, except for the purposes of subsections 505(4) and 507(3), includes the lawful deputy of the said Attorney General, Solicitor General and Attorney General of Canada. (Emphasis added.)*

tive province obtained. The position of the defendants was that without such consent there was no constitutional authority for the prosecutions to proceed since, it was contended, the provinces have exclusive jurisdiction to supervise the conduct of criminal prosecutions.

The same issue had been raised in *Regina v. Hauser*,<sup>6</sup> but it was side-stepped when a majority of the Supreme Court held that the Narcotic Control Act<sup>7</sup> was legislation in relation to the peace, order and good government of Canada rather than the criminal law. The *Hauser* case, therefore, went no further than deciding that the Federal government has jurisdiction to supervise the conduct of *non-criminal* federal prosecutions.

In light of *Hauser*, a preliminary question confronting the court was whether the Acts under which the prosecutions were brought depended upon the criminal law power or whether they might also be grounded on some other head of federal power.<sup>8</sup> In what could prove to be a watershed decision regarding the scope of federal power respecting matters of general trade, Dickson J., with the support of Beetz and Lamer J.J., held in his concurring opinion in *C.N. Transportation* that the Combines Investigation Act is supported by Parliament's jurisdiction over trade and commerce.<sup>8a</sup> He thus upheld federal supervisory authority over prosecutions brought under that Act on the basis of the majority judgment in *Hauser*. Laskin C.J.C., however, writing for the majority in *C.N. Transportation*, proceeded on the assumption that the Combines Investigation Act is dependent upon the criminal law power. In *Kripps Pharmacy*, Laskin C.J.C., again writing for the majority, strongly hinted that the Food and Drugs Act might be supported by the trade and commerce power as well as the criminal law power. Ultimately, however, he and the rest of the court reached their decisions based upon the assumption that the Act is legislation in relation solely to the criminal law. For the majority in *C.N. Transportation* and for all judges in *Kripps Pharmacy*, therefore, the question of which order of government possessed constitutional authority

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Section 15(2) of the Combines Investigation Act also purports to authorize the Attorney General of Canada to institute and conduct prosecutions under that Act.

<sup>6</sup>*Regina v. Hauser et al.*, [1979] 1 S.C.R. 984, (1979), 98 D.L.R. (3d) 193, [1979] 5 W.W.R. 1.

<sup>7</sup>R.S.C. 1970, c. N-1.

<sup>8</sup>In *Hauser* the majority found no criminal law component to the Narcotic Control Act. While *Hauser* established federal prosecutorial jurisdiction over non-criminal federal offences, therefore, it did not establish such federal jurisdiction with respect to offences contained in legislation founded, wholly or partially, upon the criminal law power. However, both the majority and the minority judgments in *C.N. Transportation* and *Kripps Pharmacy* appear to have assumed that, based upon *Hauser*, the finding of any non-criminal component to a federal offence given rise to federal prosecutorial jurisdiction, regardless of whether that component is a primary or secondary one.

<sup>8a</sup>See N. Finkelstein, *Constitutional Law—Section 91(2) of the Constitution Act, 1867—Competition Legislation* (1983), 62 Can. Bar Rev. 182.

to supervise the conduct of criminal prosecutions had squarely to be faced.

### *Provincial Prosecutorial Authority*

The position of the defendants (respondents) and of the six provincial Attorneys General who intervened in the cases<sup>9</sup> was that responsibility for supervising the conduct of criminal prosecutions is exclusively provincial by virtue of section 92(14) of the Constitution Act, 1867.<sup>10</sup> This position was founded upon three assertions:

- (1) That the words "Administration of Justice" in section 92(14) encompass the administration of both criminal and civil justice;
- (2) That the administration of criminal justice includes the power to supervise the conduct of criminal prosecutions;
- (3) That the federal criminal law and procedure power<sup>11</sup> should be interpreted in light of section 92(14) as excluding the power to supervise the conduct of criminal prosecutions.

The first assertion seemed uncontroversial. Provincial jurisdiction over the administration of criminal justice had been recognized in decisions of the Supreme Court from the *Adoption Reference*<sup>12</sup> in 1938 to *Di Iorio v. Warden of The Common Jail of Montreal*<sup>13</sup> in 1976. The assertion was also supported by an examination of historical developments prior to and following Confederation. These developments were summarized by Beetz J. in his concurring judgment in *Di Iorio*:<sup>14</sup>

Before Confederation, the provinces were in charge of the administration of justice, including criminal justice. It was contemplated by s. 91(27) of the *British North America Act, 1867*, that criminal law, substantive and procedural, would come under the exclusive legislative authority of the Parliament of Canada. But subject to this provision and to the paramountcy of federal law enacted under

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<sup>9</sup> The intervenors included the Attorneys General of Ontario, Quebec, New Brunswick, British Columbia, Saskatchewan and Alberta.

<sup>10</sup> Section 92(14) provides that the provincial Legislatures "may exclusively make Laws" in relation to:

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

<sup>11</sup> Section 91(27) of the Constitution Act, 1867, provides that the "exclusive Legislative Authority of the Parliament of Canada" includes matters coming within the following class of subjects:

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including Procedure in Criminal Matters.

<sup>12</sup> *Reference re Adoption Act*, [1938] S.C.R. 398, at p. 403, [1938] 3 D.L.R. 497, at pp. 498-499.

<sup>13</sup> [1978] 1 S.C.R. 152, (1976), 73 D.L.R. (3d) 491.

<sup>14</sup> *Ibid.*, at pp. 223 (S.C.R.), 540 (D.L.R.).

primary or ancillary federal jurisdiction, the provinces were to remain responsible in principle for the enforcement of criminal law and to retain such power as they had before with respect to the administration of criminal justice. They continued in fact to police their respective territories, to investigate crime, to gather and to keep records and informations relating to crime, to prosecute criminals and to supervise police forces, sheriffs, coroners, fire commissioners, officers of justice, the summoning of juries, recognizances in criminal cases, and the like. Pertaining to such functions is the power to make laws relating to public and reformatory prisons, expressed in s. 92(6) of the Constitution. Some of these responsibilities are executive in nature; but to carry them required instrumentalities which had to be regulated, financed, abolished and reconstituted and the jurisdiction and powers of which had to be defined by legislation. Such legislation could not have been enacted unless the power to make laws for the administration of criminal justice was vested in the provincial legislatures. That is why s. 92(14) of the Constitution does not distinguish between civil and criminal justice: the natural meaning of the expression "the administration of justice" is broad enough to encompass both. . . .

Further support for the assertion was contained in statements of British and Canadian legislators. Explaining the British North America Bill to the British Parliament on February 18, 1867, the Earl of Carnarvon said:<sup>15</sup>

To the Central Parliament will also be assigned the enactment of criminal law. The administration of it indeed is vested in the local authorities. . . .

Statements of federal politicians had been to the same effect. Federal Justice Minister James MacDonald, for example, wrote in a report to Cabinet dated May 11, 1880:<sup>16</sup>

The administration of Criminal Justice devolves upon the Provincial authorities. . . .

The second assertion—that the administration of criminal justice includes the power to supervise the conduct of criminal prosecutions—appeared equally well established. The following passage from the *Adoption Reference* was relied upon by Pigeon J. in *Di Iorio*:<sup>17</sup>

Moreover, while, as subject matter of legislation, the criminal law is entrusted to the Dominion Parliament, responsibility for the administration of justice and, broadly speaking, for the policing of the country, *the execution of the criminal law*, the suppression of crime and disorder, has from the beginning of Confederation been recognized as the responsibility of the provinces and has been discharged at great cost to the people. . . .

Dickson J. in *Di Iorio* stated:<sup>18</sup>

Under head 92(14) of our Constitution, as I understand it, law enforcement is primarily the responsibility of the Province and in all provinces the Attorney General is the chief law enforcement officer of the Crown. He has broad responsibilities for most aspects of the Administration of Justice. Among these within the field of

<sup>15</sup> Quoted by Dickson J. in *Di Iorio, ibid.*, at pp. 200 (S.C.R.), 524 (D.L.R.).

<sup>16</sup> Public Archives of Canada, RG13C-1, Vol. 1418 McLean & Hare, Vol. 2; referred to in the Respondents' factum in *Kripps Pharmacy*.

<sup>17</sup> *Reference re Adoption Act, supra*, footnote 12, at pp. 403 (S.C.R.), 498-499 (D.L.R.); quoted by Pigeon J. in *Di Iorio, supra*, footnote 13, at pp. 187 (S.C.R.), 514-515 (D.L.R.). (Emphasis added).

<sup>18</sup> *Ibid.*, at pp. 205 (S.C.R.), 528 (D.L.R.). (Emphasis added).

criminal justice, are the court system, the police, criminal investigation and prosecutions, and corrections.

The third assertion—that the federal criminal law and procedure power should be interpreted in light of section 92(14) as excluding the power to supervise the conduct of criminal prosecutions—was the most problematic. Dickson J. in *Di Iorio* acknowledged “a certain degree of overlapping” between the subject matters covered by sections 91(27) and 92(14).<sup>19</sup> Although later, in his dissenting judgment in *Hauser*, Dickson J. dismissed the suggestion that the power to supervise the conduct of criminal prosecutions fell within this overlap,<sup>20</sup> two decisions of the Ontario Court of Appeal disagreed. In *Regina v. Pelletier*<sup>21</sup> and *Regina v. Hoffman-LaRoche*<sup>22</sup> the Court of Appeal appeared to reject the third assertion by suggesting that the federal Parliament and the provincial Legislatures might indeed hold concurrent jurisdiction to supervise the conduct of criminal prosecutions.

### *Renunciation of Provincial Authority*

The most startling aspect of Laskin C.J.C.’s judgments in *C.N. Transportation* and *Kripps Pharmacy* is their renunciation of the first assertion stated above. The point is made most clearly in the following passage from *C.N. Transportation*:<sup>23</sup>

There is, in addition, an attempt here to prefer the general administration of justice over the special criminal law and procedure, when there is no language in the former to override or even suggest the latter. The respondents and the supporting interveners submit that because s. 92(14) includes the constitution of courts of “criminal jurisdiction” the word “criminal” must be imported into the opening words of the section, which must be construed as if they said “the Administration of Civil and Criminal Justice in the Province”. However, this is not how the section was drafted; neither logic nor grammar support this construction.

This statement represents a rejection of the majority judgments in *Di Iorio*, and it is even inconsistent with the minority opinion of Spence J. in *Hauser*,<sup>24</sup> an opinion for which Laskin C.J.C. elsewhere had expressed support.<sup>25</sup> The questions which must be addressed, therefore, are the implications of this holding and the extent to which it forms the basis of the decisions of the court.

<sup>19</sup> *Ibid.*, at pp. 207 (S.C.R.), 529 (D.L.R.).

<sup>20</sup> *Supra*, footnote 6, at pp. 1022-1025 (S.C.R.), 223-226 (D.L.R.), 32-36 (W.W.R.).

<sup>21</sup> *Regina v. Pelletier* (1974), 4 O.R. (2d) 677 (Ont. C.A.), leave to appeal refused [1974] S.C.R. x.

<sup>22</sup> *Regina v. Hoffman-LaRoche Ltd. (Nos. 1 and 2)* (1981), 125 D.L.R. (3d) 607, 33 O.R. (2d) 694 (Ont. C.A.).

<sup>23</sup> *Supra*, footnote 1, at pp. 223-224 (S.C.R.), 29 (D.L.R.), 207 (W.W.R.).

<sup>24</sup> *Supra*, footnote 6, at pp. 1004-1005 (S.C.R.), 201 (D.L.R.), 7 (W.W.R.).

<sup>25</sup> *Schneider v. The Queen*, [1982] 2 S.C.R. 112, at p. 115, (1982), 139 D.L.R. (3d) 417, at p. 421, [1982] 6 W.W.R. 673, at p. 677.

A "hard" interpretation of the above statement is that the words "administration of justice" in section 92(14) do not encompass anything which relates to the administration of criminal justice. If this is what is meant by the statement, then the opening words of section 92(14) refer solely to the administration of *civil* justice and cannot form the basis of provincial jurisdiction over other aspects of criminal law enforcement such as investigations, policing and corrections. This appears to be the interpretation of the majority judgment taken by Dickson J. in his dissenting opinion in *Kripps Pharmacy*<sup>26</sup> and it finds support in a literal reading of Laskin C.J.C.'s words.

There may, however, be room for a somewhat "softer" interpretation of the majority judgment in *C.N. Transportation*. It might be argued, for example, that while that judgment rejects the view that the words "administration of justice" explicitly contemplate criminal justice, it does not rule out the possibility that those words might be broad enough to encompass incidentally matters of criminal law enforcement which do not fall within "the criminal law" or "procedure in criminal matters" as those phrases are used in section 91(27). It is clear, of course, that the judgment does not contemplate the "administration of justice" encompassing the power to supervise the conduct of criminal prosecutions, but this is because of Laskin C.J.C.'s view that such power falls squarely within criminal law and procedure. It may still be possible to argue, therefore, that some aspects of criminal law enforcement do not fall within criminal law and procedure and are thus subsumed within the general phrase "administration of justice".

Some support for this view is suggested in the following passage from *C.N. Transportation*:<sup>27</sup>

A greater objection to *Pontbriand* is the repeated intrusion of the word "criminal" in s. 92(14), as if the administration of justice in the province was to be read as administration of criminal justice. Section 92(14) does not disclose any such limitation and any authority of the kind which it may confer cannot be read as excluding paramount federal authority under s. 91(27). Moreover, I am bound to note that *Pontbriand* has exaggerated the effect of *Di Iorio*. . . . The majority judgment sustaining the exercise of provincial authority to investigate organized crime made it clear that there was no attempt at particular accusations of crime, no attempt to create crimes or to alter criminal procedure. There was merely authority to investigate and report and, even so, subject to compliance with federal procedural standards, as, for example, to give protection against self-crimination. The present case rests on a different base, involving not the scope of provincial investigatory authority, but rather the scope of actual prosecutorial authority.

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<sup>26</sup> *Supra*, footnote 2, at pp. 300-301 (S.C.R.), 590 (D.L.R.). Dickson J. states: "There is no support in the Constitution nor in the decisions of this court for the notion that the words 'administration of justice' should be qualified in such manner that 'justice' is taken to mean merely 'civil justice'. There is no need to reduce the legislation to futility by reading into s. 92(14) a limitation not therein expressed".

<sup>27</sup> *Supra*, footnote 1, at pp. 233 (S.C.R.), 36-37 (D.L.R.), 215 (W.W.R.).

The words "any authority of the kind which it may confer" appear to contemplate that the "administration of justice" power may encompass some matters of criminal justice. Whatever comfort provinces might find in this suggestion, however, must be tempered by the fact that the Chief Justice clearly regards the scope of section 92(14) in relation to the administration of criminal justice as extremely limited. With respect to criminal investigation, for example, he restricts *Di Iorio* to upholding the constitutional authority of the provinces to take measures to investigate crime and to report on it in the absence of "particular accusations of crime".<sup>28</sup> This passage and selective quotations he subsequently adopts from the judgment of Martin J.A. in *Hoffman-LaRoche* make it plain that Laskin C.J.C. regards the power to investigate specific criminal offences as a matter of criminal procedure falling within federal jurisdiction.<sup>29</sup> Furthermore, to the extent that his judgment suggests that there may be a provincial aspect to criminal investigation, the Chief Justice indicates that such provincial power is subject to "paramount federal authority" with respect, for example, to procedural standards governing its exercise.

Even based upon a "softer" interpretation of the majority judgment in *C.N. Transportation*, therefore, the result is to deny any provincial authority over criminal prosecutions and to restrict provincial authority over criminal investigations to investigations aimed generally at criminal conditions in the province (subject to federal procedural standards).

The impact of this "softer" interpretation on the non-investigatory aspects of policing is not entirely clear, although all police conduct relating to the enforcement of the criminal law, including charging, summoning, and diversion, would presumably fall within federal jurisdiction. What might be left to the provinces are some general police powers relating to the suppression of crime and disorder (although the decision in *Westendorp v. The Queen*<sup>30</sup> casts doubt even with respect to these powers).

The impact on corrections is also not clear, and the question is further complicated by the presence in section 91(28) of the Constitution Act, 1867 of an exclusive federal power over "Penitentiaries" and in

<sup>28</sup> See *Re the Royal Commission of Inquiry into Certain Deaths at the Hospital for Sick Children and Related Matters* (April 12, 1984) unreported judgment, in which the Ontario Court of Appeal, relying upon *C.N. Transportation*, states at p. 11:

While the constitutional validity of the Order in Council [establishing the Commission] is not in issue in this Court, it may be that it would have been vulnerable to question had the limitation not been imposed upon the Commissioner that he not express any conclusions as to civil or criminal responsibility.

<sup>29</sup> In this regard, Laskin C.J.C.'s judgment is consistent with the view of Estey J. in his concurring opinion in *Attorney General of Quebec and Keable v. Attorney General of Canada*, [1979] 1 S.C.R. 152, (1978), 90 D.L.R. (3d) 161. At the same time, it is clearly inconsistent with the holding of the majority in *Keable*. It is significant that nowhere in his decision does Laskin C.J.C. refer to the *Keable* case.

<sup>30</sup> [1983] 1 S.C.R. 43, (1983), 144 D.L.R. (3d) 259, [1983] 2 W.W.R. 385.

section 92(6) of an exclusive provincial power over "Public and Reformatory Prisons in and for the Province". Before Confederation, penitentiaries were generally used to incarcerate offenders sentenced to two or more years of imprisonment while prisons were used to incarcerate those sentenced to less than two years.<sup>31</sup> This practice has continued since Confederation and is today recognized in federal legislation.<sup>32</sup> It might therefore be argued that the intent of sections 91(28) and 92(6) was to divide jurisdiction over correctional facilities on the basis of the two year rule. According to this view, the federal government would constitutionally be required to provide that custody of criminal offenders sentenced to less than two years of imprisonment be given over to provincial institutions. Resistance to this view, however, had been expressed even before *C.N. Transportation* and *Kripps Pharmacy*. In 1938 the Archambault Royal Commission rejected the notion that the terms "Penitentiaries" and "Public and Reformatory Prisons" were susceptible to precise constitutional definition, and thus concluded that there was no bar to the federal government's assuming custody of criminal offenders sentenced to less than two years of imprisonment.<sup>33</sup> The theory that section 92(6) gives the provinces exclusive constitutional authority over the incarceration of certain criminal offenders must also confront the limiting words "in and for the Province", which could be interpreted as confining provincial power to imprisonment for the furtherance of provincial purposes. Such an interpretation might have seemed too restrictive prior to Laskin C.J.C.'s holding that the provinces possess no plenary jurisdiction over the administration of criminal justice. In light of that holding, however, and in light of the general thrust of the majority judgment in *C.N. Transportation*—namely that the government which has constitutional authority to enact criminal laws must also have authority to see to their enforcement—it may now be that sections 91(27) and 91(28) will be read together as giving Parliament jurisdiction over all criminal corrections. The provincial power in section 92(6) would then be read in conjunction with section 92(15)<sup>34</sup> as giving the provinces constitutional jurisdiction only with respect to facilities for the incarceration of persons convicted of provincial offences.

<sup>31</sup> W.H. McConnell, *Commentary on the British North America Act* (1977), pp. 241, 255.

<sup>32</sup> *Criminal Code*, *supra*, footnote 5, s. 659.

<sup>33</sup> Royal Commission to Investigate the Penal System in Canada (Ottawa, 1938), pp. 339-340.

<sup>34</sup> Section 92(15) provides that the provincial legislatures may make laws in relation to:

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.



Thus even the "softer" interpretation of the majority judgment in *C.N. Transportation* appears to be devastating for the provinces. Nor is there much room in the judgment to argue that Laskin C.J.C.'s holding that the "administration of justice" does not include criminal justice is somehow *obiter* and can be overlooked in future cases. The holding is repeated throughout the judgment and is central to his determination that the scope of section 91(27) is not narrowed by the opening words of section 92(14), and that the power to supervise the conduct of criminal prosecutions therefore falls within criminal law and procedure. Furthermore, any attempt to confine *C.N. Transportation* and *Kripps Pharmacy* to their facts must confront the introduction to the former judgment in which Laskin C.J.C. states that it is his purpose to go beyond the "narrower compass" of the questions posed in the appeal and to provide ". . . a broader and principled canvass of the scope of the provincial power under s. 92(14) of the . . . Constitution Act, 1867, and its relation to the federal power under s. 91(27)".<sup>35</sup>

It is true that the judgment in *C.N. Transportation* alludes to the possibility of there being an argument in favour of concurrent federal and provincial jurisdiction over matters of criminal law enforcement, but such allusions are put forward as a secondary line of attack and are dismissed almost as quickly as they are made.<sup>36</sup> Some suggestion of concurrency might also be inferred from Laskin C.J.C.'s reliance upon the reasoning of Spence J. in *Hauser* and the Ontario Court of Appeal in *Pelletier* and *Hoffman-LaRoche*,<sup>37</sup> although he makes it clear that he relies upon these judgments in support of the result he reaches "[a]part from the reasons in this court which I have produced".<sup>38</sup> Thus the suggestion of concurrency is secondary to and contradictory with the broad reasoning set out at the beginning of the judgment. (Furthermore, even if a theory of concurrency could be resurrected in some future case, this would still leave the federal government with paramount authority over most matters concerning the administration of criminal justice).

There is always the possibility, of course, that in another case the court will simply ignore *C.N. Transportation* and *Kripps Pharmacy*, or overrule them, just as these judgments effectively ignored the decision of the court in *Di Iorio*. It might be thought that this possibility is strength-

<sup>35</sup> *Supra*, footnote 1, at pp. 212 (S.C.R.), 20 (D.L.R.), 197 (W.W.R.).

<sup>36</sup> See, for example, *ibid.*, at pp. 226-228 (S.C.R.), 31-33 (D.L.R.), 210-211 (W.W.R.).

<sup>37</sup> *Ibid.*, at pp. 228-232, 236-244 (S.C.R.), 33-35, 39-45 (D.L.R.), 211-214, 218-225 (W.W.R.). There is also the suggestion in some of these cases that federal authority over criminal prosecutions may extend only to offences involving interprovincial or international transactions. However, this limitation is not embraced by Laskin C.J.C. and clearly does not form a part of his judgment. Furthermore, while it is conceivable that *C.N. Transportation* might be distinguished on this basis, *Kripps Pharmacy*, which concerned the intraprovincial handling and sale of a drug, cannot.

<sup>38</sup> *Ibid.*, at pp. 244 (S.C.R.), 45 (D.L.R.), 225 (W.W.R.).

ened by the fact that *C.N. Transportation* was decided by a seven judge panel, only three of whom concurred with Laskin C.J.C.<sup>39</sup> The four to three split in *C.N. Transportation*, however, is somewhat deceptive. The three judges who did not concur with Laskin C.J.C.'s reasoning came to the same result based on different grounds.<sup>40</sup> When those three judges were forced in *Kripps Pharmacy* to address the same issue addressed by the majority in *C.N. Transportation*, only Dickson J. dissented. The remaining two judges concurred with the majority on the ground that they were bound by the decision of the court in *C.N. Transportation*.

### *The Provinces as Delegates*

Under both a "hard" and "soft" interpretation of *C.N. Transportation* and *Kripps Pharmacy* the provinces appear to lack independent constitutional authority to supervise the conduct of criminal prosecutions and likely also lack constitutional authority over large areas of criminal policing and, possibly, corrections. Assuming this to be the case, the only means by which the provinces can exercise authority in these areas is through delegation of powers from the federal Parliament.<sup>41</sup>

The implications of the provinces exercising merely delegated authority with respect to these matters are far-reaching. In legal terms, one consequence will be to subject the actions of provincial Attorneys General and their agents to attack on the ground that they fall outside the scope of delegated powers. The fact that the right of provincial Attorneys General and their agents to exercise prosecutorial discretion is now seen as deriving from a specific federal delegation, rather than from common law and usage,<sup>42</sup> might also encourage the courts to broaden the scope of judicial review with respect to such discretion.

<sup>39</sup> Ritchie, Estey, and McIntyre JJ. concurred with Laskin C.J.C.

<sup>40</sup> Dickson J. (Betz and Lamer JJ. concurring) held that the Combines Investigation Act was not grounded exclusively on the criminal law power and therefore, based upon *Hauser*, that authority over prosecutions properly belongs to the federal Parliament.

<sup>41</sup> Or, in the absence of federal legislation, by virtue of the temporary continuation of pre-Confederation authority under section 129 of the Constitution Act, 1867.

<sup>42</sup> Prior to these judgments, the authority of Attorneys General to supervise prosecutions was thought to be rooted in common law and usage which has evolved from medieval times to the present. Such authority is adopted in provincial legislation. For example, the Ministry of the Attorney General Act, R.S.O. 1980, c. 271 provides in section 5 that the Attorney General:

(d) shall perform the duties and have the powers that belong to the Attorney General and Solicitor General of England by law or usage, so far as those duties and powers are applicable to Ontario, and also shall perform the duties and have the powers that, up to the time of the British North America Act, 1867 came into effect, belonged to the offices of the Attorney General and Solicitor General in the provinces of Canada and Upper Canada and which, under the provisions of that Act, are within the scope of the powers of the Legislature. . .

Another possible legal implication will be to subject to challenge under section 15 of the Canadian Charter of Rights and Freedoms<sup>43</sup> differences in provincial practice relating to the administration of criminal justice. Section 15, which came into force on April 17, 1985, guarantees that "every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination". It is most unlikely that the courts will view section 15 as requiring provincial governments to act consistently with respect to matters within their jurisdiction, as this would undermine the principle of federalism. It is not at all unlikely, however, that the courts will interpret section 15 as requiring the federal government to act consistently across the country with respect to matters within its jurisdiction, especially matters affecting individual liberty.<sup>44</sup> Failure to do so could be said to constitute discrimination on the basis of province of residence<sup>45</sup> and the courts could strike down such regional differences unless they could be justified under section 1 of the Charter as being "reasonable limits prescribed by law" which "can be demonstrably justified in a free and democratic society".<sup>46</sup> Thus, if the administration of criminal justice is now viewed as a matter within federal jurisdiction, inter-provincial discrepancies relating to policing, prosecutions and corrections could be in danger of being struck down on the basis of section 15.

The political consequences of the theory of delegated authority are staggering. If the sole source of provincial power with respect to criminal prosecutions and policing is a federal delegation, obviously there is nothing to prevent Ottawa from at any time limiting, altering, or even eliminating this provincial power. The federal Parliament could, for example, enact legislation to standardize police and prosecutorial procedures across the country. Furthermore, the fact that Parliament has been held to exercise exclusive constitutional jurisdiction over these matters undermines the rationale for current fiscal arrangements between the federal and provincial governments. The costs of criminal prosecutions and policing in the provinces, and of detaining criminal offenders in provincial correc-

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<sup>43</sup> Part 1, Constitution Act, 1982.

