

Notes of Cases

Commentaires d'arrêt

EXPROPRIATION—RESTRICTIONS ON EXPROPRIATION OF PRIVATELY-OWNED MINERALS WITHIN A PARK—WHETHER REGULATIONS CAN AMOUNT TO TAKING—NATURE OF INTEREST IN MINERALS: *The Queen in Right of British Columbia v. Tener*.

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The Supreme Court of Canada has taken a significant step in *The Queen in Right of British Columbia v. Tener*,¹ in holding that a form of statutory regulation amounted to the taking of property rights within the meaning of expropriation legislation, and that compensation was therefore payable. This may prove to be but one step in a long journey, but the direction that it indicates is towards firmer insistence that governments do not avoid expropriation procedures and compensation obligations when their regulatory activities result in the virtual acquisition of private property. The issue is constitutional in the sense of the relations between state powers and individual rights, even though there is no Charter guarantee against taking property without compensation. Nations with such guarantees, such as the United States and Australia, have produced a number of cases that resemble *Tener*, but even then those cases have not produced any clear guidance on the central question of when does regulation become compensable taking.

The predecessor in title of the Teners in 1937 obtained from the Crown sixteen Crown-granted mineral claims. Made under the British Columbia Mineral Act,² these grants gave to their holder all minerals under the claims and the right to the use and possession of the surface of the claims for the purpose of winning and getting the minerals. In 1939, under the Provincial Parks Act,³ Wells Gray Park was gazetted by set-

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¹ [1985] 1 S.C.R. 533, (1985), 17 D.L.R. (4th) 1.

² R.S.B.C. 1936, c.181.

³ R.S.B.C. 1936, c.211.

ting aside all vacant Crown lands within an area of 1,164,800 acres. The Crown-granted mineral claims were situated in this area, but they were not expropriated. Neither the Mineral Act nor the Provincial Park Act at the time restricted mining activity, so the owner's rights to use the claims were left unaffected. In 1965, however, a system of regulation was imposed by an amendment to the Park Act. A park use permit now had to be obtained from the minister before natural resources (including minerals) in a park could be exploited.⁴ The standard to be applied by the minister in deciding whether to issue a permit depended on the classification of the park. Wells Gray Park was first classified as a Class B park, which allowed permits to be issued relatively easily. In 1973 the Park Act was again amended,⁵ to reclassify the Park as a Class A Park and thereby impose a much more protective standard on the issue of permits. Section 9 of the Park Act then read:

(1) No natural resource. . . within a

(a) park of Class A or Class C shall be granted, sold, removed, destroyed, damaged, disturbed or exploited except as authorized by a valid and subsisting park use permit, which shall not be issued unless, in the opinion of the Minister, issuance is necessary to the preservation or maintenance of the recreational values of the park involved; . . .

Another significant amendment in 1973 was to the Mineral Act, prohibiting the exploration for or the development of minerals in a park without the authorization of the Lieutenant Governor in Council.⁶

The Parks Branch allowed work on the claims in 1973, but refused to issue park use permits in the following years. The Branch was plainly worried that mineral development and the construction of nine miles of road across the Park would conflict with the Park Act.⁷ In 1978 the Director of the Parks Branch finally wrote to advise that no new exploration or development work would be authorized. The owners treated this as a conclusive denial of the opportunity to exploit their claims, and sued for compensation for the expenditures over the years and the present value of the lost opportunity to exploit the claims. They asserted that this denial of a park use permit to develop their Crown-granted mineral claims was an expropriation of an interest in land under the expropriation provisions of the Park Act,⁸ or in the alternative that their interest in land had been injuriously affected, in which case the Land Clauses Act⁹ applied.

⁴ S.B.C. 1965, c.31, s.18.

⁵ S.B.C. 1973, c.67.

⁶ S.B.C. 1973, c.52, s.9, adding s.12(1a) to the Mineral Act, R.S.B.C. 1960, c.244.

⁷ (1982), 133 D.L.R. (3d) 168, at p. 173 (B.C.C.A.).

⁸ S.B.C. 1965, c.31, s.11, as am. to 1978:

For the purpose of the establishment or enlargement of any park or recreation area, the Minister, on behalf of Her Majesty the Queen in right of the Province, with the

Rae J., who gave judgement on a stated case, rejected both contentions. "What the plaintiffs seek here really is to be compensated in damages for loss alleged to flow from a statutorily authorized withholding of a permit, under the guise of its being an expropriation."¹⁰ Further, the Park Act, incorporating by reference the Ministry of Highways and Public Works Act,¹¹ was a complete code that excluded the Land Clauses Act. The Court of Appeal agreed that the refusal of a permit did not amount to expropriation under the Park Act, but Lambert J.A., with Anderson J.A. concurring, decided that the Land Clauses Act was not excluded, holding that the refusal did damage the plaintiff's rights in land, and amounted to injurious affection under that Act.¹²

The Supreme Court of Canada dismissed the Crown's appeal, and held that the owners were entitled to compensation. The basis, however, was not injurious affection, but full expropriation under the Park Act. Although this general conclusion was unanimous, members of the Court reached it by two different approaches which derived from entirely different views of the nature of the property interest under the Crown-granted mineral claims. This issue we will return to, and for the moment we can observe that the majority view (Estey J., with Beetz, McIntyre, Chouinard and Le Dain JJ. concurring) was that the respondents had a fee simple interest in the minerals.

Taking by Regulation

To Estey J. the key questions were whether an expropriation had occurred in the circumstances arising in this case, and if so, at what time did it do so. In approaching them he dwelt on several cases where the formal machinery of expropriation had been used, but which were admittedly not squarely on point as in this case the formal procedures had not been used. He then considered the complex pattern of interacting statutes involved, especially section 6 of the Park Act which, in empowering the Minister to "expropriate land", must be read to include an interest in land, and the extinc-

approval of the Lieutenant Governor in Council, may. . . (c) expropriate land, and the provisions of the *Ministry of Highways and Public Works Act* shall apply, *mutatis mutandis*, in event of such expropriation.

⁹ R.S.B.C. 1960, c. 209. The Land Clauses Act has now been replaced by the Expropriation Act, R.S.B.C. 1979, c. 117.

¹⁰ (1980), 114 D.L.R. (3d) 728, at p. 738, 23 B.C.L.R. 309, at p. 320 (B.C.S.C.).

¹¹ R.S.B.C. 1960, c.109.

¹² (1982), 133 D.L.R. (3d) 168, at p. 185, [1982] 3 W.W.R. 214, at p. 233 (B.C.C.A.). See S.L. Martin, *Land Withdrawals: Government Needs Versus Vested Rights*, in N. Banks and J.O. Saunders (eds.), *Public Disposition of Natural Resources* (1983), p. 129.

tion of an interest in land. Mention was made of the presumption against construing a statute to take away property without compensation, with reference being made to the well-known decision in *Attorney-General v. DeKeyser's Royal Hotel*.¹³ When all was said and done, though, the decision simply turned on whether the facts of the case disclosed an expropriation of land.¹⁴

This denial of a permit [in 1978] then made the prohibitions in ss. 9 and 18 operative. The property rights which were granted to the respondents or their predecessors in title in 1937 were in law thereby reduced. . . . The denial of access to these lands occurred under the *Park Act* and amounts to a recovery by the Crown of a part of the right granted to the respondents in 1937. This acquisition by the Crown constitutes a taking from which compensation must flow.

The taking did not include title to the minerals themselves; Estey J. envisaged that the Crown could take a last step and expropriate the minerals. What had been lost was the right of access. That interest could be valued by taking the total value of the minerals and subtracting from it the value of the possibility that a removal permit might be issued in the future. Estey J. distinguished this process of taking from the zoning of land use and similar regulation of activities on land in the community. Those types of regulation add nothing to the value of public property, while in this case the action of the government in 1978 took value from the respondents and added value to the public park.

In this manner the court disposed of an issue of some importance. If expropriation, with a consequent obligation to compensate, could be detected in this particular kind of regulation, then in what other kinds can it be found, given all the innumerable ways that governments set rules to constrain private actions? The decision certainly has a radical look to it, but in fact on most of its key points it follows directions that at the very least have been indicated in earlier case law, both within Canada and elsewhere in the common law world. Before taking each point in turn, we should dwell for a moment on the similarities and differences between this case and the main Supreme Court of Canada precedent that the court considered.

In *Manitoba Fisheries Ltd. v. The Queen*¹⁵ the Parliament of Canada passed the Freshwater Fish Marketing Act,¹⁶ which created a Crown corporation and gave it a monopoly in the export of fish from Manitoba. This had the effect of putting the long-established plaintiff company out of business. The court held that the company was entitled to compensation for the loss of its business goodwill. As in *Tener*, the first issue was

¹³ [1920] A.C. 508 (H.L.).

¹⁴ *Supra*, footnote 1, at pp. 563 (S.C.R.), 11 (D.L.R.).

¹⁵ [1979] 1 S.C.R. 101, (1978), 88 D.L.R. (3d) 462.

¹⁶ R.S.C. 1970, c. F-13.

to confirm that there was indeed "property" involved—in this case, the goodwill. However, the key points of difference then appear; in *Manitoba Fisheries* the legislation clearly contemplated and brought about the deprivation of the goodwill, but (just as clearly) did not provide for compensation to be paid for it. The court in *Manitoba Fisheries* recognized both of these features of the situation,¹⁷ but to reach its conclusion the court seems to have changed its tune and decided that the taking was unauthorized, on the basis that the Act did not provide for the taking of such property without compensation, and that regard should be had to the rule in *De Keyser's Royal Hotel*. This basis appears to be a substantive common law right to compensation for property taken, and an entirely new legal principle.¹⁸ The previous law had only provided a rule of construction: "Unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation."¹⁹ The rule did not apply if the statute was clear in taking away property with or without compensation. In *Tener* the intention of the statute to take away property was by no means clear. On the other hand, there were express provisions creating rights to compensation, under which the facts could be brought. There was no need to call on *Manitoba Fisheries* to imply a right to compensation if an expropriation had taken place.²⁰

Perhaps the most basic point to emerge in *Tener* is that in certain circumstances regulatory restrictions can amount to expropriation. A measure may be in the form of a regulatory restriction, but, if it is sufficiently

¹⁷ *Supra*, footnote 15, at pp. 109, 113 (S.C.R.), 467, 470 (D.L.R.).

