BANKRUPTCY—SECURED CREDITORS ISSUING PETITION—EFFECT ON PREFERRED AND UNSECURED CREDITORS: *Bank of Montreal* v. *Scott Road Enterprises Limited*

C. Keith Ham*

Introduction

The judgment of Esson J.A. of the British Columbia Court of Appeal in *Bank of Montreal* v. *Scott Road Enterprises Limited*[1] dated March 20, 1989 raises concerns about the use of the Bankruptcy Act[2] by secured creditors to improve their priority position in the context of a nil asset bankruptcy. In so doing the Court of Appeal has raised fundamental issues about the treatment of secured creditors under the Bankruptcy Act.

Reversal of Priorities and the Nil Asset Bankruptcy

One of the principal purposes of the Bankruptcy Act is to facilitate an orderly and fair distribution of the property of a bankrupt among creditors on a *pari passu* basis.[3] To this end, section 141 of the Bankruptcy Act states that, subject to the Act, all proven claims shall be paid rateably. However, section 136(1) makes provision for a special list of "preferred" claims to be paid in the order of priority set forth therein. Ordinary claims therefore will not be paid until the entire list of preferred claims is paid in full.

Section 136(1) is in turn "subject to the rights of secured creditors". A secured creditor is defined in section 2 of the Bankruptcy Act as a person holding a mortgage or charge against the property of the debtor as security for a debt due. The qualification in section 136(1) means in practice that any person who comes within the definition of secured creditor may, in respect of the collateral to which his security interest attaches, liquidate his security independently of the Bankruptcy Act. If a secured creditor does so, and he invariably will, the property available to be

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[1] [1989] 4 W.W.R. 566, (1989), 73 C.B.R. (N.S.) 273 (B.C.C.A.).

[2] R.S.C. 1985, c. B-3.

[3] See, for example, *Re Commonwealth Investors Syndicate Ltd.* (1986), 60 C.B.R. (N.S.) 193 (B.C.S.C.).

distributed by the trustee in bankruptcy to other creditors will be reduced correspondingly.

The regime governing the treatment of secured, preferred and ordinary claims in a bankruptcy has been in place since the enactment of the original Bankruptcy Act in 1919.[4] At that time, most creditors were unsecured and the amount owed to secured creditors was usually only a small part of the total debt of the bankrupt.[5] The trustee, therefore, would usually have some property available to distribute to preferred and ordinary creditors. Since 1919, however, both the methods of secured financing and the legislation governing them have changed considerably whereas the Bankruptcy Act has not. Today, few if any assets of a typical corporate debtor are unencumbered by security. This has resulted in a preponderance of nil asset bankruptcies—the trustee in bankruptcy has no property to distribute among preferred and ordinary creditors because it is entirely subject to the claims of secured creditors.

Nil asset bankruptcies are, ironically, usually precipitated by secured creditors who either persuade the debtor to make a voluntary assignment into bankruptcy or petition the debtor into bankruptcy themselves. While the priority scheme contained in the Bankruptcy Act may appear to make such action unnecessary, judicial interpretation has created an incentive for a secured creditor to invoke bankruptcy proceedings in two situations.

The first situation occurs in circumstances in which a landlord has purported to distrain on the debtor's assets for arrears of rent. Secured creditors routinely invoke the Bankruptcy Act in an attempt to reverse the pre-bankruptcy priority of the landlord. The courts have held that the effect of a bankruptcy is to subordinate the entire amount of the landlord's claim to the rights of secured creditors.[6] In addition they have held that it is not improper for a secured creditor to petition a company into bankruptcy solely for the purpose of reversing its priority against the landlord.[7]

The second situation in which a secured creditor has an incentive to precipate a bankruptcy is if there are substantial provincial liens or deemed trust claims for taxes, workers' compensation assessments and similar kinds of claims. The Supreme Court of Canada has held in a series of recent cases, commencing with *Deputy Minister of Revenue (Quebec)* v.

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[4] 9-10 Geo. V, Can. S. 1919, c. 36.

[5] See, Report of the Study Committee on Bankruptcy and Insolvency Legislation (1970), Information Canada, p. 56.

[6] *Re Polycoating & Films Limited* (1965), 51 D.L.R. (2d) 673, 8 C.B.R. (N.S.) 163 (Ont. C.A.).

[7] *Re Develox Industries Limited* (1970), 12 D.L.R. (3d) 579, 14 C.B.R. (N.S.) 132 (Ont. S.C.); *Re Gasthof Schnitzel House Ltd. and Sanderson*, [1978] 2 W.W.R. 756, (1979), 27 C.B.R. (N.S.) 75 (B.C.S.C.); *Re Harrop of Milton* (1979), 92 D.L.R. (3d) 535, 29 C.B.R. (N.S.) 289 (Ont. S.C.).

Rainville[8] and culminating with *British Columbia* v. *Samson Belair Ltd.*,[9] that as Parliament has the exclusive power to determine priorities on a bankruptcy, attempts by the provincial governments to avoid having preferred status on a bankruptcy by resort to deemed trust devices are invalid. Therefore, secured creditors will invoke a bankruptcy to avoid payment of large government claims against the debtor.

A bankruptcy precipitated by a secured creditor inevitably results in the trustee having no assets to distribute to other creditors. This has been used as a defence to petitions by secured creditors. In *Re Black Bros. (1978) Ltd.*[10] the debtor contended that a resulting nil asset bankruptcy was a "sufficient cause" within the meaning of section 43(7) of the Bankruptcy Act for the court not to grant the petition of the secured creditor. McLachlin J. rejected the debtor's argument, stating that while courts generally will not make orders which they know to be ineffective a nil asset bankruptcy does not have this consequence. An order for bankruptcy, according to McLachlin J., does more than vest property in the trustee for distribution among creditors: it gives the trustee special powers to recover other assets of the bankrupt and allows for a reversal of priorities in favour of a secured creditor. A resulting nil asset bankruptcy does not mean that the order will have no purpose.

This reasoning is very much in the main stream of judicial thinking on the nil asset bankruptcy. The Supreme Court of Canada has also indicated indirectly that nil asset bankruptcies have value if only because they reverse priorities in favour of secured creditors. In *Federal Business Development Bank* v. *Quebec (Commission de la santé et de la sécurité du travail)*,[11] Lamer J. observed that even if secured creditors use the Bankruptcy Act simply to improve their title, it is beneficial because it ensures consistency of priorities across the country.

The Scott Road Case

Scott Road Enterprises Ltd. was financed by the Bank of Montreal. It defaulted on its loan obligations and the Bank appointed a receiver. The Bank learned subsequently that there was approximately $80,000 in government claims ranking in priority to the Bank. Included in these claims were wage and vacation pay claims of about $39,000. To avoid paying the provincial portion of these claims, the Bank decided to put the company into bankruptcy. The directors of the company refused to make a voluntary assignment into bankruptcy and the Bank therefore, about six weeks after the commencement of the receivership, issued a bankruptcy petition against the company. The company opposed the petition.

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[8] [1980] 1 S.C.R. 35, *sub nom, Re Bourgault* (1979), 105 D.L.R. (3d) 270.

[9] [1989] 2 S.C.R. 24, (1989), 59 D.L.R. (4th) 726.

[10] (1982), 41 C.B.R. (N.S.) 163 (B.C.S.C.).

[11] [1988] 1 S.C.R. 1061, (1988), 50 D.L.R. (4th) 577.

At the hearing, counsel for the company argued, first, there had been no act of bankruptcy and second, the petition had been brought for an improper purpose. In respect of the first argument, the Chambers Court judge held that, as of the date of filing the petition, the company had committed an act of bankruptcy. In respect of the second argument, McKenzie J. stated that he was obliged to follow the decision in *Re Black Bros.* Consequently, he refused to dismiss the petition. The company appealed.

The appeal was heard by a panel of three judges, two of whom wrote opinions and both of which dismissed the appeal. The more extensive opinion was written by Esson J.A. and concurred in by Seaton J.A. Reviewing both grounds of dispute put forward by the company, Esson J.A. rejected the first ground with little difficulty, noting that the company did not seriously attack the finding of McKenzie J. On the second ground, however, Esson J.A. had more difficulty. Not bound to follow *Re Black Bros.*, he took note of the misgivings expressed by Henry J. in *Re Harrop of Milton Inc.*[12] in granting a petition to a secured creditor in a nil asset bankruptcy situation. He also noted implications of similar misgivings in McKenzie J.'s judgment. In addition, he referred to academic writings[13] on the subject of the nil asset bankruptcy. They suggested both that petitions by secured creditors may contravene the spirit of the Bankruptcy Act and that the priority scheme contained in section 136(1) is arguably inoperative if there are no assets subject to it.[14] Esson J.A. did not comment on these assertions.

Esson J.A. then stated that the circumstances of this case starkly illustrate the inequitable consequences of allowing secured creditors to use the Bankruptcy Act to reverse priorities otherwise existing in favour of the Crown and employees. He noted that until the day the receiver was appointed, the company had met all its obligations as they became due or within the terms of arrangement with creditors. Further, he observed that the Bank had appointed its receiver on a pay day which resulted in the employees not being paid. With the ensuing bankruptcy, any prospect for a recovery of unpaid wages was lost.

On these facts, counsel for the company argued that the Bank's petition had violated the spirit of the Bankruptcy Act and caused such inequitable consequences that it should be dismissed. To this submission, the Bank replied that the only parties who could argue that they were being treated inequitably were Crown agencies and the company's employees; however, they were not litigating the case. In addition, counsel for the Bank noted

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[12] *Supra*, footnote 7.

[13] A. Kemp-Gee, Bankruptcy in a Receivership (1984), 1 Nat. Insolvency Rev. 23, at p. 27.

[14] A. Giroux, The Use of the Bankruptcy Act by Secured Creditors, in Bankruptcy—Present Problems and Future Perspectives (Meredith Memorial Lectures, 1985), at p. 240.

that even though the company was up to the date of the receivership meeting its obligations it was doing so by overdrawing its line of credit.

To the Bank's submissions, Esson J.A. replied that while they may have been true, they are not an answer to the real question whether valid legislative schemes for protecting Crown revenues and wages should be nullified by a bankruptcy which serves no useful purpose. He was inclined, therefore, but did not dismiss the petition due to the Supreme Court of Canada's decision in the *Federal Business Development Bank* case. According to Esson J.A., the statement made by Lamer J. therein and referred to above represents a considered dictum of the Supreme Court of Canada on an issue of policy. Therefore, if the current law is unsatisfactory, he was of the view that Parliament would have to change it.

In concluding his decision, Esson J.A. focused on the law as it affects wage claims in a bankruptcy. Wage earners, he stated, are particularly prejudiced by a secured creditor's use of the Bankruptcy Act to improve its position. In conferring preferred status on wage claims, Parliament had attempted to give them a high degree of protection. Today, Esson J.A. remarked, this protection is illusory; wages have a preferred status up to a maximum of only $500 and, with so many nil asset bankruptcies, the chances of recovering even this amount are small.

Esson J.A. did note that it was possible to argue that the charge in favour of unpaid wage claims created by section 15 of the British Columbia Employment Standards Act[15] is not necessarily destroyed on a bankruptcy. Unlike the claims considered by the Supreme Court of Canada in the *Rainville* line of cases, it does not secure a charge of the Crown. As Esson J.A. pointed out, however, this may be a distinction without a difference because the reasoning in the *Rainville* cases is likely broad enough to catch it. In that case, the result is, he argued, anomalous because wage earners would be better off if Parliament had not mentioned them in section 136(1) of the Act.

Conclusion

The judgment of Esson J.A. in *Scott Road* is a valuable contribution to the bankruptcy law jurisprudence because of its willingness to question the utility of laws which allow a secured creditor to invoke a bankruptcy which "serves no useful purpose" and to suggest that bankruptcy law reform is necessary. This differs notably from the current jurisprudence in the area which is either highly formalistic (the *Rainville* cases) or somewhat unrealistic (McLachlin J.'s judgment in *Re Black Bros.).*[16]

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[15] S.B.C. 1980, c. 10, as amended.

[16] The *Rainville* cases are virtually silent on the policy issue of whether a secured creditor should properly be able to reverse priorities *vis-à-vis* the Crown. The *Black Bros.* case is unrealistic to the extent that McLachlin J. attributes value to a nil asset bankruptcy because it gives the trustee special powers to recover other assets of the bankrupt. While

In addition, the judgment's discussion of the effect of a bankruptcy on employees' wage claims is compelling. Esson J.A.'s point that wage claims are unlike other claims is a good one. Clearly, such claims are deserving of special protection which the current Bankruptcy Act no longer provides.

The weakness of the judgment, however, may be its failure to address why the Crown should also have priority over secured creditors in a bankruptcy. Crown claims are of a different nature than employees' wage claims, yet Esson J.A. does not explain why the two should be given similar treatment. The issue of Crown priority on a bankruptcy is one of considerable academic debate. It is interesting to note that the reports on bankruptcy reform done for the federal government over the past twenty years have generally advocated abolition of Crown priority.[16]

How one resolves this issue will depend largely on one's political and philosophical beliefs, and Esson J.A. may have felt therefore that it would be inappropriate for the court to venture further than it did. Whichever view one takes on the necessity for Crown priority, however, the message from the Court of Appeal that the Bankruptcy Act is in strong need of reform is well-taken. If its primary function is to protect secured creditors who are not even bound by the statute, then something needs to be done.

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CONSTITUTIONAL LAW—CONSTITUTION ACT, 1867, SECTION 67—LABOUR STANDARDS CODE, S.N.S. 1972, c. 10, s. 67A—POWER OF PROVINCIAL LABOUR TRIBUNAL TO RULE ON DISMISSAL FOR CAUSE: *Sobeys Stores Ltd.* v. *Yeomans.*

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The Litigation

Yeomans had been employed by Sobeys Stores Ltd. for ten years when in 1983 he was dismissed. The Nova Scotia Labour Standards Code[1] prohibits an employer from discharging without "just cause" an employee with ten or more years of employment. Yeomans filed a complaint with the Director of Labour Standards claiming that his dismissal had been made without "just cause" and seeking reinstatement with back pay.

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this is correct the trustee in the nil asset bankruptcy context will not commence proceedings under the Bankruptcy Act without funding from other creditors who seldom want to risk further losses.

[17] See, for example, *op. cit.*, footnote 5, pp. 122-123.

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[1] Labour Standards Code, S.N.S. 1972, c. 10.

Following inquiry into the complaint and failing to effect a settlement, the Director ordered Yeoman's reinstatement with back pay of $21,242.

Sobeys unsuccessfully appealed to the Labour Standards Tribunal on the merits. In further proceedings before the Court of Appeal, Sobeys argued that jurisdiction "to hear and decide disputes between masters and servants respecting complaints of unjust dismissal ... and to adjudicate thereupon and to order remedies whether by way of compensation or reinstatement or otherwise",[2] was an exclusive jurisdiction of the superior courts of Nova Scotia at confederation, and the provisions of the Code conferring jurisdiction on the tribunal were therefore unconstitutional. The court accepted that argument. Yeomans and the Attorney General of Nova Scotia appealed to the Supreme Court of Canada. The Supreme Court reversed the decision of the Nova Scotia Court of Appeal, and held the legislation to be constitutionally valid.[3]

Legal Background

Before any discussion of the Supreme Court's decision, a brief review of the general legal background is appropriate. Section 96 of the Constitution Act, 1867 reads as follows:

> The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

It is well established that section 96 prohibits Parliament and the provincial legislatures from conferring on provincially appointed bodies the judicial powers of superior, district or county courts, or powers analogous to those powers. However, the exact test or tests for deciding if that has happened and the application of the tests in particular cases has been a source of considerable dispute. The modern[4] point of departure for a section 96 analysis is the decision of the Supreme Court of Canada in *Reference Residential Tenancies Act*.[5] Dickson J., for the court, established a three-step general test:[6]

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[2] *Re Sobeys Stores Ltd. and Yeomans* (1985), 24 D.L.R. (4th) 573, at p. 578, 70 N.S.R. (2d) 391, at p. 395 (N.S. App. Div.).

[3] *Sobeys Stores Ltd.* v. *Yeomans*, [1989] 1 S.C.R. 238, (1989), 57 D.L.R. (4th) 1.

[4] See, as examples of some earlier cases, *Toronto* v. *York Township*, [1938] A.C. 415, [1938] 1 D.L.R. 593 (P.C.); *Reference re Adoption Act*, [1938] S.C.R. 398, [1938] 3 D.L.R. 497; *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.*, [1949] A.C. 134, [1948] 4 D.L.R. 673; *Tomko* v. *Labour Relations Board (N.S.)*, [1977] 1 S.C.R. 112, (1975), 69 D.L.R. (3d) 250.