<sup>44</sup> In *Regina v. Burnshine*, [1975] 1 S.C.R. 693, (1974), 44 D.L.R. (3d) 584, [1974] 4 W.W.R. 49, a challenge along these lines was brought under the equality rights provision of the Canadian Bill of Rights, R.S.C. 1970, Appendix III, against a section of the Prisons and Reformatories Act, R.S.C. 1970, c. P-21, which enabled the courts of British Columbia to impose special sentences on persons under the age of twenty-two. The Supreme Court, in a six to three decision, dismissed the claim, but did so on the basis that the Bill of Rights merely guaranteed rights as they had existed in Canada in 1960. This so-called "frozen rights" doctrine clearly is not applicable to section 15 of the Charter.

<sup>45</sup> Section 15 does not specifically mention "province of residence" as a ground of prohibited discrimination, but the section is worded broadly enough so as to prohibit unenumerated forms of discrimination.

<sup>46</sup> Or they could be characterized as affirmative action programs as defined in subsection 15(2) of the Charter.

tional facilities, are borne largely by the provinces. Indeed, where provincial police services are provided by the Royal Canadian Mounted Police, the practice has been for the provinces to compensate the federal government for the provision of such services.

Thus the effect of these judgments is to place the provinces in a strong political position to argue not only that payments currently made by them for Royal Canadian Mounted Police services should cease, but that the federal government should compensate them for provincial monies spent on criminal prosecutions, policing, and, possibly, corrections. A rough estimate would place the national cost of such services at more than two billion dollars annually.<sup>47</sup> While the court may have delivered the federal government a jurisdictional victory, therefore, the result could be a massive transfer of financial responsibility from the provinces to Ottawa.

It is, of course, conceivable that the federal government could attempt to ignore these consequences in the expectation that the provinces will continue to provide and to pay for these services. This then raises two questions: (1) whether provinces can decline to accept powers delegated to them by the federal Parliament and, (2) whether the federal Parliament can validly use some form of mandatory delegation as a means of imposing costs of federal services upon provincial treasuries. The assumption here is that certain provinces might not wish to assume voluntarily the authority so delegated (at least not without compensation); if delegated authority is exercised voluntarily, it follows that the provinces assume the financial burden of administration unless the federal and provincial governments make other arrangements and Parliament appropriates monies to cover some or all of the costs.

### (1) *Provincial Power to Decline Delegated Authority*

Constitutional considerations aside, where legislation imposes upon persons certain duties or obligations, those persons are required to perform those duties or fulfill those obligations and may be compelled to do so in the courts. This principle applies equally to Crown servants, although certain remedies such as *mandamus* and injunctions will not lie against servants of the Crown where they are acting in their capacity as servants. Thus, in the absence of some constitutional variable persons may not decline authority delegated to them by legislation (except to the extent that the legislation permits them to do so).

<sup>47</sup> This figure is based upon an approximation of provincial and municipal costs for criminal policing, prosecutions, and adult corrections. Sources of information used to obtain these costs are: Police Services in Canada (Draft Report)—Ministry of Justice (1978/79 and 1979/80); Manpower Resources and Costs of Courts—Canadian Centre for Justice Statistics in Canada (1980-82); Adult Correctional Services in Canada—Canadian Centre for Justice Statistics (1981-82).

Authority over Criminal Code prosecutions is delegated by section 2 of the Code to provincial Attorneys General. The issue with respect to prosecutions, therefore, is whether there are constitutional grounds which would justify a provincial Attorney General in declining authority delegated to him by the federal Parliament. If the delegation were to a provincial official other than a member of the executive, or if it were to the Attorney General in his capacity as an individual (as opposed to a minister of the Crown in the right of the province), then the general principles outlined above would apply. However, the situation may be different where, as here, the delegation is to the Attorney General in his official executive capacity, or where it would directly affect his authority as such.

It is trite law that the Constitution Act, 1867, divided executive as well as legislative powers between the federal and provincial orders of government.<sup>48</sup> It is also established that one order of government can delegate the powers conferred upon it only to a "subordinate authority" since to permit delegation to an authority that is not subordinate would undermine the exclusivity and supremacy of the powers vested in that order. As a consequence, the Supreme Court held in the *Nova Scotia Interdelegation*<sup>49</sup> case that Parliament could not delegate its powers to a provincial legislature, the latter not being subordinate to the former. By analogy, the *Nova Scotia Interdelegation* case could lead one to believe that Parliament cannot delegate its powers to the executive of a province since it too is not a "subordinate authority".<sup>50</sup>

It has been suggested that there is a fallacy underlying the reasoning of the court in the *Nova Scotia Interdelegation* case. The fallacy lies in the apparent assumption of the court that a provincial legislature cannot freely consent to act as a "subordinate authority" for the purpose of exercising powers outside its sphere. But even assuming that a legislature can voluntarily assume a subordinate role for the purposes of receiving a delegated power from Parliament, it must nonetheless be true that Parliament cannot *compel* the subordination of that legislature even for a feder-

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<sup>48</sup> See, for example, *Bonanza Creek Gold Mining Company v. The King*, [1916] 1 A.C. 566, at pp. 579-581, (1916), 26 D.L.R. 273, at pp. 280-281, 10 W.W.R. 391, at pp. 397-399.

<sup>49</sup> *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31, [1950] 4 D.L.R. 369.

<sup>50</sup> It might be argued that since the executive is subject to the law, it is subordinate to the legislature and therefore does not enjoy the same immunity from inter-delegation as does the legislature. This appears to have been the rationale underlying the decision in *Regina v. Wilson* (1980), 119 D.L.R. (3d) 558, (1980), 57 C.C.C. (2d) 54 in which the British Columbia Court of Appeal upheld a federal delegation to the Lieutenant Governor in Council. It does not follow, however, that because a provincial executive is in some respects subordinate to the legislature, the executive is, or can be, subordinate to Parliament. In this respect, the *Wilson* case points up the artificiality of the *Nova Scotia Interdelegation* decision and exposes the fallacy referred to below.

al purpose. To permit such compulsion would violate the principles of exclusivity and supremacy which the courts have consistently sought to uphold. And, again by analogy, just as it would violate these principles to permit Parliament to so compel a legislature, it would also violate these principles to permit Parliament to compel the subordination of the executive of a province.

## (2) *Federal Power to Impose Costs Through Delegation*

Even if it were held that the federal Parliament can impose upon a member of a provincial executive duties and obligations which he does not consent to assume, or where a delegation is to a provincial official other than an executive member, there is a further issue as to whether such delegation can be used by Parliament to impose costs upon a provincial treasury. Provided it can be demonstrated that the costs imposed are significant and are directly attributable to the delegation, a strong legal argument can be mounted that the province ought not to be required to bear them.

Sections 102 and 126 of the Constitution Act, 1867, establish separate Consolidated Revenue funds into which flow the duties and revenues that are allocated, respectively, to the federal and provincial orders of government. Section 126 provides:

Such Portions of the Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick had before the Union Power of Appropriation as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all Duties and Revenues raised by them in accordance with the special Powers conferred upon them by this Act, shall in each Province form One Consolidated Revenue Fund to be appropriated for the Public Service of the Province.<sup>51</sup>

The right of appropriation from the Fund established by section 126 has been held to be exclusively provincial. As stated by Duff J. in *Reference re Troops in Cape Breton*.<sup>52</sup>

The Solicitor-General in his very candid argument did not contend that the duty to pay these expenses could be imposed by the Dominion on the province *in invitum*, and that, of course, would be a plain violation of the fundamental principle of the *British North America Act*. The revenues of the province are vested in His Majesty as the supreme head of the province, and the right of appropriation of all such revenues belongs to the legislature of the province exclusively.

It is true, of course, that the courts have upheld federal laws of general application which incidentally impose financial burdens upon the provinces or provincial entities. Customs duties, for example, have been held

<sup>51</sup> Emphasis added.

<sup>52</sup> [1930] S.C.R. 554, at p. 562, *sub. nom. Attorney General of Canada v. Attorney General of Nova Scotia*, [1930] 4 D.L.R. 82, at p. 84.

to apply to provinces importing alcohol into the country.<sup>53</sup> The courts have also upheld the power of federal boards of railway commissioners to require contributions from municipalities who derive benefit from the construction of bridges, overpasses, and other works.<sup>54</sup> What distinguishes these cases from the question at hand, however, is that *here the imposition of the financial burden stems not from some general regulatory scheme but from a specific delegation of federal authority aimed exclusively at the provinces*. Furthermore, in the cases referred to above, the burden was placed upon the province only after it took some voluntary action bringing it within the ambit of the generally applicable federal law or after it had been established that the province had derived some tangible benefit for which it, like others, was being assessed.<sup>55</sup>

The constitutional significance of the distinction between a financial burden imposed upon provinces in the context of a generally applicable federal scheme and a financial burden imposed solely or discriminatorily upon provinces has been recognized by the courts.<sup>56</sup> Recognition of its significance is also reflected in the opinions of constitutional writers that the federal government's taxing power, for example, cannot be used in a manner which would "undermine the federal fabric of the constitution".<sup>57</sup> As stated by C.H.H. McNairn:<sup>58</sup>

But, as in the case of provincial taxation of the federal government, financial impositions may not be levied on that level of government which would stultify its very existence or would interfere with the legislative function of appropriating revenues.

Finally, it should be pointed out that, if the federal government could use delegation as a means of transferring to the provinces responsibility for funding matters within federal jurisdiction, it would be possible for Parliament to fund any and all of its legislative initiatives simply by designating the provinces, or provincial officials, as the ones responsible for implementing such initiatives. In light of the previously mentioned principles of exclusivity and supremacy of each order of government in Canada, this surely cannot be the correct constitutional position.

<sup>53</sup> *Attorney General of British Columbia v. Attorney General of Canada*, [1924] A.C. 203, [1923] 4 D.L.R. 698, [1923] 3 W.W.R. 945 (P.C.). (Emphasis added).

<sup>54</sup> *Toronto Transit Commission v. Canadian National Railways et al.*, [1930] S.C.R. 94, [1930] 1 D.L.R. 231.

<sup>55</sup> See *Regional Municipality of Peel v. Mackenzie et al.* (1983), 139 D.L.R. (3d) 14, at pp. 19-20 (S.C.C.).

<sup>56</sup> *Caron v. The King*, [1924] A.C. 999, at pp. 1005-1006, [1924] 4 D.L.R. 105, at pp. 109-110, [1924] 3 W.W.R. 417, at pp. 421-422 (P.C.).

<sup>57</sup> G.V. LaForest, *The Allocation of Taxing Power under the Canadian Constitution* (2nd ed., 1981), p. 54.

<sup>58</sup> C.H.H. McNairn, *Governmental and Intergovernmental Immunity in Australia and Canada* (1978), p. 164. (Emphasis added).

### (3) *Impact upon Prosecutions, Policing and Corrections*

Based on the above analysis, it would appear that the provinces are in a strong legal position to argue that it is within the power of their Attorneys General, as members of the provincial executive, to decline prosecutorial obligations placed upon them by means of federal delegation. Alternatively, even if it were not within the authority of provincial Attorneys General to decline such obligations, it would nevertheless be open to the provinces to argue that the delegation is lawful only if it can be accomplished without the imposition of any direct and significant costs upon provincial treasuries (i.e. if it is accompanied by compensation).

Provincial powers over criminal policing and corrections, if they cannot stem from provincial legislation, must arise under the Criminal Code from the broad definitions of "peace officer" and "prison"<sup>59</sup> and from the designation of "prisons" and "other places of confinement within the province" as appropriate places for detaining certain offenders.<sup>60</sup> The delegation of authority to peace officers under the Criminal Code is largely permissive in that it merely empowers but does not require peace officers to engage in criminal law enforcement, and places specific obligations upon them only once they do so. Thus, at present, it appears that provinces (and municipalities) would be free to withdraw their participation in criminal policing, leaving it to the federal government to fulfil its constitutional responsibilities. If Parliament sought to amend the Criminal Code so as to impose upon provincial peace officers responsibility for criminal law enforcement matters, there would be no grounds upon which such officers, not being members of the executive, could decline the delegation. However, the provinces would still be in a strong position to object that, without compensation, the amendments illegally imposed costs upon provincial treasuries.

Similarly, if criminal corrections now fall within federal jurisdiction, the provinces would not be able to decline the designation of provincial facilities *per se*. They might well be able to attack the designation, however, based upon the argument that, by designating provincial facilities, the federal legislation imposes upon provincial treasuries a financial burden that Parliament is not entitled to impose.

### *Conclusion*

*C.N. Transportation and Kripps Pharmacy* represent a drastic departure from previous authorities concerning the scope of provincial powers under section 92(14) of the Constitution Act, 1867. The majority judgments in these cases reject the conventional view that provincial power

<sup>59</sup> Criminal Code, *supra*, footnote 5, s. 2.

<sup>60</sup> *Ibid.*, s. 659.



over the "administration of justice" necessarily includes the administration of *criminal* justice. Rather, they strongly suggest that the administration of criminal justice is, in most of its components, within the exclusive authority of the federal Parliament.

As a result of these judgments, it is now clear that constitutional authority to supervise the conduct of criminal prosecutions rests with federal authorities. The federal government also appears to have constitutional jurisdiction over criminal policing and, possibly, corrections.

While the cases are a jurisdictional triumph for the federal government, the victory is one that federal politicians could soon live to regret. The administration of criminal justice carries with it a national price tag of more than two billion dollars annually. The Supreme Court's decision gives the provinces a strong political rationale for demanding compensation for this amount. Furthermore, it is a demand which the provinces may be able to back up legally by contending that it is beyond the powers of Parliament to impose such costs upon provincial treasuries and, in the case of prosecutions, by asserting the right of a member of the provincial executive to decline obligations placed upon him by the federal Parliament.

ANDREW PETTER\*

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CONSTITUTIONAL LAW—SEARCH AND SEIZURE AFTER SOUTHAM.—In *Lawson A.W. Hunter, Director of Investigation and Research of the Combines Investigation Branch et al. v. Southam Inc.*,<sup>1</sup> the Supreme Court of Canada handed down its first decision on the guarantee against unreasonable search or seizure which is contained in section 8 of the Canadian Charter of Rights and Freedoms.<sup>2</sup> This comment reviews the court's reasoning in *Southam* and considers the consequences of the decision for searches and seizures generally.

Section 8 of the Charter reads as follows:

Everyone has the right to be secure against unreasonable search or seizure.

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<sup>1</sup> [1984] 6 W.W.R. 577 (S.C.C.).

<sup>2</sup> Part 1, Constitution Act 1982, being Schedule B to the Canada Act 1982, c. 11 (U.K.).

The key word in section 8 is "unreasonable". However, no specific criteria of reasonableness are enumerated to give any guidance to either the courts, public officials or private persons. By contrast the Fourth Amendment to the United States Constitution lists the prerequisites in that jurisdiction to a valid search or seizure.<sup>3</sup> A judicial warrant is required which must be based upon probable cause supported by evidence on oath, and must describe with particularity the place to be searched and the items to be seized. The lower courts in Canada, possibly as a result of the textual differences between the Canadian and American constitutional guarantees, have been divided on a number of basic issues. Among the most important of these are the use which can be made of American constitutional jurisprudence,<sup>4</sup> which party bears the onus of proof of reasonableness,<sup>5</sup> whether prior authorization must be obtained from a neutral and detached arbiter,<sup>6</sup> and whether evidence on oath is required.<sup>7</sup>

Dickson J., speaking for a unanimous eight judge court, resolved these issues conclusively in favour of a distinctly American-style reading

<sup>3</sup> The Fourth Amendment to the U.S. Constitution reads as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

<sup>4</sup> Dickson J. alludes in *Southam* to the difficulties of relying on American jurisprudence where the respective American and Canadian guarantees may be different. He says, *supra*, footnote 1, at pp. 585-586:

The [section 8] guarantee is vague and open. The American courts have had the advantage of a number of specific prerequisites articulated in the Fourth Amendment to the United States Constitution, as well as a history of colonial opposition to certain Crown investigatory practices from which to draw out the nature of the interests protected by that amendment and the kinds of conduct it proscribes. There is none of this in s. 8. There is no specificity in the section beyond the bare guarantee of freedom from "unreasonable" search and seizure; nor is there any particular historical, political or philosophic context capable of providing an obvious gloss on the meaning of the guarantee.

He then reviewed various principles of interpretation to be applied to constitutional guarantees, made reference to several American cases on the Fourth Amendment, and continued, *ibid.*, at pp. 590-591:

The terms of the Fourth Amendment are not identical to those of s. 8 and American decisions can be transplanted to the Canadian context only with the greatest caution. Nevertheless, I would in the present instance respectfully adopt Stewart J.'s formulation [in *Katz v. U.S.* (1967), 389 U.S. 347, at p. 351] as equally applicable to the concept of "unreasonableness" under s. 8, and would require the party seeking to justify a warrantless search to rebut this presumption of unreasonableness.

<sup>5</sup> Seaton J.A., speaking for himself in *R. v. Collins*, [1983] 5 W.W.R. 43, (1983) 33 C.R. (3d) 130 (B.C.C.A.) said that the onus of proving that a warrantless search was unreasonable lies on the accused. A unanimous British Columbia Court of Appeal in *R. v. Hamill*, [1984] 6 W.W.R. 530, implicitly decided the same thing in upholding s. 10 of the Narcotic Control Act, R.S.C. 1970, c. N-1 which allowed a police officer to enter and

of section 8, particularly in cases involving enabling legislation. Legislation authorizing searches or seizures must require that, in the absence of exigent circumstances, prior authorization based on specific, sworn evidence be obtained from a neutral officer, although not necessarily a judge. In my view, the principles enunciated in *Southam* will also apply to cases where either a warrantless search is unreasonable in light of the surrounding circumstances or where the conduct of the search, notwithstanding that it is authorized by a valid warrant, is unreasonable.

### *Indicia for a Valid Statutory Authorization to Search or Seize*

In *Southam*, the Supreme Court decided that subsections (1) and (3) of section 10 of the Combines Investigation Act<sup>8</sup> were inconsistent with section 8 of the Charter and accordingly of no force and effect. The two subsections read as follows:

(1) Subject to subsection (3), in any inquiry under this Act the Director or any representative authorized by him may enter any premises on which the Director believes there may be evidence relevant to the matters being inquired into and may examine any thing on the premises and may copy or take away for further examination or copying any book, paper, record or other document that in the opinion of the Director or his authorized representative, as the case may be, may afford such evidence.

(3) Before exercising the power conferred by subsection (1), the Director or his representative shall produce a certificate from a member of the Commission, which may be granted on the *ex parte* application of the Director, authorizing the exercise of such power.

The provisions thus authorized the Director of Investigation and Research or his representative to apply *ex parte* to any member of the Restrictive Trade Practices Commission for a certificate empowering him to enter premises, search, and take away any document he believed might afford evidence of matters which were the subject of an inquiry under the Act. These sections, as interpreted by the courts,<sup>9</sup> only entitled the Commis-

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search premises other than a dwelling house without a warrant. See also *R. v. Burton* (1983), 1 D.L.R. (4th) 152 (Nfld. C.A.). The Alberta and Ontario Courts of Appeal in *Southam v. Director of Investigation and Research*, [1983] 3 W.W.R. 385 and *R. v. Rao* (1984), 46 O.R. (2d) 80, respectively, implicitly came to the opposite conclusion by holding, *inter alia*, that statutes empowering public officials to search without properly issued warrants in criminal investigations were inconsistent with s. 8 of the Charter. These holdings effectively put the burden of proof on those seeking to uphold warrantless searches. See also *R. v. Noble* (1984), 48 O.R. (2d) 645 (Ont. C.A.), a post-*Southam* decision which runs directly contrary to *Hamill* and strikes down s. 10(1)(a) of the Narcotic Control Act.

<sup>6</sup> See cases cited, *supra*, footnote 5.

<sup>7</sup> *Ibid.*

<sup>8</sup> R.S.C. 1970, c. C-23.

<sup>9</sup> In *Petrofina Canada v. Chairman, Restrictive Trade Practices Commission* (No. 2), [1980] 2 F.C. 386, 46 C.P.R. (2d) 1 (F.C.A.), the applicant challenged the certificate

sion member to ask whether there was an inquiry in progress and whether the Director believed there might be relevant evidence. The member could not inquire into either the legality of the inquiry or the reasonableness of the Director's belief in deciding whether to grant the certificate.

The Director's representatives obtained a certificate on April 16, 1982 to search Southam Inc.'s Edmonton Journal and commenced the search on April 20, 1984, three days after the Charter was proclaimed in force. The search area was geographically described in the certificate as Southam's Edmonton Journal Office "and elsewhere in Canada". Southam's motion for an interim injunction was denied by Cavanagh J.<sup>10</sup> and both sides appealed aspects of the decision. As an interim provision, the Alberta Court of Appeal ordered that the documents taken from the Edmonton Journal's offices be sealed pending final resolution of the matter. The Court of Appeal<sup>11</sup> then declared that section 10 was unconstitutional, being inconsistent with the guarantee against unreasonable search or seizure in section 8 of the Charter, and the Supreme Court of Canada unanimously dismissed the Director's appeal.

The Supreme Court's decision answers a number of critical questions about section 8. It tells us what burdens of proof the private person and the state respectively bear, and enumerates the minimum safeguards which must be written into valid enabling legislation. It appears that the courts will strike legislation down rather than read the safeguards in if they are absent. The decision has set tough standards of proof for the state, indicating that mere rationality is not enough. The fact that a search or seizure may be rationally related to law enforcement without more will not save it. Finally, the court made it clear that American jurisprudence is highly persuasive authority for interpreting the section 8 guarantee.

Dickson J. adopted a "purposive" approach to section 8; that is, the courts must analyze constitutional guarantees with a view to determining their underlying purpose. He relied on American jurisprudence in saying that, in the case of the constitutional guarantee against unreasonable search or seizure, an important although not necessarily exclusive goal is the protection of a person's reasonable expectation of privacy.<sup>12</sup> Proce-

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on the grounds that, *inter alia*, the member did not show that he had sufficient material before him to enable him to determine either the legality of the inquiry or the reasonableness of the Director's belief that evidence might be on the premises. The Federal Court of Appeal held not only that the member was not required to have such material before him but that he was in fact prevented from passing judgment on these matters. He could only inquire into whether an inquiry was in progress and whether the Director believed there might be relevant evidence.

<sup>10</sup> (1982), 136 D.L.R. (3d) 133, [1982] 4 W.W.R. 673 (Alta. Q.B.).

<sup>11</sup> *Southam Inc. v. Hunter et al.* (1983), 147 D.L.R. (3d) 420, [1983] 3 W.W.R. 385 (Alta. C.A.).

<sup>12</sup> *Supra*, footnote 1, at p. 589.

durally, an applicant seeking relief bears the initial burden of establishing that he has such a reasonable expectation in the circumstances. If he succeeds, the burden shifts to the state to show that its intrusion into the person's privacy was reasonable.

The notion of the "reasonable expectation of privacy" is one of the central tenets of Fourth Amendment jurisprudence and, in the United States, involves both a subjective and objective inquiry.<sup>13</sup> The subjective inquiry is whether the person has exhibited an actual expectation of privacy. If not, the issue is resolved without more. The objective inquiry is whether the subjective expectation is one which society would regard as reasonable. For example, in addition to the obvious cases of a person's home or office,<sup>14</sup> American cases establish that a person may have a reasonable expectation of privacy in telephone conversations in a public telephone booth.<sup>15</sup> The person using the telephone booth exhibits that expectation by closing the door. A reasonable person would not expect others to eavesdrop. This expectation of privacy does not depend on physical trespass. It persists even where there is no physical invasion of the booth, either directly or by wiretap, and extends to situations where the monitoring device does not penetrate the phone booth walls.<sup>16</sup>

In my view, one of the areas where an applicant will often be able to demonstrate a reasonable expectation of privacy is in confidential material which he has given to a third party. The most obvious example is lawyer/client communications.<sup>17</sup> Not only is a search warrant generally required with respect to such communications, but it may be argued stringent standards must be met before such a warrant is issued. Some of the pre-Charter lawyer/client cases decided in the context of section 443 of the Criminal Code<sup>18</sup> will likely be useful under section 8 of the Charter because the procedures mandated by section 443 are similar to those set out by Dickson J. in *Southam*.<sup>19</sup> In *Re Borden & Elliot and The Queen*,<sup>20</sup> the Ontario Court of Appeal held that the evidence in support of the application must establish a clear link between the confidential material

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<sup>13</sup> *Smith v. Maryland*, 442 U.S. 735 (1979).

<sup>14</sup> *R. v. Rao*, *supra*, footnote 5.

<sup>15</sup> *Katz v. U.S.*, 389 U.S. 347 (1967). *Katz* was in fact specifically cited with approval by Dickson J. in *Southam*.

<sup>16</sup> For examples of situations where a person would not have a reasonable expectation of privacy, see *infra*, p. 194.

<sup>17</sup> The Supreme Court of Canada has recognized a right of confidentiality on numerous occasions. See, for example, *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 839, (1979) 105 D.L.R. (3d) 745, at p. 760; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 870, (1982), 141 D.L.R. (3d) 590, at p. 601.

<sup>18</sup> R.S.C. 1970, c. C-34.

<sup>19</sup> See Dickson J.'s analysis, *infra*, p. 187.

<sup>20</sup> (1975), 70 D.L.R. (3d) 579, at p. 590, 13 O.R. (2d) 248, at p. 259 (Ont. C.A.).

sought and the offence. According to the Supreme Court of Canada in *Descôteaux v. Mierzwinski*,<sup>21</sup> another pre-Charter case and still the leading case in the area, the justice should refuse to issue the warrant unless there is no reasonable alternative to the search. Even if the justice issues the warrant, he should attach terms to restrict interference with the confidentiality as much as possible.<sup>22</sup>

This principle extends beyond the solicitor-client situation to cases where there may not be a traditional legal privilege. Lamer J. put it this way in *Descôteaux v. Mierzwinski*:<sup>23</sup>

. . . there are places for which authorization to search should generally be granted only with reticence and, where necessary, with more conditions attached than for other places. One does not enter a church in the same way as a lion's den, or a warehouse in the same way as a lawyer's office. One does not search the premises of a third party who is not alleged to have participated in the commission of a crime in the same way as those of someone who is the subject of such an allegation.