¹⁸ See D.P. Jones, No Expropriation Without Compensation: A Comment on *Manitoba Fisheries Ltd. v. The Queen* (1978), 24 McGill L.J. 627; Martin, *op. cit.*, footnote 12, p. 146.

¹⁹ *Attorney-General v. De Keyser's Royal Hotel Ltd.*, *supra*, footnote 13, at p. 542. See also *Sisters of Charity of Rockingham v. The King*, [1922] 2 A.C. 315, at p. 322 (P.C.): "Compensation claims are statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage, on the ground that his land is 'injuriously affected', unless he can establish a statutory right." Admittedly there are dicta in favour of a rule of statutory interpretation that imports an intention to compensate into any Act that does not expressly exclude it: *Central Control Board (Liquor Traffic) v. Cannon Brewery Co.*, [1919] A.C. 744, at p. 754, per Lord Atkinson and at p. 763, per Lord Wrenbury (H.L.), and *Belfast Corporation v. O.D. Cars Ltd.*, [1960] A.C. 490, at p. 523, per Lord Radcliffe (H.L.). See also E.C.E. Todd, *The Law of Expropriation and Compensation in Canada* (1976), p. 32. Notwithstanding such dicta, and the cases cited by Todd, there does not seem to be any case that was actually decided by implying a common law right of compensation into a statute.

²⁰ The plaintiffs' counsel conceded that they had no right to damages at common law, and that for compensation to be awarded they had to establish a statutory right to it, if not explicitly then at least implicitly: see, at trial, *supra*, footnote 10, at pp. 734 (D.L.R.), 316 (B.C.L.R.), and on appeal, *supra*, footnote 12, at pp. 175 (D.L.R.), 222 (W.W.R.). The point was not argued before the Supreme Court of Canada.

extreme, the court may hold that in substance it is a taking of property. This proposition can be seen in *Manitoba Fisheries*, but its origins can be traced back further than that. It was in the United States that regulation as taking first became a major issue, by reason of the constitutional prohibition against taking private property for public use without just compensation.²¹ The initial view, embodied in *Mugler v. Kansas*,²² was that this prohibition did not extend to include an exercise of the police power, that is, regulation. A taking only occurred if the government impaired title to or possession of property, and a taking in this view was quite distinct from a mere regulation of the use of property. This view was rejected in 1922 by *Pennsylvania Coal Co. v. Mahon*,²³ a case that, like *Tener*, concerns the surface impacts of mining, but in the context of an Act making it unlawful to mine coal so as to cause subsidence under buildings or roads within municipalities. Holmes J. rejected the notion of an absolute distinction between regulation under the police power and the taking of property. The difference was not of kind but of degree. "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."²⁴ On the facts the legislation amounted to an unconstitutional taking.

What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does.²⁵

Holmes J.'s general rule still prevails in the United States, although there has been little progress, either in the courts or in academic commentary, in establishing a test or a set formula to determine when a regulation has gone "too far".²⁶

Similar developments have taken place under other constitutions. The House of Lords in *Belfast Corporation v. O.D. Cars Ltd.*²⁷ held that town planning legislation in Northern Ireland was not invalidated by a constitutional prohibition of laws that directly or indirectly take property without compensation. There certainly was a general principle that property was not to be compulsorily acquired from a subject unless full compensation was afforded in its place, and that principle was generally observed by the courts and the legislature.²⁸ Yet, as Lords Simonds and Radcliffe both pointed out, from the earliest times the owner of prop-

²¹ U.S. Const. amend. V.

²² 123 U.S. 623 (1887).

²³ 260 U.S. 393 (1922).

²⁴ *Ibid.*, at p. 415.

²⁵ *Ibid.*, at pp. 414-415.

²⁶ A.D. Tarlock, *Regulatory Taking* (1984), 60 Chi.-Kent L. Rev. 23.

²⁷ *Supra*, footnote 19.

²⁸ *Ibid.*, at p. 523, per Lord Radcliffe.

erty, and in particular of land, had been restricted in his free enjoyment of it, not only by the common law but also by positive enactments. "It is clear that such a diminution of rights can be effected without a cry being raised that Magna Carta is dethroned or a sacred principle of liberty infringed."²⁹ These restrictions became extensive in the nineteenth century with regulation of land use in the interests first of public health and then of public amenity. The House held that the particular town planning provision concerned fell into the latter category, that of regulation of use, rather than the former, of taking. More interesting is the clear recognition in both speeches that the distinction between measures that are regulatory and measures that are confiscatory is a question of degree, and that a measure which is *ex facie* regulatory may in substance be confiscatory.³⁰ Holmes J.'s "too far" observation was quoted to this effect, and reference was made to cases under the Australian constitution as well.

These cases are usually efforts to impugn legislation, which call on the courts to reconcile expressly guaranteed rights of property with general powers to make laws. This task is rather different from the interpretation of an ordinary statute.³¹ *Manitoba Fisheries* and *Tener* are significant for taking from those cases the idea that regulation at its extreme edge can in substance be a taking, and applying that idea where there is no express guarantee of property rights. *Tener*, in particular, applied the idea to the construction of a statute authorizing a minister to "expropriate land" subject to paying compensation. The case can be neatly contrasted with *France Fenwick & Co. v. The King*³² where a direction by the government for a ship to go to a certain place and not to unload without permission was held not to amount to a "requisition" of the ship, even though it involved interference with the use and enjoyment of property.

The other main point on which *Tener* accords with the earlier authorities is the distinction between regulation as a mere negative prohibition that reduces the value of the property concerned, or simply dissipates or destroys it; and taking as an acquisition where the property, rights or value are transferred to, or captured by, the government authority. The distinction was adopted in *France Fenwick* to construe the power to "requisition" and in *Ulster Transport Authority v. James Brown & Sons*

²⁹ *Ibid.*, at p. 519, per Viscount Simonds.

³⁰ *Ibid.*, per Viscount Simonds at p. 520, and per Lord Radcliffe at p. 525.

³¹ *Ibid.*, at p. 518.

³² [1927] 1 K.B. 458 (K.B.D.). *Tener* also contrasts with the view taken in *Kruger and Manuel v. R.*, [1978] 1 S.C.R. 104, at p. 108, that the hunting restrictions in the Wildlife Act, S.B.C. 1966, c. 55, affected previously enjoyed rights in ways not deemed compensatory and not directed at the acquisition of property.

*Ltd.*³³ to construe the constitutional obligation not "to . . . take any property without compensation". In *Ulster Transport* Lord MacDermott L.C.J. held that the successfully impugned legislation allowed the respondent's goodwill not merely to be taken away, but to be taken over and diverted to the Authority. In *Government of Malaysia v. Selangor Pilot Association*³⁴ "deprivation of property" in one subsection of the constitution was critically different, in the eyes of the Privy Council, from "compulsory acquisition or use of property" in the next. The same distinction has been proposed in the United States as a test for what regulation goes "too far" and amounts to taking, in the context of distinguishing between harm prevention and public benefits extraction,³⁵ or between the arbitration and enterprise functions of government.³⁶ The Supreme Court of Canada adopted the distinction in *Manitoba Fisheries Ltd. v. The Queen*³⁷ by quoting *Ulster Transport Authority* and *France Fenwick* and emphasizing that the express purpose of the legislation was to monopolize the appellant's business. Subsequently, *Manitoba Fisheries* was distinguished on this ground by Marceau J. in the Federal Court in *La Ferme Filibier Ltée v. The Queen*³⁸ where an amendment to the Quebec Fishery Regulations had stopped the plaintiff from operating its trout hatchery, but no benefit or advantage had been appropriated by the Crown.

The Constitution of Australia in s.51(xxxi) permits Parliament to make laws for "the acquisition of property on just terms". The High Court of Australia has consistently held that the emphasis in this limited power is not on a "taking" of private property but on the *acquisition* of property for purposes of the Commonwealth. It was decided in *The Commonwealth v. Tasmania*³⁹ (the *Franklin Dam* case) that to bring the provision into play it is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or substantial it may be. It therefore applies to a narrower range of cases than its American equivalent even though the American authorities are often referred to. Given the adoption in Canada of the taking-acquisition distinction,

³³ [1953] N.I. 79 (N.I.C.A.). Also see *Belfast Corporation v. O.D. Cars Ltd.*, *supra*, footnote 19, at p. 517.

³⁴ [1978] A.C. 337 (P.C.).

³⁵ See R.C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis* (1977), 86 Yale L.J. 385, at p. 418; *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, at p. 128 (1978).

³⁶ J.L. Sax, *Takings and the Police Power* (1964), 74 Yale L.J. 36. Generally, see Tarlock, *loc. cit.*, footnote 26.

³⁷ *Supra*, footnote 15, at pp. 110 (S.C.R.), 468 (D.L.R.).

³⁸ [1980] 1 F.C. 128 (F.T.D.).

³⁹ (1983), 57 A.L.J.R. 450, at p. 494 (Aust. H.C.).

some of the Australian judgments may be useful here. Dixon J. has stated that the interest acquired need not be confined pedantically to long-recognized interests in land, chattels or choses in action but extends to innominate and anomalous interests as well. Nor are circuitous or indirect devices to acquire the substance of a proprietary interest exempt.⁴⁰ In the *Franklin Dam* case, however, the World Heritage Properties Conservation Act,⁴¹ which was designed to prevent Tasmania from building a dam on certain state Crown lands, was held not to have acquired the property for the Commonwealth even though it had sterilized the lands in terms of their potential for use in much the same way as a park.⁴²

It will be evident, then, that *Tener* breaks new ground, but does so by a reasonable extension of principles concerning expropriation that have been evolving in other contexts for some time. It applies *Manitoba Fisheries* in a circumspect manner, avoiding the more questionable elements of that case. As a precedent, it need not bring about any opening of the floodgates. It made no challenge to the validity of the legislation or of the actions taken under it, and the court showed no inclination to start awarding compensation for the entire range of restrictions that the state imposes on owners of property. The necessary ingredient of acquisition or transfer of property, or of value, to the regulator was critical, and may be the subject of further refinement. Furthermore, a number of situations that seem to be caught by *Tener* would already have been caught by the existing law. For example, the freezing of land use as a prelude to formal expropriation can be held to be part of the expropriating machinery under *Re Gibson and Toronto*,⁴³ a rule that Estey J. mentioned.