[5] [1981] 1 S.C.R. 714, (1981), 123 D.L.R. (3d) 554.

[6] *Ibid.*, at pp. 734-736 (S.C.R.), 571-572 (D.L.R.). The test substantially mirrors the test in *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.*, *supra*, footnote 4. In *Massey-Ferguson Industries Ltd.* v. *Government of Saskatchewan*, [1981] 2 S.C.R. 413, at p. 429, (1981), 127 D.L.R. (3d), at p. 526, Laskin C.J.C., for the court, summarized the *Residential Tenancies* test and broadened the third step to ask whether

> The first involves consideration, in the light of the historical conditions existing in 1867, of the particular power or jurisdiction conferred upon the tribunal. The question here is whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation....
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> If the historical inquiry leads to the conclusion that the power or jurisdiction is not broadly conformable to jurisdiction formerly exercised by s. 96 courts, that is the end of the matter.... If, however, the historical evidence indicates that the impugned power is identical or analogous to a power exercised by s. 96 courts at Confederation, then one must proceed to the second step of the inquiry.
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> Step two involves consideration of the function within its institutional setting to determine whether the function itself is different when viewed in that setting. In particular, can the function still be considered to be a "judicial" function.... [T]he question of whether any particular function is "judicial" is not to be determined simply on the basis of procedural trappings. The primary issue is the nature of the question which the tribunal is called upon to decide. Where the tribunal is faced with a private dispute between parties, and is called upon to adjudicate through the application of a recognized body of rules in a manner consistent with fairness and impartiality, then normally, it is acting in a "judicial" capacity....
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> If, after examining the institutional context, it becomes apparent that the power is not being exercised as a judicial power, then the inquiry need go no further.... On the other hand, if the power or jurisdiction is exercised in a judicial manner, then it becomes necessary to proceed to the third and final step in the analysis and review the tribunal's functions as a whole in order to appraise the impugned function in its entire institutional context.... The scheme is only invalid when the adjudicative function is a sole or central function of the tribunal ... so that the tribunal can be said to be operating "like a s. 96 court".

In *Residential Tenancies* the power of a provincially appointed commission to issue compliance and eviction orders to residential landlords and tenants was challenged. At step one, the Attorney General of Ontario conceded that these powers were the same as the superior court powers to issue orders of specific performance, or injunctive relief, and ejectment, respectively. The court limited its historical inquiry to the situation in Ontario at and prior to 1867. At step two, the exercise of these powers by the commission was found to be judicial in nature as there was a *lis* between parties determined by the application of legal principles. At the third step, the adjudicative function was found to be the primary role of the commission, with its administrative functions merely ancillary.

Two years later, in *Attorney General of Quebec and Régie du Logement* v. *Grondin*[7] the Supreme Court again considered a section 96 challenge to a provincial residential tenancies commission. The reasons for decision

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the function of the judicial power or jurisdiction "as a whole in its entire institutional context violate[s] s. 96". Having assumed answers to the first two steps contrary to the validity of the legislation, Laskin C.J.C. identified three characteristics of the board which distinguished it from a section 96 court: (i) the absence of a traditional *lis* between parties; (ii) the board was not limited to legal considerations in exercising its powers to fix compensation; and (iii) the board exercised an investigative function. These characteristics seem more appropriate to the second step than an analysis of the third.

[7] [1983] 2 S.C.R. 364, (1983), 4 D.L.R. (4th) 605.

of the court, delivered by Chouinard J., centred on jurisdiction to order rescission (resiliation) of a lease and to order repayment of rent held on deposit. Limiting the historical inquiry of the *Residential Tenancies* test to Lower Canada, Chouinard J. determined that in 1867 222 Commissioners' Courts had jurisdiction in relation to attachment for rent not exceeding $25 and the jurisdiction of the Montreal Recorder's Court extended to "all matters in dispute between lessors and lessees" not exceeding $100.[8] That was sufficient in his view to satisfy a finding that the powers or jurisdiction of the Commission were not conformable to that of superior, district or county courts in Quebec at Confederation. Accordingly, the historical situation in Quebec was distinguished from that found in *Residential Tenancies* for Ontario and the Quebec scheme was declared valid.

These two cases left a number of critical issues unclear. For example, was the limitation of the historical inquiry to the situation in the respective provinces a deliberate analytical decision, or the result of the manner in which the cases were argued? Is the year 1867 the critical time frame, or are the years prior to 1867 relevant? What inquiry is to be made when the province in issue is not one of the original four? Is the challenged power or jurisdiction characterized in terms of general subject matter, or specific remedial power, or both subject matter and remedy? These questions were addressed by the Supreme Court in *Sobeys*.

The Supreme Court Decision: A Summary

The apparent unanimity consistently reached by the court in deciding recent section 96 cases[9] was not achieved in *Sobeys*. Though unanimous as to the result, the court divided 4-3 on the reasons for decision. In brief, Wilson J., Dickson C.J.C., McIntyre and Lamer JJ. concurring, held that: (i) characterization of the challenged power or jurisdiction for the purpose of the historical inquiry test is narrow rather than broad; (ii) the reinstatement jurisdiction of the Nova Scotia Labour Standards Tribunal is properly characterized as "unjust dismissal"; (iii) the historical inquiry is to be directed to the four original provinces with any two-two tie broken by the historical situation in England; (iv) the critical period to which the historical inquiry is directed is the year 1867; (v) a "broadly co-extensive" test is to be used to determine whether a power or jurisdiction exercised by nonsection 96 courts in 1867 is to be classified as concurrent; (vi) the result of the

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[8] *Ibid.*, at pp. 378-383 (S.C.R.), 617-622 (D.L.R.), referring in particular to the 1867 Code of Civil Procedure, art. 1188, 1191, 1217 and 1219.

[9] *E.g.*, *Massey-Ferguson Industries Ltd.* v. *Government of Saskatchewan*, *supra*, footnote 6; *Capital Regional District* v. *Concerned Citizens of British Columbia*, [1982] 2 S.C.R. 842, (1982), 141 D.L.R. (3d) 385; *McEvoy* v. *Attorney General of New Brunswick*, [1983] 1 S.C.R. 704, (1983), 148 D.L.R. (3d) 25; *Attorney General of Quebec and Regie du Logement* v. *Grondin*, *supra*, footnote 7; *Attorney General of Quebec* v. *Udeco Inc.*, [1984] 2 S.C.R. 502, (1984), 13 D.L.R. (4th) 641.

historical inquiry, upon a tie decided by reference to England, was a finding that jurisdiction over "unjust dismissal" was within the jurisdiction of superior courts in 1867; (vii) in the exercise of its jurisdiction, the Tribunal acted in a judicial manner, thereby satisfying the second step of the *Residential Tenancies* test; and (viii) considered in its entire institutional setting, the conferring of the challenged jurisdiction upon the Tribunal does not violate section 96 because it is necessarily incidental to a broader policy goal of the legislature for the protection of non-unionized workers.

The concurring reasons of La Forest J., joined by Beetz and L'Heureux-Dubé JJ., were grounded in the absence of a *lis* in the exercise by the Tribunal of its appellate jurisdiction. In the opinion of the minority, the carriage by the Director of an appeal before the Tribunal supports the broader social policy of the legislation and is far removed from the contract-based private rights examined by Wilson J.

Reasons of Wilson J.

(1) *The Historical Inquiry*

(a) *Characterization*

The first issue addressed by Wilson J. was characterization of the challenged power or jurisdiction. In argument, and in the court below, various characterizations had been urged. Both the Attorney General of Nova Scotia and the respondent Sobeys Stores characterized the challenged power or jurisdiction of the Labour Standards Tribunal as the equitable remedy of specific performance of employment contracts (reinstatement), though for different reasons. In supporting the legislation, the Attorney General sought to distinguish the challenged power or jurisdiction from that exercised by section 96 courts as traditionally such courts did not grant specific performance of employment contracts. On the other hand, Sobeys Stores urged the same characterization to oppose the legislation on the basis that such equitable remedies were conformable to superior court powers. However, for the purposes of steps two and three of the *Residential Tenancies* test, the parties urged characterizations such as "unjust dismissal", employer-employee relations, labour standards, and master-servant relations. As noted by Wilson J., Hart J.A., for the Court of Appeal, had accepted "unjust dismissal" as the appropriate characterization and, by so doing, had rendered irrelevant the arguments of the Attorney General and Sobeys Stores Ltd. regarding specific performance.[10]

To evaluate this plethora of diverse characterizations, Wilson J. turned to the purposes of characterization in the *Residential Tenancies* test. She

[10] Hart J.A. did hold that the equitable power to grant specific performance of an employment contract, though not exercised, remained in the superior courts; *Re Sobeys Stores Ltd. and Yeomans*, *supra*, footnote 2, at pp. 583 (D.L.R.), 399 (N.S.R.).

noted that the test represents a "reconciliation" of the inferior court and administrative tribunal cases:[11]

> The first line of cases establish the proposition that, while the jurisdiction of the inferior courts will not be frozen as of the date of Confederation, neither will it be substantially expanded so as to undermine the independence of the judiciary which s. 96 protects.... The second line of cases, those dealing with administrative tribunals might be called permissible exceptions to the constitutional stricture against the reduction of superior court jurisdiction. The courts have recognized that s. 96 should not stand in the way of new institutional approaches to social or political problems. Departures from the strict rule against devolving superior court jurisdiction on inferior tribunals are permitted only if the scheme meets the criteria of the second or third stages of the test.

Wilson J. then opted in favour of narrow characterization at the historical inquiry stage. Though she did not detail her reasoning beyond the above-quoted general statement, recognition that section 96 merely inhibits but does not prohibit expansion of the jurisdiction of nonsection 96 courts and tribunals makes selection of narrow characterization logical. A decision in favour of broad characterization would have had two results: the protected jurisdictional scope of section 96 courts would be enhanced, and concomitantly the potential to inhibit development of nonsection 96 courts and tribunals would be unduly increased. Wilson J. also concluded that characterization of the challenged power or jurisdiction does not broaden as one moves to steps two and three of the test. The different purposes of steps two and three in examining the judicial nature of the power or jurisdiction in its institutional setting make further refinements in characterization irrelevant. To this point there has been no change in the essence of the *Residential Tenancies* test, only clarification.

Selection of a narrow characterization approach led Wilson J. to eliminate from consideration the broader characterizations mentioned above (employer-employee relations, labour standards, master-servant relations) and to choose between jurisdiction over "reinstatement", a remedial power, and "unjust dismissal", a subject-matter jurisdiction. It is at this point in her analysis that Wilson J. alters pre-existing constitutional concepts. Without detailed analysis or discussion of prior authority, Wilson J. concluded that "[i]t is ... the type of dispute that must guide us and not the particular remedy sought".[12] In her view, the flaws with remedy analysis are twofold: (i) it would result in a freezing of section 96 court jurisdiction at 1867; and (ii) consideration of new remedies is analytically more appropriate at the second and third steps of the *Residential Tenancies* test. As a result, characterization of the jurisdiction in issue as jurisdiction in relation to unjust dismissal was accepted.

It is unfortunate that Wilson J. chose to ignore, rather than be hindered by, prior case law. In *Residential Tenancies*, Dickson J., though without

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[11] *Supra*, footnote 3, at pp. 253 (S.C.R.), 11 (D.L.R.).

[12] *Ibid.*, at pp. 255 (S.C.R.), 12 (D.L.R.).

defining terms, had referred to both the "power or jurisdiction" conferred upon the tribunal, a phrase which seemingly includes remedial powers. As well, there is an abundance of remedy-based section 96 analysis in prior case law. For example, in *Residential Tenancies*, remedial powers to make compliance and eviction orders were in issue; in *Grondin*, it was the power of the regie to order rescission of a lease; and in *Tomko* v. *Labour Relations Board (N.S.)*,[13] the power of the Labour Relations Board to issue cease and desist orders. All of this was ignored by Wilson J. in favour of subject-matter jurisdiction—the type of question which the tribunal is called upon to decide. Wilson J. has seemingly cut remedy jurisdiction free from the protective net of section 96. To choose subject-matter jurisdiction at the expense of remedy jurisdiction, or *vice versa*, is to ignore a necessary element in the nature of section 96 courts. The historical differences between nonsection 96 and section 96 courts were based not only on subject-matter but also on the type of remedy available. Section 96 should not involve a choice between these elements which constitute a whole, but rather should protect both subject matter and remedy jurisdiction.

(b) *Concurrent Jurisdiction*

In practical terms, historically exclusive section 96 and nonsection 96 jurisdictions raise no concerns in the application of the historical inquiry step of the *Residential Tenancies* test.[14] As the purpose of section 96 is to protect the fundamental attributes of section 96 courts, only exclusive jurisdiction is protected; jurisdiction shared or concurrent with nonsection 96 tribunals is not protected by section 96. But what constitutes concurrent jurisdiction? Having abandoned the narrower and more precise concept of "concurrency" based on remedy analysis, Wilson J. had to define terms. She did so by reference to *Grondin*. As summarized by Wilson J., the historical inquiry in that case had determined that inferior court jurisdiction "although . . . subject to pecuniary limits, . . . was province-wide and included most matters of dispute between landlords and tenants".[15] Accordingly, she concluded that the concurrency test should be "whether or not the work of the inferior courts at the time of Confederation was broadly co-extensive with that of the superior courts".[16] The indicia of a "broadly co-extensive" jurisdiction—geographic, pecuniary and particular issue limitations—were stated in general terms, leaving room for future development. Although Wilson J. had to draw her limits of concurrency at some point, what causes difficulty is that the *Grondin* case, upon which the "broadly

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[13] *Supra*, footnote 4.

[14] *E.g.*, *Attorney General of Quebec* v. *Farrah*, [1978] 2 S.C.R. 638, at pp. 642-643, (1978), 86 D.L.R. (3d) 161, at p. 165, per Laskin C.J.C.

[15] *Supra*, footnote 3, at pp. 260 (S.C.R.), 16 (D.L.R.).

[16] *Ibid.*, at pp. 261 (S.C.R.), 17 (D.L.R.).

co-extensive" test is founded, is itself a questionable application of the test because it fails to satisfy the geographic and pecuniary limit indicia.[17]

(c) *Extent of the Historical Inquiry*

Finally, Wilson J. considered the many definitional problems inherent in the concept of a superior, district or county court. Is the concept that which actually existed in each province at Confederation? If the answer is yes, variations in the historical situations existing in the provinces would mean that section 96 varies in effect across the country. Or, if it is to be a normative, transprovincial concept, is it to be defined by the situation which existed in the four original provinces or widened to include later provinces? Are provincial variations to be accepted at face value, or to be considered in context so as to disregard deviations from a norm? In other words, is a normative concept of a superior, district or county court to be discovered and made controlling, or is the inquiry to be a mere numbers game? Finally, is the concept to be defined in terms of 1867 simpliciter, or is the general period prior to Confederation to be examined?

As noted by Wilson J., prior case authorities are inconsistent and contradictory in geographic approach. For example, in *Reference re Section 6 of the Family Relations Act of British Columbia*,[18] both Laskin C.J.C. and Estey J. had ignored British Columbia in favour of examining the historical situation in Upper Canada and the United Kingdom, with Laskin C.J.C. also examining New Brunswick and Prince Edward Island. Yet in *Attorney General of British Columbia* v. *McKenzie*,[19] only the situation in the province wherein the dispute originated, British Columbia, was examined. This latter approach is also illustrated in *Residential Tenancies* (Ontario) and *Grondin* (Quebec). Further, while most cases refer to 1867, it is not the universally accepted date. In *Jones* v. *Edmonton Catholic School District No. 7*[20] the date of union of Alberta, 1905, was accepted.

Wilson J. responded to these inconsistencies by authoritatively setting the date of inquiry at 1867 and the scope of the historical inquiry as the four original provinces, with England as a tie-breaker jurisdiction.[21] The bases for these conclusions were found in the *Residential Tenancies* and *Re Family Relations Act* cases and as an implication from the fact

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[17] See further the discussion, *infra*.

[18] [1982] 1 S.C.R. 62, (1982), 131 D.L.R. (3d) 257.

[19] [1965] S.C.R. 490, (1965), 51 D.L.R. (2d) 623.

[20] [1977] 2 S.C.R. 872, (1976), 70 D.L.R. (3d) 1. In considering a section 96 challenge to the Alberta Court of Revisions, Martland J. referred to The School Assessment Ordinance, 1901 North-West Territories Ordinances, c. 30 and the Edmonton Charter, 1904 North-West Territories Ordinances, c. 19.