Lamer J. followed the above passage with the example of *Re Pacific Press Ltd. and The Queen*,<sup>24</sup> which involved the search of a newspaper office for information. Notwithstanding that no reporter or newspaper

<sup>21</sup> *Supra*, footnote 17.

<sup>22</sup> Lamer J. set out the "substantive rule" of solicitor-client confidentiality in *Descôteaux v. Mierzwinski*, *ibid.*, at pp. 875 (S.C.R.), 605 (D.L.R.):

1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.

<sup>23</sup> *Ibid.*, at pp. 889 (S.C.R.), 615-616 (D.L.R.).

<sup>24</sup> *Re Pacific Press Ltd. v. The Queen*, [1977] 5 W.W.R. 507, at pp. 516-517, (1977), 37 C.C.C. (2d) 487, at p. 495, approved in *Descôteaux v. Mierzwinski*, *ibid.*, at pp. 890-891 (S.C.R.), 616-617 (D.L.R.):

It is sufficient to say that in situations such as the one in *Re Pacific Press Ltd.*, where the search would interfere with rights as fundamental as freedom of the press, and, in the case at bar, a lawyer's client's right to confidentiality, the justice of the peace may and should refuse to issue the warrant if these two conditions have not been met, lest he exceeds the jurisdiction he had *ab initio*.

In the United States, the same rule holds that premises belonging to a third party not suspected of a crime such as a newspaper may be searched upon a showing of reasonable

privilege exists in Anglo-Canadian law, Lamer J. said that a very high standard of proof was required before a warrant could issue because "rights as fundamental as freedom of the press" were at stake. One may now expect that this principle will be applied even more forcefully given the Charter's enactment. Similarly one can expect in view of the freedom of religion guaranteed in section 2 of the Charter that a person has a reasonable expectation of privacy in the priest/penitent relationship even though there may not strictly speaking be a privilege at common law.<sup>25</sup>

Once the applicant has established that he has a reasonable expectation of privacy, it is clear from *Southam* that the burden of upholding enabling legislation or the conduct of a search shifts to the state.<sup>26</sup>

Dickson J. said in *Southam* that the underlying purpose of section 8 is, *inter alia*, to protect privacy.<sup>27</sup> It therefore followed that a search must be *prima facie* unreasonable unless authorization has been obtained from a neutral arbiter *before* the search or seizure has taken place. *Post facto* authorizations are not sufficient given the purpose of section 8. It is true that the private person could claim damages after the fact, assuming he had provable damages (which is unlikely in the usual case), but this would not further the constitutional objective of protecting his privacy from invasion. Dickson J. made two critical points about the requisite prior authorization. First, it must be obtained whenever feasible or the search will be invalid.<sup>28</sup> Second, and of the utmost importance, the onus of justifying a warrantless search lies on the party seeking to uphold it.<sup>29</sup>

It should be noted that *Southam* does not require that the person who grants the authorization be a judge, although Dickson J. said that it would be "wise" to allocate this function to a judicial officer. All that is required is that the decision-maker be capable of acting judicially. His paramount consideration must not be the public interest or his duties as an executive officer of the government. Rather he must be neutral, able to

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cause to believe that evidence of an offence is on the premises. However, since First Amendment rights may be implicated, the warrant requirements in the Fourth Amendment must be applied with particular exactitude—see *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

<sup>25</sup> However, see *Re Church of Scientology and The Queen (No. 2)* (1984), 10 D.L.R. (4th) 312 (Ont. H.C.), holding that no priest/penitent privilege exists either at common law or under section 8 of the Charter. It should be noted that the judgment leaves open the question of whether places of worship must be approached with greater care and sensitivity, holding on the facts that the restrictions placed on the search were sufficient given the information before the judicial officers involved.

<sup>26</sup> *Supra*, footnote 1, at pp. 590-591, where Dickson J. said that he "would require the party seeking to justify a warrantless search to rebut this presumption of unreasonableness".

<sup>27</sup> *Ibid.*, at p. 589.

<sup>28</sup> *Ibid.*, at p. 590.

<sup>29</sup> *Ibid.*, at pp. 590-591.

give sufficient weight to the individual interests enshrined in the Charter. On this point, Dickson J. said:<sup>30</sup>

For such an authorization procedure to be meaningful it is necessary for the person authorizing the search to be able to assess the evidence as to whether that standard has been met in an entirely neutral and impartial manner. . . . The person performing this function need not be a judge, but he must at a minimum be capable of acting judicially.

In *Southam*, the Restrictive Trade Practices Commission had substantial investigatory and prosecutorial functions. These included instructing the Director to commence an inquiry, causing evidence to be gathered, ordering the Director to conduct further investigation after the commencement of a hearing, and requesting the appointment of counsel to assist the inquiry.<sup>31</sup> Because a body charged with investigative responsibilities is likely to put more weight on the success of the investigation than on the individual interests involved, it cannot be a detached and impartial arbiter able to effectively balance the interests raised by section 8 of the Charter.<sup>32</sup> Dickson J. put it this way:<sup>33</sup>

In my view, investing the commission or its members with significant investigatory functions has the result of vitiating the ability of a member of the commission to act in a judicial capacity when authorizing a search or seizure under s. 10(3). This is not, of course, a matter of impugning the honesty or good faith of the commission or its members. . . . A member of the R.T.P.C. passing on the appropriateness of a proposed search under the Combines Investigation Act is caught by the maxim "Nemo iudex in sua causa". He simply cannot be the impartial arbiter necessary to grant an effective authorization.

On this basis alone I would conclude that the prior authorization mandated by s. 10(3) of the Combines Investigation Act is inadequate to satisfy the requirements of s. 8 of the Charter and consequently a search carried out under the authority of ss. 10(1) and 10(3) is an unreasonable one.

As a practical matter, I would suggest that at present only an authorization granted by a judge or a justice of the peace is sufficient to satisfy the *Southam* test. There is presently no independent and detached state body in existence apart from the judiciary capable of acting judicially and being seen to so act. Dickson J.'s judgment thus merely leaves room for the establishment of a central and detached search and seizure authorization office at some future time.

<sup>30</sup> *Ibid.*, at p. 591.

<sup>31</sup> Combines Investigation Act, *supra*, footnote 8, s. 47; ss. 9, 10, 12, 17; s. 22; s. 33.

<sup>32</sup> The problem of intermingling investigative and prosecutorial with adjudicative functions will have Charter significance going beyond search or seizure: see *McBain v. Canadian Human Rights Commission*, unreported F.C.C. released May 9, 1984, is a good example. MacBain was a member of Parliament. His special assistant lodged a complaint of sexual harassment with the Canadian Human Rights Commission. The Commission appointed an investigator and, upon receiving his report, decided that the complaint had been "substantiated". The Commission then appointed a three person tribunal to adjudicate the matter and, as is invariably the case, proceeded to take the position before the



The next issue in *Southam* was what kind and how much evidence is constitutionally required in support of an application for authorization to search or seize. Section 10 of the Combines Investigation Act<sup>34</sup> did not require, or indeed empower,<sup>35</sup> the Commission to inquire into either the legality of the inquiry or the reasonableness of the Director's belief that relevant evidence might be found. The Supreme Court in *Southam* said that the legislation was constitutionally deficient on that basis alone. The court went on to say that the legislation would have been inoperative even if the Commission member had been empowered to inquire into these matters. Section 10 of the Act only required the Director to be satisfied that evidence *might* be on the premises. Thus a prior authorization (even assuming such an authorization by a detached official was required by the legislation) could be issued on the basis of a mere *possibility* of finding evidence. Dickson J. said that valid enabling legislation must require that there be reasonable grounds to believe that evidence of the offence *is*, not *might* be, in the place to be searched. Furthermore, the evidence in

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tribunal that the complaint was justified. The tribunal had the authority under the Act to award both compensation and punitive damages.

MacBain challenged the jurisdiction of the tribunal on the grounds that the method of its appointment gave rise to a reasonable apprehension of bias contrary to s. 7 and 11(d) of the Charter. The tribunal dismissed MacBain's jurisdictional challenge and proceeded to hear and decide the complaint against him on the merits. MacBain refused to participate and applied to Federal Court for a prohibition order.

Collier J. dismissed the application on technical grounds, although with obvious misgivings. He dismissed MacBain's argument based upon s. 11(d) on the basis that a violation of the Canadian Human Rights Act is not an "offence" within the meaning of s. 11 of the Charter. That aspect of the decision is arguably correct. However MacBain's argument based upon s. 7 should have been a powerful one. It is hard to imagine a more clear case of an unconstitutional intermingling of investigative, prosecutorial and adjudicative functions than was the case here, short of placing all three hats on the same head.

The key to Collier J.'s decision on the s. 7 point, is that he was "not persuaded that the right to "life, liberty, and security of the person" includes interference with one's "good name, reputation or integrity". This view runs contrary to most of the American authority on the point. Even if the American law was different, in my view the liberty or security of the person clause must surely cover a person's interest in his reputation. One would have thought on principle that a provision like s. 7 of the Charter protects a person from being unfairly branded by the state with a pejorative label. In Canada, see *R. v. Young* (1984), 46 O.R. (2d) 520, at p. 553 where Dubin J.A., speaking for the Ontario Court of Appeal in a case involving different facts, held that prejudice to a person's career and reputation in the community could found a constitutional challenge based on s. 7 of the Charter. If so, *Southam* is very powerful support for the proposition that the statutory procedure set out in the Canadian Human Rights Act, s.c. 1976-77, c. 33, is inconsistent with the principles of fundamental justice. The Commission simply has too many competing functions.

<sup>33</sup> *Supra*, footnote 1, at p. 593.

<sup>34</sup> *Supra*, footnote 8.

<sup>35</sup> See *Petrofina Canada Ltd. v. Chairman, Restrictive Trade Practices Commission* (No. 2), *supra*, footnote 9.

support of the deponent's belief must be specific enough both as to the offence and the evidence sought to enable the arbiter to impose meaningful limits on the search. Dickson J. said:<sup>36</sup>

In cases like the present, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search constitutes the minimum standard consistent with s. 8 of the Charter for authorizing search and seizure. Insofar as ss. 10(1) and 10(3) of the Combines Investigation Act do not embody such a requirement, I would hold them to be further inconsistent with s. 8.

To summarize, after *Southam* the applicant for a remedy must establish that he has a reasonable expectation of privacy. Once he has done that, the onus shifts to the government. According to *Southam*, enabling legislation is unreasonable, and therefore inconsistent with section 8, unless it contains at least the following minimum safeguards:

- (1) a requirement of prior authorization by a neutral and detached arbiter who, while not necessarily a judicial officer, is capable of acting judicially;<sup>37</sup>
- (2) a requirement that there be reasonable and probable ground established on oath to believe that an offence has occurred *and* that evidence thereof is on the premises;<sup>38</sup> and
- (3) a requirement that the geographical area to be searched must be clearly described and limited to those areas where there is probable cause to believe the evidence is situated.<sup>39</sup>

The Supreme Court in *Southam* only had to deal with the minimum constitutional requirements for a valid statutory authorization. It did not have to address the procedural requirements in any particular warrant. It should be borne in mind that a given warrant may be subject to attack even apart from the validity of the enabling legislation. While the procedural requirements of search warrants is beyond the scope of this paper, the following may be usefully noted from the general law on the sufficiency of warrants:<sup>40</sup>

- (1) the items sought must be described in the warrant with particularity in order to avoid fishing expeditions;<sup>41</sup>

<sup>36</sup> *Supra*, footnote 1, at p. 596.

<sup>37</sup> *Ibid.*, at pp. 591-594.

<sup>38</sup> *Ibid.*, at pp. 594-596.

<sup>39</sup> This follows from Dickson J.'s comments, *ibid.*, and his characterization of the certificate in question as having a "breathtaking sweep": for the latter characterization, see *ibid.*, at p. 581.

<sup>40</sup> For further discussion, see R.E. Salhany, Canadian Criminal Procedure (4th ed., 1984), pp. 72-95; Goldman, *Hunter v. Southam: The Decision and Its Effect*, Canadian Competition Policy Record, Vol. V, No. 4, December 1984.

<sup>41</sup> *R. v. Fauteaux, Ex parte Morgentaler* (1970), 3 C.C.C. (2d) 187 (Que. Q.B.), aff'd [1972] C.A. 219 (Que. C.A.); *R. v. Colvin, Ex parte Merrick*, [1970] 3 O.R. 612,

- (2) the nature of the offence must be detailed in the warrant sufficiently to allow the person whose premises are subject to the search to know the reasons therefore;
- (3) the grounds for the informant having probable cause to believe that an offence has been committed and that evidence thereof is on the premises must be set out in the information in sufficient detail.<sup>43</sup>

### *Implications of Southam for other Statutes*

*Southam* has serious implications for a number of federal and provincial statutes beyond the Combines Investigation Act.<sup>44</sup> Portions of section 231 of the Income Tax Act<sup>45</sup> are a prime example. Following *Southam*, the test for validity of a search or seizure provision is whether it properly balances the competing individual and state interests. In the tax context, this involves a determination of the point at which the state interest in tax collection outweighs the individual privacy interest and, flowing from that, the legislative safeguards which are necessary to ensure that both of these interests are accorded their proper weight.

It should be noted that the Income Tax Act is different from the Combines Investigation Act in an important respect. Whereas the latter is a penal statute and has been traditionally upheld on the basis of the federal

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(1970), 1 C.C.C. (2d) 8 (Ont. H.C.); *Re Purdy and The Queen* (1972), 28 D.L.R. (3d) 720, 8 C.C.C. (2d) 52 (N.B.C.A.). This point was alluded to by Dickson J. in *Southam* in his comments upon the breadth of the certificate obtained pursuant to s. 10 of the Combines Investigation Act. He said, *supra*, footnote 1, at pp. 581-582:

The authorization has a breathtaking sweep; it is tantamount to a licence to roam at large on the premises of Southam Inc. at the stated address "and elsewhere in Canada".

<sup>42</sup>*Re Alder and The Queen* (1977), 37 C.C.C. (2d) 234 (Alta. T.D.).

<sup>43</sup>*R. v. Kehr* (1906), 11 O.L.R. 517 (Ont. C.A.); *R. v. Colvin, Ex parte Merrick*, *supra*, footnote 41. See also s. 443 of the Criminal Code, *supra*, footnote 18, which sets out the warrant requirements for a search pursuant to the Code. It currently appears that s. 443 can be used for searches pursuant to the Combines Investigation Act—see *Miles Laboratories Ltd. and Coles Book Stores Limited v. A.G. Can.* (unreported Ont. C.A., decision rendered October 9, 1984); Canadian Competition Policy Record, Vol. V, No. 3, September 1984, at pp. 17-20.

<sup>44</sup> For other statutory provisions allowing warrantless searches, see Canada Dairy Products Act, R.S.C. 1970, c. D-1, s. 7; Canada Labour Code, R.S.C. 1970, c. L-1, s. 91; Explosives Act, R.S.C. 1970, c. E-5, s. 15; Food and Drugs Act, R.S.C. 1970, c. F-27, s. 22; Hazardous Products Act, R.S.C. 1970, c. H-3, s. 5; Motor Vehicle Safety Act, R.S.C. 1970, c. 26 (1st supp.) (amended S.C. 1976-77, c. 19), s. 11; Textile Labelling Act, R.S.C. 1970, c. 46 (1st supp.), s. 8; Transportation of Dangerous Goods Act, S.C. 1980, c. 36, s. 14; Canada Pension Plan Act, R.S.C. 1970, c. C-5, s. 26; Excise Tax Act, R.S.C. 1970, c. E-13, s. 6; Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, s. 73; Narcotic Control Act, R.S.C. 1970, c. N-1, s. 10.

<sup>45</sup> S.C. 1970-71-72, c. 63, as amended.

criminal law power,<sup>46</sup> the primary thrust of the Income Tax Act is to raise revenue for federal purposes. Tax audits are not necessarily, or even primarily, to discover or assist in the prosecution of criminal violations. They are to ensure that every person pays his fair share of tax. An audit will often disclose that a taxpayer has understated his tax liability for reasons having nothing to do with criminality. The taxpayer may simply have taken a different but good faith view about the application of the Act or about the characterization of a particular item of revenue or expense. Alternatively, he may have failed to declare income through oversight without criminal intent. In my view, a court is likely to hold that the audit function is a necessary adjunct to the administration of the Income Tax Act to catch cases like these. If so, the investigative machinery of the Act would be greatly hampered if the Minister had to lead evidence of probable tax violations as a precondition to auditing because often no violations will have occurred or even been alleged. The Ontario Court of Appeal has already signalled in *R. v. Rao*,<sup>47</sup> albeit in *obiter*, that search or seizure standards in connection with the inspection and audit of business activities for regulatory purposes may be lower than where a criminal offence has likely been committed.

However it follows from *Southam* that the balance shifts as soon as the auditor has probable cause to believe that an offence has been committed. Once the audit turns up evidence of criminality, the *Southam* protections should become operative. If so, the Minister must go to a neutral and impartial officer at that point for a warrant before proceeding further with the investigation. Nice questions may arise in particular cases as to whether the auditor should have gone for a warrant earlier, but that is a question of fact to be decided by a trial judge on a case by case basis.

The Income Tax Act does not contain the appropriate *Southam* standards. Section 231(1)(d) of the Act reads as follows:

- (1) Any person thereunto authorized by the Minister, for any purpose related to the administration or enforcement of this Act, may, at all reasonable times, enter into any premises or place where any business is carried on or any property is kept

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<sup>46</sup> See *Proprietary Articles Trade Association v. Attorney-General for Canada*, [1931] A.C. 310, [1931] 2 D.L.R. 1, [1931] W.W.R. 552 (P.C.); *Reference Re. s. 498A of the Criminal Code*, [1937] A.C. 368, [1937] 1 D.L.R. 688, [1937] 1 W.W.R. 317 (P.C.); *Goodyear Tire and Rubber Co. v. The Queen*, [1956] S.C.R. 303, (1956), 2 D.L.R. (2d) 11. However, this may be changing, and the Supreme Court of Canada may be willing to ground properly drafted competition legislation in the federal trade and commerce power. See *Macdonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134, (1976), 66 D.L.R. (3d) 1; Dickson J.'s minority concurrence in *Attorney General of Canada v. Canadian National Transportation Ltd.*, [1983] 2 S.C.R. 206, (1983), 3 D.L.R. (4th) 16, [1984] 1 W.W.R. 193. And see N. Finkelstein (1984), 62 Can. Bar Rev. 182 for a full discussion of these cases and an analysis of the Supreme Court's apparent move to a trade and commerce basis for federal competition legislation.

<sup>47</sup> *Supra*, footnote 5, at p. 96.

or anything is done in connection with any business or any books or records are or should be kept, and . . .

- (d) if during the course of an audit or examination, it appears to him that there has been a violation of this Act or a regulation, seize and take away any of the documents, books, records, papers or things that may be required as evidence as to the violation of any provision of this Act or a regulation.

The provision permits an auditor to seize documents or records during the course of an audit if it appears to *him* that there has been a violation of the Act. *Southam* requires that, once the auditor finds sufficient evidence to create a reasonable belief that an offence has been committed and that evidence thereof is on the premises, he must go before a neutral officer for authorization to seize or proceed further.<sup>48</sup>

It follows that *New Garden Restaurant and Tavern Limited v. M.N.R.*<sup>49</sup> must be reconsidered. In that case, the tax auditor seized documents pursuant to section 231(1)(d) on four separate non-successive days without a warrant. White J. upheld the section on the basis that:<sup>50</sup>

. . . the public interest in a reasonably efficient system of collecting tax revenue outweighs the taxpayer's expectation of privacy in the circumstances contemplated by s. 231(1)(d) of the Act which I interpret as specifically authorizing a seizure without a warrant in cases where the tax investigator comes upon incriminating evidence in the course of his audit without having formulated prior to the audit any belief of guilt of the party searched.

This reasoning does not give sufficient weight to the individual privacy interest. The state's efficiency interest remains paramount only to that point in the audit where evidence of an offence surfaces. At that point, the balance shifts in favour of the individual. A neutral officer, not the investigator, must assess the evidence of probable cause, satisfy himself that evidence is on the premises, and put meaningful limits on the search.<sup>51</sup>

It should be noted that even section 231(4) of the Act, which empowers the Minister to go before a judge where he has reasonable grounds to believe that a violation has been or will be committed, is substantially overbroad. As a matter of statutory interpretation, the weight of authority is that the Minister's belief that a *particular* tax violation has occurred will support an authorization to seize evidence of *any* violation, not just

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<sup>48</sup> As to evidence of criminality obtained before probable cause is found to support the issuance of a warrant, I would submit that it be sealed as was done in *Southam*, to be unsealed only upon the warrant being issued.

<sup>49</sup> (1983), 43 O.R. (2d) 417 (Ont. H.C.).

<sup>50</sup> *Ibid.*, at pp. 421-422. (Emphasis added).

<sup>51</sup> White J. recognized that on the facts the seizures, particularly after the first day when the auditor must have formulated a belief that an offence had occurred, may well have been unreasonable.

the one detailed in the supporting affidavit.<sup>52</sup> The presiding judge may authorize the broadest sort of fishing expedition. On this interpretation, the Federal Court of Appeal was clearly correct in holding in *M.N.R. v. Kruger Inc.*<sup>53</sup> that section 231(4) is constitutionally overbroad. Unfortunately, the court does not clearly specify whether the legislation is thereby wholly invalid or may be read down. In my view, the section is a potential candidate for the application of the reading down doctrine because it does not require a wholesale reading in of safeguards in the same way as section 10 of the Combines Investigation Act in *Southam*. Section 231(4) should be read to mean that the authorization referred to therein must be limited to seizures related to the offence described in the supporting affidavit.

The second problem with section 231(4) is that it does not require the Minister to lead evidence of a belief that evidence of the offence is on the premises. The Minister might not even have such a belief. The judge is empowered to grant a license to roam in the hope that the Minister will find something. Section 231(4) is therefore unconstitutionally overbroad.

Another likely candidate for a declaration of unconstitutionality is section 11(6) of the Ontario Securities Act.<sup>54</sup> Section 11 establishes the Act's investigative machinery. Section 11(1) empowers the Ontario Securities Commission to appoint an investigator whenever it appears probable to the Commission, based upon a statement on oath, that a violation of the Act, its regulations or the federal Criminal Code<sup>55</sup> in connection with a trade in securities has occurred. The investigator's appointment authorizes him to investigate the affairs of the subject person, compel witnesses to produce documents or give evidence under oath,<sup>56</sup> and provide the Commission with a full report and transcripts of evidence. Most important for our purposes, section 11(6) authorizes him to seize any records or property of the person whose affairs are being investigated.

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<sup>52</sup> The most recent statement to this effect on the proper statutory interpretation of s. 231(4) is in the Federal Court of Appeal's decision in *M.N.R. v. Kruger Inc.*, unreported, released August 30, 1984. For a detailed review of the Charter aspects of the enforcement procedures in the Income Tax Act and the jurisprudence in connection with s. 231(4), see D.C. Nathanson, Entry, Search, and Seizure: Recent Developments, in Canadian Tax Foundation, Corporate Management Tax Conference 1982, Income Tax Enforcement, Compliance and Administration, p. 1; E.G. Ewaschuk, Search and Seizure: Charter Implication and Remedies, *ibid.*, p. 25; M. Manning, The Canadian Charter of Rights and Freedoms and Its Impact on the Income Tax Act of Canada, *ibid.*, p. 71.

<sup>53</sup> *Ibid.* See also *Vespoli v. The Queen*, unreported, F.C.A., released August 30, 1984. *Vespoli* reaches the same conclusion on constitutionality as *Kruger*, a decision handed down by the same panel of the Federal Court of Appeal on the same day.

<sup>54</sup> R.S.O. 1980, c. 466.

<sup>55</sup> *Supra*, footnote 18.

<sup>56</sup> This power, set out in s. 11(4) of the Securities Act, is of questionable validity if *R.L. Crain Inc. v. Couture* (1983), 6 D.L.R. (4th) 478 (Sask. Q.B.) is correct.

The provision reads as follows:

Where an investigation is ordered under this section, the person appointed to make the investigation may seize and take possession of any documents, records, securities or other property of the person or company whose affairs are being investigated.

As with the Restrictive Trade Practices Commission in *Southam*, the Ontario Securities Commission is not an exclusively adjudicative body. It holds hearings into various matters under the Act, but its functions are by no means limited to that. The Commission initiates investigations where it believes an offence has occurred, appoints investigators and, where it feels necessary, retains accountants and other experts to report on various aspects of the affairs of the person being investigated. Following an investigation, the Commission reports to the Minister of Consumer and Commercial Relations if it believes that an offence has been committed. The Commission is also empowered in certain circumstances to apply to a judge for the appointment of a receiver or liquidator. Thus, as in *Southam*, there is an unconstitutional intermingling of investigatory and adjudicative responsibilities.

There are further problems with the search and seizure authorization in section 11(6). The investigator's authorization is open-ended in all relevant respects. He may seize any documents or property of the person being investigated without restriction. He never has to prove to a neutral arbiter, or even to the Commission for that matter, that evidence of the offence is on any particular premises. The documents susceptible to seizure pursuant to the statute do not even have to relate to the suspected offence. The investigator has *carte blanche* both as to documents and place. In my view, this sort of enabling legislation is inconsistent with the principles enunciated in *Southam* and is unconstitutional.<sup>57</sup>

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<sup>57</sup> One further point is of interest. It currently appears, in Ontario, at least, that ss. 8 and 24 of the Charter can be used to deal with items seized before the Charter's promulgation. MacKinnon A.C.J.O., speaking for the Ontario Court of Appeal in *Re Chapman and The Queen* (1984), 9 D.L.R. (4th) 244, at pp. 251-252, said the following:

It is true, in the instant case, that the article in issue was seized prior to the enactment of the Charter. However, as the Crown seeks to use it now as evidence, the invocation of ss. 8 and 24, in light of all the circumstances, is not to give the Charter or the sections retrospective effect. To consider, in relation to s. 24, the circumstances surrounding the execution of the search warrant, and the subsequent condemned activities cited by the motions court judge which took place after the enactment of the Charter, is not, in my view, to give retrospective effect to the Charter.

The order made by Reid J. could be considered to have been made under s. 24(1) although his inherent jurisdiction to order the return of the article has not been taken away by the Charter. Under either approach, he had the grounds and the power to make the order he did.

In my view, although s. 24(1) could be invoked, s. 24(2) has no application to the present facts of this case. It is not a question, at this stage of the proceedings, of excluding evidence.