For all that the case is consistent with existing principles, the court relied mainly on its own analysis of the facts and statutes involved. Three aspects of the analysis call for comment. The first is the event that caused expropriation to occur. The case was argued on the basis, and the court held, that the event was the letter of 1978 wherein the ministry advised that no park use permit would be issued.⁴⁴ This perhaps had the advantage of bringing the case more exactly under the expropriation section of the Park Act, which authorized the *minister* to expropri-

⁴⁰ *Bank of New South Wales v. The Commonwealth* (1948), 76 C.L.R. 1, at p. 349 (Aust. H.C.).

⁴¹ World Heritage Properties Conservation Act, 1983 (Aust.).

⁴² *Supra*, footnote 39, at pp. 495, per Mason J., 510, per Murphy J. and 539, per Brennan J. Deane J., at p. 555, held that this was an acquisition. Gibbs C.J., Wilson and Dawson JJ. held that the Act was invalid.

⁴³ (1913), 11 D.L.R. 529, 28 O.L.R. 20 (Ont. C.A.).

⁴⁴ *Supra*, footnote 1, at pp. 564 (S.C.R.), 12 (D.L.R.). The question of an alternative argument arose in the Court of Appeal; *supra*, footnote 13, at pp. 179 (D.L.R.), 227 (W.W.R.).

ate land, and also of avoiding any limitation problem,⁴⁵ but it is not free from doubt. The power of the minister to issue a park use permit was only a power to dispense with the prohibition against exercising Mineral Act rights in a park—and that prohibition was made by the legislature, in the Park Act of 1965.⁴⁶ It could be argued that this is merely a matter of form in legislative drafting and that in substance the prohibition was the minister's to impose or remove at his discretion, but that argument lost much of its force in 1973, when Wells Gray Park was upgraded—by statute—to a Class A Park. A permit could not then be issued “unless, in the opinion of the Minister, issuance is necessary to the preservation or maintenance of the recreational values of the park involved”.⁴⁷ This is a stringent limitation on the minister's discretion, amounting to a prohibition in all except the most unusual cases. It is hard to see how the minister could lawfully have issued the permit in 1978. Arguably, the result was pre-ordained by the legislature in 1973, so that if any taking occurred, it occurred then and by force of the statute rather than by the acts of the minister. Whether or not the taking could still come under the expropriation section of the Park Act⁴⁸ raises an entirely new question.

The second obscure element in the court's analysis of the statutes is its handling of the prohibition of mining in parks that was inserted in the Mineral Act in 1973.⁴⁹ This section prohibited all kinds of mineral exploration or development unless authorized by the Lieutenant Governor in Council on the recommendation of the person responsible for the park, and therefore seems similar in nature and form to the Park Act restrictions which received much more attention. To Estey J., however, there was a distinction between regulation “*qua* minerals” and “regulation *qua* park use” that apparently enabled him to take an extremely restrictive view of the Mineral Act: “There has been no regulation *qua* minerals which reduced the value of these minerals or the opportunity of the respondents to remove them.”⁵⁰ It is by no means clear why the Crown could not have argued that the Mineral Act would still have prohibited mining until the Lieutenant Governor had made an order to the contrary, even if the minister had issued a permit under the Park Act. Nor is it entirely clear how some similar distinction avoided the proviso in the Crown grant of 1937. That proviso read: “Provided that the grant hereby made shall be subject to the laws for the time being in force respecting

⁴⁵ See Rae J. at first instance: *supra*, footnote 11, at pp. 735 (D.L.R.), 317 (B.C.L.R.).

⁴⁶ S.B.C. 1965, c.31, s.18.

⁴⁷ s.9(1). See text at footnote 5, *supra*.

⁴⁸ *Supra*, footnote 8.

⁴⁹ *Supra*, footnote 6.

⁵⁰ *Supra*, footnote 1, at pp. 563 (S.C.R.), 11 (D.L.R.).

mineral claims.”⁵¹ Estey J. said that it could not be read to authorize a compulsory taking for purposes unrelated to the regulation of the mining of the respondents’ minerals.⁵² The grant was not subject to laws relating to mineral claims “other than *qua* mineral claims”.⁵³

The third item that calls for comment is the silence of Estey J.’s judgment, for the majority, on the Court of Appeal’s carefully reasoned conclusion that injurious affection had occurred rather than expropriation. The silence cannot be explained as a tacit acceptance of all of Wilson J.’s reasons for judgement on the point (Wilson J.’s reasons having been prepared first), on account of a disagreement on the nature of the respondent’s property interest. Wilson J. certainly tackled injurious affection head on, holding that the absolute denial of the right to go on the land and sever minerals deprived the respondents of their entire interest in land as that interest was a *profit à prendre* and did not include ownership of the minerals *in situ*.⁵⁴ On that assumption about the ownership of the minerals, full expropriation would indeed seem to fit the facts better than injurious affection. Estey J., however, could not go so far because he had held that the respondents did own the minerals *in situ* and were not deprived of them. He held that only “access” to the minerals was expropriated. This notion of the rights of access, or rights to use the surface, as an interest in land, distinct from the minerals, is a difficult one. A mineral owner’s rights to use the surface are purely ancillary to his ownership of the minerals. The rights over the surface, for example, are not transferable independently of the mineral rights.⁵⁵ A theory of injurious affection would have avoided this artificial division of what is really one single interest in land, and it would have provided a measure of compensation perhaps no less fitting to the justice of the case. (The procedure, however, would have been different.) One is left wondering why it did not appeal to the majority of the court as a better explanation of the circumstances of the case than outright expropriation.

The Privy Council case, *Davies v. James Bay Railway*,⁵⁶ is particularly apposite. The federal Railway Act,⁵⁷ in providing for the expropriation of land, forbade the use or disturbance of the surface by the owner who retained the minerals, but the Act did not affect title to the minerals. The minerals in question could only be worked from the surface. The mineral owner was held to have an immediate claim for compensa-

⁵¹ *Ibid.*, at pp. 553 (S.C.R.), 4 (D.L.R.).

⁵² *Ibid.*, at pp. 554 (S.C.R.), 4 (D.L.R.).

⁵³ *Ibid.*, at pp. 562 (S.C.R.), 11 (D.L.R.).

⁵⁴ *Ibid.*, at pp. 550 (S.C.R.), 24 (D.L.R.).

⁵⁵ *Re Reliance Gold Mining & Milling Co.* (1908), 13 B.C.R. 482 (L.J.S.C.); *Nelson & Ft. Sheppard Ry. Co. v. Jerry* (1897), 5 B.C.R. 396 (Full Ct.).

⁵⁶ [1914] A.C. 1043 (P.C.).

⁵⁷ R.S.C. 1906, c. 37.

tion for the minerals, not on the basis of expropriation, but of injurious affection. Injurious affection was appropriate even though the title to the minerals was practically, so far as it was possible to foresee, destroyed. The award would have to be for a loss substantially equivalent to the value of the minerals.

The Nature of the Property Interest

The importance of ascertaining the true character of the interest that the respondent claimed to have been taken was underscored by the two different processes of reasoning that flowed from different views of this initial question. Estey J., for the majority, held that the respondents had an interest in fee simple in the lands: the grantees had received a grant of all minerals in the lands with the right to remove the same.⁵⁸ Wilson J. (with whom Dickson C.J.C. concurred) held that what the respondents had was one integral interest in land in the nature of a *profit à prendre* comprising both the claims and the surface rights necessary for their enjoyment.⁵⁹ Thus the distinction is between a grant of the minerals themselves, in place, as a corporeal hereditament—a severed part of the land—and a grant of a right to enter and take the minerals, which right is a *profit à prendre* (and therefore an incorporeal hereditament) that passes property in the minerals only if and when they are taken.⁶⁰ With respect, it seems plain that the majority's choice of the former characterization is the correct one.

The criticism that must be made of Wilson J.'s judgement is that it proceeds too rapidly to quote various definitions of a *profit à prendre* without any scrutiny of how they might apply to the terms of the document in issue. The granting words of the Crown grant of 1937 were:

Know ye that we [His Majesty the King in Right of British Columbia] do by these presents. . . in consideration of the fulfilment of the conditions of the laws providing for the acquisition of minerals. . . give and grant unto WESTERN INVESTMENTS LIMITED its successors and assigns, all minerals, precious and base (save coal, petroleum, and natural gas), which may be found in veins, lodes, or rock in place,. . . under that Parcel or Lot of Land. . . and the right to the use and possession of the surface of such mineral claim. . . for the purpose of winning and getting from and out of such claim the minerals contained therein, including all operations connected therewith or with the business of mining. . . To have and to hold the same unto the said WESTERN INVESTMENTS LIMITED its successors and assigns forever.⁶¹

⁵⁸ *Supra*, footnote 1, at pp. 553-554 (S.C.R.), 3-4 (D.L.R.). This provides a contrast with the trial judgment which held that there were two interests, one in the minerals and one in the right to use the surface: see, *supra*, footnote 10, at pp. 735 (D.L.R.), 316-317 (B.C.L.R.).

⁵⁹ *Supra*, footnote 1, at pp. 540 (S.C.R.), 16 (D.L.R.).

⁶⁰ See J.M. MacIntyre, *The Development of Oil and Gas Ownership Theory in Canada* (1969), 4 U.B.C. L. Rev. 245.

⁶¹ *Supra*, footnote 1, at pp. 553 (S.C.R.), 3-4 (D.L.R.).

Wilson J. does not explain why this form of words should not sever the minerals and create a separate fee simple estate in them, something that the words seem perfectly apt to do. It is quite competent for an owner of land so to convey minerals; as Kellock J. pointed out in *Berkheiser v. Berkheiser*,⁶² the leading Supreme Court of Canada case on the characterization of mineral interests. Kellock J. also cited a passage from *Armour on Real Property*⁶³ that is relevant to the instrument here.⁶⁴

... [A] grant of all the coal or other mineral in or upon certain land, is a grant of part of the land itself, and passes complete ownership in the mineral to the grantee ... But a grant of the right to enter, search for and dig coal, and carry away as much as may be dug, is a grant of an incorporeal right to enter and dig, and passes the property in such coal only as shall be dug.