[21] The actual reference by Wilson J. to the United Kingdom should be construed as England; otherwise the inquiry will be mired in a comparison of the different structures in England and Wales, Scotland and Ireland.

of Confederation. In the former case, the 1867 date was expressed in such phrases as "any function which in 1867" and "in the light of historical conditions existing in 1867", phrases which Wilson J. characterized as "deliberate".[22] In the latter case, Dickson J. linked section 96 with the distribution of powers under the Constitution Act, 1867 and the maintenance of a unitary judicial system. Accordingly, 1867 was determined to be *the* critical date for the historical inquiry into jurisdiction. As later provinces accepted the constitutional arrangements of 1867, it followed that that date governed rather than the specific date of union for each subsequent province.

With respect to the geographic extent of the historical inquiry, the problem of later provinces, coupled with the 1867 date, necessarily led to the conclusion that the inquiry be directed at the four original provinces to achieve a transprovincial or national rather than a provincial test. There were two practical reasons for this. First, provinces which joined confederation after 1867 would have to look to the history of the four original provinces, yet would have no reason to choose one over the other. Second, as a constitutional provision, section 96 should have consistent effect across the country. In the event of a two-two tie, 1867 England was selected as the decisive jurisdiction as its court structures had served as models for those in the provinces.

As defined by Wilson J., the historical inquiry appears to result in nothing more than a tally of the quirks of local conditions in the four original provinces in 1867. There is no attempt to create a model section 96 court in any normative sense. Would it not be more appropriate to consider provincial variations as what, no doubt, they were perceived to be in 1867; that is, as convenient variations from a norm in response to local conditions? And why should 1867 alone be the controlling date? Surely, the evolution of jurisdiction in the years prior to Confederation is more significant than the snap-shot of 1867 in isolation. These concerns are reflected in the opinion of La Forest J. who stated:[23]

> ... I am not sure one should be so much concerned with precise dates as with avoiding incorporating into s. 96 court jurisdiction matters that may be specific to a province by reason of a situation peculiar to the province at the time. For what we are seeking after all is a generalized and workable meaning for the jurisdiction exercisable by s. 96 courts.

La Forest J. would also widen the scope of the inquiry to include the historical situations in other British North American colonies in 1867 (Newfoundland, Prince Edward Island and British Columbia) in addition to the four original provinces and England. The test would become truly pan-British North American, or in modern terms, national.

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[22] *Supra*, footnote 3, at pp. 263 (S.C.R.), 19 (D.L.R.).

[23] *Ibid.*, at pp. 288 (S.C.R.), 38 (D.L.R.).

The unknown for the future is whether the court will take the easier path of a mere tally of provincial situations or will in fact discount provincial jurisdictional variations as reflective of local conditions.

(d) *Application of the Modified Residential Tenancies Test*

Having refined the historical inquiry step of the *Residential Tenancies* test and characterized the challenged jurisdiction in terms of "unjust dismissal", Wilson J. examined the historical situation existing in the four original provinces in search of a "broadly co-extensive" inferior court jurisdiction.

For Nova Scotia, the starting position was recognition of the general jurisdiction of the Supreme Court over contracts.[24] There were three arguments in favour of inferior court jurisdiction: (i) general contract jurisdiction existed in the Halifax City Court in actions originating within its territorial limits and not exceeding $80;[25] (ii) justices of the peace and other inferior tribunals exercised a small debt jurisdiction throughout the province;[26] and (iii) inferior courts exercised a jurisdiction to compel deserting seamen and apprentices to return to their employment.[27] All of these jurisdictions were found deficient when tested against the three indicia of "broadly co-extensive". The jurisdiction of the Halifax City Court failed to satisfy the geographic scope indicia;[28] unjust dismissal involves unliquidated damages rather than the liquidated damages within the jurisdiction of the small debt courts; and the inferior court jurisdiction in relation to seamen and apprentices was too narrow in scope to satisfy the general involvement indicia. A similar historical situation was found to exist in New Brunswick.[29] Accordingly, for both Nova Scotia and New Brunswick, "unjust dismissal" was a superior court jurisdiction.

The opposite result was found for both Ontario and Quebec. For Ontario, the Upper Canada system of Division Courts, exercising a general contract jurisdiction up to $100, was held by Wilson J. to constitute sufficient inferior court involvement in the area of unjust dismissal to satisfy the

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[24] Of the Supreme Court and its Officers, R.S.N.S. 1864, c. 123, s. 1.

[25] Halifax City Charter, S.N.S. 1864, c. 81, s. 115.

[26] Of the Jurisdiction of Justices of the Peace in Civil Cases, R.S.N.S. 1864, c. 128, s. 1; Of Stipendary or Police Magistrates, R.S.N.S. 1864, c. 129, s. 18; Of Municipalities, R.S.N.S. 1864, c. 133, ss. 64, 96-109.

[27] Of Shipping and Seamen, R.S.N.S. 1864, c. 75, ss. 12, 18; Of Masters, Apprentices and Servants, R.S.N.S. 1864, c. 122, ss. 11-15; Of Municipalities, R.S.N.S. 1864, c. 133, s. 123.

[28] It should also be noted that the population of Halifax in 1871, 29,582 persons, was 7.6% of the provincial population. 5 Censuses of Canada 1608-1876 (Ottawa: 1878).

[29] Referring to Of Regulations for Seamen, R.S.N.B. 1854, c. 86, s. 10; Of Regulations for Shipping at the Port of Saint John, R.S.N.B. 1854, c. 87, s. 9; Of the Jurisdiction of Justices in Civil Suits, R.S.N.B. 1854, c. 137, s. 1.

historical inquiry in favour of nonsection 96 court jurisdiction.[30] For Quebec, following the analysis and conclusion of the Quebec Court of Appeal in *Asselin* v. *Industries Abex Ltée*,[31] Wilson J. accepted that inferior courts in Lower Canada had jurisdiction in 1867 in relation to master-servant disputes and to award damages to illegally dismissed employees.

The original provinces having divided two-two, Wilson J. resorted to the historical situation in England in 1867 to break the tie. The English Master and Servant Acts[32] were distinguished, as had been similar legislation in Ontario, on the basis that the inferior court jurisdiction there conferred was concerned with claims of non-payment of wages rather than unjust dismissal. The 1846 County Courts Act[33] was cited, as were a number of 1840's court cases, to illustrate the unjust dismissal jurisdiction of superior and county courts. The difficulty in amassing appropriate historical evidence is perhaps well illustrated by Wilson J.'s inquiry into 1867 England.

(2) *Judicial Function*

The historical inquiry having been decided in favour of section 96 jurisdiction, it was necessary to proceed to the second or judicial function step of the *Residential Tenancies* test. As the appellant had challenged the jurisdiction of both the Director of Labour Standards and the Labour Standards Tribunal, it was necessary to consider each separately. In respect of "unjust dismissal" jurisdiction, the functions of the Director were easily determined to be nonjudicial in character. The primary reason was that the Labour Standards Code, by section 19(1), conferred upon the Director the nonjudicial functions of investigation and conciliation. In addition, it was noted that the Director may undertake an investigation on his own initiative, may make an order without notice or a hearing, has a discretion as to the remedy to impose, has carriage of most complaints on appeal to the Tribunal, and that no record of proceedings before the Director is kept. All of these factors clearly served to justify the characterization of the function of the Director in relation to unjust dismissal as nonjudicial.

The character of the Tribunal, however, was different. It was found to be judicial in nature and involved hearing and determining appeals from decisions of the Director by application of legal principles as opposed to policy. In so deciding, Wilson J. rejected three arguments that the Tribunal was not performing a judicial function.

First, it was argued that the Director had the carriage of the complaint before the Tribunal, and this meant there was no *lis inter partes* involving

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[30] An Act Respecting the Division Courts, C.S.U.C. 1859, c. 19, s. 55. Wilson J. also mentioned An Act Respecting Master and Servant, C.S.U.C. 1859, c. 75, but considered the scope of the legislation too narrow to cover claims for unjust dismissal.

[31] [1985] C.A. 72, (1985), 22 D.L.R. (4th) 212.

[32] 20 Geo. 2, c. 19 (1747); 4 Geo. 4, c. 34 (1823); 30 & 31 Vict., c. 141 (1867).

[33] 9 & 10 Vict., c. 95, s. 58.

the complainant. Wilson J. characterized this argument as an attempt "to elevate form over substance".[34] Despite the role of the Director the function of the Tribunal was still "to adjudicate a dispute between parties".[35] This argument was no doubt based upon legislation of the type considered in *Tomko* v. *Labour Relations Board (N.S.)*[36] whereby third parties could file complaints of violation of the Act without the assent or cooperation of the individual directly affected. However, under the Labour Standards Code, the complainant in most instances is the affected party. Second, it was argued that the Tribunal had a broad discretion as to remedy, and was not bound by legal principles. This argument was summarily dismissed on the basis that no implication arises from the existence of discretionary powers that their exercise is not governed by the application of legal principles. Another reason for rejecting this argument might well have been found in Wilson J.'s determination, for purposes of the historical inquiry step, that consideration of remedial powers is irrelevant to an examination of how a Tribunal functions in relation to the question it is called upon to decide. Third, it was said that the Tribunal did not exercise a judicial function because of the absence of a privative clause, coupled with a trial *de novo* appeal and the availability of judicial review. This argument is best described as confused. The logical relationship between the absence of a privative clause and a determination that a tribunal is not exercising a judicial function is not clear. In essence, the argument was dismissed by Wilson J. as a false inference from *Attorney General of Quebec* v. *Farrah*[37] and *Crevier* v. *Attorney General of Quebec*.[38] While those cases establish the proposition that too broad a privative clause may violate section 96 by insulating a tribunal from jurisdictional review, it did not follow that the mere absence of a privative clause validated an inferior tribunal.[39]

(3) *The Institutional Context*

By concluding that the challenged jurisdiction over unjust dismissal is exercised by the Labour Standards Tribunal in a judicial manner, it was necessary for Wilson J. to proceed to the third step of the *Residential Tenancies* test. This involves a review of the "tribunal's function as a whole in order to appraise the impugned function in its entire institutional

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[34] *Supra*, footnote 3, at pp. 276 (S.C.R.), 28 (D.L.R.).

[35] *Ibid.*, at pp. 276 (S.C.R.), 28-29 (D.L.R.).

[36] *Supra*, footnote 4.

[37] *Supra*, footnote 14.

[38] [1981] 2 S.C.R. 220, (1981), 127 D.L.R. (3d) 1.

[39] *Supra*, footnote 3, at pp. 277 (S.C.R.), 29 (D.L.R.).

context".[40] In *Residential Tenancies*, Dickson J. clearly established the threshold criterion for this stage of the analysis:[41]

> It may be that the impugned "judicial powers" are merely subsidiary or ancillary to general administrative functions assigned to the tribunal (*John East*; *Tomko*) or the powers may be necessarily incidental to the achievement of a broader policy goal of the legislature (*Mississauga*). In such a situation, the grant of judicial power to provincial appointees is valid. The scheme is only invalid when the adjudicative function is a sole or central function of the tribunal (*Farrah*) so that the tribunal can be said to be operating "like a s. 96 court".

In her discussion of the second step of the test, Wilson J. had found that the Tribunal's "primary function is to hear appeals from the decisions of the Director".[42] It may be stated in even stronger terms. A review of the legislation reveals that, apart from receiving payment of wages and benefits on behalf of complainants just as courts do, the hearing of appeals was the only function of the Tribunal. Applying the "sole or central function" criterion should, therefore, have resulted in the jurisdiction of the Tribunal being declared *ultra vires*. However, Wilson J. chose to ignore the "sole or central function" criterion of the *Residential Tenancies* test in favour of giving full effect to the statement of Dickson J., quoted above, referring to a "broader policy goal of the legislature". The critical issue was restated to be "whether the provision is necessarily incidental to a broader policy goal of the legislature".[43] She found that it was and accordingly held that the exercise of unjust dismissal jurisdiction by the Tribunal does not violate section 96.

The Labour Standards Code was found to be an amalgam of various statutes codified by the Legislature to fulfill the policy goal of providing protection to non-unionized workers. Necessarily incidental to this goal was the provision of a speedy mechanism, the Tribunal, for resolving complaints. In the words of Wilson J.:[44]

> These procedures are in the Code in part because the courts have historically proved too slow and expensive a mechanism for dealing with the relatively small amounts of money that would be claimed in lost wages or wages in lieu of notice by unskilled or semi-skilled workers.

This entire line of reasoning, to validate a jurisdiction found historically to have been a section 96 court jurisdiction and exercised by the Tribunal in a judicial manner, is perhaps the least convincing part of the lengthy opinion of Wilson J. Having painstakingly worked through two steps of the *Residential Tenancies* test, it is less than satisfactory to make suddenly a detour from the established critical question in favour of a novel approach.

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[40] *Reference re Residential Tenancies Act*, *supra*, footnote 5, at pp. 735 (S.C.R.), 572 (D.L.R.).

[41] *Ibid.*, at pp. 736 (S.C.R.), 572 (D.L.R.).

[42] *Supra*, footnote 3, at pp. 275 (S.C.R.), 28 (D.L.R.).

[43] *Ibid.*, at pp. 278 (S.C.R.), 30 (D.L.R.).

[44] *Ibid.*, at pp. 280 (S.C.R.), 32 (D.L.R.).

It is difficult to read *Mississauga* v. *Regional Municipality of Peel*[45] as support for the proposition for which Dickson J. cites it in *Residential Tenancies*. That case concerned a challenge to the jurisdiction of the Ontario Municipal Board to construe a contract and relevant statutory provisions in fulfilment of its function as arbitrator in a dispute over assets and liabilities incident to a municipal amalgamation. There is no suggestion in the case that it was decided on the basis of deference to a broad policy goal of the legislature. Rather, it appears to have been decided on the basis that the judicial functions in issue were merely ancillary to the administrative functions of the Board. If it did involve a broad policy goal, it was not of the same order as the protection of non-unionized workers identified in *Sobeys*. If furtherance of a broad policy goal was an accepted exemption from the constraints of section 96, one may well wonder why *Residential Tenancies* was decided as it was. The legislation under consideration in that case was obviously enacted to achieve the broad policy goal of creating a new balance in the relationship between landlords and tenants and to provide an efficient and inexpensive mechanism to resolve disputes. Yet the scheme was held invalid and this "policy goal" approach not considered.

Reasons of La Forest J.

La Forest J.'s brief judgment deals almost exclusively[46] with the second question, does the Director or the Tribunal exercise a judicial function. His analysis is based on a consideration of the Code in its entirety rather than consideration of their separate functions in isolation. In his view, the Code is social policy legislation setting minimum standards for the relationship between employees and employers. It creates "a new obligation imposed by law ... [which] transcends the relationship between private parties",[47] and bears no relationship to the contractual jurisdiction considered by Wilson J. La Forest J. concludes that a true *lis* does not arise under the enforcement mechanisms of the Code. The critical role of both the Director and the Tribunal is to determine whether there has been a violation of the Code, not to vindicate private rights. It is the Director who has the pivotal role in investigating a complaint, conciliating a friendly settlement if possible, and carriage of any appeal to the Tribunal. The investigative and conciliatory functions of the Director are clearly distinguishable from a judicial function. The Tribunal, however, is acknowledged to exercise a judicial function, but is held to do so in the absence of a *lis* between complainant and respondent due to the Director's role in carrying the appeal and the public policy, rather than contractual, nature of the interests adjudicated.[48]

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[45] [1979] 2 S.C.R. 244, (1979), 97 D.L.R. (3d) 439.

[46] He also commented on the "historical inquiry" question; see the text, *supra*.

[47] *Supra*, footnote 3, at pp. 284 (S.C.R.), 35 (D.L.R.).

[48] Note that La Forest J. is invoking the social policy factor at step two of the *Residential Tenancies* test whereas, as we have seen, Wilson J. played this trump card at step three.

To reach his conclusions, La Forest J. drew heavily upon *Labour Relations Board of Saskatchewan* v. *John East Ironworks Ltd.*[49] and *Tomko* v. *Labour Relations Board (N.S.)*[50] which recognized that modern industrial relations/collective bargaining legislation does not create a *lis* between worker and employer but a general right arising from concern for industrial peace. However, that analogy may not apply to the Labour Standards Code in issue in *Sobeys*. The Labour Standards Tribunal is an appellate body whereas the boards considered in the prior cases were of original jurisdiction; complainants under the Labour Standards Code are the aggrieved parties rather than some interested third party; with non-unionized workers there is less likelihood of strikes so that policy considerations of industrial peace are not as relevant a consideration for the existence of the legislation; adjudication of complaints under the Code is limited to an application of legal principles as the fundamental question is whether its provisions have been violated; and a complainant under the Labour Standards Code is seeking to vindicate an individual, though statutory, right rather than a general interest as in the case of a policy grievance.