*Southam* also sounds the death knell of writs of assistance issued under section 10 of the Narcotic Control Act.<sup>58</sup> The section allowed a police officer to enter and search premises other than a dwelling house, on the authority of a writ of assistance, based only upon the officer's reasonable belief. In *R. v. Hamill*,<sup>59</sup> a pre-*Southam* decision, the British Columbia Court of Appeal upheld the validity of section 10. *Hamill* is based upon the now-repudiated proposition that Parliament is entitled to decide whether the initial arbiter should be an administrative or quasi-judicial officer. After *Southam*, a person capable of acting judicially is required. As such, the Ontario Court of Appeal's decision in *R. v. Noble*,<sup>60</sup> a post-*Southam* decision striking down writs of assistance in section 10, is clearly a correct statement of the law and is to be preferred over *Hamill*. In my view, section 10 is invalid and cannot be saved by the application of the reading down doctrine.<sup>61</sup>

### Warrantless Searches

*Southam* dealt with the validity of a statutory authorization to search or seize, as opposed to the validity of any particular search. Nevertheless, certain inferences may be drawn from the case about when a warrantless search may be justified. Given the Supreme Court's emphasis on an

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The Court cannot have "regard to all the circumstances" because all the circumstances are clearly not before the Court. At the trial, an argument might be raised under s. 24(2) for the exclusion of evidence relating to the transmitter/receiver when "all the circumstances", including the circumstances of the offence, are before the court.

In *Chapman*, the court used s. 24(1) to order the return of the seized items. It follows both in principle and from the language of the above passage that the evidence could also be excluded at trial pursuant to s. 24(2) of the Charter in appropriate circumstances notwithstanding that the seizure took place prior to the Charter's coming into force on April 17, 1982. However, see *R. v. Simmons* (1984), 45 O.R. (2d) 609 (Ont. C.A.) holding that evidence obtained in good faith pursuant to a statute which had not yet been held unconstitutional may be admitted. This presumably could apply to seizures made prior to the Charter's proclamation. For further cases and materials on s. 24(2), see footnote 81, *infra*.

<sup>58</sup> R.S.C. 1970, c. N-1.

<sup>59</sup> *Supra*, footnote 5.

<sup>60</sup> *Supra*, footnote 5.

<sup>61</sup> Dickson J. said in *Southam*, *supra*, footnote 1, at pp. 596-597:

In the present case, the overt inconsistency with s. 8 manifested by the lack of a neutral and detached arbiter renders the appellants' submissions on reading in appropriate standards for issuing a warrant purely academic. Even if this were not the case, however, I would be disinclined to give effect to these submissions. While the courts are guardians of the Constitution and individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.



individual's reasonable expectation of privacy and its requirement that prior authorizations be obtained "where it is feasible",<sup>62</sup> the government will likely be able to justify warrantless searches in two kinds of situations.<sup>63</sup>

The first is where the subject of the search has a diminished or non-existent expectation of privacy. Thus an individual standing on the threshold of her house in public view is liable to arrest without a warrant on a showing of probable cause.<sup>64</sup> Similarly there is probably little or no reasonable expectation of privacy in vacated hotel rooms,<sup>65</sup> articles exposed to public view,<sup>66</sup> open fields,<sup>67</sup> the exterior of an automobile,<sup>68</sup> at customs,<sup>69</sup> or in dealings with third parties such as banks.<sup>70</sup> The rationale for the latter exclusion, at least in the United States, is that a person should expect his bank records to be amenable to subpoena. He therefore cannot expect the same degree of confidentiality with his bank as he can with his lawyer or priest. This rationale is not particularly convincing, notwithstanding the American jurisprudence. One should reasonably be able to expect confidentiality in one's dealing with a bank, and a neutral arbiter should be required to pass upon the sufficiency of the state's grounds for wanting to examine those dealings. It is to be hoped that this will be the law in Canada under the Charter.

The second category of cases where warrantless searches will likely be permissible is where the administration of justice would be unduly

<sup>62</sup> *Supra*, footnote 1, p. 590.

<sup>63</sup> For an excellent compendium of situations where American courts have regarded warrantless searches as reasonable in the circumstances, and not violative of the Fourth Amendment, see E.G. Ewaschuk, *op. cit.*, *supra*, footnote 52.

<sup>64</sup> *U.S. v. Santana*, 427 U.S. 38 (1978).

<sup>65</sup> *Abel v. U.S.*, 362 U.S. 217 (1960).

<sup>66</sup> *R. v. Longtin* (1983), 41 O.R. (2d) 545, (1983), 5 C.C.C. (3d) 12 (Ont. C.A.). *Quaere* the correctness of this decision in view of the fact that the items "in plain view" were inside an occupied hotel room that a police officer had entered without a warrant, albeit on consent. The occupant consented to the entry, but does that limited consent to entry imply a concomitant right in the police to search?

<sup>67</sup> *Hester v. U.S.*, 265 U.S. 57 (1924).

<sup>68</sup> *Cardwell v. Lewis*, 417 U.S. 583 (1974).

<sup>69</sup> *U.S. v. Ramsay*, 431 U.S. 606 (1977). This case was cited with approval on the point by the majority of the Ontario Court of Appeal in *R. v. Simmons*, *supra*, footnote 57.

<sup>70</sup> *U.S. v. Miller*, 425 U.S. 435 (1976), where the U.S. Supreme Court held that a depositor takes a risk, in revealing information to a bank, that his records will be subpoenaed by the government. However, it is unlikely that this principle would be extended to allow fishing expeditions.

See, in Canada, the pre-Charter case of *James Richardson & Sons Ltd. v. M.N.R.* (1984), 9 D.L.R. (4th) 1 (S.C.C.) holding that, as a matter of statutory interpretation, s. 231(3) of the Income Tax Act did not authorize the Minister to require production by a broker of information about all its customers notwithstanding the extremely broad wording of the provision.

hampered if a warrant was required. This category of exception to the warrant requirement is based upon what may be compendiously called the "necessity rationale". Examples are searches of automobiles stopped with probable cause and searches after hot pursuit or in emergencies. The "automobile exception" to the warrant rule is a good illustration of the necessity rationale. It is also a useful admonition to the Canadian courts about the importance of grounding exceptions in a sound theoretical base. Recent American automobile cases have strayed from their origin, and we must be wary of importing them into Charter law.

In *Carroll v. United States*,<sup>71</sup> the genesis of the automobile exception, the United States Supreme Court upheld warrantless automobile searches where there was probable cause to believe that evidence of an offence was in the car. The rationale was that the car could be driven away in the time it would take the police to obtain a proper warrant. Unfortunately, the court has since extended *Carroll* to the point where its original rationale has been left behind. In *Chambers v. Maroney*,<sup>72</sup> the court upheld a warrantless search made after the police had impounded a car and driven it to the police station. The practical concerns supporting *Carroll* were thus not present in *Chambers*. The car was in police custody so it could not be driven away, and no substantial efficiency loss would have resulted from taking the time to get a warrant.

More recent decisions have gone even farther astray. Search warrants have generally been required for searches of luggage.<sup>73</sup> Since it is easier to bring luggage than cars into police control, given space and storage constraints, there is arguably an efficiency rationale which distinguishes the two cases. Furthermore, a person has a greater expectation of privacy in his luggage. Inevitably, the question arose as to whether a warrant was needed where luggage was found in a car. One would have thought the Supreme Court would follow the luggage rather than the automobile line of cases. None of the justifications respecting warrantless searches are present whether luggage is found inside or outside a car. Luggage is relatively easy to secure pending issuance of the warrant so there are no urgent circumstances, and a person retains an equally reasonable expectation of privacy wherever it is found.

At first, the Supreme Court followed the luggage line of cases and held that search warrants were required for closed containers found in cars.<sup>74</sup> It reversed itself in *United States v. Ross*,<sup>75</sup> holding that police

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<sup>71</sup> 267 U.S. 132 (1925).

<sup>72</sup> 399 U.S. 42 (1970).

<sup>73</sup> *U.S. v. Chadwick*, 433 U.S. 1 (1977); *Arkansas v. Sanders*, 422 U.S. 753 (1979); *U.S. v. Place*, 51 U.S.L.W. (U.S. Sup. Ct., 1983).

<sup>74</sup> *Robbins v. California*, 453 U.S. 420 (1981).

<sup>75</sup> 102 S. Ct. 2157 (1982).

may search closed containers where they have a general suspicion that contraband is in the car but do not know where. If the police specifically believe that the contraband is in the container, they need a warrant. The problem is that one never knows after the fact whether the police suspicion was specific or general, because the evidence of probable cause does not have to be submitted to a neutral magistrate prior to the search. Afterwards, it is easy to fit the evidence to the facts where the test is as susceptible to manipulation as the one enunciated by the court. Furthermore, *Ross* gives rise to a constitutional absurdity: why should the issue of whether luggage is found inside or outside a car have attained constitutional significance? The warrant rule should be the same wherever the luggage is found. The lesson to be learned from cases like *Chambers* and *Ross* is that while American cases are often useful in enunciating the policies underlying our similar constitutional guarantees, they should not always be followed. Each case must be assessed on its merits and followed only when it is based upon a sound rationale.

An interesting Canadian automobile example is *R. v. Esau*.<sup>76</sup> The police received information that a vehicle of a particular description was being used in the sale of drugs at a particular place, and they observed it there three times. The Manitoba Court of Appeal held that even though the police were not "sure" they were stopping the right car, they had ample reason to search it without a warrant. It is, of course, arguable that since the car was in the same location three times it would return a fourth time, so the police should have obtained a warrant in the interval. However the counter-argument is that the police never knew from one time to the next whether the car would be back and, after observing the car three times in suspicious circumstances, they were not constitutionally required to gamble on it returning once more. While *Esau* is a difficult case on the facts, it can likely be justified on the exigency rationale for warrantless searches.

Another Manitoba case of interest is *R. v. Moretto*.<sup>77</sup> In *Moretto*, the police set up a "routine checkpoint" on the highway and stopped each vehicle coming through to check for licences and other automobile documentation. The police stopped the accused, examined his driver's license and vehicle registration and transmitted the name and number to headquarters for a computer search. After a cursory visual search, the accused was released and continued on his way. Shortly thereafter the computer report came back indicating that the accused was listed as a "suspected cocaine trafficker". On the basis of this information, the police overtook the accused's vehicle, stopped his car a second time and searched. Drugs were found in a sports bag in the car.

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<sup>76</sup> (1983), 147 D.L.R. (3d) 561, 20 Man. R. (2d) 230 (Man. C.A.).

<sup>77</sup> Unreported Man. Q.B., rendered August 10, 1983.

Schwartz J. held that the first stop was valid as part of a routine check:<sup>78</sup>

The right to drive a motor vehicle on the Queen's Highways has been defined [by statute] to mean that the right is, in fact, a privilege to be exercised subject to certain restrictions contained in the *Highway Traffic Act*. Included in those restrictions are the obligations on the part of a prospective driver to be qualified; to hold an operator's permit; to carry same; to carry the registration card of the motor vehicle owner; and to produce them when required. The enforcement of these provisions do not constitute an unlawful search and seizure.

Unfortunately, Schwartz J. did not say why these provisions of the Highway Traffic Act<sup>79</sup> were reasonable within the meaning of section 8 of the Charter. He merely asserted that they were. Given the decision in *Southam*, it is certainly arguable that statutory stop and search provisions are *prima facie* unconstitutional after *Southam*.

Schwartz J. went on to hold in the alternative, again without reasons, that even if the stop and check provisions of the Highway Traffic Act violated section 8 of the Charter, they were saved by section 1 as reasonable limits which are demonstrably justified in a free and democratic society. That is a justifiable result, though the Crown ought to have been required to lead evidence in support of its reliance on section 1. However, that aside, the case, with respect, correctly assesses the relationship between sections 1 and 8. On the face of it, one may ask how a search which is "unreasonable" within the meaning of section 8 may be "reasonable" for the purposes of section 1. It is a conundrum until one considers the *Southam* principle that the lack of a prior authorization requirement is *prima facie* unreasonable. Section 1 must then become operative to allow the Crown to lead evidence of reasonableness and demonstrable justification to support the search or seizure. It should be noted that the Supreme Court of Canada in *Southam* did not have to address the interrelationship between the two sections because no submissions were addressed to it on section 1.<sup>80</sup>

Schwartz J. found that the second stop and search by the police was invalid. He held that a suspicion turned up by a computer search was not sufficient to constitute reasonable and probable grounds for believing that the accused had committed an offence or was in the process of doing so. However, having found a violation of section 8 in the second stop, Schwartz J. then refused to exclude the evidence pursuant to section 24(2). The scope and application of that section is beyond the bounds of

<sup>78</sup> *Ibid.*, at p. 21.

<sup>79</sup> C.C.S.M., c. H60.

<sup>80</sup> For further discussion of s. 1, see N. Finkelstein, Section 1: The Standard for Assessing Restrictive Government Actions and the Charter's Code of Procedure and Evidence (1983), 9 Queen's L.J. 144.

this comment; however it is to be hoped that it will not develop into an emasculation of the protection in section 8 of the Charter through a too permissive reading of its concluding phrase, "bring[ing] the administration of justice into disrepute".<sup>81</sup>

However the Canadian law on the search of automobiles develops, it is clear that in these and other cases warrantless searches are *prima facie* invalid and the burden of justifying them is heavy. Thus, cases such as *R. v. Burton*<sup>82</sup> must now be taken to have been wrongly decided. The Newfoundland Court of Appeal there upheld a warrantless search of lobster boxes anchored offshore, notwithstanding the fact that there were no exigent circumstances and there was ample time to acquire a search warrant.

A case like *R. v. Heisler*<sup>83</sup> is more problematic. In *Heisler*, uniformed constables on special duty at a rock concert were instructed to deny entry to those who refused to submit to a check for drugs or alcohol. The accused purchased a ticket and, as she entered the concert, a constable asked to look in her purse. He did not give her the choice of either submitting to the search or leaving the premises. It was common ground that the constable did not have reasonable and probable grounds prior to the search to believe that the accused was carrying drugs. Upon finding a bag of marijuana in her purse, the constable took the accused to a security room where she voluntarily pulled another bag of marijuana out of her jeans and handed it to him. The trial judge excluded the evidence pursuant to sections 8 and 24(2) of the Charter and acquitted her. The Alberta Court of Appeal ordered a new trial.

The Court of Appeal agreed that the original search at the door was illegal, but it held that legality was not co-extensive with reasonableness. Lieberman J.A., speaking for the Court, approved Rehnquist J.'s decision in *Bell v. Wolfish*<sup>84</sup> that what is required is a balancing of the need for the search against the invasion of personal rights which it entails. One must look at the scope of the intrusion, the manner in which the search is conducted, the justification for initiating it and the place where it is done.

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<sup>81</sup> For further discussion of s. 24(2), see C.-A. Lachance, *L'exclusion de la preuve illégalement obtenue et la Charte* (1984), 62 Can. Bar Rev. 278; D. Gibson, *Enforcement of the Canadian Charter of Rights and Freedoms*, in W.S. Tarnopolsky and G.A. Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms* (1982), p. 489; H.S. Fairley, *Enforcing the Charter* (1982), 4 Sup. Ct. L. Rev. 217. The leading cases to date on s. 24(2) are *R. v. Therens* (1983), 5 C.C.C. (3d) 409 (Sask C.A.), leave to appeal to the Supreme Court of Canada [1983] 1 S.C.R. xii; *R. v. Collins*, *supra*, footnote 5; *R. v. Rao*, *supra*, footnote 5; *R. v. Simmons*, *supra*, footnote 57; *R. v. Chapin* (1983), 2 D.L.R. (4th) 538, (1983), 43 O.R. (2d) 458 (Ont. C.A.).

<sup>82</sup> (1983), 1 D.L.R. (4th) 152, (1982), 40 Nfld. & P.E.I.R. 195 (Nfld. C.A.).

<sup>83</sup> (1984), 8 D.L.R. (4th) 764 (Alta. C.A.).

<sup>84</sup> 441 U.S. 520, at p. 559 (1979).

In this case, the Court of Appeal held that the trial judge erred in not considering the nature of the event, a rock concert, or the duty of the occupier to ensure the safety of the persons attending it.

In my view, the Court of Appeal's approach was correct but its decision on the facts may be wrong. The court was right in holding that where the conduct of a search is impugned the test of reasonableness is a balancing of interests. In a rock concert situation, given the usual crush of people and the need for orderliness, it is not unreasonable to take steps to exclude alcohol or drugs for the protection of those in attendance. However, the search was not necessary to protect that interest in *Heisler*. The accused could simply have been informed of her option to leave. The constable's failure to do so should have vitiated the search. The Court of Appeal should have found section 8 to have been violated and proceeded to the question of the admissibility of the evidence pursuant to section 24(2).

### *Production of Documents*

*Southam* does not deal with the interesting question of whether the guarantee against unreasonable seizure comprehends compulsory production of documents. For example, section 17(1) of the Combines Investigation Act<sup>85</sup> authorizes a member of the Restrictive Trade Practices Commission to require a corporate officer to make virtually unlimited production of corporate records. Similarly, section 11(4) of the Ontario Securities Act<sup>86</sup> empowers an investigator to compel the attendance of witnesses and the production of documents. No independent arbiter is required to make a prior assessment of the reasonableness or relevance of the material sought. A person who fails to comply with the investigator's order may be committed for contempt by a Supreme Court judge. The judge is not authorized to inquire into the reasonableness of the investigator's order as a term of validity even after the fact, although the reasonableness of the order, or lack thereof, may be a factor in his decision about whether to commit for contempt.

The obvious distinction between entry and search on one hand and demand for production on the other is that in the former case there is an actual entry and concomitant physical invasion of privacy. There is no such direct intrusion with compulsory production of documents. While this distinction is superficially attractive, its difficulty is that if the purpose of section 8 is to protect privacy, it should apply where the state can accomplish the same result by ordering a person to produce all his records without apparent limitation. Pursuant to provisions like section 17(1) of the Combines Investigation Act or section 11(4) of the Securities Act, the

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<sup>85</sup> *Supra*, footnote 8.

<sup>86</sup> *Supra*, footnote 54.

public official wears the twin hats of investigator and adjudicator and performs a "constructive seizure" without the necessity of physical entry.

Canadian courts to date have been divided on whether section 8 covers compulsory production of documents.<sup>87</sup> In *Attorney-General for Ontario v. Bear Island Foundation*,<sup>88</sup> Steele J. held, without reasons, that it does not, at least in a validly constituted action. It is not clear whether this was because compulsory production is not a "seizure" or because it was reasonable in the context of an action. In *Re Ziegler and Hunter*,<sup>89</sup> the applicants sought to prohibit the Director from acting upon certain orders for production issued pursuant to s. 17(1) of the Combines Investigation Act. A majority of the Federal Court of Appeal clearly took the position that section 8 of the Charter did not apply to production of documents because there was no uninvited entry or forcible seizure.<sup>90</sup> The majority's decision has been followed in Ontario by the Divisional Court in *Belgoma Transportation Limited v. Director of Employment Standards*.<sup>91</sup>

In *Re Alberta Human Rights Commission and Alberta Blue Cross Plan*,<sup>92</sup> which the majority in *Ziegler* refused to follow, the Alberta Court of Appeal took the opposite position and held that compulsory production is indeed a seizure. The *Blue Cross* case involved a request for records belonging to an employer in connection with a preliminary investigation into a sex discrimination complaint. If proved, the alleged breach carried only civil consequences and the rules for production were analogous to those in civil proceedings. The Court therefore indicated that, while section 8 could be called in aid in an appropriate case, on the facts the demand for production was reasonable and valid. *Alberta Blue Cross* was followed in *Re Reich and College of Physicians and Surgeons of Alberta (No. 2)*.<sup>93</sup>

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<sup>87</sup> The American position presently appears to be that compulsory production of documents by order of an administrative tribunal falls outside the protection of the Fourth Amendment and is valid. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); but cf. *Hale v. Henkel*, 201 U.S. 43, at p. 77 (1905); *F.C.C. v. American Tobacco Co.*, 264 U.S. 298 (1924). Some American courts have even upheld statutory powers given to administrative tribunals to punish for contempt—see *Rushing v. Tennessee Crime Commission*, 117 S.W. 2d 4 (Tenn., 1983).

<sup>88</sup> (1982), 138 D.L.R. (3d) 683 (Ont. H.C.).

<sup>89</sup> (1983), 8 D.L.R. (4th) 648, (1983), 75 C.P.R. (2d) 246 (F.C.A.).

<sup>90</sup> To the same effect, see also *Roblin v. The Queen* (1982), 2 C.R.R. 166 (Que. S.C.) that a demand for information pursuant to s. 231(3) of the Income Tax Act, S.C. 1970-71-72, is not a seizure.

<sup>91</sup> Unreported Div. Ct. (Southey, Saunders and Hollingworth JJ.), rendered August 10, 1984.

<sup>92</sup> (1983), 1 D.L.R. (4th) 301, [1983] 6 W.W.R. 758 (Alta. C.A.).

<sup>93</sup> (1984), 8 D.L.R. (4th) 696 (Alta. Q.B.).

In *Gershman Produce Co. Ltd. v. The Motor Transport Board*,<sup>94</sup> Kroft J. of the Manitoba Court of Queen's Bench struck down a compulsory production statute pursuant to section 8 of the Charter. The applicant in *Gershman* held a commercial/public service vehicle licence and was alleged to have committed certain infractions thereof. The Motor Transport Board sent the applicant a notice to show cause why its licence should not be amended or revoked, followed by a demand pursuant to section 255(1)(n) of The Highway Traffic Act<sup>95</sup> to produce all its accounting records for an eleven month period. The demand was in no way limited to the alleged infractions.

Section 255(1)(n) of The Highway Traffic Act incorporated by reference *mutatis mutandis* the provisions of section 27(2) of The Public Utilities Board,<sup>96</sup> which read as follows:

The board, or any person authorized by the board to make inquiry or report, may, where it appears expedient,

- (a) enter upon and inspect any place, building, works or other property;
- (b) require the attendance of all such persons as it or he thinks fit to summon and examine and take the testimony of the persons;
- (c) administer oaths, affirmations, or declarations, and summon witnesses, enforce their attendance, and compel them to give evidence and produce the books, plans, specifications, drawings, and documents, which it or he may require them to produce.

Kroft J.'s analysis of the validity of section 255(1)(n) commenced with the obvious but apt to be overlooked point that section 8 guarantees the right to be secure against "unreasonable search or seizure". The phrase is disjunctive. A search is therefore not a necessary concomitant to the invocation of the section. After reviewing the *Blue Cross*, *Reich* and *Ziegler* cases, Kroft J. said:<sup>97</sup>

Under the legislation which I must consider, the Board, or a person designated by it, has the power to enter and inspect any place without prior approval, although that power is not specifically now under consideration. It also has the unrestricted right to require the production of documents, and by virtue of s. 24(4) of *The Public Utilities Board Act*, has all the powers vested in the Court of Queen's Bench or a judge thereof.

It must also be remembered that the Board has more than an administrative and investigative function. The documents which it has the power to demand be produced may be used during the show cause hearing. That hearing can result in the imposition of very real penalties. Furthermore, pursuant to s. 290 of *The Highway Traffic Act*, there can also be a prosecution and, on summary conviction, a fine of up to \$2,000.00.

<sup>94</sup> Unreported, judgment rendered November 21, 1984.

<sup>95</sup> *Supra*, footnote 79.

<sup>96</sup> C.C.S.M., c. P280.

<sup>97</sup> *Supra*, footnote 94, at p. 21.



Within the context of *The Highway Traffic Act* I have concluded that the right of the Board or its appointee to require unrestricted production is in fact a power of seizure within the contemplation of s. 8 of the *Charter*.

Kroft J. went on to hold that, in light of *Southam*, a forced production of documents which is not reviewed prior to issuance by a neutral arbiter and is unrestricted by relevance is unreasonable and inconsistent with section 8. Unfortunately, he did not specifically address the majority argument in *Ziegler* that uninvited entry is a necessary element of section 8. He simply agreed with the Alberta cases that compulsory production is a seizure and applied the *Southam* criteria to determine reasonableness. The difficulty with Kroft J.'s reasoning is that it contains a quantum leap. It is possible to admit that forced production is a "seizure" within the meaning of section 8 while still denying that it can ever be "unreasonable" in constitutional terms. Restated, *Ziegler* and *Southam* can be reconciled if one takes the position, which did not have to be addressed in *Southam*, that actual entry is a necessary element of "privacy" as that word is constitutionally understood. Kroft J.'s decision does not address that fundamental issue.

In my opinion, the *Ziegler* view of the scope of section 8 is too narrow and Kroft J.'s ultimate conclusion that forced production can be unreasonable is correct. A person's private papers are private whether someone comes in and takes them or one is forced to hand them over. The fact that there is no actual uninvited entry by a public official certainly goes to the issue of reasonableness, and the standards of reasonableness may be higher for an entry and search than a demand for production. However, an open-ended demand for documents backed up by the power of the state is certainly a seizure as that word is generally understood. The guarantee in section 8 of the *Charter* should be available to cover it.

### *Conclusion*

The protection afforded by the constitutional guarantee against unreasonable search or seizure has taken a long step forward with the Supreme Court of Canada's decision in *Southam*. The Supreme Court has adopted what Dickson J. termed a "purposive" test. The courts must inquire into the underlying purposes of the particular constitutional guarantee at issue and be prepared to give it a broad interpretation consistent with its goals. It is to be hoped that in other *Charter* cases currently before it the court will apply the same broad reasoning and philosophy to other constitutional guarantees that it has to search and seizure.

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CONSTITUTIONAL LAW—THE DOCTRINES OF COLOURABILITY AND EXTRA-TERRITORIALITY.—*Churchill Falls (Labrador) Corporation Ltd. et al. v. Attorney General of Newfoundland et al.*<sup>1</sup> is a classic combination of good news and bad news for constitutional law. The good news is that the Supreme Court of Canada clearly decided that *Ladore v. Bennett*<sup>2</sup> contains the correct test for determining the territorial reach of provincial legislative jurisdiction. The decision thereby apparently ends decades of uncertainty.<sup>3</sup> The light shed on the doctrine of colourability by the case should also be welcomed. The bad news is that aspects of the *Royal Bank*<sup>4</sup> test for territoriality are still alive and well, though considerably restricted in operational scope. The decision may also constitute bad news for the conflict of laws by inadvertently unsettling what was generally considered to be a clear rule—that choice of jurisdiction clauses do not conclusively determine where an action can be brought.

A residual question of considerable significance from both a practical and a constitutional point of view arises from the case. Can any legislative action be taken either by Quebec or by the Dominion to resolve the impasse which the decision has maintained?