At first sight, *Berkheiser* seems to support a *profit à prendre* interpretation of the *Tener* grant, since it was a case where an instrument that "doth. . . grant and lease. . . all the petroleum and natural gas. . . within, upon or under the lands" was construed as a *profit à prendre*. However it is readily distinguishable by virtue of the emphasis that the court placed on the fluid nature of the substances concerned⁶⁵ and the true intentment of the instrument when read as a whole.⁶⁶ *Cherry v. Petch*,⁶⁷ which Wilson J. cited, is a pre-*Berkheiser* oil and gas lease case which discusses the *profit à prendre*, but falls into inconsistency in holding that the lease was a profit and at the same time a grant of the products *in situ*. A more useful authority for construing instruments as creating a corporeal or an incorporeal right in minerals is *Duke of Sutherland v. Heathcote*,⁶⁸ where a deed reserved "full and free liberty by all necessary ways and means to search for, get, dig, drain, and carry away, the coal, ironstone, and minerals which may or shall be found within the several lands. . .". To contend that this resulted in an exception of the mines and minerals was held to violate well-settled rules of conveyancing. No conveyancer intending to except mines and minerals would express his intention by reserving a liberty to get minerals. To like effect one can also cite *Doe d. Hanley v. Wood*,⁶⁹ *Carr v. Benson*,⁷⁰ *Little v. Western Transfer and Storage Co.*⁷¹ (a particularly vivid illustration of the

⁶² [1957] S.C.R. 387, at p. 395.

⁶³ (2nd ed., 1916), p. 47.

⁶⁴ *Supra*, footnote 62, at p. 397.

⁶⁵ *Ibid.*, at pp. 391-392.

⁶⁶ *Ibid.*, at pp. 392, 398-399. One clause, for example, referred to the lessor's obligation to pay taxes levied on her by reason of her ownership of mineral rights: *ibid.*, at p. 392.

⁶⁷ [1948] O.W.N. 378 (Ont. H.C.).

⁶⁸ [1892] 1 Ch. 475 (C.A.), followed in *McLeod v. Lawson* (1906), 8 O.W.R. 213 (Ont. C.A.).

⁶⁹ (1819), 2 B. & Ald. 724, 106 E.R. 529 (K.B.).

⁷⁰ (1868), L.R. 3 Ch. App. 524.

⁷¹ [1922] 3 W.W.R. 356 (Alta. C.A.).

difference between having a corporeal and an incorporeal right) and *Detomac Mines Ltd. v. Reliance Fluorspar Mining Syndicate Ltd.*⁷²

The character of a *profit à prendre* as a right of access to land for the purpose of taking something made it easy for the minority to conclude that the entire interest of the respondents had been taken and that it was not a case of injurious affection. The majority view, that the respondents had and still retained title to the minerals themselves, leads to a more striking (if perhaps insufficiently explained) result in holding that even interference with the right of access alone could amount to an expropriation. The majority interpretation of the Crown grant, although not the result of any long analysis, means that *Tener* is more consistent with the previous authorities on the drafting and construction of instruments of this nature, including grants of minerals both by the Crown and by private owners. Private ownership of minerals occurs in many areas, especially those of early settlement or early mining activity. Many Crown-granted mineral claims survive undisturbed in British Columbia, although they have not been issued since 1957.⁷³ Patents of mining claims are still available in Ontario.⁷⁴

Conclusion

In the final analysis, it seems that the British Columbia Government was more willing to compromise park values than to pay the respondents the compensation to which the Supreme Court had held them to be entitled. The Park Act has now been amended to redefine the boundaries of Wells Gray Park so as to remove from it the lands covered by the claims and an access road, and to redesignate them as a recreation area, a status that allows mining.⁷⁵ However, the government has not been able so expediently to dispose of the more general conflict between resource use and wilderness protection. The continuing controversy led to the appointment of a special Wilderness Advisory Committee, which attracted much public attention and numerous submissions in the course of its investigation of decision-making processes for wilderness designations and the protection appropriate for a series of specific areas. The Committee reported in March 1986,⁷⁶ but there is no sign that its work will bring all controversy to a close.

⁷² [1952] O.R. 783 (Ont. C.A.). There is also *Lynch v. Seymour* (1887), 15 S.C.R. 341, but it is less useful in that both the Supreme Court of Canada and the Ontario Court of Appeal were evenly divided, and the deed itself was rather ambiguous.

⁷³ Mineral Act Amendment Act, S.B.C. 1957, c.37, s.2.

⁷⁴ Mining Act, R.S.O. 1980, c.268, s.96.

⁷⁵ Miscellaneous Statutes Amendment Act (No. 3), S.B.C. 1985, c. 52, ss. 81-83.

⁷⁶ The Wilderness Mosaic: The Report of the Wilderness Advisory Committee (Vancouver, B.C., 1986). Also see Martin, *op. cit.*, footnote 12.

NEGLIGENCE—REACTIONS AGAINST ALLEGED EXCESSIVE IMPOSITION OF LIABILITY—A TURNING POINT?—*Crocker v. Sundance Northwest Resorts Ltd.*; *Robson v. Ashworth; B.D.C. Ltd. v. Hofstrand Farms*.

Lewis Klar*

The liability insurance crisis and the extensive publicity which has been given to it have raised the consciousness of legislators, judges, and the public to tort law issues. Despite the fact that the fundamental principles of negligence law which dictate compensation have not been altered, and even though the fault/no-fault debate is at least three decades old, people have woken up to the issues. Should negligence law continue to compensate accident victims? Are tort law principles being inadvertently or deliberately misapplied by judges in order to provide compensation to needy claimants?¹ What are the purposes of contemporary negligence laws and are these being accomplished? These and other questions are now actively being debated again, especially in jurisdictions like Ontario, where it has recently been recommended that a universal disability compensation program be considered to replace existing negligence law.²

Tort scholars tell us that the history of tort law has reflected the changing values and needs of the society in which it has operated. Professor Fleming, for example, writes that "primitive law stressed security" and that it therefore "looked to causation rather than fault".³ Later on, as a result of the influence of the Church, the moral philosophy of individualism, and the economic postulate of *laissez-faire*, the courts "yielded to the general dogma of 'no liability without fault'".⁴ Fleming writes that "today, we are in the process of revising this approach",⁵ and that compensation through loss-spreading has become society's objective.

It is my observation that we may now be witnessing another phase in the evolution of negligence law—a "turning point". The current liability insurance crisis has focused attention on negligence law, and whether rightly or wrongly (and in my opinion wrongly) negligence law has been blamed for producing the current situation. The courts have been accused

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¹ Are judges being "intellectually dishonest", a suggestion by Mr. Justice Horace Krever, in *Ontario Lawyers Weekly*, February 1986.

² Ontario Task Force on Insurance (May 1986).

³ J.G. Fleming, *The Law of Torts* (6th ed., 1983), p. 6.

⁴ *Ibid.*, p. 7.

⁵ *Ibid.*

of having been excessively generous in damage assessments and of too liberally applying negligence principles in order to assist claimants. This accusation and the attendant hysteria regarding the availability and affordability of liability insurance is producing a judicial "backlash"—an over-reaction which is creating a resistance to tort claims. After this initial period, and when the liability insurance industry begins to stabilize, which is apparently already happening, there will be a readjustment. However, important lessons will have been learned in the process concerning the capacity of negligence law to accommodate needy victims. Negligence law will be left a much more principled, fault-based law, less prone to award compensation for compensation's own sake. Concurrently with this development there will, it is to be hoped, the strengthening of social insurance programs, no-fault automobile benefits, or private schemes if there is evidence that this is necessary, to ensure that all disabled persons receive an acceptable degree of care, rehabilitation and retraining following a disabling injury or disease.

The over-reaction in the judiciary with regard to negligence law is evident in three recent judgments which I propose to highlight briefly. As well, there have been statements in other tort cases indicating that courts are sensitive to the current climate.

*Crocker v. Sundance Northwest Resorts Ltd.*⁶

The defendant company operated a commercial ski complex and decided to hold a winter carnival. One of the attractions was a "tubing race", an event in which a two person team went down a mogulled ski hill, while hanging onto a very large tire tube. The plaintiff and his partner entered the race and won their first heat. In the next race, however, the plaintiff broke his neck and became a quadraplegic.

The plaintiff had been drinking heavily before and during the tube racing event and was obviously drunk when he entered the second race. The evidence, as interpreted by the trial judge,⁷ was that although the supervisor of the races, who was the manager of the defendant company, knew that the plaintiff was intoxicated when he entered the second race, no steps other than giving oral advice not to race were taken to stop the plaintiff from racing. The trial judge held that in view of the danger which the plaintiff was running by racing while drunk, the defendant owed a "very heavy" duty to stop him. The trial judge relied exclusively on *Jordan House Ltd. v. Menow*⁸ as authority for the existence of the duty in this case, and apart from lengthy quotation from the *Menow* judgment, he did not concentrate on this aspect of the case.

⁶ (1985), 20 D.L.R. (4th) 552, 33 C.C.L.T. 73 (Ont. C.A.).

⁷ (1983), 150 D.L.R. (3d) 478, 25 C.C.L.T. 201 (Ont.H.C.).

⁸ [1974] S.C.R. 239, (1973), 38 D.L.R. (3d) 105.

Volenti was also quickly rejected. More attention was paid to the exemption clause which the plaintiff had signed, but its availability as a defence was also rejected.⁹

In a strongly worded judgment for the majority of the Court of Appeal, Finlayson J.A., in reversing the trial judgment and dismissing, in its entirety, the plaintiff's action, expressed his opposition to the duty imposed by the trial judge. The plaintiff was graphically portrayed as an immature, irresponsible, and dishonest individual. He was a heavy and uncontrollable drinker and a trouble maker. These were facts well known to the defendant corporation. Is there a duty of care owed to such a person? Finlayson J.A. stated:¹⁰

Our permissive society encourages risk-taking activities from scuba-diving to sky-diving and those who participate cannot have their cake and eat it. If they insist upon taking abnormal and completely unnecessary risks, they cannot complain of the consequences inherent in the very risk that makes the activity challenging and attractive.

What has been the Canadian law in this situation? Are irresponsible individuals to be left totally to their own dangerous devices? In my respectful opinion, this was not the law as expressed in *Jordan House Ltd. v. Menow*¹¹ The plaintiff there was a drunk, an irresponsible individual, of a similar type to Mr. Crocker. Yet he was owed a duty by the defendant tavern keeper, a duty to ensure that he would not be allowed to drink to excess and left to his own devices. It was in fact this defect in character, which, rather than exonerating the defendant from any duty owed to the plaintiff, imposed the duty on the defendant. In my opinion, the character sketch drawn of the plaintiff by Finlayson J.A. did have important legal relevance. With respect, however, it was exactly the opposite to that attributed to it by the Ontario Court of Appeal.