Wilson J. characterized as elevating form over substance the argument that carriage of an appeal by the Director meant there was no *lis* before the Tribunal. Considered narrowly, this seems correct. The purpose of having the Director carry any appeal is to provide experienced presentation of the case at no cost to the complainant. The result is the same as if the complainant were represented by legal aid counsel. If so represented, could it possibly be argued that a *lis* did not exist? The foundation of the process remains the complaint filed by the complainant who, by section 20(c), is a party to the appeal. The complainant is seeking individual redress and vindication of a right protected by statute.

However, considered in a broader perspective, the role of the Director on appeal may be the vindication of minimum employment standards, as accepted by La Forest J. This perspective is intimately linked to the characterization of the legislation as a "new obligation imposed by law". This characterization, in turn, is intended to distinguish the source of the obligation, in social policy, from the private rights concerns familiar to section 96 courts in 1867. In the opinion of La Forest J. the judicial function of the Tribunal is intended to implement the social policy of the Code and therefore a *lis* in the traditional sense does not arise. But all legislation implements social policy decisions of one type or another. The "new obligation" approach would provide an easy method for provincial legislatures to avoid the constraints of section 96 by enacting legislation in any given area so that rights sought to be enforced will owe their existence to the statute rather than any recognized head of jurisdiction of section 96 courts. Surely, section 96 is not so easily evaded. The test of conformability

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[49] *Supra*, footnote 4.

[50] *Ibid.*

would seem to be a complete answer to this argument. If the statutory rights or jurisdiction are conformable to the type of rights or jurisdiction exercised by section 96 courts, the mere fact that it is a modern development should not, of itself, resolve a jurisdictional challenge.[51]

La Forest J. arrived at his conclusions by treating the Tribunal as an integrated part of the administrative scheme established under the Labour Standards Code. However, without other administrative functions in which to submerge its judicial function, the Tribunal in *Sobeys* seems analogous to the appellate bodies held *ultra vires* in *Attorney General of Quebec* v. *Farrah*[52] and *Crevier* v. *Attorney General of Quebec*.[53] The following description and conclusion by Laskin C.J.C. in *Farrah* seem apposite:[54]

> Where an administrative appeal agency is constituted, divorced, as is the Transport Tribunal here, from involvement in the exercise of original jurisdiction under the *Transport Act* and given a purely appellate authority ... there is a meshing both of jurisdiction and power, giving it the form and authority of a s. 96 Court.

Conclusion

The majority decision of Wilson J. in *Sobeys* may resolve some technical points arising from the decisions of the court in *Residential Tenancies* and *Grondin*. It represents, however, the views of a four judge majority. It is not entirely clear, for example, that on the scope of the historical inquiry, a future majority in a nine judge court may not adopt the views of the minority decision of La Forest J. and expand the inquiry to include other provinces in addition to the four original and England, or extend the inquiry beyond the critical 1867 date. These, however, are mere details; there are two more general questions raised by the decision.

First, to return to the place of beginning and jurisdiction over landlord and tenant disputes. Wilson J.'s approach to the "historical inquiry" casts

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[51] If a statutory base coupled with a social policy purpose is all that is needed to avoid the constitutional constraints of section 96, as noted earlier, *Residential Tenancies* would have been decided differently. The legislation considered in that case surely could not be held other than to have implemented broad social policy goals of the legislature.

It is also worth noting that La Forest J.'s reasoning was rejected by the Privy Council in *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.*, *supra*, footnote 4, at pp. 151 (A.C.), 682 (D.L.R.), per Lord Simons:

> It is not, therefore, conclusive of the constitutionality of the board that in the main it is an administrative instrument and that its judicial function is designed to implement administrative policy.

[52] *Supra*, footnote 14.

[53] *Supra*, footnote 38.

[54] *Supra*, footnote 14, at pp. 646 (S.C.R.), 166-167 (D.L.R.). Another view of the respective functioning of the Director and the Labour Standards Tribunal would be by analogy to a preliminary inquiry prior to a trial. However, this analogy was not referred to by the court and suffers from the defect that a determination by the Director that a violation has occurred is an effective determination of the complaint unless reversed by the Tribunal on appeal.

doubts on the reasoning in *Residential Tenancies* and *Grondin*. In all provinces the superior courts enjoyed an extensive jurisdiction in relation to landlord and tenant as an incident to their general jurisdiction and from the characterization of a leasehold interest as a chattel real and the nature of the remedies available. In considering concurrent jurisdiction the critical question, therefore, is to identify the scope of the nonsection 96 court jurisdiction. Wilson J. held this had to be decided by asking if the inferior court jurisdiction was "broadly co-extensive" with that of the superior courts looking at geographic, pecuniary and particular issue limitations as they existed in 1867 in Ontario, Quebec, Nova Scotia and New Brunswick, and if need be breaking any tie by reference to England.

When discussing the indicia reflective of a "broadly co-extensive" jurisdiction, Wilson J. gave the following explanation of the significance attached to a geographic limitation:[55]

> A significant geographical limitation would tell against the legislative scheme much more than a purely pecuniary limit. The former might well have prevented recourse to the inferior courts for the majority of colonial residents, while the latter, given inflation, would be a much less dramatic bar.

If effect is given to the identified *purpose* of the geographic limitation rather than to its extent, it is not *geographic* at all; it is *demographic*. So considered, the critical concern is to identify the level of courts to which the majority of the population had access. In many instances, the answer might be thought to give an urban view of jurisdiction.

The historical inquiry of *Residential Tenancies* concluded that ejectment of an overholding tenant was an exclusive section 96 court function in 1867 Upper Canada.[56] A detailed inquiry into jurisdiction was not undertaken because of the remedy based analysis employed. In Upper Canada, the Division Courts Act[57] conferred jurisdiction in relation to debt, subject to a $100 limit and to a general prohibition against jurisdiction over actions of ejectment or in which "the right or title to any corporeal hereditaments" was brought into question. It is not clear, however, that it was a nonsection 96 court for it was generally presided over by County Court judges, with recorders exercising that function in the cities.[58] In turn, the significance of the Recorders' Courts is diminished when it is appreciated that, on a demographic basis, such courts did not serve the majority of

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[55] *Supra*, footnote 3, at pp. 260 (S.C.R.), 17 (D.L.R.).

[56] See, An Act Respecting Ejectment, C.S.U.C. 1859, c. 27, s. 63, providing for an application to the superior courts, and An Act to Allow a more Expeditious Remedy as Regards Tenants Overholding Wrongfully in Upper Canada, S.C. 1864, c. 30, s. 1, providing an application to the county court judge.

[57] C.S.U.C. 1859, c. 19, ss. 54-55. In 1841, Division Courts replaced the former Courts of Requests, which had been presided over by two or more justices of the peace and served as a small claims court to 25 pounds.

[58] The Municipal Institutions Act, C.S.U.C. 1859, c. 54, s. 383, authorized the Governor to appoint a Recorder to preside over the Division Court in a city.

the provincial population and so would fail the geographic indicia of the "broadly co-extensive" test.[59]

In *Grondin*, Chouinard J. determined that Commissioners' Courts had jurisdiction in relation to attachment for rent not exceeding $25; that there were 222 Commissioners' Courts in 1867; and that the Montreal Recorder's Court enjoyed jurisdiction co-extensive with that of the superior courts in relation to all disputes between landlords and tenants though subject to a pecuniary limit of $100. The Commissioners' Courts were not "broadly co-extensive" with superior court jurisdiction in terms of either the pecuniary limit or subject matter jurisdiction. While the existence of 222 Commissioners' Courts may be readily accepted as providing province-wide geographic jurisdiction, the pecuniary limit of $25 and the limitation to actions for attachment for rent fail the other two indicia.[60] The Recorder's Courts were not "broadly co-extensive" in the geographic sense, seemingly being limited in the cities of Montreal and Quebec.[61] The limited number of Recorder's Courts also renders insignificant the reference in *Grondin* to the provisions of the 1867 Code of Civil Procedure allowing an extension of the jurisdiction of such courts in landlord-tenant matters.

In New Brunswick, justices of the peace exercised a summary jurisdiction in relation to overholding tenants, subject to an appeal to the superior court.[62] They also exercised throughout the province a civil jurisdiction over actions of debt and debt upon a specialty not exceeding five pounds in value.[63] The City Court of Saint John and the Police Magistrate of the Parish of Portland in the City and County of Saint John

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[59] The Law Reform Act of 1868, S.O. 1868-69, c. 6, s. 10, indicates that there were five Recorder's Courts in Ontario in the following cities, with 1871 population statistics indicated in brackets: Hamilton (26,716); Kingston (12,407); London (15,826); Ottawa (21,545); and Toronto (56,092). These five cities represented 8.2% of the provincial population of 1,620,851 persons. See, 5 Censuses of Canada 1608 to 1876 (1878).

[60] Though not specifically mentioned by Chouinard J. the contract jurisdiction of the Commissioners' Courts may be considered to include actions for rent in arrears, but again was of limited pecuniary scope.

[61] See, An Act Respecting the Police in Quebec and Montreal, and Certain Regulations of Police in Other Towns and Villages, C.S.L.C. 1860, c. 102, s. 20; An Act to Amend and Consolidate the Laws Respecting the Recorder's Court of the City of Quebec, S.C. 1861, c. 26. The percentage of the population of Lower Canada served by the Montreal Recorder's Court in 1867 was only 9%, far short of a majority of "colonial residents". See 5 Censuses of Canada 1608-1876 (1878). The population of Montreal in 1871 was 107,225 which represented 8.99% of the 1,191,516 population of the province of Quebec. The population of Quebec City was 59,699 or 5%. Even considered on a population basis, *Grondin* fails the "broadly co-extensive" test for which it is the model. The absence in *Grondin* of any discussion of the Recorder's Court other than that in Montreal is not without significance. There may also have been such a court in Three Rivers.

[62] Of Landlord and Tenant Act and Replevin, R.S.N.B. 1854-55, c. 126, s. 27, as amended by S.N.B. 1865, c. 19.

[63] Of the Jurisdiction of Justices in Civil Suits, R.S.N.B. 1854-55, c. 137, as amended by S.N.B. 1864, c. 7.

enjoyed a debt jurisdiction to ten pounds in value and $80, respectively.[64] The geographic limitations would fail to satisfy the "broadly co-extensive" test.

In Nova Scotia, the Court of Appeal determined in *Burke* v. *Arab*[65] that the settlement of landlord and tenant disputes was confined to the superior courts. However, justices of the peace did exercise a jurisdiction in relation to overholding tenants similar to that found in New Brunswick.[66] In relation to debt, justices of the peace and police and stipendary magistrates had jurisdiction not exceeding $80.[67]

In *Sobeys*, Wilson J. determined that the critical consideration is the type of the dispute that the tribunal is called upon to decide. The above historical inquiry leads to the conclusion that inferior courts were called upon in New Brunswick and Nova Scotia, but not in Ontario and Quebec, to decide disputes in relation to debt actions for rent in arrears. There is a two-two split in relation to inferior jurisdiction over ejectment of overholding tenants. Reference to the English 1838 Small Tenements Recovery Act[68] decides the matter in favour of inferior court jurisdiction as that Act, similar to that in New Brunswick and Nova Scotia, conferred a summary jurisdiction upon justices of the peace to issue a warrant for repossession of leasehold property against an overholding tenant. On this analysis *Residential Tenancies* arrived at the wrong result on the historical inquiry issue; *Grondin* at the right result but for the wrong reasons.

Second, both Wilson J. and La Forest J. find special support for their conclusions in the fact that the legislation under consideration is concerned with labour relations. Yet, there is nothing so particular about that area of the law that would differentiate it for section 96 purposes from areas such as modern residential tenancies or consumer products regimes. Section 96 does not affect one area of jurisdiction differently from another. This aspect of the two judgments is indicative of the Supreme Court's special consideration for labour relations legislation and, perhaps, of a desire to forestall future section 96 challenges by creating a broader approach in favour of nonsection 96 jurisdiction. The amendment to section 96 proposed in 1983 which would allow a province to confer upon any provincial "tribunal, board, commission or authority ... concurrent or

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[64] An Act to Enlarge the Jurisdiction of the City Court of the City of Saint John, S.N.B. 1859, c. 38, s. 1, and An Act to Amend the Law Relative to the Collection of Taxes and Small Debts in the Parish of Portland in the City and County of Saint John, S.N.B. 1867, c. 36, s. 4.

[65] (1981), 49 N.S.R. (2d) 181, at p. 196, referring to *Attorney General of Nova Scotia* v. *Gillis* (1980), 39 N.S.R. (2d) 97.

[66] Of Tenancies and of Forcible Entry and Detainer, R.S.N.S. 1864, c. 140, s. 2.

[67] Of the Jurisdiction of Justices of the Peace in Civil Cases, R.S.N.S. 1864, c. 128, ss. 1 & 37; Of Stipendary or Police Magistrates, R.S.N.S. 1864, c. 129, s. 18. See also, Of Municipalities, R.S.N.S. 1864, c. 133, s. 100, re judicial district courts.

[68] 1 & 2 Vict., c. 74.

exclusive jurisdiction in *respect of any* matter within the legislative authority of the Province"[69] has come into force, not by a process of constitutional amendment, but by judicial construction.

* * *

CONSTITUTIONAL LAW—FREEDOM OF COMMERCIAL EXPRESSION UNDER THE CHARTER—LEGISLATIVE JURISDICTION OVER ADVERTISING—A REPRESENTATIVE RULING: *Attorney General of Quebec* v. *Irwin Toy Limited*

Dale Gibson*

Under the leadership of Dickson C.J.C., the Supreme Court of Canada developed, at least in its constitutional decisions, a collegial personality more distinctive than that of any of its previous incarnations: adventuresome, purposefully instructive, willing to re-examine and revise previous rulings, innovative, wordy, alive to pragmatic and functional realities (though sometimes misinformed about them), cautiously libertarian, middle-of-the-road (sometimes confusingly so) concerning the federal/provincial distribution of constitutional powers, generally well organized, occasionally careless. All these characteristics were exhibited by the court's ruling in *Attorney General of Quebec* v. *Irwin Toy Limited.*[1] One reason that the decision contained so much that is typical of the Dickson Court may be that the case involved an unusually wide range of constitutional issues, both new and old.

At stake was the constitutional validity of provisions of the Quebec Consumer Protection Act and related regulations which placed severe restrictions on advertising directed at persons under the age of thirteen years.[2] Among the advertising techniques prohibited, if directed at children, were those which exaggerate the benefits or minimize the cost or skill required to use the thing advertised, make comparisons with competing goods or services, directly incite children to buy or urge others to buy, employ cartoon characters or well-known personalities to promote the thing advertised, suggest that the thing advertised will bestow a social advantage on a child who acquires it, or are in other ways misleading to children. The prohibitions were directed against any person who might "make use

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[69] The Constitution of Canada: A Suggested Amendment Relating to Provincial Administrative Tribunals—A Discussion Paper (Ottawa: 1983).

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[1] [1989] 1 S.C.R. 927, (1989), 58 D.L.R. (4th) 577.

[2] R.S.Q., c. P-401, ss. 248, 249; R.R.Q., c. P-40.1, r.1, ss. 87-91.

of commercial advertising directed at persons under thirteen years of age".[3] The prohibitions applied to all forms of advertising within the province, including "broadcast" advertising. The evidence indicated that most of the advertising affected by the legislation would be in the form of television commercials.[4]

Irwin Toy Limited challenged the constitutionality of these restrictions on two basic grounds: (a) that they were *ultra vires* the provincial legislature by reason of trenching upon federal jurisdiction over broadcast television and criminal law; and (b) that they violated the guarantees of free expression and liberty under sections 2(b) and 7 of the Canadian Charter of Rights and Freedoms.[5] All these challenges were rejected by a majority of the Supreme Court of Canada, which found the legislation to be constitutionally sound, and applicable to television advertising in Quebec. In the course of doing so, the majority wrote some new constitutional law, and both clarified and muddied some old.