### *The Case*

In 1958 the Hamilton Falls Power Corporation was created by federal letters patent. Its objects were to produce or otherwise acquire and transmit electricity and to harvest and make use of water for the purpose of producing hydro-electric power. To that end the corporation acquired and exercised an option from Her Majesty the Queen in Right of Newfoundland to develop the water resources of the Hamilton River in Labrador. When the name of the river was changed to the Churchill River the company became known as the Churchill Falls (Labrador) Corporation Ltd. (CFLCo). In 1961, by the Churchill Falls (Labrador) Corporation Limited Lease Act,<sup>5</sup> the Lieutenant-Governor in Council was authorized to execute and deliver a lease to CFLCo granting full rights to the exclusive use of the Churchill River for the development of hydro-electric power. Subsequent amendments to the Act between 1963 and 1970 authorized the granting of other leases of property in Labrador for purposes related to the generation and transmission of the hydro-electric power.

<sup>1</sup> (1984), 8 D.L.R. (4th) 1 (S.C.C.).

<sup>2</sup> [1939] A.C. 468, [1939] 3 D.L.R. 1, [1939] 2 W.W.R. 566 (P.C.).

<sup>3</sup> See E. Edinger, *Territorial Limitations on Provincial Powers* (1982), 14 *Ottawa Law Rev.* 57.

<sup>4</sup> *Royal Bank of Canada v. The King*, [1913] A.C. 283, (1913), 9 D.L.R. 337, 3 W.W.R. 944 (P.C.).

<sup>5</sup> S. Nfld. 1961, c. 51.

In 1969 a power contract was entered into with Hydro Quebec. Under this contract CFLCo agreed to sell and Hydro Quebec agreed to purchase virtually all the power produced at Churchill Falls for forty years. Hydro Quebec was given an option of renewing for a further twenty-five years. Provision was made for CFLCo to retain a fixed amount of power for use in Labrador by its Labrador subsidiary, Twin Power Corporation, and for CFLCo to recall up to 300 megawatts on three years notice to meet the needs of Newfoundland. The power contract also required CFLCo to enter into complex financing requirements. Under the financing arrangements, entered into with lenders outside Newfoundland, CFLCo assigned and charged all its assets and rights in Newfoundland as security. It was also agreed that the law of Quebec should be the proper law of the contract and that the courts of Quebec (specifically the courts of the Judicial District of Montreal) should have exclusive jurisdiction over any disputes arising under the power contract.

Only five years of the forty year term of the contract had passed when Newfoundland discovered that more power was needed for provincial use. Neither requests to Hydro Quebec and to the premier of Quebec nor an order-in-council directed to CFLCo produced any increase in the amount of power retained for Newfoundland use. The Attorney General of Newfoundland therefore commenced a civil action in Newfoundland against CFLCo, joining Hydro Quebec and serving it *ex juris* as a necessary and proper party. The relief sought by the Attorney General was a declaration that under the terms of the lease between Newfoundland and CFLCo the corporation was obliged to comply with the request for more power and a declaration that compliance with the terms of the lease would not be a breach of the power contract. The Newfoundland Court of Appeal held<sup>6</sup> that the courts of Newfoundland could entertain the action with respect to the lease but that the declaration with respect to the power contract was “[r]elief that CFLCo, by reason of the exclusive jurisdiction clause in the Power Contract, [could not] seek from a Newfoundland Court”.<sup>7</sup>

Shortly after the action was commenced in Newfoundland, Hydro Quebec filed a corresponding motion for a declaratory judgment in Quebec. Because the eventual decision of the Newfoundland Court of Appeal could not be foreseen, Hydro Quebec was attempting the typical rush to judgment manoeuvre to which conflicts cases are susceptible. Hydro Quebec requested a declaration that the courts of Quebec had exclusive jurisdiction over disputes arising under the contract, a declaration that CFLCo was obliged under the contract to sell all power to Hydro Quebec and a declaration that retention of the power requested by Newfoundland

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<sup>6</sup> *Attorney-General of Newfoundland v. Churchill Falls (Labrador) Corporation Ltd.* (1980), 109 D.L.R. (3d) 146 (Nfld. C.A.).

<sup>7</sup> *Ibid.*, at p. 151.

would constitute a breach of the power contract. Whether compliance with the Newfoundland order-in-council would amount to a breach depended on whether the order-in-council could be considered by the proper law of the contract to be an Act of God or *force majeure* and on whether the power contract contained an implied term that it was subject to the lease. The Queen in Right of Newfoundland was joined in the Quebec action. Both CFLCo and the Queen in Right in Newfoundland objected to the Quebec action on jurisdictional grounds.

In the Supreme Court of Canada,<sup>8</sup> Beetz J., speaking for a seven judge court, held that, as a matter of Quebec law, the courts of that province had no jurisdiction over Newfoundland with respect to the cause of action so that the sovereign immunity argument was redundant but that, also as a matter of Quebec law, the Quebec courts did have jurisdiction to grant the relief prayed for. The case was a proper one for a declaration and the action pending in Newfoundland concerned the lease, not the power contract. There was no possibility of inconsistent judgments.

With the action in Newfoundland on the lease and in Quebec on the power contract still pending, the Newfoundland legislature passed the Upper Churchill Water Rights Reversion Act.<sup>9</sup> That Act repealed the leases of CFLCo and revested all rights and interests arising thereunder in Her Majesty in Right of Newfoundland. Provision was made for repayment of all secured creditors and for compensation to all shareholders of CFLCo for any loss in the value of their shares and both groups were given a right to appeal to the Supreme Court of Newfoundland. All other actions arising from the consequences of the reversioning of the water rights were prohibited. No provision was made for compensation to CFLCo itself for the loss of assets.

In February 1981 the Lieutenant Governor in Council referred the Reversion Act to the Court of Appeal of Newfoundland. Although the reference contained nine detailed and specific questions, the arguments were directed at the validity of the Act as a whole. Upheld in the Court of Appeal,<sup>10</sup> the Act was declared *ultra vires* in the Supreme Court of Canada.<sup>11</sup> The Act survived the argument that it sterilized the status and capacity of a federally incorporated company but fell victim to a combination of the doctrines of colourability and extraterritoriality.<sup>12</sup> First, by

<sup>8</sup> *The Queen in Right of Newfoundland v. Quebec Hydro-Electric Commission*, [1982] 2 S.C.R. 79, (1982), 137 D.L.R. (3d) 577.

<sup>9</sup> S. Nfld. 1980, c. 40.

<sup>10</sup> *Reference Re Upper Churchill Water Rights Reversion Act, 1980* (1982), 134 D.L.R. (3d) 288, 36 Nfld. & P.E.I.R. 273 (Nfld. C.A.).

<sup>11</sup> *Supra*, footnote 1.

<sup>12</sup> The appellants also argued that the legislation was in relation to trade and commerce and/or that it was in relation to an interprovincial work and undertaking. The Supreme Court did not deal with or comment on either argument.

application of the doctrine of colourability, the Supreme Court determined that the subject matter of the Act was not property in Newfoundland but the power contract. Then, by application of the *Royal Bank* version of the doctrine of extraterritoriality, the Court held that the Act was *ultra vires* on the grounds that it destroyed civil rights outside Newfoundland. These civil rights were located in Quebec. Two independently sufficient rules were relied on to locate the civil rights under the power contract: either Quebec was the province in which the contract was to be performed, or Quebec was the province in which an action was to be brought by virtue of the jurisdiction selecting clause in the power contract.

### *The Doctrine of Colourability*

The doctrine of colourability is the equivalent of the doctrine or maxim that “. . . you cannot do that indirectly which you are prohibited from doing directly”, first enunciated by the Privy Council in *Madden v. Nelson and Fort Sheppard Railway*.<sup>13</sup> The two doctrines are used interchangeably to strike down legislation. Both lead inexorably to the unsurprising conclusion that form is not controlling in determining the validity of legislation.

As between a direct and an indirect tax, of course, form is controlling. The provinces, taking account of adverse judicial decisions, have been able to come up with drafting formulae which do pass muster.<sup>14</sup> Even where form is not conclusive it may significantly influence the court.<sup>15</sup> The wrong form can be overlooked,<sup>16</sup> but on the whole it is a

<sup>13</sup> [1899] A.C. 626, at pp. 627-628 (P.C.).

<sup>14</sup> See, e.g. the comment in *Simpson Sears Ltd. v. Provincial Secretary of New Brunswick*, [1978] 2 S.C.R. 869, at p. 872, (1978), 82 D.L.R. (3d) 321, at p. 322: “The difference in formulation owes much to the judgment of the Privy Council in *Attorney-General for British Columbia v. C.P.R.* . . ., [[1927] A.C. 934, [1927] 4 D.L.R. 113, [1927] 3 W.W.R. 460], where a gasoline tax charged on a “purchaser” was struck down as indirect. This led to a provincial search for a drafting formula which would meet the test of a direct tax, and it was found in imposing the tax on the “consumer” and fortifying the charge by making retail sellers the agents of the government for collection of the tax: see, *Attorney-General for British Columbia v. Kingcome Navigation Co. Ltd.*, [[1934] A.C. 45, [1934] 1 D.L.R. 31, [1933] 3 W.W.R. 353]”. (Emphasis added).

See also *Attorney General for British Columbia v. Canada Trust Co.*, [1980] 2 S.C.R. 466, at p. 480, (1980), 112 D.L.R. (3d) 592, at p. 602 where Dickson J. said: “It is clear from these cases that long after 1867 the Privy Council regarded English principles governing succession duties as rules of construction and not hardened constitutional imperatives. There was no constitutional impediment to a province enacting a succession duty of a novel kind. If the subject matter (there property, here persons) was “within the Province” the Legislature had competence, and *the only question was whether it had used apt words to implement the measure*”. (Emphasis added).

<sup>15</sup> In *Schneider v. The Queen*, [1982] 2 S.C.R. 112, (1982), 139 D.L.R. (3d) 417, the health terminology in the Heroin Treatment Act R.S.B.C. 1979, c. 166 was considered in the characterization of the Act.

<sup>16</sup> *The Queen v. Aziz*, [1981] 1 S.C.R. 188, at p. 195, (1981), 119 D.L.R. (3d) 513, at p. 519: “The provision contained in subs. 2 [of s. 115 of the Criminal Code] has the

sound legislative drafting principle to employ the form which would seem most appropriate to matters falling within the jurisdiction of the legislative body.

If that is all either doctrine tells us, then both are not only redundant but also gratuitously insulting, since the application of either is accompanied by allegations or inferences of bad faith not to be found in simple cases of invalidity. In *Ladore v. Bennett*,<sup>17</sup> for example, the Privy Council spoke of a "colourable device". Martland and Ritchie J.J., dissenting in the *Constitutional Amendment Reference*,<sup>18</sup> described the resolution as "... an attempt by the federal Parliament to accomplish indirectly that which it is legally precluded from doing directly by *perverting* the recognized resolution method of obtaining constitutional amendments by the Imperial Parliament for an *improper* purpose". Other recent reference include the phrases "covert means";<sup>19</sup> "the guise or disguise";<sup>20</sup> "a purported exercise of legislative or executive authority";<sup>21</sup> "a transparent attempt to evade constitutional limitations";<sup>22</sup> and "the ostensible use of its power".<sup>23</sup> The selections are representative only.

The only possible explanation for the continued existence of the doctrine of colourability is that it encompasses some element which is not found in ordinary cases. The critical problem is to determine what that element is. *Churchill Falls* provides an excellent opportunity to test possible theories. Why was the Reversion Act considered by the Supreme Court of Canada to be an indirect attempt to legislate in relation to the power contract, but not to be an indirect attempt to sterilize a federal company or to derogate from the extraprovincial rights of the secured creditors?

Constitutional characterization of legislation can be accomplished by one or more of three means or factors. The first, and most commonly

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same effect as if it had been specifically enacted, in substance, in the *Narcotic Control Act*. The mere fact that it appears as a general provision in the *Criminal Code* does not affect its constitutional validity".

<sup>17</sup> *Supra*, footnote 2, at pp. 482 (A.C.), 7 (D.L.R.), 573 (W.W.R.) (Emphasis added).

<sup>18</sup> [1981] 1 S.C.R. 753, at p. 846, (1981), 125 D.L.R. (3d) 1, at p. 77, [1981] 6 W.W.R. 1, at p. 90. (Emphasis added).

<sup>19</sup> *Amax Potash Limited et al. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576, at p. 590, (1976), 71 D.L.R. (3d) 1, at p. 10, [1976] 6 W.W.R. 61, at p. 73.

<sup>20</sup> *Boggs v. The Queen*, [1981] 1 S.C.R. 49, at p. 60, (1981), 120 D.L.R. (3d) 718, at p. 727.

<sup>21</sup> *Attorney General of Quebec and Keable v. Attorney General of Canada*, [1979] 1 S.C.R. 218, at p. 254, (1978), 90 D.L.R. (3d) 161, at p. 190.

<sup>22</sup> *Reference Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, at p. 1225, (1978), 84 D.L.R. (3d) 257, at p. 277.

<sup>23</sup> *Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545, at p. 584, (1977), 80 D.L.R. (3d) 449, at p. 475.

used means is by determination of the object and purpose of the legislation. This is the *objective determination of legislative intention* derived from interpretation of the statute—from what the Legislature, a corporate entity, has actually done. The second means by which legislation may be characterized is by determination of its legal and practical effect in operation. The third possible means is one which is generally said to be irrelevant and it consists of determination of *actual* governmental motive or policy. That actual governmental motive has generally been considered irrelevant is best illustrated by the old rigid exclusionary rule prohibiting introduction of ministerial statements and legislative debates.<sup>24</sup> Nevertheless, actual governmental intent and objective legislative intent have always been difficult to separate and with the progressive relaxation of the exclusionary rules in constitutional cases the exclusion of actual intent has become even more difficult to maintain.

In most cases the application of each test will produce the same constitutional characterization. The legal and practical effect, the legislative purpose and the actual governmental objective will independently point to the same constitutional characterization. The problem cases are those in which a discrepancy is said to result from use of different means. It is in these cases that allegations of colourability may arise.

The essence of the doctrine of colourability, clarified by the decision in *Churchill Falls*, must be that the governmental motive or purpose is to achieve a practical effect at variance with the object and purpose of the legislation objectively ascertained.<sup>25</sup> Of course, because the effect of the statute must also be consistent with the actual purpose it is very easy to formulate the constitutional conclusion in terms of the permissible factors and so to mask the fact that the critical element is actual intent.

No real distinction can be drawn in *Churchill Falls* between the effects on the company, the contract and the outside creditors and yet only the effect on the contract was considered to be significant. All of the effects were clearly foreseen and therefore would have to be described as intended. All were serious and direct, though the outside creditors were perhaps least seriously affected in the sense that provision was made to prevent loss. Legally, the power contract was no more destroyed<sup>26</sup> than

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<sup>24</sup> *Attorney General of Canada v. Readers' Digest Association (Canada) Ltd.*, [1961] S.C.R. 775, (1961), 30 D.L.R. (2d) 296.

<sup>25</sup> Where direct evidence of governmental motive was inadmissible, of course, inferences had to be drawn from proof of the effect of the statute. One suspects, however, that in *Attorney General of Alberta v. Attorney General of Canada*, [1939] A.C. 117, [1938] 4 D.L.R. 433, [1938] 3 W.W.R. 337 (P.C.) the Privy Council was able to take judicial notice of the Social Credit philosophy as well, since the birthplace of that movement was England.

<sup>26</sup> See discussion on the extraterritoriality issue, *infra*.

the federal company was sterilized.<sup>27</sup> The only factor which distinguishes the effect on the power contract from the effect on the company and from that on the outside creditors is that it was the one consequence the government clearly wanted to obtain, though, arguably, not as an end in itself but as a means of attaining a larger objective, control of its water resource.

This fact—actual governmental motive—was established by the extrinsic evidence. MacIntyre J. initially asserts that the extrinsic evidence is admissible only to show the background against which the legislation was enacted and not as an aid to construction of the statute, but then later states that the government pamphlet entitled “The Energy Priority of Newfoundland and Labrador”, which outlined the government’s reasons for passing the Reversion Act, was admissible “as evidence of the intent and purpose of the Legislature of Newfoundland in enacting the Reversion Act”,<sup>28</sup> The distinction between background and construction may have remained clear to the Supreme Court of Canada but this is a formulation of grounds of admissibility which appears to come perilously close to eliminating the distinction and thus to allowing extrinsic evidence of actual intent.

In holding that extrinsic evidence should always be admissible for determination both of effect and of “true object and purpose”,<sup>29</sup> this case may have rendered actual governmental purpose a permanent element in the process of constitutional characterization because the separation between actual governmental intent and objective legislative intent will become impossible to maintain. If that is an accurate prediction, a new problem has been created not only for governments but also for the courts.

Governments are elected to solve problems, *inter alia*. Problems do not present themselves in watertight section 91 and section 92 compartments. Regulation of any issue usually requires legislation which can be said to affect both section 91 and section 92 heads of power. The responsibility of the government is to foresee all the ramifications of the legislation in operation and to cast it in a constitutionally acceptable form.

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<sup>27</sup> The Reversion Act was unique in that, unlike other provincial statutes held to be laws of general application to which a federal company is subject, it applied exclusively to the only federal company engaged in the business of generating hydro-electric power. All other provincial legislation previously upheld has regulated a business generally. Thus *Churchill Falls* must cast doubt on the definition of a law of general application enunciated by Dickson J. in *R. v. Sutherland, Wilson and Wilson*, [1980] 2 S.C.R. 451, at p. 454, (1981), 113 D.L.R. (3d) 374, at p. 378, a case concerning Indian immunity from provincial legislation.

<sup>28</sup> *Supra*, footnote 1, at p. 20.

<sup>29</sup> “. . . I am also of the view that in constitutional cases, particularly where there are allegations of colourability, extrinsic evidence may be considered to ascertain not only the operation and effect of the impugned legislation but its true object and purpose as well”.: *ibid.*, at p. 19.



Because of the doctrine of colourability and the new general admissibility of extrinsic evidence great care must now be exercised in any discussion and debate leading up to the legislation. It may prove very difficult to persuade the courts thereafter that a foreseen and discussed consequence is not the desired consequence and thus the true object or aim of the legislation. Conversely, the court must be more on guard than ever against self-serving statements as to intent.

The irony of the doctrine of colourability is that any attempts to deal with a problem by legislating within one's own jurisdiction are labelled as attempts to evade constitutional restrictions. A government can do indirectly what it cannot do directly *except* when the court decides that that is what it is 'aiming' at. A province can bar certain kinds of advertising on television, for example, even though legislation in relation to television content is a subject matter beyond provincial jurisdiction.<sup>30</sup> Legislative inter-delegation of powers is unconstitutional<sup>31</sup> but administrative subdelegation<sup>32</sup> and incorporation by reference both of existing<sup>33</sup> and of future legislation is permissible.<sup>34</sup> A province cannot prohibit importation<sup>35</sup> of goods but it can make possession of imported goods an offence.<sup>36</sup> Taxation of persons outside the province is invalid, but taxation of property or transfers within the province is not, even when the property belongs to or is being transferred to the non-resident.<sup>37</sup>

The majority in the Supreme Court of Canada in the *Constitutional Amendment Reference* appeared to be prepared to reconsider the doctrine of colourability:<sup>38</sup>

The maxim "you cannot do indirectly what you cannot do directly" is a much abused one. It was used to invalidate provincial legislation in *Madden v. Nelson and Fort Sheppard Railway Co.* [[1889] A.C. 626]. It is a pithy way of describing colourable legislation: see *Ladore v. Bennett* . . . [[1939] A.C. 468, at p. 482, [1939] 3 D.L.R. 1, at p. 7, [1939] 2 W.W.R. 566, at p. 573]. However, it does not

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<sup>30</sup> *Attorney-General of Quebec v. Kellogg's Co. of Canada*, [1978] 2 S.C.R. 211, (1978), 83 D.L.R. (3d) 314.

<sup>31</sup> *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31, [1950] 4 D.L.R. 369.

<sup>32</sup> *P.E.I. Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392, [1952] 4 D.L.R. 146; *Reference Re Agricultural Products Marketing Act*, *supra*, footnote 22.

<sup>33</sup> *Attorney General for Ontario v. Scott*, [1956] S.C.R. 137, (1955), 1 D.L.R. (2d) 433.

<sup>34</sup> *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569, (1968), 68 D.L.R. (2d) 384; *R. v. Smith*, [1972] S.C.R. 359, (1971), 21 D.L.R. (3d) 222.

<sup>35</sup> *Gold Seal Ltd. v. Dominion Express Co.* (1921), 62 S.C.R. 424, 62 D.L.R. 62, [1921] 3 W.W.R. 710.

<sup>36</sup> *R. v. Gautreau* (1978), 88 D.L.R. (3d) 718 (N.B. App. Div.).

<sup>37</sup> *Attorney General for British Columbia v. Canada Trust Co.*, *supra*, footnote 14.

<sup>38</sup> *Supra*, footnote 18, at pp. 798 (S.C.R.), 41 (D.L.R.), 46-47 (W.W.R.).

preclude a limited legislature from achieving directly under one head of legislative power what it could not do directly under another head.

The *Churchill Falls* case indicates that the doctrine is as strong as ever and, indeed, that actual governmental motive, the element which the courts have always expressly rejected as irrelevant, is crucial in characterizing impugned legislation when the doctrine of colourability is invoked. The accompanying allegations of bad faith are regrettable but the existence of the doctrine of colourability is probably inevitable in a system in which judicial notice of actual events cannot be excluded and in which judges are asked to do the almost impossible—to use extrinsic evidence to determine only the background of the legislation, not its proper construction, and thus to maintain watertight compartments for actual governmental intent and objective legislative intent.

Elimination of the doctrine of colourability from the arsenal of constitutional interpretative doctrines might result in form playing a more controlling role in the process of characterization of the legislation. That would inject greater certainty into constitutional law, a characteristic now lacking. On the other hand, elimination of the doctrine might achieve nothing beyond more polite and less explicable judgments. The process of constitutional characterization is so flexible that the same results could be achieved without direct reference to the factors considered by the court. Generally speaking, it is preferable to learn the real reasons for any decision, so there is something to be said for retention of colourability.

*Churchill Falls* at least clarifies the operation of the doctrine so that we can identify the critical factor. Invocation of the doctrine and judicial application of it remain unpredictable. Nevertheless, if *Churchill Falls* does open the door for regular use of extrinsic evidence concerning actual governmental purpose, as this comment suggests it might, considerations of colourability will become the rule instead of the exception. One might reasonably hope that in those circumstances the language employed by the courts will be more moderate and that eventually even the connotations of bad faith will disappear.

### *The Doctrine of Extraterritoriality*

The Supreme Court of Canada seemed to be faced with a clear choice on the territoriality issue between the *Royal Bank of Canada v. The King*<sup>39</sup> test and the test enunciated in *Ladore v. Bennett*<sup>40</sup> twenty-six years later.

Newfoundland relied on *Ladore v. Bennett*: the legislation was in relation to property entirely within the province, and any effects on the rights of Hydro Quebec under the power contract were merely incidental.

<sup>39</sup> *Supra*, footnote 4.

<sup>40</sup> *Supra*, footnote 2.

The reasons for judgment state that Newfoundland also inexplicably argued that "the pith and substance test employed in division of power cases has no application to the determination of the territoriality issue".<sup>41</sup> Since *Ladore* is to territoriality what *Carnation Co. v. Quebec Agricultural Marketing Bd.*<sup>42</sup> is to distribution of powers this argument would appear to have been misconceived. Rather than refuting the "pith and substance test" the province should have been persuading the court that the Reversion Act had a legitimate provincial objective.<sup>43</sup>

CFLCo, of course, relied on the *Royal Bank* test. Since the company would be unable to fulfil its contractual obligations without the property and assets which the Reversion Act had revested in Her Majesty The Queen in Right of Newfoundland, the company argued that the Act was beyond the territorially limited legislative jurisdiction of the province, either because it affected civil rights in Quebec or, alternatively, because in pith and substance it was aimed at destroying civil rights in Quebec.

Recognizing that two lines of authority existed, though perhaps not completely admitting their irreconcilability, MacIntyre J. held that *Ladore v. Bennett* "states the law correctly".<sup>44</sup>

Where the pith and substance of the provincial enactment is in relation to matters which fall within the field of provincial legislative competence, incidental or consequential effects on extra-provincial rights will not render the enactment *ultra vires*.

Thus the first of the alternative CFLCo arguments was without merit. Had the judgment stopped at this point the Reversion Act would have been upheld on the territorial issue. "Property and Civil Rights" is a head of provincial power. Property and civil rights are normally read disjunctively. The Act was in relation to property situated entirely within the province. Consequential effects felt by persons outside the province are to be overlooked under *Ladore v. Bennett*.

Unfortunately the court held that the Act was colourable legislation, that it was "aimed", not at the reversioning of the water rights and other property in Her Majesty in Right of Newfoundland, but rather at the power contract itself. MacIntyre said:<sup>45</sup>

<sup>41</sup> *Supra*, footnote 1, at pp. 26-27.

<sup>42</sup> [1968] S.C.R. 238, (1968), 67 D.L.R. (2d) 1.

<sup>43</sup> It may be that the summary by MacIntyre J. of the Newfoundland argument at this point in the reasons for judgment is misleading. He states later in his reasons: "It was argued by the Attorney-General of Newfoundland that control over the power generated at Churchill Falls is essential for the effective management by Newfoundland of its water resources and to meet the energy needs of the province"; *supra*, footnote 1, at p. 32. This argument appears to have been treated as one going to the wisdom and policy of the legislation rather than to its object: ". . . it is not for this court to consider the desirability of legislation from a social or economic perspective where a constitutional issue is raised". . . *ibid.*

<sup>44</sup> *Ibid.*, at p. 30.

<sup>45</sup> *Ibid.*, at p. 31.

. . . the Reversion Act is a colourable attempt to interfere with the power contract and thus to derogate from the rights of Hydro-Quebec to receive an agreed amount of power at an agreed price.

This conclusion provided an opportunity for the reintroduction of the *Royal Bank* line of cases, never totally rejected by the Court.<sup>46</sup> *Royal Bank* is reconciled with *Ladore v. Bennett* on the grounds that the pith and substance of the impugned provincial legislation in the former case must necessarily have been the destruction of, or interference with, extraprovincial civil rights. The Reversion Act was to be treated as though it had been cast in the same form as that struck down in *Ottawa Valley Power Co. v. Attorney General for Ontario et al.*<sup>47</sup> and *Beauharnois Light, Heat and Power Co. Ltd. v. Hydro-Electric Power Commission of Ontario*,<sup>48</sup> as if, in other words, it declared the power contract to be void and unenforceable.