What of *volenti*? Did it apply? There is little doubt that the plaintiff willingly assumed the physical risks of the contest after having been made aware of them. It was these risks which in fact made the race attractive—both for the competitors and for the spectators. It is clear, however, that Canadian negligence law requires an acceptance of the legal risks of an activity before *volenti* comes into play. Can a drunk competitor agree to the legal risks of a dangerous event? More to the point, is it logical even to consider *volenti* in the context of a duty of care owed to a person who cannot because of incapacity protect himself from dangers? The duty and breach in *Crocker* related not to the risks of the actual race, but to the defendant's decision to permit the plaintiff to race, despite his condition. If a duty existed it did so because the

⁹ For a case comment strongly supporting the reasonableness of the judgment see P.H. Osborne, Case Comment (1983), 25 C.C.L.T. 220.

¹⁰ *Supra*, footnote 6, at pp.564 (D.L.R.), 87 (C.C.L.T.).

¹¹ *Supra*, footnote 8.

plaintiff's incapacity created it. In this context, *volenti* becomes inappropriate. One would not seriously argue, for example, that adults can relieve themselves of their duty to safeguard children, or teachers their pupils, by entering into an agreement with them, whereby they agree to waive their legal recourse in case of injury. For *volenti* to have applied in *Crocker* the court would have to countenance the following "agreement":

The plaintiff agrees that despite his drunkenness and his inability to gauge the dangers of the race which he is entering, and despite the defendant's duty to prevent him from racing, the plaintiff will in the case of injury not sue the defendant for not having stopped him from entering the race.

Put this way, can one really argue *volenti* in *Crocker*?

*Robson v. Ashworth*¹²

The plaintiff's husband had been the defendant doctor's patient and had been seeing him for insomnia caused by a depression. The defendant prescribed a barbiturate for the insomnia. The patient took a lethal dose of the drug combined with alcohol and committed suicide. The deceased's dependants sued the doctor under the Ontario Family Law Reform Act.¹³

In his judgment, Galligan J. extensively reviewed the patient's medical and personal history which led up to the suicide. The plaintiffs' action in negligence was based upon two theories of liability. First, it was alleged that the defendant's diagnosis and subsequent treatment of the patient's depression and insomnia were negligent and that it was this negligence that led to the continued depression and eventual suicide. The trial judge rejected this. Second, it was alleged that the defendant was negligent when he prescribed what turned out to be a lethal dose of barbiturates. The trial judge agreed that to prescribe a barbiturate for a long period of time, in this case for five years, was not in accordance with the accepted standards of the profession. More important, the trial judge also agreed that it had been negligent for the defendant to have prescribed a lethal quantity of barbiturate to his patient when the defendant had reason to suspect that the patient was a suicide risk. The trial judge even went so far as to suggest the following standard of care, which the defendant had failed to observe:¹⁴

If a physician is or ought to be aware of circumstances that raise a fair suspicion only that the patient might be a suicide risk, except in an exceptional case, it is negligence to prescribe barbiturates in an amount sufficient to be lethal if taken at one time, either along or in combination with other drugs, unless the most careful inquiry is made to satisfy himself that the suspicion is unfounded.

¹² (1985), 33 C.C.L.T. 229 (Ont.H.C.).

¹³ R.S.O. 1980, c.152, repealed and replaced by Family Law Act, S.O. 1986, c. 4.

¹⁴ *Supra* footnote 12, at p.248.

The trial judge also specifically held that that defendant's negligence materially contributed to the deceased's death, utilizing the test of *McGhee v. National Coal Board*.¹⁵

Duty, breach, and cause, therefore liability. Right? No, wrong. The trial judge held that the patient was sane at the time of his suicide and that the suicide was a deliberate and intentional act. He referred to the "well recognized rule of public policy that the survivors of a person who commits suicide are not entitled to benefit from the suicide".¹⁶ Cases which have awarded damages flowing from suicide, such as *Cotic v. Gray*,¹⁷ were distinguished on the basis that in those cases the mental condition which led to the suicide was brought on in the first place by the defendant's negligent act. On the basis of these arguments, the dependants' action was dismissed in its entirety.

Are these reasons for rejecting the plaintiffs' claim defensible? I do not think so. First, the "rule" of public policy precluding survivors from benefitting from a wrongdoing surely ought not to apply to a suicide, and more so, to dependants of suicide victims, who are in no way parties to the "wrongdoing". It is tenuous to characterize tort law judgments to replace loss of support as "benefits" in the traditional sense, at any event. Even insurance law, where life insurance proceeds can be described as benefits, no longer as a matter of law precludes the payment of insurance proceeds in the event of suicide. Second, the distinction between negligence which results in a suicidal condition as opposed to negligence which contributes to the suicide of an already suicidal person is a weak one. One may even argue that if anything it ought to work in the opposite way. Is it more negligent to cause indirectly a suicide by contributing to a precipitating event, such as an automobile accident, or to contribute directly to a suicide by unreasonably allowing a foreseeable suicide risk to occur? Quite frankly, I think that the distinction is irrelevant. Tort law does not look for the "most" negligent party to an injury producing event to place the entire blame on that person, but apportions liability for an injury among all those who have caused or contributed to it. That is what contributory negligence is all about.

At the heart of Galligan J.'s decision to exonerate the defendant despite the defendant's own negligence was his sense that negligence law's principle of "individual responsibility" required the patient and his dependants to be responsible for the deceased's conscious and deliberate acts. This was expressed as follows:¹⁸

¹⁵ [1973] 1 W.L.R. 1, [1972] 3 All E.R. 1008 (H.L.).

¹⁶ *Supra*, footnote 12, at p.250.

¹⁷ (1981), 124 D.L.R. (3d) 641, 33 O.R. (2d) 356, 17 C.C.L.T. 138 (Ont.C.A.), *aff'd*. (1984), 1 D.L.R. (4th) 187 (S.C.C.).

¹⁸ *Supra*, footnote 12, at p.252.

Does the law permit a sane person deliberately to kill himself and expect that a person who was not the cause of the problems that led to his suicide will be called upon to support his widow and children? Unless the concept of individual responsibility has now been rejected by our law, it seems to me to be repugnant to public policy and to common sense upon which it is based to answer the question in the affirmative. The Court of Appeal recently, albeit in another context, has implicitly suggested that the concept of personal responsibility has not been rejected—see *Crocker v. Sundance* (1985), 33 C.C.L.T. 73, 9 O.A.C. 286 [p.22 of transcript].

What, however, of the “personal responsibility” of the defendant? The implications of this judgment are distressing. There is little point in noting that it is negligent for a physician to prescribe a lethal dose of a drug to a patient suspected of being suicidal if no legal responsibility is to attach to this negligence because of the “personal responsibility” of the patient. More significantly, the judgment plays havoc with traditional defences of contributory negligence and *volenti non fit injuria*. It returns tort law to the days when a plaintiff’s own fault was a complete bar to his cause of action in tort, despite the defendant’s negligence.

*B.D.C. Ltd. v. Hofstrand Farms*¹⁹

The plaintiff informed a clerk in the Crown grant unit office in Victoria that it was essential that Crown grants be registered in a certain land registry office by a certain date. The clerk arranged for a courier to deliver an envelope containing the grants to the land registry office prior to closing time on a certain day. The envelope was marked “air express” and “special delivery”. The courier negligently allowed the envelope to be delivered by truck and as a result it arrived late. The plaintiff suffered an economic loss and sued the Crown and the courier. The plaintiff’s action was dismissed at trial,²⁰ but upheld against the courier on appeal.²¹ The courier then appealed to the Supreme Court of Canada.

Estey J. wrote the judgment for the majority of the court and allowed the appeal. He emphasized “the need for reasonable limitations” with respect to what has been an expanding tort law, especially when dealing with pure economic loss claims. The previous jurisprudence in the areas of negligent misrepresentation and pure economic loss recovery was reviewed. It is a jurisprudence which I believe indicates that there has been, in Canada and elsewhere in the Commonwealth, a gradual widening of liability—a relaxation of the fears of liability “in an indeterminate amount for an indeterminate time to an indeterminate class”, to quote the classic statement of Chief Justice Cardozo in *Ultramares Corp. v. Touche*.²² One may have regard, for example, to cases such as *Haig v.*

¹⁹ [1986] S.C.R. 228, (1986), 26 D.L.R. (4th) 1.

²⁰ (1980), 114 D.L.R. (3d) 347 (B.C.S.C.).

²¹ (1962), 131 D.L.R. (3d) 464, 20 C.C.L.T. 146 (B.C.C.A.).

²² 255 N.Y. 170 (N.Y.C.A., 1931).

Bamford et al.,²³ *Whittingham v. Crease*,²⁴ *Ross v. Caunters*,²⁵ *Caltex Oil (Australia) Pty. v. The Dredge Willemstad*,²⁶ *City of Kamloops v. Nielsen*,²⁷ *Batty v. Metropolitan Property Realisations Ltd.*,²⁸ and *Junior Books Ltd. v. Veitchi Co. Ltd.*,²⁹ *inter alia*, as indicating this trend.³⁰ Granted, one may attempt to distinguish those cases on the facts, by arguing, for example that the defendants there had more specific knowledge of particular plaintiffs than was the case in *Hofstrand*. One can in this way dismiss the judgment in *Hofstrand* as not being particularly significant or telling. I would however reject this. The Supreme Court of Canada has not intervened frequently in the law of torts in recent years, and certainly has not shown a desire to do so merely because it disagrees with a lower court's interpretation of facts. It has only taken up tort law matters when it has wanted to signal a new direction or a way of dealing with old issues, such as damage assessment principles. Is there not therefore a message in the following statement by Estey J. in the *Hofstrand* judgment?³¹

The *Anns* principle sets out a broad and independent right and a concomitant liability in the law of negligence. It has found application in a variety of ways and circumstances in the courts of this country and elsewhere in the years since it was decided. Doubtless, the principle and its reach will be the subject of discussion in the courts as the law of torts continues to evolve. This appeal does not, on its facts, face the court with the need to re-examine the parameters of the doctrine or its definitive role in our jurisprudence. No doubt the courts of this country will continue to search for reasonable and workable limits to the liability of a negligent contractor for contractual undertakings owed to others, and to the liability of persons who negligently make misrepresentations. In this search courts will be vigilant to protect the community from damages suffered by a breach of the "neighbourhood" duty. At the same time, however, the realities of modern life must be reflected by the enunciation of a defined limit on liability capable of practical application, so that social and commercial life can go on unimpeded by a burden outweighing the benefit to the community of the neighbourhood historic principle.