Charter Issues

(1) *Freedom of Expression*

The most important constitutional innovations to be found in the decision relate to freedom of expression. Not everything the court said on the subject was new; its emphasis on the importance of the right,[6] and its insistence that commercial expression is protected by the right[7] (on both of which matters the majority and minority judges were in full agreement) had already been expressed in its judgments in two cases, *Ford* v. *Quebec (Attorney-General)*,[8] and *Devine* v. *Quebec (Attorney-General)*,[9] which had been argued at the same time as the *Irwin Toy* case, but decided earlier. The majority (Dickson C.J.C. and Lamer and Wilson JJ.)[10] elected, however, to offer some entirely new thoughts on other aspects of the guarantee. Since these comments were not strictly crucial to the outcome of the case, the minority (McIntyre and Beetz JJ.) chose not to address them. It is likely, however, that despite their status as *obiter dicta* by a mere three judge majority, these remarks will have future significance.

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[3] *Ibid.*, s. 248.

[4] *Supra*, footnote 1, at pp. 952-954 (S.C.R.), 594 (D.L.R.).

[5] Constitution Act, 1982, Part I.

[6] *Supra*, footnote 1, at pp. 968-969 (S.C.R.), 606 (D.L.R.) (majority), pp. 1007 (S.C.R.), 635 (D.L.R.) (minority).

[7] *Ibid.*, at pp. 966-967 (S.C.R.), 605 (D.L.R.) (majority), pp. 1006 (S.C.R.), 635 (D.L.R.) (minority).

[8] [1988] 2 S.C.R. 712, (1988), 54 D.L.R. (4th) 577.

[9] [1988] 2 S.C.R. 790, (1988), 55 D.L.R. (4th) 641.

[10] Estey and LeDain JJ., who sat on the hearing of the appeal, took no part in the decision.

The first part of the majority's joint judgment as to freedom of expression appears to have been written by Dickson C.J.C. At any rate, it begins by promulgating a characteristically Dicksonian analytical protocol for approaching freedom of expression issues:

> ... the first step to be taken in an inquiry of this kind is to discover whether the activity which the plaintiff wishes to pursue may properly be characterized as falling within "freedom of expression". If the activity is not within s. 2(b), the government action obviously cannot be challenged under that section.[11]
>
> ...
>
> Having found that the plaintiff's activity does fall within the scope of guaranteed free expression, it must next be determined whether the purpose or effect of the impugned governmental action was to control attempts to convey meaning through that activity.[12]

It is the responsibility of the person invoking the Charter guarantee of free expression to fulfil both of these initial steps. Only then will governmental authorities be called upon to attempt to justify the restriction on free expression as a "reasonable limit" under section 1 of the Charter.

(a) *"Expression"*

Step one concerns the meaning of "expression". The majority stressed that the question cannot be answered solely in terms of the *medium* employed; what counts is whether the activity has an expressive *content*:[13]

> The content of expression can be conveyed through an infinite variety of forms of expression: for example, the written or spoken word, the arts, or even physical gestures or acts.

Nor does a communication cease to be "expression" if it is likely to "offend, shock or disturb the State or any sector of the population".[14] The majority continued:[15]

> We cannot, then, exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee.

An instructive illustration, involving the parking of an automobile, was then offered. Parking a car would normally be a purely physical activity, unrelated to any attempt to convey meaning. Nevertheless, the majority pointed out, a situation could exist in which such an activity was carried out for the purpose of conveying a meaning:[16]

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[11] *Supra,* footnote 1, at pp. 968 (S.C.R.), 606 (D.L.R.).

[12] *Ibid.*, at pp. 971-972 (S.C.R.), 608-609 (D.L.R.).

[13] *Ibid.*, at pp. 969-970 (S.C.R.), 607 (D.L.R.).

[14] *Ibid.*, at pp. 969 (S.C.R.), 606 (D.L.R.), quoting from the *Handyside* decision of the European Court of Human Rights, April 29, 1976, Series A, No. 24, at p. 23.

[15] *Ibid.*, at pp. 969 (S.C.R.), 607 (D.L.R.).

[16] *Ibid.*

> For example, an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource. If that person could demonstrate that his activity did in fact have expressive content, he would, at this stage, be within the protected sphere. . . .

If, however, a physical act intended to convey meaning were *violent* in nature, the majority would not be willing to classify it as "expression":[17]

> While the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection. It is not necessary here to delineate precisely when and on what basis a *form* of expression chosen to convey a meaning falls outside the sphere of the guarantee. But it is clear, for example, that a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen.

The exclusion of violent forms of physical expression (which the court had already rejected, with respect to picketing activities, in a previous case),[18] might be considered an exception to the general rule that anything which conveys meaning must be considered to be expression. A better way of explaining the exclusion might, however, be that violent conduct, even if employed for expressive purposes, must be considered, by the "pith and substance" approach commonly used to classify situations for constitutional purposes, to be *predominantly physical* rather than expressive.

The reason that the "pith and substance" approach is preferable to the "exception" approach is that the word "violence" has no firmly established legal meaning, and would be capable of being defined to include the slightest exertion of force, even against property. If expressive acts which involved even such rudimentary "violence" were removed from the protection of the Charter, freedom of expression could be seriously curtailed. If, on the other hand, a "pith and substance" approach were taken, constitutional protection would be denied only in those situations where the "violence" was significant enough to override the expressive aspect of the conduct in question.

Since advertising aimed at children is undeniably expressive, and does not involve violence, the court had no difficulty concluding that the plaintiff had met the first requirement.

(b) *Restrictive Purpose or Effect*

The second step of the process—a determination of "whether the purpose or effect of the government action in question was to restrict freedom of expression"—was also found to have been satisfied by the plaintiff, but not before the majority offered some thoughts about the nature of free expression that carry the potential for restricting the right unduly in the future. Stylistic clues suggest that this part of the reasons for judgment

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[17] *Ibid.*, at pp. 970 (S.C.R.), 607 (D.L.R.).

[18] *R.W.D.S.U.* v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 588, (1986), 33 D.L.R. (4th) 174, at p. 187.

was written by someone other than the author of the preceding parts, probably Wilson J. It begins with an over-long, but otherwise unexceptional explanation that the plaintiff's task at this stage of the inquiry is to establish that *either* the purpose or the effect of the governmental action complained of is to restrict the plaintiff's freedom of expression.[19]

(c) *Values Served by Free Expression*

Then, however, the discussion swings abruptly to an examination of a question that would seem to belong more appropriately to the first part of the analysis: the "principles and values" sought to be protected by the constitutional guarantee of free expression, and the plaintiff's obligation to demonstrate that the particular form of expression interfered with promotes those principles and values. These remarks relate to the possibility that governmental action, whatever its *purpose*, might have a restrictive *effect* on free expression:[20]

> Even if the government's purpose was not to control or restrict attempts to convey a meaning, the Court must still decide whether the effect of the government action was to restrict the plaintiff's free expression. Here, the burden is on the plaintiff to demonstrate that such an effect occurred. In order so to demonstrate, a plaintiff must state her[21] claim with reference to the principles and values underlying the freedom.
>
> We have already discussed the nature of the principles and values underlying the vigilant protection of free expression in a society such as ours. They were also discussed by the Court in *Ford* ... and can be summarized as follows: (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. In showing that the effect of the government's action was to restrict her free expression, a plaintiff must demonstrate that her activity promotes at least one of these principles. It is not enough that shouting, for example, has an expressive element. If the plaintiff challenges the effect of government action to control noise, presuming that action to have a purpose neutral as to expression, she must show that her aim was to convey a meaning reflective of the principles underlying freedom of expression. The precise and complete articulation of what kinds of activity promote these principles is, of course, a matter for judicial appreciation to be developed on a case-by-case basis. But the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfilment and human flourishing.

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[19] *Supra*, footnote 1, at pp. 971-976 (S.C.R.), 608-613 (D.L.R.).

[20] *Ibid.*, at pp. 976-977 (S.C.R.), 612-613 (D.L.R.).

[21] The attempt in this part of the majority judgment to counter the conventional reliance on masculine pronouns in mixed-gender situations by substituting the feminine forms is noteworthy. Other parts of the judgment employ the conventional style. While it is encouraging to see the court taking cognizance of the desirability of gender-neutral expression, it is regrettable that it chose this hit-and-miss method. The court's leadership in employing more forthrightly and consistently neutral language could be influential.

This passage raises many difficult questions. The first of these is whether it accurately paraphrases the court's observations on the subject in *Ford*.[22] It is submitted that it does not. In *Ford*, the court referred to attempts by two academics to identify the purposes served by freedom of expression. These corresponded roughly to the three categories postulated in the passage quoted above, although there were several differences of terminology which could be quite significant in particular circumstances. What requires emphasis, however, is that in *Ford* the court did not designate these identified values as objects *a person invoking the constitutional guarantee of free expression must prove to be promoted by the form of expression in question.* On the contrary, the court emphasized the "philosophical" nature of the academic analysis, and pointed out that it included many matters that the *government* must establish under section 1 of the Charter:[23]

> While these attempts to identify and define the values which justify the constitutional protection of freedom of expression are helpful in emphasizing the most important of them, they tend to be formulated in a philosophical context which fuses the separate question of whether a particular form or act of expression is within the ambit of the interest protected by the value of freedom of expression and the question whether that form or act of expression, in the final analysis, deserves protection from interference under the structure of the Canadian Charter and the Quebec Charter. These are two distinct questions and call for two distinct analytical processes.... First, consideration will be given to the interests and purposes that are meant to be protected by the particular right or freedom in order to determine whether the right or freedom has been infringed in the context presented to the court. If the particular right or freedom is found to have been infringed, the second step is to determine whether the infringement can be justified *by the state* within the constraints of s. 1. It is within the perimeters of s. 1 that courts will in most instances weigh competing values in order to determine which should prevail.

The majority dictum in *Irwin Toy* fails to take account of this vital distinction that the court stressed in *Ford*, and purports instead to impose on the plaintiff the sole responsibility for demonstrating that the restricted statement promotes one of the three catalogued goals of free expression. This approach is not only inconsistent with the court's words in *Ford*; it is also incompatible with a statement made in the earlier part of the same majority judgment in the *Irwin Toy* case itself: "We cannot... exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed."[24]

Another serious problem with the "protected values" approach, whether as articulated in *Irwin Toy* or in *Ford*, is the fact that many would dispute the exhaustiveness of the three values recognized in those cases. Cannot expression serve acceptable purposes other than truth-seeking, social or political decision-making, or personal fulfilment and flourishing? What about sheer entertainment or pleasure, for example? It would be difficult to find anything that contributes to self-fulfilment or flourishing in a trashy detective

[22] *Supra*, footnote 8, at pp. 764-766 (S.C.R.), 617-618 (D.L.R.).

[23] *Ibid.*, at pp. 764-766 (S.C.R.), 617-618 (D.L.R.). (Emphasis added).

[24] *Supra*, footnote 1, at pp. 969 (S.C.R.), 607 (D.L.R.).

novel, a "Tom and Jerry" film cartoon, or a bawdy limerick, yet most of us would object if such forms of expression were prohibited.

One might be inclined to overlook such discrepancies and oversights on the part of an overworked court, if they did not involve a serious risk of shrinkage for this vital constitutional guarantee. Read literally, by a court unsympathetic to the views being expressed, or to the person expressing them, the words of the *Irwin Toy* dictum could be used to justify the suppression of unpopular ideas, without any reference to section 1 of the Charter.

Consider three classical free expression situations:

(1) A school teacher alleges, on the basis of sincere but laughably inept "research", that whites are more intelligent than blacks, and is subjected to two different sanctions: (a) prosecution for engaging in hate propaganda, and (b) dismissal from his or her teaching post. In both cases the teacher resists, relying upon the constitutional guarantee of free expression.

(2) An author publishes a highly erotic fantasy about a man who shrinks to the size of a small insect, and makes use of his condition to explore and stimulate his lover's private parts. The author is accused of violating the obscenity provisions of the Criminal Code, and raises freedom of expression under the Charter as a defence.

(3) The leader of a group called "Fighters Against the Exploiting Classes" issues a manifesto advocating non-violent disobedience of all laws, with a view to bringing the existing social and political structure to its knees, and replacing it with a non-democratic "dictatorship of the exploited classes". He defends a prosecution for counselling criminal conduct by relying upon the constitutional guarantee of free expression.

In all these situations genuine expressions of ideas are involved, and plausible arguments can be made both in support of and in opposition to suppressing the statements in question. They are all situations suitable for the process of balancing societal values that section 1 of the Charter was designed to permit. With respect to the first hypothetical situation, for example, a section 1 analysis could lead to the conclusion that although legislation classifying such statements as hate propaganda would not constitute a "reasonable limit" in a "free and democratic society", legislation authorizing the dismissal of teachers who make such claims in class would.

The *Irwin Toy* dictum could be construed as denying any Charter protection to any of the hypothetical statements, however, without calling upon government to demonstrate the reasonableness of the particular restrictions. So far as the first of the three stated purposes of free expression—"seeking and attaining the truth"—is concerned, none of the statements in question could be considered to have "attained" the truth,[25] and only

[25] Read literally, the dictum seems to suggest that a statement, to be protected on grounds of "truth", must be shown to promote the attainment of truth, and not just to involve a seeking after truth. It will be noted that the court applied the singular verb "is" to the phrase "seeking and attaining", rather than saying that "seeking and attaining the truth *are* inherently good activities".

the first situation could be said to involve even a search for truth. The second purpose—"participation in social and political decision-making"—would certainly not be involved in the first two hypothetical situations, and, if interpreted as meaning *democratic* decision-making (which seems to have been intended), would also be missing from the third. The final listed goal of free expression—"individual self-fulfilment and human flourishing"—could hardly be said to be served by either the crackpot phrenology of the first hypothetical or the prurient fantasy of the second. Given its emphasis on "individual" fulfilment, it would also be difficult to relate that goal to the class warfare advocated in the third illustration.

In short, in all of these classic freedom of expression situations, a court that accepted the invitation of the dictum to restrict the applicability of free expression to the "kinds of activity [that] promote these principles" could relieve government of its obligation under section 1 of the Charter to justify restrictive laws. That result would be antithetical to the generous approach to expressive freedom adopted by the court in *Ford* and, indeed, to the assertion made at an earlier point in the majority's reasons for judgment in this case that:[26]

> Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec *Charter* so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream.

The court's disturbing observations about situations that can be determined without a section 1 analysis did not affect the outcome of the case, however, since both the majority and the minority agreed that the type of commercial expression regulated by the impugned legislation was of a type that clearly fell within the ambit of section 2(b) of the Charter.

(2) *Corporations Excluded from Section 7 Protection*

Irwin Toy Ltd. contended that in addition to infringing its freedom of expression, the legislative restrictions on advertising directed to children also deprived it of a "liberty", contrary to principles of fundamental justice, within the meaning of section 7 of the Charter. Without going into the merits of the argument, the court rejected this claim on the ground that "a corporation cannot avail itself of the protection offered by s. 7 of the *Charter*".[27]

The reasoning upon which this conclusion was reached was not compelling. Pointing out that section 7 conspicuously omits any protection for "property", which is included within the equivalent guarantees in the Canadian Bill of Rights and the American Bill of Rights, the court held that economic rights which could be considered proprietary in nature are

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[26] *Supra*, footnote 1, at pp. 968 (S.C.R.), 606 (D.L.R.).

[27] *Ibid.*, at pp. 1002-1003 (S.C.R.), 632 (D.L.R.).

excluded from the ambit of section 7. Although unwilling to conclude at this point in the Charter's history that all economic rights of human persons are excluded, it ruled out any economic liberties of corporations on the ground that the other interests protected by section 7 ("life" and "security of the person") are both incapable of being enjoyed by corporations. Those who believe that a right as basic as "fundamental justice" ought to be available to "everyone" (as the section explicitly says) no matter by what lawful means they choose to organize and conduct their affairs, may find the logic of this reasoning difficult to follow.

(3) *Reasonable Limits*

It was only at the final stage of the Charter analysis—the inquiry as to whether the government had demonstrated the reasonableness of the restrictions in accordance with section 1 of the Charter—that the court divided. The three judges of the majority were of the view that the restriction did constitute a "reasonable limit" under section 1, while the dissenting judges, McIntyre and Beetz JJ., were of the opposite view. The court's reasons for judgment on that question yielded some useful new information about the meaning of "reasonable limits" under the Charter.

(a) *An "Intelligible Standard" Required*

On the question of determining whether a discretion bestowed on the judiciary by legislation is too sweeping or vague to be considered "prescribed by law" under section 1, the majority laid down an "intelligible standard" guideline:[28]

> Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law".

After examining the legislative provisions under attack in the case before it, the court concluded that they did provide the courts with a sufficiently intelligible standard to work with.

(b) *Vintage of Evidence*

Guidance was also provided by the court as to the nature of the evidence which governments might permissibly adduce in support of the contention that a legislative restriction on Charter rights is a "reasonable limit". The Attorney-General of Quebec had tendered evidence of quite recent vintage concerning the *currently* pressing nature of the objectives intended to be served by the restriction on advertising addressed to children.