Nevertheless, even though aimed at the power contract, the territorial restriction on provincial legislative power would have been breached only if the civil rights of Hydro Quebec were located outside Newfoundland. The *Royal Bank* cases are premised on the assumptions that civil rights have an actual physical location and that their location can be determined by the application of arbitrary rules. But one of the difficulties arising from the explanation of *Royal Bank* as a contract case has always been the necessity of guessing what rule Viscount Haldane employed to locate the civil rights outside Alberta. *Churchill Falls* may advance *Royal Bank* by expressly relying on two separate rules, but the failure to state the relationship between those two *inter se* and between those two and any others which might have been relied on in the past leaves an unfortunately wide scope for continued speculation with respect to the legislative jurisdiction of a province over contracts with extra-provincial elements.

The arbitrary nature of the rules is evidenced by the fact that the Supreme Court in *Churchill Falls* held that the civil rights were located outside Newfoundland under two different rules, either of which would have been independently sufficient, in the opinion of the court. Whether it was just a fortunate coincidence that both indicated that the civil rights were located in Quebec or whether those particular rules were selected

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<sup>46</sup> MacIntyre J. says first: "It will be seen that there is an *apparent conflict* between the *Royal Bank* line of cases and *Ladore v. Bennet*"; *ibid.*, at p. 29 (emphasis added). Later he says: "It must be assumed, however, that there was at least an implied finding that the pith and substance of the Act in question was in relation to extra-provincial rights if it is to be accepted today as authority"; *ibid.*, at p. 30.

<sup>47</sup> [1936] 4 D.L.R. 594, *sub nom.*, *Ottawa Valley Power Co. v. The Hydro Electric Power Commission*, [1937] O.R. 265 (Ont. C.A.). It is noteworthy that Ontario did not have the option of legislating in relation to property because the property was not exclusively located in that province.

<sup>48</sup> [1937] 3 D.L.R. 458, [1937] O.R. 796 (Ont. C.A.).

because, in the opinion of the court, they both indicated Quebec as the *situs* is unclear. MacIntyre J., commented that little argument was advanced on this issue, and that the case had proceeded on the assumption that the rights of Hydro Quebec were situated in Quebec, so perhaps he simply selected the first two *situs* rules which were consistent with that assumption.

First, then, rights under the contract were in Quebec because performance of the contract could be said to take place there:

. . . Hydro Quebec has the right under the power contract to receive delivery in Quebec of hydro electric power and thereafter to dispose of it for use in Quebec or elsewhere as it may choose.

Secondly, the rights of Hydro Quebec were situated in Quebec because rights under a contract "are situate in the province or country where the action may be brought",<sup>50</sup> and the parties had agreed that any litigation arising under the contract should take place in the Province of Quebec.

Civil rights are thus still to be treated like tangible property which has a single physical *situs*. The only apparent advance we have achieved on *Royal Bank* is the enunciation of rules for determining *situs*. That this enunciation is an advance may prove to be an illusion. Any *situs* rule for an intangible is necessarily arbitrary but the particular rules selected in *Churchill Falls* are curious and the employment of alternative rules poses a special problem of its own. Since the rules are characterized as alternatively sufficient, where are civil rights under a contract to be located when the rules point to different jurisdictions? Would the rights of Hydro Quebec still have been located in Quebec if an action under the contract could have been brought only in Newfoundland?

Furthermore, are these alternative rules exhaustive or merely illustrative of rules for locating contract rights? Both Laskin C.J.C. and Pigeon J. have attached great significance in recent years to the place where the contract is made<sup>51</sup> and evidenced a predilection for locating contract rights by the application of that rule. Even in the seminal case of *Citizens Insurance Co. v. Parsons*,<sup>52</sup> where the Privy Council first prohibited Parliament from legislating in relation to "the contracts of a particular business or trade, such as the business of fire insurance in a single province", indications are that the place of contracting was considered highly relevant, though perhaps not the exclusive connecting factor. No attempt was made in that case to define the scope of the provincial

<sup>49</sup> *Supra*, footnote 1, at p. 31.

<sup>50</sup> *Ibid.*, at pp. 31-32.

<sup>51</sup> See, e.g. *The Queen v. Thomas Equipment*, [1979] 2 S.C.R. 529, (1979), 96 D.L.R. (3d) 1 and *Burns Food Ltd. v. Attorney General for Manitoba*, [1975] 1 S.C.R. 494, (1973), 40 D.L.R. (3d) 731 respectively.

<sup>52</sup> (1881), 7 App. Cas. 96 (P.C.).

jurisdiction over such contracts in territorial terms, but the provincial Act in question was described as dealing with “. . . policies of insurance entered into or in force in the province of Ontario for insuring property situate therein. . .”.<sup>53</sup> Is the place where the contract was made still another alternative?

Even if the rules suggested are exclusive and even if their interrelationship were clear, they would be amenable to some criticism individually. It is curious, for example, for the Supreme Court of Canada to have concluded not only that the place of performance was an appropriate jurisdictional nexus but also that Quebec was the place of performance. Conflicts and constitutional law intersect on the issue of extraterritoriality and constitutional law apparently often borrows approaches and rules from the field of conflicts. The place of performance is a very significant factor in determining the proper law of a contract but it is and has always been only one factor for consideration. The place of contracting, on the other hand, did once carry almost determinative weight and was used by Anglo-Canadian courts in the nineteenth century as the usual connecting factor in selecting the *lex causa* in contract cases. The proper law of the contract is now considered to be either the legal system selected by the contracting parties or, if no selection has been made, the legal system with which the contract and what is to be done under the contract have the most substantial connection. Thus, if the intent was to use a conflicts rule as a *situs* rule for locating contract rights it would have been more logical to borrow the current rule rather than one that has never existed.

Place of performance may be easier to determine than the proper law of contract but the rule is still not without difficulties. Under any given contract performance may take place in more than one jurisdiction and, occasionally, the place of performance may be changed at the option of one or both parties. Where are contract rights located then? On the facts of *Churchill Falls*, for example, can it be said that *the* place of performance is Quebec? Did the power contract require nothing to be done in Newfoundland? In a contract of sale of goods, delivery of the goods is certainly the most significant obligation but it is not the only obligation under such a contract. Hydro Quebec must have had an obligation to pay and it is highly likely that Newfoundland was the place of payment.

The alternative rule employed, that contract rights are located where an action may be brought, is a clear borrowing from conflicts. Both Castel<sup>54</sup> and Dicey and Morris<sup>55</sup> are cited in the reasons for judgment as direct authority for this proposition and both texts do so state. Both,

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<sup>53</sup> *Ibid.*, at p. 109. (Emphasis added).

<sup>54</sup> J.G. Castel, *Canadian Conflict of Laws* (1977), vol. 2, p. 34.

<sup>55</sup> A.V. Dicey, J.H.C. Morris, *The Conflict of Laws* (10th ed., 1980), vol. 2, p. 533.

however, also qualify this proposition: the *situs* of the chose in action consisting of a contract right is *probably not* located in a jurisdiction where an action can be brought only by way of service *ex juris*. The qualification is expressed in terms of "probability" because there is no decision on point. If one applies the complete rule, Newfoundland becomes the *situs* of the chose in action (if a single *situs* can be said to exist for an intangible) because that is where CFLCo could be found and could be personally served. Even though the contract contained a jurisdiction selecting clause, the Quebec action against CFLCo still had to be commenced by service *ex juris*.

The complete deference to the jurisdiction selecting clause in *Churchill Falls* is also anomalous. It used to be considered contrary to public policy to oust the jurisdiction of the court; such clauses were therefore ignored. Today, jurisdiction selecting clauses are considered to be entitled to very great weight but the courts have generally not completely reversed their position. They do not regard them as absolute.<sup>56</sup> There is a residual discretion to exercise jurisdiction in spite of a jurisdiction selecting clause.<sup>57</sup> Yet for constitutional purposes the Supreme Court of Canada has chosen to ignore the existence of this residual discretion and to treat the choice of Quebec as a forum as conclusively determining the place where the action might be brought.<sup>58</sup> As a constitutional rule this reformulation of the conflicts rule has obvious problems. Is the *situs* the place where the defendant can be found and personally served when there is no jurisdiction selecting clause in the contract? Should any provision be made for the fact that whichever party is defendant is totally fortuitous? Will parties be able to evade the application of provincial law by incorporation of jurisdiction selecting clauses? There is a conflicts rule to deal with the problem of evasion but it qualifies choice of law clauses, not choice of jurisdiction clauses.

Obviously, in deciding that civil rights in Quebec had been destroyed, the Supreme Court had practical consequences rather than theoretical considerations in mind. Even if the contract had been declared void in Newfoundland, which it was not, the Quebec contract action would have continued if the Reversion Act had been upheld. That action was commenced for the very purpose of determining whether CFLCo

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<sup>56</sup> The most notable exception is *E.K. Motors Ltd. v. Volkswagen Canada Ltd.*, [1973] 1 W.W.R. 466 (Sask. C.A.).

<sup>57</sup> See e.g., *The Fehmarn*, [1958] 1 W.L.R. 159, [1958] 1 All E.R. 333 (C.A.); *The Eleftheria*, [1970] P. 94, [1969] 2 All E.R. 641 (P.D.A.); *Polito v. Gestioni Esercizio Navi Sicilia Gens*, [1960] Ex. C.R. 233; *Neptune Bulk Terminals v. Intertec Internazionale Technische Assistenz GmbH et al.* (1981), 127 D.L.R. (3d) 736, 31 B.C.L.R. 73 (B.C.C.A.); *Piranna Small Car Centres Ltd. v. Rumm, Measures and Kathcare Enterprises Ltd.*, [1981] 5 W.W.R. 79, (1981), 27 B.C.L.R. 292 (B.C.S.C.).

<sup>58</sup> The clause was also treated as conclusive as a matter of both Newfoundland and Quebec law in the civil lease and contract actions, *supra*, footnotes 6 and 8.

would be in breach of the power contract. The question of what notice should be taken of the Reversion Act in an action on the contract would be a matter of Quebec conflicts law. Common law conflicts rules suggest that since the Reversion Act was not part of the proper law of the contract nor a law of the place of performance (assuming the Supreme Court was correct on that point) no notice should be taken of it. If the Quebec court determined the contract was breached, then judgment for damages would presumably have been awarded. That Quebec judgment would, *prima facie*, have been enforceable both in that province and in Newfoundland, since CFLCo had submitted to the jurisdiction of the Quebec court by the choice of jurisdiction clause in the power contract. Newfoundland, as a matter of Newfoundland conflicts law, might have refused to recognize the Quebec judgment on grounds of public policy. Legally, all the rights of Hydro Quebec under the contract would have remained intact. Practically, Hydro Quebec would have been just another judgment creditor with a dry judgment, since the Reversion Act made no provision for compensation to CFLCo. If the company truly was not sterilized in its essential status and capacities—a question answered on legal rather than practical grounds—then Hydro Quebec could have waited, like any other judgment creditor, for its judgment debtor to recover the ability to pay.

### *The Legacy of Churchill*

#### (1) *Provincial Jurisdiction in Contract*

*Churchill Falls* assuredly does not change the result of a case like *The Queen v. Thomas Equipment*<sup>59</sup> insofar as territorial restrictions on legislative jurisdiction are concerned—at least in the absence of the doctrine of colourability. Since *Ladore v. Bennett* is the primary test for extraterritorial legislative competence, legislation such as the Farm Implement Act of Alberta<sup>60</sup> should still be valid and applicable to any contracts caught by it. The Act was held to be legislation in relation to the regulation of a local business and any incidental effect on extraprovincial rights is now considered constitutionally irrelevant. The key will be the judicial classification of the matter in relation to which the Act was passed, always bearing in mind the possible application of the doctrine of colourability.

There will still, therefore, be a danger that the legislation will be held to be in relation to extra-provincial rights. The characterization might be established either by extrinsic evidence as to the precise concern of the government or by inference from the fact that the Act operates exclusively against extra-provincial rights. The rights, which are alleged to exist extra-provincially, will have been so located by one or more of

<sup>59</sup> *Supra*, footnote 51.

<sup>60</sup> R.S.A. 1970, c. 136.



the rules suggested by *Churchill Falls* or by some rule not eliminated from consideration by that case. The possibility that was rejected in *The King v. Eastern Terminal Elevator Co.*,<sup>61</sup> that legislative jurisdiction might be determined by percentage, looms. For example, if it could have been established in *Thomas Equipment* that most of the vendors of farm machinery, or even just fifty-one percent were non-Albertans and that their contractual rights (however located) were derogated from (as they certainly were in that case despite the denial of Martland J. that the case had anything to do with contracts), the legislation might have been considered to have been in relation to extra-provincial contract rights.

*Ladore v. Bennett* would not seem to preclude applications to read down legislation by way of the common law rules of statutory interpretation, confining the scope of legislation to acts and persons within the borders of the legislating state in the absence of express contrary direction. Even though inclusion might be constitutionally permissible, an argument that the legislation could not have been intended to apply to other than entirely domestic facts would still seem to be available.

Whether a province could legislatively deem a contract to be performed or made or actionable in the province for purposes of assuring a valid provincial law remains an open question. The Supreme Court borrowed conflicts concepts but by borrowing more than one it would appear to have constitutionalized none. In any event, the existence of alternative rules, with all the concomitant problems discussed above, leaves the field so wide open that any unilateral assumption of jurisdiction by a provincial deeming provision is probably unnecessary.

## (2) *The Private Law Repercussion*

In no reported case involving the power contract, is there any indication that the jurisdiction selecting clause should be considered anything but absolute. Yet by common law conflicts rules in force in the provinces such clauses are considered to be persuasive only, though certainly highly persuasive.<sup>62</sup> In the right circumstances a court will exercise jurisdiction in spite of a jurisdiction selecting clause.<sup>63</sup>

The correctness of the common law rule in Canada may now be subject to some controversy. MacIntyre J. was purporting to borrow a conflicts rule to solve a constitutional problem. In the transition, qualifications were lost. The question which arises, but which cannot be answered, is whether *Churchill Falls* now represents the current law for conflicts cases as well as for constitutional cases with respect to the weight to be given to jurisdiction selecting clauses. It is to be hoped that

<sup>61</sup> [1925] S.C.R. 434, [1925] 3 D.L.R. 1.

<sup>62</sup> See cases cited *supra*, footnote 57.

<sup>63</sup> See, e.g. *Piranna Car Centres v. Rumm*, *ibid.*

the rule as applied in *Churchill Falls* will be limited to its constitutional purpose.

### (3) *Is The Impasse Impassible?*

Legislatively Newfoundland appears to have reached the end of the line as far as recapture of its hydro electric power is concerned. Not only is it difficult to imagine another head of power which might be employed but it is also inconceivable that another attempt could escape being labelled colourable.

Should Quebec suffer a change of mind with respect to the amount of power it wants to receive under the power contract and/or the price it wishes to pay for the power it does receive, Hydro Quebec could be directed to renegotiate the contract. Legislation in Quebec would thus be unnecessary but, of course, the obvious question is whether Quebec could legislate with respect to the power contract. Since the Supreme Court of Canada held that one province could not because contract rights were located in the other province, it might follow that the other province could.<sup>64</sup> Applying the same rules used in *Churchill Falls* to locate the contract rights in Quebec, however, one finds that performance is also to take place in Newfoundland and that an action can be brought in that province if the jurisdiction selecting clause is not considered absolute. The power contract would be aimed at and the contract rights of CFLCo in Newfoundland would be interfered with by Quebec legislation. It would surely be considered fortuitous and irrelevant that CFLCo might want that result. It is the existence of the interference extraterritorially that is crucial, not the nature of the interference. Of course if Quebec could formulate some other provincial object then *Ladore v. Bennett* might save the legislation but overcoming judicial notice of history is difficult.

Parliament, however, would appear to have legislative capability under more than one head of power. Two possible heads of power were raised in *Churchill Falls* itself, but were not discussed in the reasons for judgment since the provincial legislation was declared to be *ultra vires* because of the doctrine of extraterritoriality. Parliament's jurisdiction

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<sup>64</sup> But cf. *Central Canada Potash Ltd. v. Attorney General of Saskatchewan*, [1979] 1 S.C.R. 42, at pp. 75-76 (1978), 88 D.L.R. (3d) 609, at p. 631, where Laskin C.J.C. stated: "I do not agree with Chief Justice Culliton that the consequence of invalidating the provincial scheme in this case is to move to the Parliament of Canada the power to control production of minerals in the Province and the price to be charged at the mine. There is no accretion at all to federal power in this case, which does not involve federal legislation, but simply a determination by this Court, in obedience to its duty, of a limitation on provincial legislative power. It is true, as he says, that ... the *British North America Act*, distributes all legislative power either to Parliament or to the provincial Legislatures but it does not follow that legislation of a Province held to be invalid may *ipso facto* be validly enacted by Parliament in its very terms".

over interprovincial trade and commerce and over interprovincial works and undertakings would each appear to be sufficient. Laskin C.J.C. was confident in *Fulton v. Energy Resources Conservation Board and Calgary Power Ltd.*<sup>65</sup> that, should Parliament ever care to legislate, any federal regulation of the transmission of electric power from Alberta to British Columbia would be unimpeachable as legislation in relation to section 92(10)(a).<sup>66</sup> Peace, order and good government might even be invoked as a long shot on the basis that the matter is beyond the control of either province and therefore of national dimensions—even though only two provinces are concerned.<sup>67</sup> As a last resort, Parliament could even invoke the declaratory power under section 92(10)(c) and declare the generating plant on the Churchill River to be a work for the general advantage of Canada. Since section 92(10)(a) is undoubtedly applicable, a section 92(10)(c) declaration would appear somewhat heavy handed as a first choice.

The impasse is not, therefore, totally inescapable, though unilateral resolution by either of the provinces concerned is probably foreclosed. Ultimately, Parliament has the authority under one or more heads of power to impose a solution if it should choose to do so.

### Conclusion

Relief at the selection of *Ladore v. Bennett* as the correct test for determining whether a province has exceeded the territorial limitations on its legislative jurisdiction is tempered by the immediate reintroduction of the *Royal Bank* approach. All the problems that approach entails are simply compounded by the enunciation of alternative rules, which are not perhaps exhaustive, for locating the choses in action which rights under a contract constitute. *Churchill Falls* does, however, limit the operation of the *Royal Bank* approach to legislation 'aimed at' civil rights. So long as the legislation can be said to be in relation to another provincial object, incidental interference can now be disregarded.

The application of the doctrine of colourability clarifies the operation of that doctrine. Since it is unlikely that the judiciary is about to abandon colourability, any enlightenment is gratefully received. Nevertheless, the allegation of bad faith implicit in the doctrine is probably unjustified and certainly not desirable.<sup>68</sup> Since legislatures are always doing indirectly what they cannot do directly it is anomalous that they should be held to have acted colourably and thus in bad faith only when

<sup>65</sup> [1981] 1 S.C.R. 153, (1981), 118 D.L.R. (3d) 577.

<sup>66</sup> Cf. also federal jurisdiction over interprovincial transmission of gas: *Re Saskatchewan Power Corp. et al. and Trans Canada Pipelines et al.* [1979] 1 S.C.R. 297, (1978), 88 D.L.R. (3d) 289.

<sup>67</sup> See *Schneider v. The Queen*, *supra*, footnote 15, at pp. 131 (S.C.R.), 434 (D.L.R.).

<sup>68</sup> As is pointed out in P. Hogg, *Constitutional Law of Canada* (1977), p. 87.

they appear to have done everything right in drafting the legislation and to have attempted to act within the limits imposed by the Constitution.

Like the *Constitutional Amendment Reference*,<sup>69</sup> this case might be regarded as producing a desirable result. Unilateral action has been prevented. A solution must be achieved by negotiation or by federal legislation. Either process should be able to achieve a compromise. Nevertheless, there is something strange in the fact that Quebec has been able to persuade the Supreme Court of Canada to strike down legislation almost identical in form and effect to legislation passed by Quebec and upheld for that province by the Quebec Court of Appeal as recently as 1981.<sup>70</sup>

ELIZABETH EDINGER\*

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LAWYERS—NEGLIGENCE—STANDARD OF CARE.—It now seems well established that lawyers, in common with other professionals, must reconcile themselves to an ever widening range of liability to an ever widening range of people. Liability to a client with whom a lawyer has a contractual link may lie either in contract, as has traditionally been the case, or, in all probability in light of recent developments, in tort.<sup>1</sup> In the

<sup>69</sup> *Supra*, footnote 18.

<sup>70</sup> In *Société Asbestos Ltée. v. Société Nationale de l'Amiante et al.* (1981), 128 D.L.R. (3d) 405, the Quebec Court of Appeal held that the Quebec government had the right to expropriate assets of a federally incorporated asbestos company in the face of arguments that the Acts sterilized the status and capacities of a federal company and/or that the Acts were legislation in relation to interprovincial and/or international trade in asbestos fibre. Extrinsic evidence was tendered in relation to the latter argument and was admitted, but the court considered that the legislation was not colourable. This Quebec decision was relied on by the Newfoundland Court of Appeal, *supra*, footnote 10, in upholding the right of Newfoundland also to expropriate property within its boundaries.

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<sup>1</sup> The law is still unsettled but in Canada and in other Commonwealth jurisdictions it appears to be moving towards concurrent liability: Canada: *Power v. Halley* (1978), 88 D.L.R. (3d) 381 (Nfld. S.C.); *Jacobsen Ford-Mercury Sales Ltd. v. Sivertz* (1980), 103 D.L.R. (3d) 480, [1980] 1 W.W.R. 141 (B.C.S.C.).

England: *Midland Bank Trust Co. v. Hett, Stubbs & Kemp*, [1979] Ch. 384, [1978] 3 All E.R. 571 (Ch. D.).

Australia: *MacPherson & Kelly v. Kevin J. Prunty & Assoc.*, [1983] 1 V.R. 573 (Full Ct.); *Aluminium Products (Qld.) Pty. Ltd. v. Hill & Ors.*, [1981] Qd. R. 33 (Full Ct.); *Valic v. Bilinsky*, [1983] 2 N.S.W.L.R. 472 (Sup. Ct.); *Watts v. Public Trustee for Western Australia*, [1980] W.A.R. 97 (Full Ct.).

New Zealand: In *McLaren Maycroft & Co. v. Fletcher Development Co. Ltd.*, [1973] 2 N.Z.L.R. 100, the Court of Appeal affirmed that only contractual duties of care exist

wake of *Anns v. Merton London Borough Council*<sup>2</sup> liability in negligence may be imposed with respect to persons who may never have met the lawyer,<sup>3</sup> who could not in any sense be said to have relied on care being taken by the lawyer,<sup>4</sup> or who may even have had separate legal representation.<sup>5</sup> Moreover, if some recent Ontario cases are accepted, negligence claims will lie against barristers for their actual conduct of litigation.<sup>6</sup> This comment is, however, primarily concerned with the lawyer who is, or who is acting as, a solicitor.

All of this being accepted, enthusiastically or reluctantly, the field of battle may now be moving to the issue of the standard of care to be

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where a contract exists between the professional and his client. In the later case of *Rowe v. Turner Hopkins & Partners*, [1982] 1 N.Z.L.R. 178, the Court of Appeal gave a strong indication that it would be prepared to reconsider *McLaren Maycroft* in light of recent developments. *Inder Lynch Devoy & Co. v. Subritzky*, [1979] 1 N.Z.L.R. 87, at p. 94 (H.C.) suggests concurrent liability, as does Cooke J. in *N.Z. Social Credit Political League v. O'Brien*, [1984] 1 N.Z.L.R. 84, at p. 88 (C.A.).

For a review of authority on the contract/tort issue generally see *John Maryon International Ltd. v. New Brunswick Telephone Co. Ltd.* (1983), 141 D.L.R. (3d) 183 (N.B.C.A.); *Crocker v. Sundance Northwest Resorts Ltd.* (1983), 150 D.L.R. (3d) 478, 43 O.R. (2d) 145 (Ont. H.C.). The Supreme Court of Canada may have the opportunity of re-considering its judgment in *Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*, [1972] S.C.R. 769, (1972), 26 D.L.R. (3d) 699, in hearing the appeal in *Central Trust Co. v. Rafuse et al.* (1983), 147 D.L.R. (3d) 260, 120 A.P.R. 125 (N.S.C.A.), a case involving, interestingly enough, solicitor's negligence. For a good review of the whole question see C. French, *The Contract/Tort Dilemma* (1982), 5 Otago L. Rev. 236.

<sup>2</sup> [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.).

<sup>3</sup> As in *Tracy v. Atkins* (1980), 105 D.L.R. (3d) 632, 16 B.C.L.R. 223 (B.C.C.A.) (plaintiff an unrepresented party in a real estate transaction).

<sup>4</sup> As in *Gartside v. Sheffield, Young & Ellis*, [1983] N.Z.L.R. 37 (C.A.) (plaintiff a disappointed beneficiary under a will not executed because of delay by defendant solicitor).

<sup>5</sup> As in *Allied Finance & Investments Ltd. v. Haddow*, [1983] N.Z.L.R. 22 (C.A.) (plaintiff lender, with independent representation, relied on representation by borrower's solicitor as to sufficiency of security). More recently, in *N.Z. Social Credit Political League v. O'Brien*, *supra*, footnote 1, the N.Z. Court of Appeal, in refusing to recognize the possibility (in the absence of malice) of a claim by A against the solicitor who acted for B in launching a suit against A without reasonable grounds, treated *Allied Finance* as an exceptional case. As was noted by Casey J., however, in *N.Z. Social Credit Political League*, *ibid.*, at p. 97, ". . . once a principle has been extended to exceptional situations experience shows an inevitable tendency for it to be more widely applied". See too *Palmeri & Palmeri v. Littleton et al.*, [1979] 4 W.W.R. 577 (B.C.S.C.) and the comment thereon by R.H. Guile, *Lawyer's Lumps* (1980), 38 *Advocate* 477.

<sup>6</sup> *Demarco v. Ungaro et al.* (1979), 95 D.L.R. (3d) 385, 21 O.R. (2d) 673 (Ont. H.C.); *Karpenko v. Paroian, Courey, Cohen & Houston* (1980), 30 O.R. (2d) 776 (Ont. H.C.); *Pelky et al. v. Hudson Bay Insurance Co. et al.* (1982), 35 O.R. (2d) 97 (Ont. H.C.). These cases did not rely on *Anns* for their result, but certainly manifest the expansion in liability heralded by *Anns*. The position taken in these cases is similar to that taken in the United States: see *Woodruff v. Tomlin*, 616 F. (2d) 924 (6th Cir., 1980). Despite the general expansion of the law of negligence other Commonwealth jurisdictions have retained the barristers' immunity: see *Saif Ali v. Sydney Mitchell & Co.*, [1980] A.C.

expected of the lawyer. In *Polischuk v. Hagarty*<sup>7</sup> the High Court of Ontario and in *Edward Wong Finance Co. Ltd. v. Johnson, Stokes and Master* the Privy Council came to conclusions about the standard of care which, in the light of earlier law, are not only surprising, but which, it will be argued, are unduly onerous to the professional person. A survey of the earlier law is thus a necessary precondition to a consideration of those two cases.