Other Cases

Much of the recent criticism concerning negligence law's "excessive" generosity has been directed at Ontario's Family Law Reform Act.³²

²³ [1977] 1 S.C.R. 466, [1976] 3 W.W.R. 331.

²⁴ (1977), 88 D.L.R. (3d) 353, 6 C.C.L.T. 1 (B.C.S.C.).

²⁵ [1980] Ch. 297, [1979] 3 W.L.R. 605 (Ch.D.).

²⁶ (1976), 136 C.L.R. 529 (Aust.H.C.).

²⁷ [1984] 2 S.C.R. 2, [1984] 5 W.W.R. 1, (1984), 29 C.C.L.T. 97.

²⁸ [1978] Q.B. 554 (C.A.).

²⁹ [1983] 1 A.C. 520, [1982] 3 All E.R. 201 (H.L.).

³⁰ The flow has not been only in one direction. There have been decisions which have resisted the expansion. See, for example, *Seale v. Perry*, [1982] V.R. 193 (S.C.); *Buthmann v. Balzer*, [1983] 4 W.W.R. 695 (Alta.Q.B.).

³¹ *Supra*, footnote 19, at pp.243 (S.C.R.), 13 (D.L.R.).

³² *Supra*, footnote 13.

This revolutionary legislation allows relatives of those injured or killed by the fault of others to recover damages for such thing as services rendered to their injured relative and compensation for the loss of guidance, care and companionship. It extended existing law by specifically providing for damages for these items,³³ and by opening up the action to relatives of injured victims, in addition to the estates of those killed as a result of a tort.

In *Nielsen v. Kaufmann*³⁴ the Court of Appeal varied an award made under the Act by Holland J. He had awarded the ten year old son of the deceased mother \$65,856.00 representing the costs of attending a private boarding school on the basis that this would improve the mental health of the young boy. Holland J. had reasoned that the principle established by the Supreme Court of Canada in *Andrews et al. v. Grand & Toy Alberta Ltd.*,³⁵ that an injured person is entitled to full compensation to sustain or improve his physical or mental health, is applicable to dependants under the Act. The Court of Appeal rejected this and stated:³⁶

It is an undue and unwarranted extension of the principle that money can be used to improve the future mental health of a injured person. It is true that the *Family Law Reform Act* is a remedial statute which must be liberally construed. It cannot be extended, however, to include ideal and optimum schooling for a child who has already been generously compensated by an award of general damages for the loss of his mother's guidance, care and companionship. In our view in this case the award is significantly disproportionate to the loss suffered.

The damages of \$529,087.75 awarded at trial to all dependants was reduced to \$385,645.00 by the Court of Appeal.³⁷

*Attorney-General of Canada v. Szaniszlo et al.*³⁸ involved an action *per quod servitium amisit* taken by the Crown against one member of its armed forces for injuries he caused to another member of the armed forces. The action *per quod* is peculiar and generally outside the scope of this discussion. There was however an interesting statement made by McEachern C.J.S.C. in his judgment which I believe bears on the theme of this comment. The Chief Justice stated:³⁹

In present times the principal use of the action is to transfer responsibility for some kinds of losses from one insurer to another. For many years liability insur-

³³ Courts in other provinces without this broad legislation have been awarding limited damages under this head, rationalizing it as a type of "pecuniary" loss.

³⁴ (1986), 26 D.L.R. (4th) 21 (Ont.C.A.), varying (1984), 28 C.C.L.T. 54 (Ont. H.C.).

³⁵ [1978] 2 S.C.R. 229, (1978), 83 D.L.R. (3d) 452.

³⁶ *Supra*, footnote 34, at p.29.

³⁷ See also *Reidy et al. v. McLeod et al.* (1986), 27 D.L.R. (4th) 317, where the Ontario Court of Appeal reduced by over one-half the damages awarded at trial under the Act.

³⁸ (1985), 25 D.L.R. (4th) 606 (B.C.S.C.).

³⁹ *Ibid.*, at p. 608.

ance has been regarded as an inexhaustible fund of wealth which justifies judicial policy decisions. The learned professions have discovered to their regret that liability insurance is not always available at reasonable cost. The Legislatures might consider whether these limited resources should be conserved for the protection of uninsured risks, leaving it to direct insurers to bear losses which can more accurately be forecast actuarially.

The implications of this line of reasoning, if applied beyond the boundaries of the action *per quod* to the many areas of tort where actions are essentially merely transferring funds from one insurer to another, are significant.

The principle of "individual responsibility"

Both *Crocker v. Sundance Northwest Resorts Ltd.* and *Robson v. Ashworth* emphasized the principle of individual or personal responsibility. This principle, vague though it is, is the cornerstone of a fault-based accident compensation law. It contrasts with the principle of community responsibility, upon which no-fault systems of compensation are predicated. If one should ask why a victim of an accident should be entitled to seek compensation one's answer would vary depending upon these contrasting notions. Advocates of community responsibility would answer:

... society as a whole should pay the cost of progress as well as reap the benefits. Justice demands that principles of equity be invoked to determine the standard of payment; what an individual actually loses when a community adopts a given way of life should be restored by the community. Such restoration is the right of the individual by virtue of being a victim, and no further test of eligibility should be required. Such rights exist for all on a universal basis.⁴⁰

More recently this view was expressed by Krever J. in *Ferguson v. Hamilton Civic Hospitals*⁴¹ where, after dismissing the plaintiff's action for medical negligence due to lack of proof of fault and causation, he stated:

I must add a personal note. In the conclusion to the reasons for judgment of Linden J. in *Davidson v. Connaught Laboratories et al.* (1980), 14 C.C.L.T. 251, there is to be found, in more or less precatory language, an eloquent expression of concern about the requirement of our law that fault exists as a condition precedent to the receipt of compensation in matters of this kind. I cannot leave this case without following Mr. Justice Linden's example. I confess to a feeling of discomfort over a state of affairs, in an enlightened and compassionate society, in which a patient, who undergoes a necessary procedure and who cannot afford to bear the entire loss, through no fault of his and reposing full confidence in our system of medical care, suffers catastrophic disability but is not entitled to be compensated because of the absence of fault on the part of those involved in his care. While it

⁴⁰ Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand (1967), p. 20.

⁴¹ (1983), 144 D.L.R. (3d) 214, at pp. 258-259, 23 C.C.L.T. 254, at p. 313 (Ont.H.C.).

may be that there is no remedy for this unfortunate and brave plaintiff and that this shortcoming should not be corrected judicially, there is, in my view urgent need for correction.

What is the principle of individual responsibility and what are its implications for those injured through the fault of others, their own fault, or no-one's fault? At its minimum, the principle requires that those who injure another through their own fault repair the damage that they cause. Whether this is done personally, or through their insurer, is of little theoretical relevance. In either case, it is the wrongdoer's *responsibility* to ensure that the victim is restored. The principle also requires that those who injure themselves, or who contribute to their own injuries in conjunction with others, retain a degree of responsibility for the result. As indicated by Krever J., the difficult case for tort law concerns those who are injured through neither their own or another's fault. Who is to care for them? With respect to Krever J.'s sentiments, however, the question is one which has little to do with negligence law. It may very well be that the community as a political decision will decide to care for certain disabled—those who suffer from faultless medical misadventure, for example. Frankly, the choice will be a difficult one. On the surface there is very little distinction between victims of medical misadventure, disease, old age, accidents, environmental and social deprivation, poor education, and so on.

Judges find themselves pulled between the competing notions of community and individual responsibility. *Crocker* and *Robson* represented well-intentioned efforts to pull negligence law back to its underlying principle, although the facts of these cases did not justify this treatment. Nevertheless, it is this tension, and the way courts handle it in the future years, which will determine the nature of negligence law.

Conclusion

As indicated in the title of this comment, whether negligence law is now experiencing an important, and lasting, turning point, or merely a temporary aberration, is open to question. Although I am persuaded that we are witnessing more than an immediate reaction to a passing crisis, events may prove me, as they have proved other soothsayers, to have been wrong. As well, I must concede that my theme is clearly open to the objection that a few cases are little evidence of a major trend.

The time is right, however, for a serious evaluation of where negligence law has come and where we want it to go. The Canadian Charter of Rights and Freedoms⁴² has focused attention on individual rights, as opposed to rights of the community or wishes of the majority.⁴³ The

⁴² Constitution Act, 1982.

⁴³ The possible effect of the Charter on tort law, a private law area, generally dominated not by legislation but by the common law, is an interesting issue, which

Charter challenges the views of those who wish to see decision making moved from the courts to other forums. Difficult economic times; and governments committed to reducing deficits, have also stalled alternative compensation schemes. At the same time, however, the insurance industry, insights gained from the law and economics advocates, crowded court rooms (generally filled with Charter "challenges"), and other factors have made it clear that negligence litigation based on traditional principles may not be the best way to deal with issues of compensation and dispute resolution for some kinds of losses.

Negligence law is at a turning point. It will become a more moderate, but more principled law, less concerned purely with compensation but with other values and goals. In weighing the sometimes competing values of justice and economy, morality and efficiency we will do well to recall the following words of one writer:

By thinking of law solely in terms of its efficiency, we rob it of that very efficiency. By failing to give enough attention to its religious dimensions, we deprive it of its capacity to do justice and possibly even of its capacity to survive. . . . By virtue of their symbolization in judicial, legislative and other rituals, the ideals of legal justice come in to being not primarily as matters of utility but rather as matters of sanctity, not primarily as ideals, but rather as shared emotions: a common sense of rights, a common sense of duties, a demand for a fair hearing, an aversion to inconsistency, a passion for equality of treatment, an abhorrence of illegality, and a commitment to legality.⁴⁴

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LABOUR LAW—JURISDICTION OF THE COURTS OVER ARBITRABLE DISPUTES:
St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219.

Robert Kerr*

In *St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219*¹ the Supreme Court of Canada deliberately undertook to clarify the proper role of the courts when a party to a collective agreement seeks to invoke original jurisdiction of the courts to adjudicate a dispute which is subject to arbitration under the collective agree-

has not yet been fully explored. There are those who are convinced that tort law will not be immune from Charter considerations. See, for example, Dale Gibson, *Tort Law And The Charter Of Rights*, unpublished paper delivered at Torts Teachers Conference, Montebello, Quebec, 1986.