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[28] *Ibid.*, at pp. 983 (S.C.R.), 617 (D.L.R.).

The plaintiff objected that such evidence should not be admitted, because it did not exist at the time the legislation was enacted. The majority found the evidence to be admissible, pointing out that although the *object* of the legislation must have been in existence at the time the legislature created the law, a court faced with a Charter challenge to the legislation may consider subsequent *evidence* as to either the original "pressingness" of the object, or any ensuing changes in the situation:[29]

> In showing that the legislation pursues a pressing and substantial objective, it is not open to the government to assert *post facto* a purpose which did not animate the legislation in the first place (see *Big M. Drug Mart Ltd.* . . .). However, in proving that the original objective remains pressing and substantial, the government surely can and should draw upon the best evidence currently available. The same is true as regards proof that the measure is proportional to its objective (see *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 769, [(1986) 35 D.L.R. (4th) 1, at p. 41]. It is equally possible that a purpose which was not demonstrably pressing and substantial at the time of the legislative enactment becomes demonstrably pressing and substantial with the passing of time and the changing of circumstances.

It bears noting that the court considered both the "pressingness" and "proportionality" aspects of the "reasonable limits" test under section 1 of the Charter to be determinable as of the date of the Charter attack, rather than the date of original enactment. Read carefully, the passage quoted above appears to do more than give governments the *option* of providing evidence about current conditions; it seems to place them under an *obligation* to do so.

(c) *"Unreasonable Impairment"*

The majority's most significant contribution to the understanding of section 1 concerned the question of "minimal impairment". The court had ruled in *R.* v. *Oakes*[30] that to satisfy section 1 a restriction on Charter rights must impair the rights in question "as little as possible". This seemed to indicate that a government could not invoke section 1 of the Charter unless it could demonstrate that there would be no alternative means of achieving its objective that would be less hurtful of Charter rights. Strictly interpreted, this requirement would place severe limitations on legislative autonomy. An earlier indication of an awareness of this problem might be seen in Dickson C.J.C.'s slight modification of the requirement in *R.* v. *Edwards Book and Art Ltd.*,[31] where he suggested that the restriction must abridge the freedom in question "as little as is *reasonably* possible".

In the *Irwin Toy* case, the majority seems to have modified the "minimal impairment" element even more substantially. The situation it faced in that case—legislation to protect children from commercial exploitation

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[29] *Ibid.*, at pp. 984 (S.C.R.), 618 (D.L.R.).

[30] [1986] 1 S.C.R. 103, at p. 139, (1986), 26 D.L.R. (4th) 200, at p. 227.

[31] [1986] 2 S.C.R. 713, at p. 772, (1986), 35 D.L.R. (4th) 1, at p. 44. (Emphasis added).

through advertising—provided a good illustration of a problem it would be hard to guarantee could not be dealt with in other, less intrusive, ways. The majority drew attention to the fact that such problems are amenable to many possible approaches, and that democratic legislatures have the primary responsibility for choosing the most appropriate one:[32]

> . . . in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck. . . . When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.

More interference by the courts in the balancing process might be appropriate, it was suggested, where government has a vested interest in the subject-matter of the legislation than when it is able to act in an arm's length fashion:[33]

> In other cases . . . rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed. For example, in justifying an infringement of legal rights enshrined in ss. 7 to 14 of the *Charter*, the state, on behalf of the whole community, typically will assert its responsibility for prosecuting crime whereas the individual will assert paramountcy of principles of fundamental justice. There might not be any further competing claims among different groups. In such circumstances, and indeed whenever the government's purpose relates to maintaining the authority and impartiality of the judicial system, the courts can assess with some certainty whether the "least drastic means" for achieving the purpose has been chosen, especially given their accumulated experience in dealing with such questions. . . . The same degree of certainty may not be achievable in cases involving the reconciliation of claims of competing individuals or groups or the distribution of scarce government resources.

The courts cannot abdicate their ultimate responsibility for policing section 1 of the Charter. However, in the view of the majority in this case, they need not demand proof that the measures selected by the legislature are the *absolutely* least restrictive means possible to achieve their object. What it is necessary to demonstrate to the court is the *reasonableness* of the means chosen in the light of all relevant circumstances. The majority was satisfied (though the dissenters were not) that the impugned restrictions on child-directed advertising were reasonable:[34]

> In sum, the evidence sustains the *reasonableness* of the legislature's conclusion that a ban on commercial advertising directed to children was the minimal impairment of free expression consistent with the pressing and substantial goal of protecting children against manipulation through such advertising. While evidence exists that other less intrusive options reflecting more modest objectives were available to the

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[32] *Supra*, footnote 1, at pp. 993 (S.C.R.), 625 (D.L.R.).

[33] *Ibid.*, at pp. 994 (S.C.R.), 626 (D.L.R.).

[34] *Ibid.*, at pp. 999 (S.C.R.), 629-630 (D.L.R.). (Emphasis added).

> government, there is evidence establishing the necessity of a ban to meet the objectives the government had *reasonably* set. *This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures choose the least ambitious means to protect vulnerable groups.*

It would appear, therefore, that the "minimal impairment" test has now evolved into a requirement that there be no "unreasonable impairment" of the Charter rights affected.

Division of Powers Issues

In addition to its Charter arguments, the plaintiff attacked the provincial restrictions concerning child-directed advertising on the ground that it was an unconstitutional attempt by the provincial legislature to deal with subjects beyond its jurisdictional competence.

One basis for this assertion—that the law, because it imposed penal sanctions, impinged on the federal criminal law power—was swiftly, and justifiably, rejected:[35]

> It cannot be said that because there are sanctions against a breach of these sections, they are best characterized as being, in pith and substance, legislation relating to criminal law.... This Court has on numerous occasions upheld provincial penal laws enacted in relation to otherwise valid provincial objectives....

Three other arguments, of greater substance, received fuller consideration:

> (1) that the legislation concerned, in pith and substance, the federally regulated activity of television broadcasting;
>
> (2) that, in any event, the legislation attempted impermissibly to affect that federal undertaking in respect of a core function; and
>
> (3) that the legislation was incompatible with federal legislation on the same subject.

Each of these contentions was eventually rejected.

(1) *Advertising or Broadcasting?*

The court had little difficulty concluding that the legislation was genuinely intended to provide consumer protection, an area of governmental responsibility clearly within provincial control. The fact that the restrictions extended to advertising carried by federally regulated broadcast undertakings, and that, indeed, television is the most common medium employed to convey advertising to children, did not prevent the legislation being provincial in its pith and substance. Although the court did not use the term, this was clearly a "dual aspect" situation, in that restrictions of this kind could be legitimately characterized as relating to *both* advertising and broadcasting. That being so, provincial legislation on the subject must be considered valid unless proved to conflict with federal legislation on the subject.

The only way in which the court's reasons might be faulted in this regard is that they seem to suggest that the sole question at issue was

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[35] *Ibid.*, at pp. 965 (S.C.R.), 603 (D.L.R.).

whether the provincial legislature was "*bona fide*" in its attempt to regulate all forms of child-directed advertising in the province, rather than making a "colourable" attempt, under the guise of a law of general application, to legislate in relation to television advertising.[36] "Colourability" relates only to the *genuineness* of an asserted basis for legislative jurisdiction. The mere fact that legislation is not bogus or "colourable" in its expressed intention does not necessarily protect it. A sincere, but mistaken, claim to legislative jurisdiction would be as invalid constitutionally as a "colourable" one.

(2) *Were Core Broadcast Functions Affected?*

Provincial legislation, even though otherwise valid, has been held to be inapplicable to crucial or "core" aspects of undertakings falling under the jurisdiction of the Parliament of Canada.[37] While this is most obviously the case in circumstances where the provincial law would seriously impair the federal operation, the immunity has been held to apply to even less drastic situations. As Beetz J. stated, on behalf of the Supreme Court of Canada, in a passage from an earlier case quoted in the *Irwin Toy* decision:[38]

> The impairment test is not necessary in cases in which, without going so far as to impair the federal undertaking, the application of the provincial law affects a vital part of the undertaking....
>
> In order for the inapplicability of provincial legislation rule to be given effect, it is sufficient that the provincial statute which purports to apply to the federal undertaking affects a vital or essential part of that undertaking, without necessarily going as far as impairing or paralysing it.

It was contended on behalf of those who attacked the provincial legislation restricting child-directed advertising that it could not be applied to television commercials because such advertising, and the revenue it produces, are "vital or essential parts of the undertaking" of television broadcasting. The court did not accept this argument, holding that the effect of the restrictions on broadcasters is merely "incidental". The reasoning by which the court arrived at that conclusion involved a refinement of the distinction between provincial laws which impair federal undertaking and those which merely affect vital parts of such undertakings. The virtue of the refinement is not self-evident.

The court acknowledged that so far as provincial laws which would actually *impair* a federal undertaking are concerned, the undertaking will be immune whether the impairment would be a direct or an indirect consequence of the law. In the case of provincial laws which would merely

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[36] *Ibid.*, at pp. 953-954 (S.C.R.), 594-595 (D.L.R.).

[37] See, D. Gibson, Interjurisdictional Immunity in Canadian Federalism (1969), 47 Can. Bar Rev. 40.

[38] *Supra*, footnote 1, at pp. 955 (S.C.R.), 596 (D.L.R.), quoting from *Bell Canada* v. *Quebec*, [1988] 1 S.C.R. 749, at pp. 859-860, (1988), 51 D.L.R. (4th) 161, at p. 244.

affect federal undertakings in some vital aspect, however, it held that immunity applies only to those laws which apply *directly* to federal enterprises:[39]

> The federal government has exclusive jurisdiction as regards "essential and vital elements" of a federal undertaking.... No provincial law touching on those matters can apply to a federal undertaking. However, where provincial legislation does not purport to apply to a federal undertaking, its incidental effect, even upon a vital part of the operation of the undertaking, will not normally render the provincial legislation *ultra vires*.

Here, it was held that although the provincial legislation would affect television broadcasters indirectly in the vital matter of advertising, it did not "purport to apply to television broadcast undertakings".[40] Therefore, it was concluded, since the restrictions on advertising directed to children would not significantly impair broadcast television operations, they could constitutionally be applied to them.

At least two objections can be raised to this line of reasoning, one factual and the other legal. Factually, it is hard to understand how the court could have interpreted the legislation as not purporting to apply to television broadcast operations when the language employed explicitly included "broadcasts". What the court perhaps meant was that the legislation did not purport to apply to *broadcasters*. This was the basis relied upon by the court in the earlier case of *Attorney-General of Quebec* v. *Kellogg's Company of Canada*[41] to dismiss a challenge to an earlier version of the Quebec legislation.

But why, even if one accepts that explanation of the factual finding, should it matter to the constitutionality of the provisions whether a particular category of plaintiff is explicitly targeted in legislation? It is a long-recongized principle of Canadian constitutional law that the constitutionality of legislation depends upon *both* its purpose and its effect. Even if a statute does not purport to serve an unconstitutional purpose, it can be struck down on the ground that it has an unconstitutional effect. As Dickson J. said, on behalf of a unanimous court, in *R.* v. *Big M Drug Mart Ltd.*:[42]

> In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.

It has also long been a commonplace of Canadian constitutional law that governments are not permitted to achieve indirectly what they cannot do directly.[43] Why should there be an exception to these fundamental

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[39] *Ibid.*

[40] *Ibid.*, at pp. 957 (S.C.R.), 597 (D.L.R.).

[41] [1978] 2 S.C.R. 211, (1978), 83 D.L.R. (3rd) 314.

[42] [1985] 1 S.C.R. 295, at p. 331, (1985), 18 D.L.R. (4th) 321, at p. 350. See, generally, D. Gibson, The Law of the Charter: General Principles (1986), p. 52ff.

[43] *Amax Potash Ltd.* v. *Government of Saskatchewan*, [1977] 2 S.C.R. 576, at pp. 590-591, (1977), 71 D.L.R. (3rd) 1, at pp. 10-11, per Dickson J.

constitutional principles in the case of provincial laws which indirectly affect vital aspects of federal undertakings? The consequence of such an exception will likely be that provinces seeking to extend their laws to federal undertakings will employ the ingenuity of their legislative drafters to find clever ways of accomplishing indirectly what they cannot achieve forthrightly. Surely that is not a course of legislative conduct the Supreme Court of Canada should be encouraging.

The creation of such an anomaly at least called for an explanation of its virtue or necessity by the court. None is evident in the reasons for judgment of the *Irwin Toy* case. In the absence of an official explanation, one can speculate that the court was concerned about the undue constraints placed, by its previous rulings as to interjurisdictional immunity, upon the power of provincial legislatures to affect federal enterprises operating within their territory, and saw this new refinement as a way of loosening the constraints. If this was indeed the court's intent, one can sympathize. The rule that provincial laws may not affect core aspects of federal enterprises may well be unduly restrictive.

It would have been preferable to address the problem more forthrightly, however. This could have been accomplished by simply doing away with *all* interjurisdictional immunity of federal undertakings from provincial laws which do not threaten to impair them. Why, in a healthy federal system, should federal undertakings being operated within a province not have to obey the laws applicable to everyone else in the province, unless those laws actually threaten the continued functioning of the enterprise? By failing to address this question frontally, the Supreme Court of Canada declined an important opportunity to clarify a confusing area of constitutional law. It made matters worse, in fact, by introducing a new and unjustifiable complication.

(3) *Federal Paramountcy?*

Those who attacked the provincial advertising legislation contended that even if it were in itself constitutionally valid, it must be considered to have been overridden by inconsistent provisions of federal legislation applicable to the broadcasting industry. Where, as in this case, a legislative topic has both federal and provincial features, the "dual aspect" principle dictates that provincial laws will only be valid if they do not conflict with federal laws, in which case the latter will be considered "paramount". The court found no inconsistency here, however. Although federal regulations did impose restrictions on broadcasters with respect to advertising aimed at children, those restrictions did not purport to regulate advertisers. In any event, the federal regulations were intended to be supplementary of other applicable standards, and not to become substitutes for them. There being no federal-provincial inconsistency, there was no occasion to invoke the paramountcy doctrine.

(4) *Centring the Pendulum of Federalism*

There was a period of Canadian constitutional history, extending roughly from the end of World War II until the mid 1970s, when the courts favoured generous interpretations of the constitutional powers of the Parliament of Canada and other federal institutions. Taking an "unbroken net" approach to federal jurisdiction, they would seize upon almost any federal aspect of a question as a basis for excluding any provincial role. The "dual aspect" principle was almost forgotten.

In *The Queen* v. *Board of Transport Commissioners*[44] (the *Go-Train* case), for example, the Supreme Court of Canada held that because a commuter train service, which operated entirely within the province of Ontario, using rolling stock owned by the Government of Ontario, was operated over the C.N.R. tracks, federal rather than provincial authorities must be responsible for setting the fare structure. In *Re Public Services Board, Dionne, and Attorney-General of Canada*,[45] the court rejected the power of provinces to licence cable television operations in the province if they made use of signals that were originally broadcast. In so ruling, Laskin C.J.C., speaking for a majority of the court, commented:[46]

> Divided constitutional control of what is functionally an interrelated system ... not only invites confusion but is alien to the principle of exclusiveness of legislative authority, a principle which is as much fed by a sense of the constitution as a working and workable instrument as by a literal reading of its words.

The latter case was decided at the conclusion of the period of judicial preoccupation with federal exclusivity. In fact, in other areas of the constitution the pendulum had already begun to swing back in the provincial direction, and the *Dionne* ruling, along with two decisions which seriously crippled the provinces' power over their own resources,[47] probably did much to accelerate the back-swing. It was not long after the *Dionne* decision that the Supreme Court of Canada decided another case, *Attorney-General of Quebec* v. *Kellogg's Company of Canada*,[48] in which it exhibited a much more flexible attitude toward television regulation, holding that provincial advertising restrictions concerning child-oriented advertising (the forerunner of the laws challenged in *Irwin Toy*) could be enforced constitutionally against television advertisers (though not television broadcasters).

As is too often the case with backlashes, however, the period of provincial ascendancy, which continued for the next decade or so, sometimes

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[44] [1968] S.C.R. 118, (1967), 65 D.L.R. (2nd) 425.

[45] [1978] 2 S.C.R. 191, (1977), 83 D.L.R. (3rd) 178.

[46] *Ibid.*, at pp. 197 (S.C.R.), 181 (D.L.R.).