### *The Earlier Law*

Two preliminary points may be made before discussing the general question of the standard of care. First, until very recently, lawyers' liability to their clients had been seen as sounding only in contract.<sup>9</sup> It must be remembered, then, that most references to "negligence" claims against lawyers are referring not to tort claims at all, but rather to claims in contract, based upon an alleged breach of the universally implied duty to take care that is a part of every retainer agreement. Most of the time, of course, this will not matter to the all important *standard* of care to be applied. It is generally treated as one and the same, whether the duty to be careful is the tort duty, or that implied in the contract.<sup>10</sup> There may, however, in odd cases be some difference in the applicable standard. It was suggested on one occasion that the standard in contract might be higher than that in tort in the case of a solicitor possessing above average skill and experience. Megarry J. has stated:<sup>11</sup>

If the client engages an expert, and doubtless expects to pay commensurate fees, is he not entitled to expect something more than the standard of the reasonably competent? . . . The uniform standard of care postulated for the world at large in tort hardly seems appropriate when the duty is not one imposed by the law of tort but arises from the contractual obligation existing between the client and the particular solicitor or firm in question.

This suggestion, although tantalizing, has not yet had a practical effect.<sup>12</sup> Nonetheless, solicitors who hold themselves out to clients as possessing above average skills (and it is a rare solicitor who does not so hold himself out) should take note of this possible complication.

198, [1978] 3 All E.R. 1033 (H.L.); *Rees v. Sinclair*, [1974] 1 N.Z.L.R. 180 (C.A.); *Thompson v. Howley*, [1977] 1 N.Z.L.R. 16 (S.C.); *Feldman v. A Practitioner* (1978), 18 S.A.S.R. 238 (S.C.).

<sup>7</sup> (1983), 149 D.L.R. 65, 42 O.R. (2d) 417 (Ont. H.C.).

<sup>8</sup> [1984] A.C. 296, [1984] 2 W.L.R. 1 (P.C.).

<sup>9</sup> *Groom v. Crocker*, [1939] 1 K.B. 194, [1938] 2 All E.R. 394 (C.A.). The authorities, including 19th century cases recognizing concurrent liability, are well reviewed in *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp*, *supra*, footnote 1.

<sup>10</sup> *Esso Petroleum v. Mardon*, [1976] Q.B. 801, at p. 820, [1976] 2 All E.R. 5, at p. 15 (C.A.). This case led the way to the recognition of concurrent tort/contract liability.

<sup>11</sup> *Duchess of Argyll v. Beuselinck*, [1972] 2 Lloyd's L.R. 172, at p. 183 (Ch.D.).

<sup>12</sup> R.M. Jackson, J.L. Powell, *Professional Negligence* (1982), p. 10, n. 55.

Second, in considering the standards of care imposed upon a solicitor in contract and in tort it needs also to be borne in mind that the issue of a lawyer's liability to his client is not necessarily concluded by a favourable determination that the requisite degree of care has been met. A court wishing to find in the client's favour may hold, through the implication of terms into the retainer, that contractual obligations of the lawyer exist *beyond* the mere duty to take care, and these can amount to a virtual guarantee of performance.<sup>13</sup> There has recently been a focussing on this largely unexplored effect of the retainer agreement and the result has been the possibility of the imposition of stricter duties in contract than in tort. This presages more bad news for lawyers and its possible ramifications are touched on in the later discussion of *Polischuk v. Hagerty*.<sup>14</sup>

With those two provisos in mind we can turn to the general question of the standard of care in negligence claims against professionals. In such cases the overworked reasonable man is quite fairly asked to vacate his seat on the judicial omnibus in favour of "a normal prudent practitioner of the same experience and standing"<sup>15</sup> who sets the standard of conduct that must be reached. It seems acceptable to all that the public, who presumably hire the professional precisely because of his skill or knowledge of a level above that of the reasonable layman, should be entitled to demand adherence to this higher level of competence. The corollary of this position, and safeguard for the lawyer, battered though he may be by recent attacks, should be a security from complaint against his performance so long as he ensures compliance with this set standard of practice. Given the apparently universal acceptance of the test established by "the ordinary, prudent solicitor" a lawyer may be forgiven for assuming that, at least in cases of professional negligence, Lord Alness stated the law correctly in *Vancouver General Hospital v. McDaniel*:<sup>16</sup>

A defendant charged with negligence can clear his feet if he shows that he has acted in accord with *general and approved practice*.

This statement has been approved on more than one occasion by the Supreme Court of Canada,<sup>17</sup> and although attempts have been made to

<sup>13</sup> "A contract gives rise to a complex of rights and duties of which the duty to exercise reasonable care and skill is but one": Oliver J. in *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp*, *supra*, footnote 1, at pp. 434 (Ch.), 611 (All E.R.).

<sup>14</sup> *Supra*, footnote 7.

<sup>15</sup> *Aaroe et al. v. Seymour et al.* (1956), 6 D.L.R. (2d) 100, at pp. 101-102, [1956] O.R. 736, at pp. 737-738 (Ont. H.C.), *aff'd* (1957), 7 D.L.R. (2d) 676 (Ont. C.A.); *Brenner et al. v. Gregory et al.* (1972), 30 D.L.R. (3d) 672, at p. 677, [1973] 1 O.R. 252, at p. 257 (Ont. H.C.); *Ostrowski v. Lotto* (1971), 15 D.L.R. (3d) 402, at p. 412, [1971] 1 O.R. 372, at p. 382 (Ont. C.A.), *aff'd* [1973] S.C.R. 220, (1973), 31 D.L.R. (3d) 715; *Eady v. Tenderenda*, [1976] S.C.R. 599, at p. 619, (1974), 51 D.L.R. (3d) 79, at p. 87. See generally J. Charlesworth, *Negligence* (6th ed., 1977), chap. 13.

<sup>16</sup> [1934] 4 D.L.R. 593, at p. 597, [1934] 3 W.W.R. 619, at p. 623 (P.C.) (emphasis added).

<sup>17</sup> *MacLeod v. Roe*, [1947] S.C.R. 420, at pp. 424, 430, [1947] 3 D.L.R. 241, at pp.

explain it away<sup>18</sup> it remains a succinct summary of a strong line of authority and a practical recognition of the usual mode of defence in professional negligence cases.

The other judgment most often referred to in support of the conclusive weight to be afforded a profession's "general and approved practice" is McNair J.'s direction to the jury in *Bolam v. Friern Hospital Management Committee*<sup>19</sup> which again has been approved by the highest authority.<sup>20</sup> Its general tenor and treatment of the more sophisticated issue of adherence to one commonly accepted practice when others exist, bear repeating:<sup>21</sup>

But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art . . . a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view . . . it is not essential for you to decide which of two practices is the better practice, as long as you accept that what the defendants did was in accordance with a practice accepted by responsible persons.

It is difficult to argue with this proposition. A stricter view which would require the individual professional to go beyond the practices sanctioned by his compatriots would be an unrealistic and wistful approach. It is difficult enough for today's busy practitioner to keep up with current developments in his profession. To expect and demand a continual individual judging of these developments, and a consequential individual innovation beyond current standards should a suspicion of negligence be raised, is to demand the unattainable. The touchstone of "the ordinary,

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243, 248; *London & Lancashire Guarantee & Accident Co. v. Drolet*, [1944] S.C.R. 82, at p. 86, [1944] 1 D.L.R. 561, at p. 564; *Vermont Construction Inc. v. Beaton*, [1977] 1 S.C.R. 758, at p. 770, (1976), 67 D.L.R. (3d) 95, at p. 103. In *Ware's Taxi Ltd. v. Gilliam*, [1949] S.C.R. 637, [1949] 3 D.L.R. 721, it was made clear that in order to rely on this defence of customary practice, it would be necessary to show that the practice was one of long standing.

<sup>18</sup> A.M. Linden, *Canadian Tort Law* (3rd ed., 1982), pp. 161-164. Chapter 6 of this work by Linden contains a valuable discussion of customary practice, with different conclusions reached than by the author of this article.

<sup>19</sup> [1957] 1 W.L.R. 582, [1957] 2 All E.R. 118 (Q.B.D.).

<sup>20</sup> *Maynard v. West Midlands Regional Health Authority*, [1984] 1 W.L.R. 634 (H.L.); *Whitehouse v. Jordan*, [1981] 1 W.L.R. 246, at p. 258, [1981] 1 All E.R. 267, at p. 277 (H.L.); *Chin Keow v. Gov't of Malaysia*, [1967] 1 W.L.R. 813, at p. 816 (P.C.); Aylesworth J.A. in delivering the judgment of the Ont. C.A. in *Ostrowski v. Lotto, supra*, footnote 15, at pp. 412 (D.L.R.), 382 (O.R.), quoted at length from this passage from *Bolam* and this judgment of Aylesworth J.A. was adopted by the Supreme Court of Canada, *supra*, footnote 15, at pp. 231 (S.C.R.), 723 (D.L.R.).

<sup>21</sup> *Supra*, footnote 19, pp. 586-588 (W.L.R.), 121-122 (All E.R.).



prudent practitioner" provides a realistic and reasonable compromise between the need to protect the layman, and realism.

It would be naive, and probably negligent, however, to accept as conclusive the standard of customary practice. Simmering alongside the seemingly universal test of conduct equalling that of "the ordinary, prudent practitioner" is a seldom intersecting line of authority holding that although a customary practice in a business or trade may be relevant in the search for negligence, it is by no means conclusive, and adherence to such common practice may still attract liability if the practice adopted is itself determined to be a careless one.<sup>22</sup> It is surprising how seldom courts have faced the issue and dealt with the inevitable conflict between the two streams of authority. Normally one or the other approach is simply adopted to suit the desired result. When the conflict has been discussed, courts have predictably preferred the decisions which allow them to retain the power to pass judgment on the overall practice followed by a particular calling, and, should it be found wanting, affix liability on the hapless individual who has followed such practice.<sup>23</sup> The sentiment underlying this approach was well summarized some years ago by Justice Holmes, who stated:<sup>24</sup>

What is usually done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it is usually complied with or not.

Needless to say, such a view assumes that the judge, whatever his background and experience, or lack thereof, is the proper final arbiter of "reasonable prudence" in an industry.

Now in the context of general negligence law, this view as expressed by Holmes seems innocuous enough. In rejecting as an automatic defence

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<sup>22</sup> Linden, *op. cit.*, footnote 18, chap. 6; Charlesworth, *op. cit.*, footnote 15, paras. 202, 203.

<sup>23</sup> Charlesworth, *ibid.*, para. 202, n. 53 states that Lord MacDermott in *Whiteford v. Hunter*, [1950] W.N. 553 (H.L.) said of Lord Alness' dictum in *McDaniel* "such expressions beat the air and are meaningless unless used in relation to some particular condition or state of affairs". Although Lord MacDermott may have said this, his judgment is not reported in the citation given by Charlesworth nor in the alternative report of *Whiteford v. Hunter* (1950), 94 Sol. Jo. 758.

The "reconciliation" of the two views is perhaps best summed up in the manner suggested by Whittaker J. in *Can. Forest Products Ltd. v. Hudson Lumber Co. Ltd.* (1959), 20 D.L.R. (2d) 712, at p. 719 (B.C.S.C.) where he quotes Lord Alness' dictum from *McDaniel* and further states:

An adherence to general practice is not necessarily conclusive as to lack of negligence. There may be special circumstances requiring a defendant to take some added precaution . . . Generally speaking, a plaintiff who alleges that there should be some departure from that which experience has shown to be reasonable and proper in an industry, assumes a heavy onus.

<sup>24</sup> *Texas & Pacific Rail Co. v. Behymer*, 189 U.S. 468, at p. 470 (1903).

the unthinking compliance with customary practice, the law is not surprisingly preventing individuals from hiding behind a cloak of the collective negligence of some group to which a connection can be claimed. Assuming, for instance, that it could be shown that most long haul truck drivers drove recklessly when under a deadline, this could hardly be expected to exonerate an individual truck driver whose similar conduct caused damage. Likewise the official starter of a snowmobile race who, in flagging the vehicles, followed the usual "macho" practice of coming as close as possible to them, causing the plaintiff's snowmobile to glance off the starter and slam into a wall, can hope for little assistance from the fact that other race starters follow the same practice.<sup>25</sup>

Beyond the ambit of general negligence law, it is in the particular context of injuries to workers in industrial settings that the rejection of the customary practice of a trade as a complete defence is most often seen.<sup>26</sup> Here, a legitimate desire to protect workmen has led to the imposition of liability on the employer by reason of failure to utilize a safety device<sup>27</sup> or follow a practice of safety<sup>28</sup> known, but neither adopted generally in the industry nor required by any governing regulation. The present practical impact of these cases has been reduced by the effect of Workers' Compensation schemes. Theoretically, however, they remain to illustrate the obvious legislative function assumed by a court which is willing to reject as a conclusive defence the adoption of a trade custom. An employer who complied with all existing safety regulations and the customary practice of his industry might still face the onerous sanction of a damage award in negligence imposed by a court declaring what the proper practice was.

It is when this line of authority spills over into the context of professional negligence that its application becomes most controversial. In the industrial field, and "general" negligence law, the relevance of customary practice differs at least in degree from its force in the professional setting. Anyone, judge or layman, can decide if a safety railing should have been installed on a catwalk, or if protective eyewear should have been supplied to employees. In the face of a positive finding of negli-

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<sup>25</sup> *Dyck v. Manitoba Snowmobile Ass'n. Inc. & Wood*, [1981] 5 W.W.R. 97, at p. 106, (1981), 11 Man. R. (2d) 308, at p. 319 (Man. Q.B.) where Kroft J. stated: "... even accepting as I do that [the starter] followed his usual procedures in flagging the finish of the race and that those procedures were commonly followed by others, I cannot suspend my own common sense or abdicate my responsibility to evaluate the conduct of the defendant". This decision, which denied liability because of a waiver form signed by the plaintiff driver, was affirmed on appeal, (1982), 136 D.L.R. (3d) 11, [1982] 4 W.W.R. 318 (Man. C.A.).

<sup>26</sup> See Charlesworth, *op. cit.*, footnote 15, pp. 200-204.

<sup>27</sup> *Morris v. West Hartlepool S.N. Co. Ltd.*, [1956] A.C. 552, [1956] 1 All E.R. 385, [1956] 1 W.L.R. 177 (H.L.).

<sup>28</sup> *Cavanagh v. Ulster Weaving Co.*, [1960] A.C. 145, [1959] 2 All E.R. 745, [1959] 3 W.L.R. 262 (H.L.).

gence, the significance of the general practice in the industry as a whole soon fades. The very nature of a *profession*, however, adds the additional variable of expertise not shared by the untrained. It is this factor which places the judge on a shaky foundation when he chooses to disregard the overall practical judgment made by a profession on a given problem, and proceeds to impose his own view as to what would have been the better path to follow. The lawyer who finds himself defending a claim in negligence is in an unenviable position in an insiders' game, for in this professional field the judge will feel most justified in asserting his personal view as to what should have been the practice followed.

It is, of course, only when a claim of professional negligence is made in circumstances which truly involve a special expertise, a weighing of factors beyond the scope of the layman's knowledge, that the collective view of the profession as manifested in the practice of "the normal, prudent practitioner" ought to be respected. There may well be suits against professionals in which the professional factor is incidental only, and which involve allegations of negligence that are capable of being judged by a layman. *Chasney v. Anderson*,<sup>29</sup> the Canadian decision most often cited as an example where adherence by a professional to a customary practice was rejected as a defence to a negligence claim, is best seen as such a case. Though warned by his assistant, the defendant surgeon had not conducted an adequate post operation search for sponges, one of which was left behind, with the result that the child who had undergone the operation suffocated. The defence evidence showed that it was not the common practice in the particular hospital involved to attach precautionary tape or string to the sponges, or to count the sponges. Other evidence also showed, however, that both nurses who could have performed a sponge count and taped sponges were available, and such safety measures were taken at other institutions. Thus the process of judging the allegation of negligence was hardly one upon which professional expertise as to customary practice would be helpful. This is clearly the view of McPherson C.J. as set out in one of the two Manitoba Court of Appeal judgments expressly adopted in the brief Supreme Court of Canada reasons:<sup>30</sup>

While the method in which the operation was performed may be purely a matter of technical evidence, the fact that a sponge was left in a position where it was or was not dangerous is one which the ordinary man is competent to consider in arriving at a decision as to whether or not there was negligence.

Viewed from this perspective, *Chasney v. Anderson* is fairly uncontroversial and is easily seen as "just another negligence case" which happened to involve a surgeon.

<sup>29</sup> [1950] 4 D.L.R. 223 (S.C.C.), aff'g [1949] 4 D.L.R. 71, [1949] 2 W.W.R. 337 (Man. C.A.); relied upon heavily by Linden, *op. cit.*, footnote 18.

<sup>30</sup> *Ibid.*, at pp. 74 (D.L.R.), 341 (W.W.R.), adopted by the S.C.C. *ibid.*, at p. 224.

More recent, and certainly stronger Supreme Court of Canada authority on the point can be found in *Reibl v. Hughes*,<sup>31</sup> the landmark decision on "informed consent". The case dealt with the parameters of the positive duty imposed upon a doctor to advise his patient as to the material risks of proposed treatment. In the course of delivering the judgment of the Court, Laskin C.J.C. commented upon the weight to be given expert evidence as to the common practice adopted by the medical profession with respect to which risks were or were not generally disclosed to patients. Laskin stated that, as far as the duty of disclosure was concerned:<sup>32</sup>

To allow expert medical evidence to determine what risks are material and, hence, should be disclosed and, correlatively, what risks are not material is to hand over to the medical profession the entire question of the scope of the duty of disclosure including the question whether there has been a breach of that duty . . .

In the end he concluded:<sup>33</sup>

Of course, the medical evidence was relevant to what that duty entailed but, that said, it was for the *trier of fact* to determine the scope of the duty and to decide whether there had been a breach of the duty.<sup>34</sup>

A decision whether or not to disclose a risk to a patient will require a balancing by the doctor of the competing factors of the degree of urgency with which the treatment is required by the patient against the number of reported occurrences of adverse consequences suffered by others who have received treatment similar to that proposed. The issue of disclosure of risks is therefore arguably a *purely* professional one and if it is seen as such, Laskin C.J.C.'s views are clear authority for the proposition that the commonly adopted practice of the profession is not an unfailing defence.

There remains, however, an alternate, though perhaps weaker view of *Reibl v. Hughes* which allows for an interpretation of the judgment as conforming to the approach taken in *Chasney v. Anderson*. Throughout his reasons in *Reibl v. Hughes*, Laskin C.J.C. is at pains to stress the relevance of the "special considerations affecting the particular patient"<sup>35</sup> as factors of prime importance in determining the extent of the duty of disclosure. These special considerations, be they emotional or indeed economic, such as the impending pension rights of Mr. Reibl, would require evidence beyond the medical field, and include testimony from the patient himself, members of his family and presumably other lay

<sup>31</sup> [1980] 2 S.C.R. 880, (1981), 114 D.L.R. (3d) 1.

<sup>32</sup> *Ibid.*, at pp. 894 (S.C.R.), 13 (D.L.R.).

<sup>33</sup> *Ibid.*, at pp. 928 (S.C.R.), 34-35 (D.L.R.) (Emphasis added).

<sup>34</sup> It is to be noted that Laskin C.J.C. viewed this issue as one of fact. This view is to be contrasted with that of Oliver J. in *Midland Bank Trust Co. v. Hett, Stubbs, & Kemp*s, supra, footnote 1; see *infra*, p. 234.

<sup>35</sup> *Supra*, footnote 31, at pp. 898 (S.C.R.), 16 (D.L.R.).

witnesses as well.<sup>36</sup> This takes the issue of which risks to disclose *outside* the exclusive preserve of the profession and arguably leaves intact the standard of skill matching that of the "ordinary prudent practitioner" when dealing in the purely professional domain. Laskin C.J.C. himself lends support to this approach when he emphasises:<sup>37</sup>

The issue under consideration is a different issue from that involved where the question is whether the doctor carried out his professional activities by *applicable professional standards*.

It is regrettable that the Chief Justice, in delivering those portions of his judgment which can at least arguably be interpreted as rejecting as conclusive the defence of compliance with a standard professional practice, did not refer to *Bolam v. Friern Hospital Management Committee*<sup>38</sup> or other similar authorities. In *Bolam*, after all, one of the charges of negligence was the physician's failure to disclose a risk, yet the much approved jury direction<sup>39</sup> of McNair J., enshrining the standard of "the ordinary prudent practitioner", applied equally to this as to the other allegations of negligence. Whether or not Laskin C.J.C.'s views can be taken beyond the particular confines of "informed consent" in medical cases, the conflict of his reasoning with the view of McNair J. continues to make this a live issue, at least in England. It appears that the House of Lords may shortly be called upon to express its views on the point.<sup>40</sup>

Beyond *Reibl v. Hughes*, there is a slight amount of other case authority,<sup>41</sup> and universal academic approval<sup>42</sup> for the proposition that even in the professional setting, adherence to the common practice does not ensure immunity from attack. Indicative are the words of Lord Wright in *Lloyds Bank v. E.B. Savory & Co.*<sup>43</sup> where (while also holding that in fact the alleged common practice followed had not been proven) he stated:<sup>44</sup>

It is argued that . . . a bank is not negligent if it takes all precautions usually taken by bankers. I do not accept that latter proposition as true in cases where the ordinary

<sup>36</sup> *Ibid.*, at pp. 894-895 (S.C.R.), 13 (D.L.R.).

<sup>37</sup> *Ibid.* (Emphasis added).

<sup>38</sup> *Supra*, footnote 19.

<sup>39</sup> Set out in text, *supra*, at footnote 21.

<sup>40</sup> See *Sidaway v. Bd. of Gov's of the Bethlem Royal Hospital et al.*, [1984] 2 W.L.R. 778 (C.A.), leave to appeal to the House of Lords granted.

<sup>41</sup> *Clarke v. Adams* (1950), 94 Sol. Jo. 599 (K.B.D.); *Lloyds Bank v. E.B. Savory & Co.*, [1933] A.C. 201 (H.L.).

<sup>42</sup> Jackson, Powell, *op. cit.*, footnote 12, p. 11; A.M. Dugdale, K.M. Stanton, *Professional Negligence* (1982), pp. 194-195; G.R. Masel, *Professional Negligence of Lawyers, Accountants, Bankers and Brokers* (1981), p. 38; Linden, *op. cit.*, footnote 18, chap. 6; J.G. Fleming, *The Law of Torts* (6th ed., 1983), pp. 113-114; P.S. Atiyah, *Accidents Compensation and the Law* (3rd ed., 1980), pp. 40-41.

<sup>43</sup> *Supra*, footnote 41.

<sup>44</sup> *Ibid.*, at p. 232.

practice of bankers fails in making due provision for a risk fully known to those experienced in the business of banking.

This view, when applied in a case of professional negligence, does serve to strip away the veils shielding the reality of the process undertaken in *all* negligence litigation. Though in standard cases all concerned continue to genuflect to the imposing figure of the reasonable man, any experience in the process reveals that it is the individual judge, by far the most common trier of fact and hence of the issue of negligence, who actually assumes the role of this elusive sacred figure. The truth of this proposition becomes clearest when the commonly accepted practice is disregarded in a case of professional negligence in favour of what the judge dictates as the better approach. All can agree that in professional negligence cases the ordinary layman is asked to wait for the next omnibus, but when he is joined in the queue by "the ordinary, prudent practitioner" who is no longer even notionally relied upon to set the standard of care required, there is simply no one left to assume this role except the individual judge, who travels alone.

Until very recently there have been no cases involving claims against lawyers in which the tried and true standard of "the ordinary, prudent solicitor" has been abandoned. Judges have held in check the impulse to single handedly reform the practices of their former profession. Grudgingly or not the judiciary, at least in results, have agreed with the spirit shown by Lord Denning in *Simmons v. Pennington & Sons*<sup>45</sup> when he stated:

The solicitors acted in accordance with the general practice of conveyancers. No ill consequences had ever been known to flow from [the practice followed]. Now that the case has gone adversely to the vendor, we can see that it was a mistake, but it is so easy to be wise after the event. One has to try to put oneself in the position of the solicitors at the time and see whether they failed to come up to a reasonable standard of care and skill such as is rightfully required of an ordinary prudent solicitor.

This restraint has now been laid aside. *Polischuk v. Hagarty*,<sup>46</sup> by focusing on the additional implied duties in the contract of retainer beyond the mere duty to take care, and *Edward Wong Finance Co. Ltd. v. Johnson, Stokes & Master*,<sup>47</sup> by a frontal assault, have heralded the ascendancy of a

<sup>45</sup> [1955] 1 W.L.R. 193, at pp. 186-187, [1955] 1 All E.R. 240, at p. 243. A.M. Dugdale, N.R.W. Davidson, in a paper presented in the New Zealand Law Society Spring 1984 seminar on Professional Negligence, at p. 13, suggest examples exist of courts rejecting the defence in solicitors' negligence claims of adherence to common practice. The cases cited are better viewed, however, as examples where the court simply felt that the expert defence evidence did not adequately establish the common practice allegedly adopted by the defendant solicitor: see e.g. *Goody v. Baring*, [1956] 1 W.L.R. 448, [1956] 2 All E.R. 11 (Ch.D.); *Bradley v. A.G.*, [1978] 1 N.Z.L.R. 136 (S.C.).

<sup>46</sup> *Supra*, footnote 7.

<sup>47</sup> *Supra*, footnote 8. The danger of reliance on undertakings as pointed out by *Polischuk* and *Edward Wong Finance* was noted by the editor of the *Advocate* (1984), 42 *Advocate* 273.

judicially imposed standard of care of legal practice over the former rule of the level of skill achieved by "the ordinary, prudent solicitor".

### *Warning Signs*

This most recent alteration to the standard of care in cases of solicitors' negligence has not been totally unexpected and was predicted by two preliminary developments. First, with the remarkable expansion of negligence liability, there has been an inevitable tightening up of the standard of care expected of solicitors, judged by whichever notional standard may be chosen. It may still be the law that a professional is not liable for a mere "error of judgment",<sup>48</sup> and it may still be the case that, as was stated early in the nineteenth century,<sup>49</sup>

No attorney is bound to know all the law. God forbid that it should be imagined that an attorney, or a counsel, or even a judge is bound to know all the law.