⁴⁴ H.L. Berman, *The Interaction of Law and Religion* (1974), pp. 26, 33.

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¹ [1986] 1 S.C.R. 704, (1986), 28 D.L.R. (4th) 1.

ment. The case involved a fairly typical sympathy strike which occurred in New Brunswick. The members of one bargaining unit who were subject to a valid ongoing collective agreement refused to cross the picket line of another bargaining unit which was engaged in a lawful strike. The legally striking unit consisted of office workers, while the other unit was that of the employer's mill workers. The effect of the sympathy strike, therefore, was effectively to close down the mill operation, something which the striking office workers could not accomplish by themselves.

Also in fairly typical fashion, the employer promptly applied to court for an injunction against the work stoppage by the mill workers. An interlocutory injunction was granted, but that did not quickly resolve the matter. The mill workers returned to work only after a contempt order was issued and they later resumed the work stoppage. A second contempt order was issued but the mill workers did not actually return to work until several days later when a settlement had been reached with the office workers. Fines of \$15,000 and \$25,000 were levied under the respective contempt orders. Subsequently, the employer filed a statement of claim in the action it had commenced to obtain the interlocutory injunction. It claimed damages for the losses resulting from the shutdown.

The collective agreement between the mill workers and the employer included provision for arbitration of disputes. The trial judge and the New Brunswick Court of Appeal held that the courts had no jurisdiction over the claim for damages since the collective agreement provided for enforcement by arbitration and since no cause of action arose apart from the alleged breach of the collective agreement.²

The Supreme Court upheld the decision of the lower courts that the claim for damages must be dealt with through arbitration proceedings under the collective agreement, rather than by court action.³ In reaching this conclusion, the court recognized that logically this same conclusion might apply to the claim for an injunction which had originated the litigation. The court decided, however, that the courts do have jurisdiction to award an injunction in such cases, subject to any specific statutory provisions regulating labour injunctions. The court added that it would require a clear legislative directive to oust the jurisdiction of the courts to grant such injunctions.⁴

Two possible bases for the refusal of the courts to accept jurisdiction over the claim for damages were discussed by the court, one involving a legal rule and the other involving judicial discretion. The legal rule in question involves whether, when the rights in dispute are subject to

² (1982), 131 D.L.R. (3d) 616, 37 N.B.R. (2d) 602, (N.B.S.C.), affirmed (1982), 142 D.L.R. (3d) 678, 44 N.B.R. (2d) 10 (N.B.C.A.).

³ *Supra*, footnote 1, at pp. 731 (S.C.R.), 21 (D.L.R.).

⁴ *Ibid.*, at pp. 726, 728 (S.C.R.), 17, 19 (D.L.R.).

arbitration under a collective agreement, the original jurisdiction of the courts is excluded. The judicial discretion involves whether the courts ought to defer on a discretionary basis to the agreement of the parties to use an arbitral forum, but without denying the courts' own jurisdiction in such cases.

The ratio of the Supreme Court in the *St. Anne Nackawic* case appears ultimately to create a legal rule, rather than to rely on judicial discretion. The court stated that "the claim for damages *must* be advanced in the contractual forum of an arbitration board".⁵ This appears to rule out the discretionary alternative. On the other hand, the court's overall reasoning leaves some room for further argument.

The court's reasoning opened with a review of the Canadian jurisprudence on whether the courts should accept original jurisdiction over disputes arbitrable under collective agreements.⁶ The court found a general consensus against such jurisdiction with two apparent exceptions—(1) where the right arises under a collective agreement, but no interpretation of the agreement is required;⁷ and (2) where the right arises solely under common law and not under the collective agreement.⁸ It noted a trend to confine narrowly the second exception so that the courts will no longer accept jurisdiction based on the common law of master and servant if the matter in issue has been dealt with by the provisions of a collective agreement. Moreover, the court questioned the distinction between interpretation and application of a collective agreement, on which the first exception depends, citing its own decisions in *General Motors of Canada Ltd. v. Brunet*⁹ and *Shell Canada Ltd. v. United Oil Workers of Canada*.¹⁰ The court backed off, however, from a clear ruling that the courts do not have original jurisdiction in a dispute arbitrable under a collective agreement, because this would seem to exclude jurisdiction to grant an interlocutory injunction, as well as jurisdiction to award damages, in the type of case before the court.¹¹

The Supreme Court also discussed judicial deference to the arbitration process.¹² Since judicial deference is rarely absolute, this might have led to an approach based on judicial discretion. Again, the court stopped short because deference might also suggest a preference for the arbitral forum to deal with injunctive relief.

⁵ *Ibid.*, at pp. 731 (S.C.R.), 21 (D.L.R.). (Emphasis added).

⁶ *Ibid.*, at pp. 711-721 (S.C.R.), 6-13 (D.L.R.).

⁷ *Hamilton Street Ry. Co. v. Northcott*, [1967] S.C.R. 3.

⁸ *Woods v. Miramichi Hospital et al.* (1966), 59 D.L.R. (2d) 290 (N.B.C.A.).

⁹ [1977] 2 S.C.R. 537, 13 N.R. 233.

¹⁰ [1980] 2 S.C.R. 181, (1980), 114 D.L.R. (3d) 328.

¹¹ *Supra*, footnote 1, at pp. 721-723 (S.C.R.), 14-15 (D.L.R.).

¹² *Ibid.*, at pp. 721 (S.C.R.), 13-14 (D.L.R.).

Ultimately the court based its decision to preserve court jurisdiction to grant injunctive relief against an illegal strike, but to exclude court jurisdiction for the purposes of damages or other relief, on the statutory provision against work stoppages during the life of a collective agreement. This was perceived as giving the specific obligation to refrain from striking a different status from other matters arbitrable under a collective agreement.¹³

This distinction left the court free to rule that disputes under a collective agreement must be taken to arbitration. However, the court failed to state any such rule in terms of general principle. Instead it concluded with only the statement that the claim for damages had to be taken to arbitration.¹⁴ The closest that the court came to a principled statement was in its discussion of the jurisprudence when, as already noted, it stopped short of adopting the rule because of the potential impact on court jurisdiction to give injunctive relief. This leaves open the possibility that the court was ultimately exercising a judicial discretion, rather than applying a legal rule.

The distinction between granting an injunction based on the statutory prohibition of work stoppages and awarding damages under the collective agreement is not a particularly satisfactory one. Damages and injunctions are both remedies for wrongs that have been suffered. Our legal system in fact has a bias in favour of damages as a remedy. It seems strange to conclude, therefore, that this statutory provision gives rise to an action for an injunction in the courts, but not to a claim for damages in the courts. In the long run, damages may indeed be the more effective remedy since, as this case illustrated, the injunctive relief may not work in practice.

By basing the distinction on the statutory nature of the obligation not to strike, the Supreme Court has potentially given new vitality to the second exception noted in the past jurisprudence on whether the courts have jurisdiction over arbitrable disputes. This exception turned, not on the common law nature of the right being enforced, but on the existence of a judicially recognizable right outside of the collective agreement. If the statutory obligation against work stoppages during the life of a collective agreement can be taken to court, rather than to arbitration, the courts may find similar justifications for accepting jurisdiction over other arbitrable disputes.

The application of the decision throughout Canada may also be open to argument, notwithstanding that the Supreme Court appeared to intend this as a general pronouncement of its approach to such cases. New Brunswick has one of only four labour statutes in Canada which

¹³ *Ibid.*, at pp. 726-727 (S.C.R.), 18 (D.L.R.).

¹⁴ *Ibid.*, at pp. 731 (S.C.R.), 21 (D.L.R.).

fail to give the labour board a wide jurisdiction over unlawful work stoppages.¹⁵ This raises the question whether the courts can grant an injunction where the labour board has such jurisdiction. The court's requirement of a clear legislative provision to oust court jurisdiction to grant an injunction, would argue in favour of court jurisdiction. However, the policy underlying the general preference for arbitral jurisdiction over court jurisdiction in this case would support a similar preference for labour board jurisdiction over court jurisdiction where the board has a general remedial mandate in respect of unlawful work stoppages. The court acknowledged that the statute was ambiguous as to the relative roles of the courts and arbitration in this case.¹⁶ This means that exclusion of court jurisdiction is a matter of judicial policy, rather than express legislative mandate.¹⁷

The issue is complicated by the fact that some provinces have legislative provisions designed to restrict, but not exclude, the role of the courts in granting relief from unlawful work stoppages.¹⁸ Since these provisions contemplate the continued existence of some court jurisdiction even though the labour board has been given power to grant injunctive relief, it may be that these provisions actually help to preserve court jurisdiction. On the other hand, it is arguable that such provisions cover cases which are not within labour board powers and do not affect the question of whether the courts should continue to adjudicate claims for relief from work stoppages where such relief is available from a labour board.¹⁹

¹⁵ Except in Manitoba, Newfoundland, New Brunswick and Quebec, there is provision for injunctive relief from an unlawful work stoppage to be granted by the labour relations board or equivalent body: Canada Labour Code, R.S.C. 1970, c. L-1 as am., ss. 182-183; (Alberta) Labour Relations Act, R.S.A. 1980, c. L-1.1 as am., s. 142 (5)(a); (British Columbia) Labour Code, R.S.B.C. 1979, c. 212, s. 28 (1)(a); (Nova Scotia) Trade Union Act, S.N.S. 1972, c. 19, s. 49 (2), (5); (Ontario) Labour Relations Act, R.S.O. 1980, c. 228 as am., ss. 92-93; (Prince Edward Island) Labour Act, R.S.P.E.I. 1974, c. L-1, s. 10 (3)(a); (Saskatchewan) Trade Union Act, R.S.S. 1978, c. T-17 as am., s. 5(e).

¹⁶ *Supra*, footnote 1, at pp. 723 (S.C.R.), 15 (D.L.R.).

¹⁷ A similar policy was recently applied by the Supreme Court to exclude the courts from original jurisdiction over violations of human rights legislation, in favour of the jurisdiction of human rights tribunals: *Board of Governors of Seneca College v. Bhaduria*, [1981] 2 S.C.R. 181, (1981), 124 D.L.R. (3d) 193.