[47] *C.I.G.O.L.* v. *Attorney-General of Saskatchewan*, [1978] 2 S.C.R. 545, (1977), 80 D.L.R. (3rd) 449; *Central Canadian Potash* v. *Attorney-General of Saskatchewan*, [1979] 1 S.C.R. 42, (1978), 88 D.L.R. (3rd) 609.

[48] *Supra*, footnote 41.

went too far. In *Reference Re Anti-Inflation Act*,[49] for example, the Supreme Court of Canada placed unnecessary restraints on the "national dimension" approach to the federal "peace, order and good government" power. In *Attorney-General of Canada* v. *Dupond*,[50] it refused to treat as "criminal law" a municipal by-law prohibiting, in the interest of preserving public order, all public demonstrations within specified time periods. Having recovered from a starboard list, the ship of state had now developed a substantial list to port.

There are indications that the ship of state is back on an even keel of late. In *R.* v. *Crown Zellerbach*,[51] the Supreme Court of Canada once more made use of the "national dimensions" doctrine, and in a number of other recent decisions it has shown itself more willing than it has been for many years to adopt a functionally sophisticated "dual aspect" approach to the division of powers between federal and provincial authorities.[52]

The *Irwin Toy* case offers another example of the court's attempt to achieve an even-handed and workable division of labour between the provinces and the federal government. While the wisdom of the particular division chosen in this and other cases may be open to debate, the court's determination to abandon the all-or-nothing approach to division of powers, and to seek federal-provincial power-sharing arrangements that are functionally realistic and appropriate for a federal constitution in the 1990s is to be celebrated.

* * *

Constitutional Law—Right to Vote—Redistribution—Equality of Representation: *Dixon* v. *Attorney General of British Columbia*

Alan Stewart*

In 1962, the United States Supreme Court's decision in *Baker* v. *Carr*,[1] recognizing the justiciability of questions of electoral reapportionment, ignited a "reapportionment revolution" that led to the overturning of virtually

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[49] [1976] 2 S.C.R. 373, (1976), 68 D.L.R. (3rd) 452.

[50] [1978] 2 S.C.R. 770, (1978), 84 D.L.R. (3rd) 420.

[51] [1988] 1 S.C.R. 401, (1988), 49 D.L.R. (4th) 161.

[52] *All-Trans Express Ltd.* v. *Workers' Compensation Board (B.C.)*, [1988] 1 S.C.R. 897, (1988), 51 D.L.R. (4th) 253; *Brown* v. *Y.M.H.A.*, [1989] 1 S.C.R. 1532, (1989), 59 D.L.R. (4th) 694; *Quebec Ready-Mix* v. *Rocois*, [1989] 1 S.C.R. 695, (1989), 60 D.L.R. (4th) 124.

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[1] 369 U.S. 186 (1962).

every legislative apportionment in the nation by the end of the decade.[2] The decision of McLachlin C.J.S.C. in *Dixon* v. *Attorney-General of British Columbia*[3] is the opening shot that breaks the quiet here. Unlike in the United States, where unsuccessful attempts to strike down districting schemes had been going on for over thirty years before *Baker* v. *Carr*, Canada's judicial intervention comes before any extensive public debate or entrenchment of positions has had time to occur. Thus *Dixon* seems more likely to lead to reform than revolution.

The Previous Law

In Anglo-Canadian law, pre-Charter attempts to bring redistribution procedures under judicial scrutiny have been uniformly unsuccessful. A challenge to the sufficiency of the reasons given by the 1976 federal commission for Ontario in its advertised notice of public sittings was rejected because the applicants waited until after the sittings to raise the issue, and granting the order requested would have prevented the commissioners from presenting their final report within the statutory time limit.[4] A subsequent application for an injunction against preparation of the Representation Order (which is the instrument that effects the redistribution) was dismissed by the same court.[5] The matter was held to be within Federal Court of Appeal jurisdiction. Thurlow A.C.J. also stated that he would in any event refuse to put the validity of the whole redistribution in doubt by restraining the Representation Commissioner from completing the draft Representation Order within the statutory time period.

In 1985 a new formula for allocating House of Commons seats among provinces was introduced, causing British Columbia to gain fewer seats in the 1987 federal redistribution than it would have had under the old formula.[6] The city of Vancouver lost a seat in that redistribution. The plaintiffs in *Campbell* v. *Attorney-General of Canada*[7] argued that the new formula was an amendment to the Constitution of Canada in relation to the principle of proportionate representation of the provinces in the House of Commons, requiring the approval of two-thirds of the provinces with at least fifty per cent of the country's population. The trial court found that the historical principle of proportionate representation was not one of exact numerical proportionality, but left room for variations in detail such as the senatorial floor which protected smaller provinces against having

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[2] R.G. Dixon Jr., Democratic Representation: Reapportionment in Law and Politics (1968), p. 4.

[3] (1989), 59 D.L.R. (4th) 247, [1989] 4 W.W.R. 393, (1989), 35 B.C.L.R. (2d) 273 (B.C.S.C.).

[4] *Penner* v. *Electoral Boundaries Commission*, [1976] 2 F.C. 614 (T.D.).

[5] *Penner* v. *The Representation Commissioner for Canada*, [1977] 1 F.C. 147 (T.D.).

[6] Representation Act, 1985, S.C. 1986, c. 8.

[7] [1988] 2 W.W.R. 650, (1987), 21 B.C.L.R. (2d) 130 (S.C.).

their representation drop below a certain level. The Court of Appeal affirmed this judgment four to one.[8] Although the city would seem well placed to advance an equal population argument, no submissions based on the Charter were made in the case.[9]

As for English law, in *Harper* v. *Home Secretary*,[10] the plaintiff argued that being moved from an all-city district to a mixed city-country district would diminish the value of his vote and the quality of his representation. The Commission's interpretation of the statutory rules for determining the electoral quota in England proper was also challenged. The Court of Appeal rejected both arguments, noting that the Commission's approach was well within its very wide statutory discretion.

In *R.* v. *Boundary Commission for England, ex parte Foot and Others*,[11] a challenge made on "representation-by-population" grounds, arguing that the Commission had failed to perform its statutory duty of setting the quotas of electoral districts as equal as reasonably possible, was dismissed. The English equal-population requirement was explicitly subordinated to various other considerations.[12] The court was unable to find that the Commission had exceeded its discretion. McLachlin C.J.S.C.'s claim in *Dixon* that this case demonstrates "[t]he inherent justiciability of apportionment issues"[13] is somewhat exaggerated. *Foot* involved ordinary questions of administrative law concerning the presence or absence of error of law in a tribunal's application of its governing statute. Nothing in it implies that a challenge to a redistribution scheme spelled out in a statutory enactment would be justiciable.

The Challenge in Dixon

Political parties dislike redistribution, quite aside from any partisan consequences, because of the disruption involved in reorganizing every local association in the jurisdiction along new boundaries and sorting out the problems caused where existing districts disappear, or are left with two sitting members. In 1984, British Columbia adopted a complex and unique scheme to recognize population growth by doubling the number of members in high growth single-member districts in preference to the systematic redrawing of boundaries that characterizes ordinary redistributions.[14] Different quotas were established for mainland and Vancouver Island districts,

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[8] *Campbell* v. *Attorney General of Canada*, (1988), 49 D.L.R. (4th) 321, [1988] 4 W.W.R. 441, (1988), 25 B.C.L.R. (2d) 101 (B.C.C.A.).

[9] *Campbell* v. *Attorney General of Canada*, *supra*, footnote 7, at pp. 660 (W.W.R.), 140 (B.C.L.R.).

[10] [1955] 1 Ch. 238, [1955] 1 All E.R. 331 (C.A.).

[11] [1983] Q.B. 600, [1983] 1 All E.R. 1099 (C.A.).

[12] *Ibid.*, at pp. 629-630 (Q.B.), 1113 (All E.R.).

[13] *Dixon*, *supra*, footnote 3, at pp. 277 (D.L.R.), 425 (W.W.R.), 305 (B.C.L.R.).

[14] Constitution Act, R.S.B.C. 1979, c. 62, as am. S.B.C. 1984, c. 12.

accompanied by subrules for metropolitan, suburban, urban-rural, interior-coastal and remote districts. The resulting formula created wide population discrepancies illustrated by the inevitable and vivid comparison of the extremes: the largest district, Surrey-Newton, had a population of 68,347 at the 1986 census, more than 13 times larger than the smallest northern district of Atlin, with a population of 5,511.[15] Atlin's unique status as the only district characterized as "remote" exaggerates the population disparity of the British Columbia distribution; the second largest and smallest examples bear populations of 68,203 and 23,144, a ratio of less than 3:1. However, by comparative standards, British Columbia's population equality was less than other provinces.

The petitioner challenged the Act under sections 3 and 15 of the Charter of Rights and Freedoms.[16] The province offered the traditional defence of special consideration for rural and remote ridings, arguing that it compensated for difficulties in transportation and communications as well as more dubious concerns such as "[l]imited availability of resources and advisors to rural members".[17]

McLachlin C.J.S.C. found, citing the American political theorist, John Rawls,[18] that the section 3 guarantee of the right to vote implies a guarantee of equal representation, quite apart from the equal protection right under section 15(1). The choice to import an "equal representation" component into section 3 is important in two respects. Population variations created on grounds not enumerated in section 15(1) or analogous to them might be found to have been imposed "without discrimination" and thus to be allowable under section 15(1). Further, some systematic population preferences, such as those in favour of remote, disadvantaged northern regions of provinces, might fall under the affirmative action exception of section 15(2) if equal representation rights were based on section 15 alone.

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[15] *Dixon*, *supra*, footnote 3, at pp. 284-285 (D.L.R.), 433-435 (W.W.R.), 314-315 (B.C.L.R.).

[16] Constitution Act, 1982, Part I:

> 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.
>
> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[17] *Dixon*, *supra*, footnote 3, at pp. 255 (D.L.R.), 401 (W.W.R.), 281 (B.C.L.R.).

[18] *Ibid.*, at pp. 259 (D.L.R.), 406 (W.W.R.), 286 (B.C.L.R.).

However, McLachlin C.J.S.C. rejected the American doctrine that equal representation requires absolute population equality, offering a historical exegesis of the differing concepts of democracy in the two nations.[19] McLachlin C.J.S.C. would require that population must be the "dominant consideration in drawing electoral boundaries", requiring that legislatures set "limits beyond which it cannot be eroded".[20] Further, deviations from equal population require justification:[21]

> ... only those deviations should be admitted which can be justified on the ground that they contribute to better government of the populace as a whole, giving due weight to regional issues within the populace and geographic factors within the territory governed. Geographic considerations affecting the servicing of a riding and regional interests meriting representation may fall in this category and hence be justifiable.

The standard as articulated by McLachlin C.J.S.C. avoids the simplistic American doctrine that reduces equality of representation to simple equality of numbers of electors residing in each electoral district. Such a doctrine forgets that in an electoral system organizing voters by geographical districts (as opposed to a system of proportional representation that organizes voters by philosophical preference) electors are represented as numbers of a physical community, and not as choosers of political values in some abstract sense. An elector moved by redistribution from a district with a large population to a smaller one is supposedly better represented because he has a larger mathematical "share" of his member. Yet if the move means that he is artificially excluded from the political community containing those sharing his local interests and served by his local institutions, he may feel himself to be much more poorly represented. The premises of the radically individualistic equal-population measure of representation, which is concerned only with equalizing the citizen's notional ability to influence the choosing of a member, as calculated mathematically, collapse into themselves; they lead equally soundly to the nihilistic conclusion that except where an election is decided by one voter, an individual elector has had no true influence on the choice at all. The idea of a mathematical "share" of a representative is meaningful only if it is assumed that a voter is able to influence the election by banding together with people sharing like interests as himself. One reason for population variations in redistribution is to optimize the concentration of electors with like interests.

In addition, McLachlin C.J.S.C.'s standard is well chosen for a case of first impression in that it avoids implying a conclusion about the validity of the full range of the criteria used by boundary drawers. The systematic population biases repeatedly mentioned by McLachlin C.J.S.C., such as urban-rural and hinterland-metropolis, while important, account for only a fraction of the reasons that motivate deviations from pure population equality. Many other factors cause boundary drawers to design ridings

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[19] *Ibid.*, at pp. 260-263 (D.L.R.), 407-411 (W.W.R.), 287-291 (B.C.L.R.).

[20] *Ibid.*, at pp. 266-267 (D.L.R.), 414 (W.W.R.), 294 (B.C.L.R.).

[21] *Ibid.*, at pp. 267 (D.L.R.), 414 (W.W.R.), 294 (B.C.L.R.).

that deviate from the average—for example, stability of districts, respect for municipal and ward boundaries and electoral boundaries of the other level of government within the federation, physical features and other natural boundaries, population trends, and boundaries of local communities, sometimes and sometimes not ethnically and linguistically based. Recognition of these factors in redistribution is defensible because all contribute to an important component of representation—maximizing the number of electors whose natural or perceived community of interest is taken into account in determining the electoral district in which they vote. Indeed, these influences are much more defensible than the large scale rural/urban and northern/southern considerations of which McLachlin C.J.S.C. openly approves, because they do not discriminate systematically against any particular class of citizen and thus do not offend on equal protection grounds. To give an example, if the population quota is 100,000, two adjoining counties may be set as separate districts at 80,000 and 120,000 to avoid crossing county boundaries. The two districts, taken together, have exactly their proper "share" of the total number of representatives in the jurisdiction. The choice as to which electors are notionally underrepresented and which notionally overrepresented is based on no systematic bias but on chance, as represented by the relationship between the population of the county and the population quota—a relationship that will change with every redistribution. For example, with a population quota of 67,000, the larger county would likely be divided into two and the smaller county left as one district, thus reversing the original pattern of over- and under-representation. The same factor—community of interest—justifies both deviations from equal population and the resulting population variation is likely to be in the perceived interest of the great majority of electors in both jurisdictions, as confirmed by representations at the public hearings now held in most jurisdictions. Such a variation, based on a form of "implied consent" and affecting the equality of representation of no other group in the jurisdiction, should be less objectionable than systematic population biases against certain groups, such as urban or suburban residents. Yet it is the former, justifiable variations which tended to draw criticism in the American jurisprudence because, unless the background facts justifying the boundaries are articulated to the court, the variations may appear "unexplainable". McLachlin C.J.S.C. seems to verge upon acceptance of this approach when she uses a series of contrasts showing population variations for which "[t]here is no explanation"[22] to impugn the British Columbia scheme. It is to be hoped that courts have other opportunities to understand more fully the mechanics of redistribution before any similar error becomes incorporated in our jurisprudence.

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[22] *Ibid.*, at pp. 268 (D.L.R.), 416 (W.W.R.), 296 (B.C.L.R.).

The Population Standard

Although *Baker* v. *Carr*[23] is now recognized as the opening volley in the reapportionment revolution, it established only that reapportionment matters were justiciable. No numerical rules were set down to govern population variations, and the reasons of the judges led commentators to believe that an absolute equality standard was not to be implied.[24] Yet once courts intervene, repeated litigation will inevitably lead to the establishment of some numerical standard, and the absence of compelling reasoning legitimizing any intermediate standard led the American courts very quickly to a rule of absolute equality.[25] A standard of equality is (or appears) easy to justify and administer. An intermediate standard leads to questions—if twenty-five per cent is acceptable, why not thirty per cent?—for which courts have no reasoned answer.

McLachlin C.J.S.C. was assisted in her consideration of numerical standards by two sources: comparative experience in other Canadian jurisdictions and the report of the British Columbia's Fisher Commission on redistribution reform.[26] McLachlin C.J.S.C. stated that the Fisher Commission recommended a twenty-five per cent limit as followed in Canada, Ontario, Quebec and Manitoba, although Canada allows the limit to be exceeded in exceptional circumstances.

The comparative argument is weakened in that neither Ontario nor Quebec maintain a strict twenty-five per cent limit.[27] Both provinces allow variation from the limit in exceptional circumstances, and Ontario virtually requires deviation from the limit by requiring a minimum of fifteen seats to be established in northern Ontario regardless of population. The most recent commissions in both provinces exceed the twenty-five per cent limit only in the north,[28] but neither example supports a fixed twenty-five per cent limit such as McLachlin C.J.S.C. seems to prefer.

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[23] *Supra*, footnote 1.

[24] Jerold Israel, On Charting a Course through the Mathematical Quagmire: The Future of *Baker v. Carr* (1962-63), 61 Mich. L. Rev. 107; A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (2nd ed., 1986), pp. 194-196; R. McCloskey, The Reapportionment Case (1961-62), 76 Harv. L. Rev. 54, at pp. 70-74; M.E. Burchett, The Reapportionment Case: Its Political Implications (1963), 32 U. Cin. L. Rev. 305, at p. 312.