Nonetheless the level of competence expected from today's solicitor is increasingly strict in practical terms. The recent decision of *Central & Eastern Trust Co. v. Rafuse*<sup>50</sup> is illustrative. At trial Hallett J. of the Nova Scotia Supreme Court held in favour of the defendant general practitioner who was unaware of the existence and effect of a provision in the provincial Companies Act found, only after an appeal to the Supreme Court of Canada in preliminary litigation,<sup>51</sup> to invalidate a mortgage prepared by the defendant solicitor for the plaintiff trust company. After a detailed review of the evidence and applicable principles, Hallett J. refused to find negligence, as it had *not* been proven to him that "an ordinary, reason-

<sup>48</sup> There do exist numerous older authorities exonerating lawyers who have made a mere "error of judgment" as they did not guarantee success simply by taking on the case; see Jackson, Powell, *op. cit.*, footnote 12, paras. 4.17-4.21. Modern authorities also exist; see *Pelky v. Hudson Bay Insurance*, *supra*, footnote 6; *Brenner v. Gregory*, *supra*, footnote 15. A useful case for the defence of a solicitor is *Ormindale Holdings Ltd. et al. v. Ray Wolfe, Connell, Lightbody & Reynolds* (1982), 135 D.L.R. (3d) 577, 36 B.C.L.R. 378 (B.C.C.A.) (a failed tax avoidance scheme); likewise of assistance to the profession is *Bannerman, Brydone, Folster & Co. v. Murray*, [1972] N.Z.L.R. 411 (C.A.) (a failure to recognize a clog on the equity of redemption was not negligence). The House of Lords has deprecated the use of the phrase "error of judgment" as begging the question in the central search for negligence; see *Whitehouse v. Jordan*, *supra*, footnote 20. This is quite true, and the trend in cases involving solicitors is for courts to simply categorize the mistake as going beyond an error of judgment and therefore amounting to negligence. The Supreme Court of Canada has been content in the past to employ the phrase in professional cases — see *Wilson v. Swanson*, [1956], S.C.R. 804, at p. 812, (1956), 5 D.L.R. (2d) 113, at p. 120; *Ostrowski v. Lotto*, *supra*, footnote 15, at pp. 231 (S.C.R.), 722-723 (D.L.R.).

<sup>49</sup> *Montrious v. Jeffreys* (1825), 2 Car. & P. 113, at p. 116, 172 E.R. 51, at p. 53 (N.P.).

<sup>50</sup> *Supra*, footnote 1.

<sup>51</sup> *Central & Eastern Trust Co. v. Irving Oil Ltd. et al.*, [1980] 2 S.C.R. 29, (1980), 110 D.L.R. (3d) 257.

able competent solicitor" exercising the requisite standard of care, might not have made the same mistake as the defendant.<sup>52</sup> In the Court of Appeal, however, the judges were unanimous in overriding this finding, taking a different view of the evidence, and categorizing the solicitor's lack of awareness of the problem as negligence.<sup>53</sup> The Court quoted some passages from textbook authorities on the general level of skill required of a solicitor, and in the end expressly adopted the approach urged by the appellant's (plaintiff's) factum:<sup>54</sup>

[To exonerate the defendant from liability] is to permit a degree of laxity and incompetence which could not be justified to a client or to the public at large. *On grounds of public policy alone*, a solicitor should be held responsible to, at the very least, be aware of the provisions of a well-known statute which impinges on the commercial transaction in question.

The profession may be justly nervous when a finding of negligence is supported by a court on grounds of public policy alone. There seems little doubt that this is what is occurring, as the standard required of solicitors is raised.

A second preliminary development leading to the demise of the standard of "the ordinary, prudent solicitor" is a recent strictness with which the judiciary have viewed the function of expert evidence in solicitors' negligence cases.<sup>55</sup> As with any cases of professional negligence, much of the testimony in a suit against a lawyer will come from experts in the field. Properly directed to the opinion as to what is the practice of the profession as a whole, such evidence often ends up being little more than the particular view of each side's expert as to what he would have done in the situation under review as it presented itself to the defendant. Where such a battle of the experts occurs in a non-legal professional field, as in a medical negligence case, it is most difficult for a judge to reject the evidence of defence expert witnesses.<sup>56</sup> Thus in the recent House of Lords decision of *Maynard v. West Midlands Regional Health Authority*<sup>57</sup> their Lordships, in expressly applying the standard of professional care outlined in *Bolam*, pointed out the difficulties facing a judge who wished to make a finding contrary to the opinion of the expert evidence presented by the defence.

<sup>52</sup> (1983), 139 D.L.R. (3d) 385, at p. 389, 109 A.P.R. 69, at p. 74.

<sup>53</sup> However, the court dismissed the appeal on the basis of the limitation period. An appeal to the Supreme Court of Canada is pending.

<sup>54</sup> *Supra*, footnote 1, at pp 267-268 (D.L.R.), 131-132 (A.P.R.). (Emphasis added).

<sup>55</sup> A.B. Churchward, *Professional Negligence* (1979), Law Society Gazette 284.

<sup>56</sup> Although *Reibl v. Hughes*, *supra*, footnote 31, stressed the necessity to consider additional non-expert evidence in the particular field of "informed consent", this is hardly the norm in the more typical medical case where the allegation is that there was carelessness in the exercise of "pure" professional skill or judgment.

<sup>57</sup> *Supra*, footnote 20.



In the particular framework of solicitors' negligence, however, there is of late a growing unwillingness on the part of judges to be bound by expert testimony as to how the individual witness would have dealt with the problem under review. Thus in *Midland Bank v. Hett, Stubbs and Kemp*,<sup>58</sup> a leading English case on the tort-contract controversy, Oliver J., though still expressing adherence to the standard of competence matching "the reasonably competent practitioner . . . having regard to the standards normally adopted in his profession",<sup>59</sup> rejected such individualized expert evidence as usurping the role of the court. Oliver stated that it was the court's duty to determine *as a matter of law* "the extent of the legal duty"<sup>60</sup> owed by a lawyer to his client. In rejecting the validity of the testimony of expert practitioners regarding what they might have done in a given situation, and emphasizing that the issue of negligence is one of *law* for the court, there is a strong impetus given to the,<sup>61</sup>

. . . tendency, at least in the case of solicitors, to reach a decision not on the standard of what the average competent solicitor *would* do, but on the standard of what the court considers that the average competent solicitor *should* do.

The *Polischuk* and *Edward Wong Finance* decisions have shown that this latent process has now come to the fore.

### *Polischuk v. Hagarty*

In *Polischuk* the defendant solicitor acted for the purchaser in a standard land purchase. The agreement of purchase contained the traditional clause that the purchasers were to take the property free of existing encumbrances, which included a mortgage. The defendant, in closing the transaction, accepted an undertaking from the vendor's solicitor that the latter would use a portion of the purchase funds to discharge the mortgage. This undertaking was breached and the vendor's solicitor died without accounting for the purchase price received or discharging the mortgage, and the vendors left the country. The purchasers sued their lawyer for the balance required to discharge the mortgage after the Law Society indemnity funds had been applied towards the purchasers' loss.

<sup>58</sup> *Supra*, footnote 1.

<sup>59</sup> *Ibid.*, at pp. 403 (Ch.), 583 (All E.R.).

<sup>60</sup> *Ibid.*, at pp. 402 (Ch.), 582 (All E.R.). Oliver J.'s view should be contrasted with that of Laskin C.J.C. as noted *supra*, footnote 34. The distinction alluded to by Oliver J. between evidence as to common practice, and evidence as to what the expert himself might have done, has been adopted by Jeffries J. in *Sutherland v. Public Trustee*, [1980] 2 N.Z.L.R. 536, at p. 542, who added "[t]he distinction highlights the duty on the Court that ultimately it must reach its own decision, but is more cogently assisted if the evidence is weighted towards overall standards".

<sup>61</sup> Masel, *op. cit.*, footnote 42, p. 38 (emphasis added). In the same vein, see the judgment of Bray C.J. in *Neale v. Power*, [1967] S.A.S.R. 373, at p. 376 where he stated "[t]he Court presumably knows for itself what the ordinary reasonably prudent and careful solicitor ought to know and to do". The case actually involved a claim against a land agent.

The findings of fact of Henry J., the trial judge, all supported the defendant's stated position.<sup>62</sup>

The defendant solicitor acted in accordance with the general practice followed by solicitors in circumstances at that time; he used reasonable skill and judgment, according to the standards of the profession.

Reliance on a solicitor's undertaking in such circumstances had never given rise to any problems before and indeed the defendant had dealt with and relied on similar undertakings from the vendor's solicitor for the past twenty years without a hitch, and had no reason to suspect the latter's precarious financial situation. The judge held, nonetheless, "that does not end the matter".<sup>63</sup> There being no need, in this case, to become embroiled in the tort-contract controversy, the plaintiff's claim was wisely framed only as a standard breach of contract action.<sup>64</sup> The judge, in stating the terms of the retainer contract, which were necessarily left up to him to imply as there was no written agreement, set out two broad terms.<sup>65</sup> One was the undoubted obligation on the defendant "to exercise reasonable care and skill according to the standards of the profession". The defendant met this obligation; that is, he attained the level of practice of "the ordinary, prudent practitioner". Problems arose, however, because, as was not surprising, the terms of the sale agreement did not anticipate reliance on an undertaking during closing. This caused the defendant to founder on the second clause implied by Henry J. into the retainer, that the defendant would "complete the contract of purchase and sale on behalf of the clients, *according to its terms* and in so doing . . . protect the clients' interests".<sup>66</sup> Now there was nothing forcing the implication of such a clause. The defendant's obligation as outlined by the judge might just as easily have been altered by implication to include the ability to complete the transaction in the manner adopted by right thinking solicitors faced with similar circumstances, but this course was not chosen by Henry J. Once the obligation to complete the transaction according to its exact terms was insisted upon through the subtle judicial weapon of the selective implication of contractual terms, compliance with the common practice of the profession could not avail the defendant. The term imposed by the judge stood above the common practice and amounted to a guarantee of performance. That this process amounts to the blatant attempt by one judge to alter the long standing practice of the legal profession as a whole is made clear by Henry J. himself when he states.<sup>67</sup>

<sup>62</sup> *Supra*, footnote 7, at pp. 73-74 (D.L.R.), 425 (O.R.).

<sup>63</sup> *Ibid.*, at pp. 74 (D.L.R.), 425 (O.R.).

<sup>64</sup> *Ibid.*, at pp. 72 (D.L.R.), 424 (O.R.). In fact Henry J. made it clear that he would not have recognized the right of a client to sue his solicitor in tort.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.* (Emphasis added).

<sup>67</sup> *Ibid.*, at pp. 74 (D.L.R.), 425-426 (O.R.) (Emphasis added).

While solicitors in London had adopted the practice followed by the defendant, as a practical way of closing transactions, where a discharge of mortgage was not readily available to carry out a vendor's obligation, I cannot accept that *the profession* was justified in imposing such a practice upon the lay public, their clients, without their knowledge and consent.

Although everything in the judgment appeared grim for the defendant to this point, a happier note was struck when the judge proceeded to assess damages and dealt with the issue of causation. Expressing sentiments similar to those seen in the cases of "informed consent" in medical malpractice, again as highlighted by *Reibl v. Hughes*,<sup>67a</sup> Henry J. entered judgment for \$500.00 nominal damages only, because of the plaintiffs' failure to show that they would not have agreed to the closing procedure adopted by the defendant solicitor had he sought their instructions. Nonetheless, despite the nominal award, the judgment may well have serious consequences for lawyers and indeed all professionals. The technique employed renders the standard of practice achieved by "the ordinary, prudent solicitor" quite irrelevant. *Polischuk v. Hagarty* is illustrative of a modern approach which stresses the importance of terms implied by courts into the contract of retainer which go beyond the mere duty on the solicitor to exercise reasonable care. Failure by the solicitor to achieve meticulous compliance with such additional implied duties may leave no room for the escape valve which nominal damages afforded due to the particular findings in *Polischuk*. A full award of damages will occur whenever such failure to comply with the terms implied by the court cannot be seen to be due to a simple departure from a procedure anticipated in the retainer, but rather judged to have arisen from some other cause. Likewise, more than nominal damages will be available even in a case when the loss has been caused by a failure to adopt an anticipated procedure, where the client is able to show that he would not have authorized the change had his instructions been sought.

These fears have turned out to be well-founded. On appeal in *Polischuck*,<sup>67b</sup> the Ontario Court of Appeal upheld the trial judgment on the law, but reversed it on the facts. The Court of Appeal agreed that it had been a breach of the terms of the retainer for the solicitor to have relied on the undertaking of the vendor's solicitor, and in so doing cited *Edward Wong Finance*. However, the court decided that the evidence did not support the finding that the plaintiffs would have agreed to the closing procedure that was followed if a full explanation of the circumstances had been made to them. The court therefore awarded the plaintiff damages for breach of contract in the amount of \$18,694.07.

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<sup>67a</sup> *Supra*, footnote 31.

<sup>67b</sup> (1984), 49 O.R. (2d) 71 (Ont. C.A.).

*Edward Wong Finance Co. Ltd. v. Johnson, Stokes & Master*

In *Edward Wong Finance* the damage award against the defendant solicitors was from nominal. The Privy Council, on appeal from Hong Kong, restored the trial judgment which awarded damages of \$1,295,000 (H.K.) plus interest. The disaster was precipitated, as in *Polischuk*, by reliance on an undertaking. The defendant solicitors in *Edward Wong Finance* were "a long established and highly respected firm of solicitors from Hong Kong" and Miss Leung, the member of the firm whose actions were questioned, had been practising for six years prior to the events in question. The facts, although somewhat convoluted, boil down to Miss Leung acting for a mortgagee (and, apparently, for the purchaser as well, though this dual representation was not the source of the problem) in the course of a land transfer. In accord with the long accepted practice of Hong Kong solicitors, Miss Leung, on behalf of the mortgagee, advanced mortgage funds to the vendor's solicitor (Danny Yiu) on the strength of his undertaking to complete the transaction and perfect the mortgagee's security, or return the funds. The vendor's solicitor breached this undertaking and decamped for parts unknown with the mortgage proceeds, leaving the mortgagee to sue its solicitors for the amount of the funds advanced, which were now unsecured.

Some of the undisputed findings of fact should be highlighted:

- (1) Nothing was known by the defendant solicitors against the integrity of the vendor's solicitor.<sup>68</sup>
- (2) Miss Leung followed the normal conveyancing practice for this transaction that had been established for years in Hong Kong, and which was much more expeditious than the English style of closing—the concurrent exchange of documents and mortgage funds.<sup>69</sup> The English style of closing, although not unknown in Hong Kong, had been followed in only approximately one per cent of the transactions of the time.<sup>70</sup>
- (3) The speed with which a Hong Kong style closing took place resulted in a benefit to the public.<sup>71</sup>

<sup>68</sup> *Supra*, footnote 8, at pp. 302 (A.C.), 3 (W.L.R.).

<sup>69</sup> Although this is the method described by their Lordships as followed in the English style of closing, the current practice in England, using the post as the medium of exchange, leaves the matter somewhat to chance and shows how expediency, even in England has altered practice—see the portion of the judgment of Silke J. from the Hong Kong Court of Appeal set out in the judgment of the Privy Council, *ibid.*, at pp. 305 (A.C.), 6 (W.L.R.).

<sup>70</sup> *Ibid.*, at pp. 304 (A.C.), 6 (W.L.R.), quoting the judgment of the trial judge.

<sup>71</sup> *Ibid.*

- (4) This was the first occasion in which this accepted Hong Kong style of closing had backfired and a conveyance had not completed due to a solicitor defaulting on his undertaking.<sup>72</sup>

In arriving at the decision, their Lordships did, as an afterthought, allude to the issues which formed the basis of decision in *Polischuk*. The standard form contract used in the real estate transaction under review in *Edward Wong Finance* in fact anticipated the English style of completion. Lord Brightman, in delivering the Privy Council judgment, stated:<sup>73</sup>

The question therefore arises whether the purchaser's solicitor is, strictly speaking, justified in departing from the contract by permitting a Hong Kong style completion without seeking the authority of his client, and if he does so depart without authority, whether he might expose himself to liability in the event of the completion miscarrying, *whatever precautions he may have taken*.

This was not, however, the basis for the judgment entered against the defendants. The issue was stated throughout to be purely and simply whether or not Miss Leung had been negligent in following the closing procedures described. There was as well no suggestion in the judgment that the standard of care to be applied in professional negligence differed depending on whether the claim was brought in tort or contract. It is difficult to tell from the report how the action was framed and Lord Brightman stated the issue to be decided as simply, "the standard of care owed by a solicitor to his client, an intending mortgagee of property, under the conveyancing practice prevalent in Hong Kong".<sup>74</sup>

In making the extensive award of damages against the defendant solicitors, their Lordships were not daunted by the admission that Miss Leung had followed the practice of any "ordinary, prudent solicitor" of Hong Kong who might otherwise have established the required level of competency. Instead a threefold test was propounded.<sup>75</sup>

- (1) Does the practice, as operated by the defendant solicitors, involve a foreseeable risk?
- (2) If so, could that risk have been avoided?
- (3) If so, were the defendants negligent in failing to take the avoiding action?

In establishing this test, no reference was made to the strong line of authority, highlighted by *Bolam v. Friern Hospital Management Committee*,<sup>76</sup> previously adopted by the Privy Council itself,<sup>77</sup> which approved of the

<sup>72</sup> *Ibid.*, at pp. 304-305 (A.C.), 6 (W.L.R.), quoting passages from the trial judgment and the judgment of Roberts C.J., one of the majority on appeal.

<sup>73</sup> *Ibid.*, at pp. 309 (A.C.), 10 (W.L.R.) (Emphasis added).

<sup>74</sup> *Ibid.*, at pp. 301 (A.C.), 3 (W.L.R.).

<sup>75</sup> *Ibid.*, at p. 306 (A.C.), 8 (W.L.R.).

<sup>76</sup> *Supra*, footnote 19.

<sup>77</sup> *Chin Keow v. Gov't of Malaysia*, *supra*, footnote 20.

defence in professional cases of adherence to common practice. Indeed there is not one authority mentioned in the judgment, although *Vancouver General Hospital v. McDaniel*<sup>78</sup> and *Simmonds v. Pennington*<sup>79</sup> were cited to their Lordships in argument. Nor is there any suggestion that the safety valve of *Anns*<sup>80</sup> might be applied and public policy utilized to limit or negate the *prima facie* liability in negligence based on an avoidable risk. The three-fold test propounded in *Edward Wong Finance* is a test of full compensation for foreseeable harm caused by carelessness judged by a new strict test, with no suggestion of any room for the interplay of other factors.

In answering affirmatively the three questions comprising the test they proposed for negligence, their Lordships stressed most heavily two suspect items of "evidence".<sup>81</sup> One, a 1959 subcommittee report to the Hong Kong Law Society, concluded that a solicitor could, if nervous about a particular transaction, insist upon the English style of completion without breaching any of the canons of legal ethics. The logical connection between such oblique evidence and the finding of negligence is surely tenuous.

A second report to the profession was likewise relied upon in the determination that the risk presented to Miss Leung was foreseeable and should have been avoidable by some simple precautions. The procedural changes in conveyancing suggested in the judgment had been advocated by the Hong Kong Law Society itself in a circular to the profession dated November 1981, (some four years *after* the case had been commenced against the defendants and presumably have become a local *cause célèbre*). In the face of such rationalization it is little wonder that the finding of negligence was made. To make their viewpoint perfectly clear, their Lordships stated that the risk inherent in the Hong Kong style of closing should have been avoided *whether or not* the particular transaction involved any of the "warning bells" felt by the trial judge to have been crucial to put the defendants on their guard.<sup>82</sup>

The conclusion reached in *Edward Wong Finance* was probably inevitable in view of current judicial attitudes reflected in solicitors' negligence cases, and no doubt the lead shown will be adopted wholeheartedly by other courts. What makes the decision so shocking, however, beyond its rejection of the standard of skill equalling that of "the ordinary prudent solicitor", is its acceptance of the test (and the illustration that the very decision provides of the workings of that test) of a risk

<sup>78</sup> *Supra*, footnote 16.

<sup>79</sup> *Supra*, footnote 45.

<sup>80</sup> *Supra*, footnote 2.

<sup>81</sup> *Supra*, footnote 8, at pp. 306-308 (A.C.), 8-10 (W.L.R.).

<sup>82</sup> *Ibid.*, at pp. 308 (A.C.), 10 (W.L.R.).

that should have been avoided as a sufficient determination of whether the practice followed by the profession as a whole was negligent.

Risk to a client is inherent in most important professional judgments. Doctors in diagnosing, accountants in proposing a tax plan, and surely lawyers in many of their daily tasks, from putting forth a proposal in negotiation, to deciding whether to call a witness to the stand, are all necessarily dealing in the realm of risk to the client. Only the naive are surprised to discover the risk factor. The Privy Council may very well have drawn appropriate inferences from the very nature of the professional-client relationship:<sup>83</sup>

. . . it is the solicitor and not the client who has the better opportunity to assess the gravity or remoteness of the risk involved in a particular case, it is the solicitor and not the client who has the necessary expertise to analyze and guard against the risk.

Nonetheless the solution, when the negative aspect of the risk asserts itself, is not to automatically make the professional bear the burden of that risk, which is the tack taken in *Edward Wong Finance*. It was, after all, the Privy Council which, in *The Wagon Mound #2*,<sup>84</sup> declared that it was not negligent to disregard an admitted risk of harm to another when "the risk was so small that in the circumstances a reasonable man would have been justified in disregarding it and taking no steps to eliminate it".<sup>85</sup> When in the professional setting, the risk which is taken is the sort universally adopted, and reasonably adopted in the interests of the client, as opposed to those of the lawyer, it does not seem too much to ask that the client bear the brunt of the downside of the risk when, instead of the traditional benefit, an unprecedented and unsuspected detriment occurs.

The very definition of "risk" implies the possibility of a misfire and when something does go wrong, it become very difficult for an investigator not to feel that the risk ought to have been avoided. This is obviously the reasoning process of the court in *Edward Wong Finance* where their Lordships state:<sup>86</sup>

The risk inherent in the Hong Kong style of completion as operated in the instant case being foreseeable, and readily avoidable, there can be *only* an affirmative answer to the third question, whether the respondents were negligent in not foreseeing and avoiding that risk.

Such a reflex determination can only be justified by the easy wisdom of hindsight.<sup>87</sup>

<sup>83</sup> *Ibid.*, at pp. 307 (A.C.), 9 (W.L.R.).

<sup>84</sup> [1967] 1 A.C. 617, [1966] 2 All E.R. 709 (P.C.).

<sup>85</sup> *Ibid.*, at pp. 642 (A.C.), 718 (All E.R.). Lord Reid is here discussing the case of *Bolton v. Stone*, [1951] A.C. 850, [1951] 1 All E.R. 1078 (H.L.) in which cricket players were exonerated from liability to a plaintiff hit by a cricket ball, even though in the circumstances the possibility of this occurring was foreseeable.

<sup>86</sup> *Supra*, footnote 8, at pp. 308 (A.C.), 10 (W.L.R.) (Emphasis added).

<sup>87</sup> "But hindsight is no touchstone of negligence", per Megarry J. in *Duchess of Argyll v. Beuselinck*, *supra*, footnote 11, at p. 185.

The burden placed upon solicitors by *Edward Wong Finance* is an intolerable one. It is simply unrealistic to expect the busy solicitor in the course of his daily work to pause in each transaction before following a time-honoured procedure, and reflect whether the risk to his client is one which, if things go wrong for the first time in recorded history, a court in retrospect might say should have been avoided. Should he demand that his colleague's trust cheque be certified? Is it reasonable to engage in a frank "off the record" discussion with the Crown prosecutor about a possible plea bargain? Should he delegate to office staff the task of transporting documents to the registry? Should he *ever* rely on another solicitor's undertaking? Examples of commonly adopted risks are innumerable. The lawyer whose practice was risk-free would soon be a lawyer with no clientele. Not only would the mere thought of any creative innovation terrify him, but potential clients would soon be frightened off by the overwhelming cost and time involved in the lawyer's never ending safety precautions. As long as the past dictates that there is no reasonably foreseeable chance of damage to the client, solicitors will continue to follow practices sanctioned by "ordinary, prudent practitioners" as they must, due to the exigencies of practice.

In overriding the profession's collective evaluation of the risk involved in *Edward Wong Finance* in favour of a judicial standard imposed from on high, the Privy Council has shown the effects of the present popular band-wagon of "loss spreading" careening out of control. The decision reached seems a thinly veiled preference for the choice that the profession as a whole is the body best able to "bear the loss" rather than a determination of carelessness in traditional terms. For the presence of professional liability insurance shows itself between the lines of the judgment and the reasoning utilized tests the threshold of liability without fault. How else is it possible to evaluate the following conclusion of their Lordships:<sup>88</sup>

Their Lordships wish to add that they *do not themselves attach blame to Miss Leung* for the calamity that occurred. In entrusting the vendors' solicitor Mr. Danny Yiu with the whole of the money she was merely following the normal practice of the firm, and she had never been instructed to act otherwise in such case or to take any special precautions.

The practice followed was not merely that of her firm, but of all Hong Kong solicitors.

### Conclusion

It is understandable enough, given the nature of our system of dispute resolution, that courts balk against any force that tends to detract from the supremacy of their position as final arbiter. Although there is strong authority for the proposition that courts will willingly defer to the

<sup>88</sup> *Supra*, footnote 8, at pp. 308-309 (A.C.), 10 (W.L.R.) (Emphasis added).



collective judgment of a profession, as manifested in its customary practice, the contrary view has recently reasserted itself in the insiders' game of solicitors' negligence litigation. Guided by newly armed plaintiff's counsel, courts can now, if they wish, free themselves from the constraints imposed by the standard of "the ordinary, prudent solicitor". Having recently diffused the effect of expert testimony and tightened in practice the standard of care required of solicitors, courts can feel justified in individually reforming lawyers' practices, either by focusing on the selective implication of terms into the contract of retainer as in *Polischuk*, or adopting a simple test in negligence of "a risk that should have been avoided" as was done in *Edward Wong Finance*. With no apparent assistance available from public policy arguments and no identifiable standard to refer to, lawyers must simply await the law reports or the arrival of a writ in which they are named, to see if the practices which they have been following are later characterized to be negligent.

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