¹⁸ See, for example, Ontario Courts of Justice Act, S.O. 1984, c. 11, s. 115. New Brunswick has a similar provision itself: Judicature Act, R.S.N.B. 1973, c. J-2 as am., s. 34. Only the British Columbia statute expressly excludes court jurisdiction, but it also contains a provision saving court jurisdiction in circumstances similar to those to which court jurisdiction is restricted under the Ontario model: Labour Code, *supra*, footnote 15, s. 32(1), (2).

¹⁹ In Ontario, for example, there is no general labour board jurisdiction over picketing so that control of picketing would remain under court jurisdiction.

Four of the seven labour statutes which confer wide jurisdiction over unlawful strikes on the labour board also contain a provision that the jurisdiction conferred on the labour board is exclusive.²⁰ This could provide statutory confirmation of a policy excluding court jurisdiction in such cases. However, it is doubtful whether this constitutes the clear ouster of court jurisdiction to grant an injunction that the Supreme Court has called for in the *St. Anne Nackawic* case. The exclusive jurisdiction provisions are associated with the standard privative clauses. Their purpose may be seen as merely reinforcing restraint on judicial interference with the actual functioning of labour boards, rather than as depriving the courts of their own independent jurisdiction. Only the British Columbia statute appears to resolve the issue clearly by expressly excluding court jurisdiction generally, but saving it expressly in certain circumstances.²¹

Since court jurisdiction to grant an injunction was held by the *St. Anne Nackawic* decision to be based on the statutory prohibition of the work stoppage, the question does arise whether there is any initial basis for court jurisdiction where the statute confers jurisdiction on the labour board. The exclusive jurisdiction clauses would reinforce this argument against court jurisdiction. This argument might even be made under the British Columbia provisions which merely save, rather than create, court jurisdiction.

The question of whether the labour board and the court have concurrent jurisdiction has come up under the federal legislation, which does not have a provision expressly conferring exclusive jurisdiction on the labour board. The Federal Court has held that it does not have jurisdiction over unlawful strikes, but not on the basis of judicial policy such as that applied in the *St. Anne Nackawic* case to exclude court jurisdiction in favour of another tribunal's jurisdiction. Instead, the Federal Court relied on a provision in its own statute which excludes it from jurisdiction "otherwise specially assigned".²² Since the Federal Court is a court of specified jurisdiction, this conclusion does not assist in determining the jurisdiction of the provincial superior courts which have general and inherent jurisdiction. Moreover, the jurisdiction of the superior courts in the provinces to grant an injunction against an unlawful strike could apply to a strike in the federal labour sector, as well as in the provincial labour sector.

²⁰ See the legislation cited *supra*, footnote 15, Alberta, s. 18(1); British Columbia, s. 31; Ontario, s. 106(1); Prince Edward Island, s. 4(1).

²¹ See *supra*, footnote 18. The B.C. statute saves court jurisdiction to grant an injunction in cases of "immediate danger of serious injury to an individual" or "actual obstruction or physical damage to property".

²² *National Association of Broadcast Employees and Technicians v. R.*, [1980] 1 F.C. 820, 79 C.L.L.C. 14,231 (F.C.A.), applying s. 23 of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10.

The force of the *St. Anne Nackawic* decision with respect to court jurisdiction to grant injunctions against unlawful strikes is further left in doubt because the court started with a fallacious basis for the assertion that this jurisdiction was already settled.²³ The court cited *I.B.E.W. v. Winnipeg Builders' Exchange*²⁴ as having settled this issue. In that case, however, the challenge to jurisdiction was based on the fact that an injunction against a strike has the effect of enforcing contracts of personal service. While this objection to injunctive relief is frequently referred to as a question of jurisdiction, it is really a matter that goes to the court's determination of whether an injunction is the appropriate remedy, rather than to jurisdiction in the sense of the power of the courts to adjudicate the dispute. No objection to jurisdiction appeared in the *I.B.E.W.* case on the basis of the arbitrability of the dispute.

In so far as the decision in the *I.B.E.W.* case supports jurisdiction in the sense of power to adjudicate, it supports jurisdiction over damages, as well as injunctive relief. The court stated:²⁵

It is true that an employer whose operations are brought to a standstill by an illegal strike or a union whose employees are rendered idle by an illegal lockout may bring an action for damages or seek to invoke the penal provisions of the Labour Relations Act but the inevitable delay in reaching a final adjudication in such procedures would have the result that any really effective remedy was denied to the injured party.

Since the statement that an action for damages is available has been overruled in the case of an arbitrable dispute by the decision in the *St. Anne Nackawic* case, the strength of the *I.B.E.W.* case on jurisdiction to grant an injunction may also be questioned.

The citation of the *I.B.E.W.* case as authority for court jurisdiction over an action for an injunction against an illegal strike raises the possibility that, when the Supreme Court referred to jurisdiction in the *St. Anne Nackawic* case, it really meant jurisdiction in the special sense in which the term was used in the *I.B.E.W.* case. In other words, the court may have been referring to the appropriateness of the awarding of a particular remedy by the courts, rather than to the power of the courts to adjudicate the dispute. The actual result is consistent with this interpretation since the dispute in which the court upheld jurisdiction to grant an injunction was really the same dispute as that in which the court denied jurisdiction to award damages. Thus, the court accepted jurisdiction over the dispute and it was only remedial power that was limited.

Since the original injunction in such cases is interlocutory, this would raise the question of what the courts should do if a party pursued a final

²³ *Supra*, footnote 1, at pp. 721 (S.C.R.), 14 (D.L.R.).

²⁴ [1967] S.C.R. 628, (1967), 65 D.L.R. (2d) 242.

²⁵ *Ibid.*, at pp. 641 (S.C.R.), 251-252 (D.L.R.).

judgment on the question of injunctive relief, instead of abandoning that question as in the *St. Anne Nackawic* case. Because of the limited circumstances in which a strike or lockout is lawful, it is likely in most cases that injunctive relief will be justified at the time the interlocutory injunction is granted. However, it is equally likely that, by the time any court proceedings reach final judgment, any unlawful strike or lockout or threat thereof will long have ceased. Consequently, any claim for a permanent injunction is likely to be moot, which is a strong reason for declining to grant such an injunction.

If there is a genuine issue to be tried with respect to the justification of the interlocutory injunction or the need for a permanent injunction, it would seem inefficient to try that issue in the courts and require separate proceedings before an arbitrator with respect to other remedies involving the same facts. If the courts refuse to adjudicate such issues, the *St. Anne Nackawic* case will in effect have created an action which exists solely for the purpose of gaining interlocutory relief. This would be something quite different from the established jurisdiction claimed by the Supreme Court for injunctions against unlawful strikes or lockouts. The established jurisdiction was surely based on the more normal model of interlocutory relief as a temporary measure pending final judgment and an appropriate further remedy. On the other hand, if the courts are prepared to adjudicate disputes over the justification of the interlocutory injunction or the need for a permanent injunction, they may undermine effectively the policy of the *St. Anne Nackawic* case in favour of arbitration of other remedial claims in such cases. This policy could only be maintained by insistence upon duplicative proceedings before an arbitrator where the question of other remedies also arises.

The reasoning and language of the Supreme Court in the *St. Anne Nackawic* case are more consistent with the interpretation that the jurisdictional question is one of authority to adjudicate the dispute, rather than one of whether to grant a particular remedy. There are references to "a cause of action for damages" which indicate that the court was directing its mind to the entire action, and not simply to a particular remedy.²⁶ By basing its authority to grant an injunction on the statutory prohibition, the court was identifying a separate cause of action to justify its jurisdiction to grant an injunction. In other words, it recognized the existence of two separate disputes, enabling it to claim jurisdiction over one while declining jurisdiction over the other.

This interpretation does not eliminate the problem of duplicative proceedings, but it does rationalize it. While congruent, the statutory and the contractual prohibitions against such strikes are not necessarily identical so that separate proceedings may have some justification.

²⁶ For example, *ibid.*, at pp. 728 (S.C.R.), 19 (D.L.R.).

The court avoided determining whether it might be appropriate to exercise its power to award equitable damages in the action on the statutory right. The court held that the statutory violation was remedied by the injunction and the contempt orders in support thereof, eliminating any claim for equitable damages.²⁷ However, this ignored the reality that neither the injunction nor the contempt orders were effective in ending the strike. Surely the continuing work stoppage was also a violation of the statute. By the time of the further proceedings, damages were the only practical remedy for this violation. Moreover, this reasoning passed too quickly over the availability of equitable damages in addition to, as well as in place of, an injunction. The whole purpose of the power to grant equitable damages is to provide a complete remedy in a single proceeding, whether by way of injunction, or damages, or both.²⁸

The court did note that the prime reason for the courts to grant injunctive relief in this type of case is the lack of any other effective remedy.²⁹ Under many collective agreements the *ad hoc* nature of arbitration proceedings makes it impossible to obtain anything like the rapid relief of an interlocutory injunction from the courts. The decision in the *St. Anne Nackawic* case would have been more satisfactory if it had proceeded on this basis to justify the interlocutory injunction as a remedy based on the statutory obligation. This reasoning would have helped to answer many of the questions raised above. For example, this reasoning would lead naturally to the conclusion that court jurisdiction to grant an injunction is excluded where the labour board has such jurisdiction. Since labour boards generally act with expedition in such cases, there is no need for the courts to assist, except in so far as the legislation provides for enforcement of board orders through the courts.³⁰ Similarly, any question of duplicative proceedings would probably be avoided since the court jurisdiction would clearly be supportive of, rather than alternative to, arbitration proceedings.

Although the court's reasoning is not entirely satisfactory, it is likely that the *St. Anne Nackawic* case will be accepted as firmly establishing a general rule which excludes original court jurisdiction in disputes arbitrable under a collective agreement. The awarding of an injunction for an unlawful work stoppage is one of what is likely to be a minimal number of exceptions to this rule. In so far as this keeps the courts out of other disputes arising under a collective agreement, the decision could prove to be a landmark in rationalizing the process of adjudication of such disputes.

²⁷ *Ibid.*, at pp. 727-728 (S.C.R.), 19 (D.L.R.).

²⁸ Judicature Act, R.S.N.B. 1973, c. J-2, s. 26(9).

²⁹ *Supra*, footnote 1, at pp. 729 (S.C.R.), 20 (D.L.R.).

³⁰ See the legislation cited *supra*, footnote 15, Canada, s. 123; Alberta, s. 142(7); British Columbia, s. 30; Ontario, s. 94; Saskatchewan, s. 13.