[25] *Wesberry* v. *Sanders*, 376 U.S. 1 (1964); *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

[26] *Dixon*, *supra*, footnote 3, at pp. 254-255 (D.L.R.), 401-402 (W.W.R.), 281-282 (B.C.L.R.); Hon. T.K. Fisher, Report of the Royal Commission on Electoral Boundaries for British Columbia (December 1988).

[27] Resolution, Journals of the Legislative Assembly of the Province of Ontario 1983, p. 98 (June 16, 1983): Election Act, S.Q. 1989, c. 1, s. 17.

[28] Ontario Electoral Boundaries Commission, Supplementary Report upon the Redistribution of Electoral Districts in Ontario (March 1986), pp. 4, 19; Commission de la représentation électorale du Québec, The Electoral Map of Quebec, pp. 8-9 (April 1988). Iles-de-la-Madeleine is also a statutory exception to the 25% limit: Election Act, S.Q. 1989, c. 1, s. 17.

Although McLachlin C.J.S.C. speaks approvingly of twenty-five per cent limits, it is important to note that she does not explicitly demand them. Enactment of the Fisher Commission recommendations is declared to be unquestionably *sufficient* to foreclose further judicial intervention in the matter, but she does not say that the twenty-five per cent limit is *necessary*, and her reasons leave room for arguments justifying higher limits by reference to the standard set out.

Judicial scrutiny will demand more than the establishment of an acceptable outer limit. Variations in individual riding populations must be justified. This criterion may effectively impose an "articulation requirement" upon boundary drawers; without the elaboration of reasons for population variations, the constitutionality of the drawers' intentions cannot be weighed.[29] The effect of combining McLachlin C.J.S.C.'s broad "better government of the populace" standard with an articulation requirement would be to replicate the American "rational-plan" standard, offered by Clark J. concurring, in *Baker* v. *Carr*,[30] but subsequently rejected in *Reynolds* v. *Sims*.[31]

Choice of Remedies

McLachlin C.J.S.C. faced the same problem in fashioning remedies that American courts tackled so energetically during the "reapportionment revolution". The right to vote is a positive right, requiring an elaborate state mechanism for establishment and enforcement. An "equal representation" right cannot be vindicated merely by ordering the state and its officials to cease to perform certain acts; a positive scheme of representation must be created and administered.

A mere declaration of invalidity destroys the legal basis for continuing legislative representation; revival of pre-existing statutes is no help, because their populations are likely to be even more out of line than more recent plans. In the United States, courts tended to allow legislatures time to enact a constitutional apportionment. Some did, but others failed, whether because of misunderstanding of judicial standards or sheer recalcitrance, leading courts to construct their own plans, using the assistance of political geographers, computer experts, and non-partisan public interest figures or groups as special masters.[32]

With *Dixon*, Canadian jurisprudence has now paralleled the American doctrine that a malapportioned legislature should be allowed a reasonable amount of time to reform itself in accordance with constitutional principles

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[29] See J. Hart Ely, Democracy and Distrust (1980), pp. 125-131; G. Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection (1972-73), 86 Harv. L. Rev. 1.

[30] *Supra*, footnote 1, at pp. 252-260.

[31] *Supra*, footnote 25.

[32] Dixon, *op. cit.*, footnote 2, pp. 290-380.

before the courts step in. McLachlin C.J.S.C. followed the Manitoba language rights case[33] in holding that just as a finding of invalidity of all laws in the province would create "a state of emergency" that could be temporarily relieved against, so would "[t]he absence of the machinery necessary to conduct an election in a system where in theory an election can be required at any time".[34] McLachlin C.J.S.C. allowed the legislation to stay in place "[p]ending submissions on what time period may reasonably be required to remedy the legislation and the expiry of that period".[35] The difficult matter of determining an appropriate deadline for legislative action, and, if necessary, the nature of a further remedy in the event of non-compliance, was left for another day and another judge.

Subsequently, the petitioner Dixon applied unsuccessfully for an order declaring the relevant sections of the Constitution Act[36] void as of June 30, 1989. Meredith J. held that the Legislative Assembly was entitled to make the legislative choices involved in designing a valid redistribution scheme.[37] His reasons seemed to doubt not just the wisdom of setting an immediate deadline, but the court's power to impose a deadline at all:[38]

> So I conclude that the establishment of a deadline would be in direct violation of the rights and obligations of the members of the Legislative Assembly, would threaten the violation of the right of the people of British Columbia to the existence of a Legislative Assembly, and would threaten the violation of the right of the citizens of Canada to vote for members of a Legislative Assembly, to say nothing of eradicating the right to vote, whether equal or not.

If Meredith J. would refuse to set a deadline at any stage, there is an inconsistency with McLachlin C.J.S.C.'s seeming willingness to intervene should events require:[39]

> I need not enter on the speculative question of what might happen if remedial legislation were not passed within such time period as may be specified. I confine myself to the general enjoinder that just as the courts have a duty to measure the constitutionality of legislative acts against the Charter guarantees, so are they under an obligation to fashion effective remedies in order to give true substance to these rights.

British Columbia's decision not to appeal *Dixon*, and its passage of Bill 87[40] accepting the essential validity of the principles endorsed by the Fisher Commission, may forestall any immediate further elaboration of the principles of the case. Making *Dixon* moot may maximize its effect,

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[33] *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, [1985] 4 W.W.R. 385.

[34] *Dixon*, *supra*, footnote 3, at pp. 283 (D.L.R.), 431 (W.W.R.), 311 (B.C.L.R.).

[35] *Ibid.*, at pp. 284 (D.L.R.), 432 (W.W.R.), 312 (B.C.L.R.).

[36] *Supra*, footnote 16.

[37] *Dixon* v. *Attorney General of British Columbia* (1989), 37 B.C.L.R. (2d) 231 (B.C.S.C.).

[38] *Ibid.*, at p. 235.

[39] *Dixon*, *supra*, footnote 3, at pp. 283-284 (D.L.R.), 432 (W.W.R.), 312 (B.C.L.R.).

[40] Electoral Boundaries Commission Act, S.B.C. 1989, c. 65.

as legislatures and boundary commissions heed its warnings, out of respect for its caution and careful reasoning. American legislatures spurned their many opportunities before 1962 to defuse malapportionment as an issue through measured, compromising reform. When they were forced to try this route, it was too late: the flood of litigation immediately unleashed by *Baker* v. *Carr*[41] uprooted every signpost leading to any destination other than mandated strict equality of population.[42] Here, boundary commissions had begun to acknowledge Charter population considerations in establishing districts even before *Dixon*.[43] The already existing tendency towards greater equality of population now receives a boost of Charter power.

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WILLS—GENERAL POWERS OF APPOINTMENT IN WILLS—BARE POWERS AND TRUST POWERS—ONTARIO AND QUEBEC COMPARED: *Re Nicholls*; *Royal Trust* v. *Brodie*

John E.C. Brierley*

Introduction

The Courts of Appeal of Ontario and Quebec, in two recent decisions, have provided an interesting counterpoint in comparative conceptual jurisprudence in the matter of testamentary powers of appointment and trusts. Both decisions concerned the seemingly vexed question of the validity of a testamentary general power of appointment. In 1987, in *Re Nicholls*,[1] the Ontario Court of Appeal upheld such a clause for the reasons given by Krever J.A. In 1989, in *Royal Trust* v. *Brodie*,[2] the Quebec Court of Appeal struck it down for the reasons given by Chouinard J.

That the same *issue* arrived for decision in both courts is not itself unexpected, or even remarkable, when one recalls that both Canadian common law and Canadian civil law share something of a similar tradition in will-making. The general policy of freedom of willing recognized in the legal traditions of both Ontario and Quebec must lead, inevitably it

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[41] *Supra*, footnote 1.

[42] Dixon, *op. cit.*, footnote 2.

[43] Manitoba, Electoral Divisions Boundaries Commission, Report (December 1988), p. 5.

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The author thanks his colleagues Madeleine Cantin Cumyn and David Stevens for their critical readings of an earlier version of this comment.

[1] (1987), 34 D.L.R. (4th) 321, 57 O.R. (2d) 764 (Ont. C.A.).

[2] (1989), 25 Q.A.C. 22 (C.A.).

would seem, to this ultimate question: is it possible for a testator to delegate the selection of a beneficiary of his estate to another and, if it is, what scope can the delegate have in making the selection? The two decisions are, however, of significance for the large, although not complete, similarity in the *methodology* adopted by each court in coming to their respective solutions. The difference in result, therefore, is apparently to be explained by the differences in the *juridical context* in which the issue is placed in each legal tradition.

The burden of this comment is to draw a comparison between the two decisions under these three rubrics—issue, methodology and juridical context—with a view to exploring the fundamental reasons for the difference in result and the ultimate grounding of that difference. It is concluded by a critique of the specific holding in *Brodie* and suggestions for the future direction of Quebec law.

Issue

Although the factual situations in each case giving rise to the litigation were different, the issue in *Nicholls* and *Brodie* was the same. It raised a "pure" question of law (if such a thing, indeed, can ever exist), namely the validity of the testamentary clause whereby a specified person is attributed the power to appoint anyone to the benefit of property in the estate of the deceased person who grants the power. In French, the device is termed a *faculté d'élire absolue* and in common law, or English civil law parlance, the term *general power of appointment* designates the same legal reality.

In *Nicholls* the testatrix gave her estate to her executor upon trust and directed him to follow the directions of a named third person in the distribution of the residue. In *Brodie* the factual situation was more complex, but it corresponds to an estate plan no doubt commonly found in any part of Canada. The testator bequeathed his estate to trustees and directed that the revenues thereof be paid to his widow. Portions of the capital were to be paid to his children upon attaining thirty years of age and, again, upon the death of their mother; as to the capital remaining in trust, of which they were to be revenue beneficiaries for life,[3] the children were given a general power of appointment to be exercised in their own wills. In the event of the non-exercise of the power by the children, the testator further provided for a subsidiary scheme of distribution among his grandchildren.

The question, in both cases, was whether the designation of the ultimate beneficiary can be said to be certain when there is a total delegation of the selection by the testator to another. Both courts characterized the problem

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[3] Chouinard J., *ibid.*, at p. 27, described the right of the beneficiaries as a "usufruct" but he was evidently using the term in its popular rather than its technical sense. *Cf.*, in general, on the necessary distinctions, Madeleine Cantin Cumyn, Les droits des bénéficiaires d'un usufruit, d'une substitution et d'une fiducie, 4 McGill Legal Studies (1980).

in the same way. They saw it as involving two related questions: *certainty* in the beneficiary and, as a corollary, allowable scope of *delegation* in the selection. These questions are, indeed, two faces of the same issue.

In both courts, it was readily conceded that charitable bequests are an exception to any supposed principle of non-delegation or any requirement of certainty.[4] So too, it was easily admitted that the delegation by the testator of a "special" power, that is to say one that operates within a limited class or group whose limits are traced by the testator, is possible in each legal tradition.[5] These two propositions having been set out, which point in the direction of admitting that the act of willing is not necessarily the exclusive personal act of the testator, the framework for the enquiry at hand is established, namely the validity of the "general" or "absolute" power. As already suggested, the unfolding of the legal reasoning on the question was remarkably similar in both courts.

Methodology

Various paths of enquiry were pursued by Krever J.A. in his opinion in *Nicholls* and these were largely replicated in that provided by Chouinard J. in *Brodie*. Where, in the latter, the same considerations were not explicitly raised, his reasoning can be supplemented by thinking (whether for or against the validity of the power) drawn from other Quebec authority, in order to complete the parallel examination offered here.

For the purposes of the counterpoint undertaken, it is convenient to deal with these considerations under five headings: (1) texts of existing enactments; (2) prior judicial decisions; (3) authority from cognate jurisdictions; (4) scholarly opinion; (5) principle or policy. It is to be expected, and indeed it is in the nature of a comparative enquiry to discover, that the same weight is not given in each court to these several factors.

(1) *Texts of Existing Enactments*

These exist in both jurisdictions on the subject of wills and legacies. In *Nicholls* the provisions of the Succession Law Reform Act of Ontario[6] were invoked before Krever J.A. as prohibiting the clause. But he did

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[4] In *Nicholls* the point was accepted to be law in the court below by O'Leary J. and not questioned in appeal. In *Brodie* reference was properly made to article 869 C.C.: "A testator may name legatees who shall be merely fiduciary or simple trustees for charitable or other lawful purposes within the limits permitted by law; he may also deliver over his property for the same objects to his testamentary executors, or effect such purposes by means of charges imposed upon his heirs or legatees."

[5] In *Re Nicholls*, *supra*, footnote 1, at pp. 325-326 (D.L.R.), 767-768 (O.R.), Krever J.A. did not pause to deal with that proposition contained in the authorities there cited. In *Brodie* the decision of *Brosseau* v. *Doré* (1905), 35 S.C.R. 205, was cited. There are, however, in Quebec law, older precedents than that: see, for example, *McGibbon* v. *Abbott* (1885), 8 L.N. 267 (J.C.P.C.).

[6] R.S.O. 1980, c. 488, Part I, formerly the Wills Act, R.S.O. 1970, c. 488.

not even pause to make a textual examination of any of its sections in his written reasons, and rapidly found the language of that enactment to be inadequate as an expression of legislative intention to deny the general power. The field was thus opened up for the consideration of other authority considered below.

In *Brodie* the Civil Code of Lower Canada of 1866 was cited to greater effect. Article 838 C.C., which articulates rules about the existence and capacity of legatees to receive by will, makes no explicit reference to powers of appointment, whether general or special, but it was read as prohibiting the former while tolerating the latter.[7] The reasoning of Chouinard J. was that the article implicitly denies the possibility of the general power because it leaves the identification of the beneficiary "wholly indeterminate" at the moment of the testator's death. It may, however, be suggested, with respect, that this gloss put upon that article is not accurate. It does not, as Chouinard J. asserts, require existence and identification of the legatee at the moment of the *death* of the testator. The article clearly enumerates a series of legal devices, not including the power of appointment, in which it is sufficient for the existence and identification to occur at some moment in the future, that is to say at a time subsequent to death.[8] That consideration, indeed, is one justification for the validity of the special or limited power, which Chouinard J. readily admitted is accepted in Quebec law. It is, therefore, not so much the *future existence* of the legatee that is in question but rather the *mode* of his determination by means of a general delegation of the selection to another. That having been said, it is significant that Chouinard J. found it necessary to turn to authority other than the text of article 838 C.C. as support for his reading in order to deny the validity of the general power.

(2) *Prior Judicial Decisions*

Previously decided cases are cited as readily in Quebec courts in civil law matters as they are in other Canadian courts in matters falling within the realm of private relations in the common law. The intriguing question, in each tradition, is to identify to what precise effect they are invoked when there is no text of existing enactments or when such text is ambiguous.

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[7] In a curious inversion, article 838 C.C. deals with the *capacity* of a legatee to receive before dealing with the *existence* of such person in para. 2. The latter provides, in part: "Persons benefitted by a will need not be ... absolutely described or identified therein. It is sufficient that at the time of the death of the testator they be in existence, or that they be then conceived and subsequently born viable, and be clearly known to be the persons intended by the testator. *Even in the case of suspended legacies*, already referred to in this article, it suffices that the legatee be alive, or conceived ... and that he prove to be the person indicated, *at the time the legacy takes effect in his favour.*" (Emphasis added).

[8] Namely, conditional legacies (*i.e.* legacies under suspensive condition), legacies to children not yet born, legacies with fiduciary substitution (*i.e.* to A, and then to B, and then to C).

Are they cited as mere applications of a principle found elsewhere or as actually containing a principle? The signals given out on the use of precedent are, of course, conflicting, not only as *between* the two legal traditions but also *within* each one.

In *Brodie*, the earlier decision of the Quebec Court of Appeal in *Trépanier* v. *Fagan*[9] of 1972 was cited as an "example" of the proposition that the general power is prohibited, in other words as demonstrating the thrust of article 838 C.C. Upon examination of that decision, however, it is discovered that the Quebec Court of Appeal did no more than confirm the reasoning of the court below. It was stated there, in the context of a holograph will in which the testator gave a general power to his testamentary executor,[10] that Quebec law admitted the power of appointment only in the case of charitable bequests because the only text of the Civil Code (article 869 C.C.) existing on such powers is found on that topic. The power in the context of a charitable bequest is thus perceived as an exception to the rule of article 838 C.C.

That reasoning is not irresistible. It may be said, with equal force, that the provision of the Civil Code on charitable bequests is no more than an instance of a power that is regulated by the Code and that it is thus no more than an example, textually expressed, of a more general principle. Indeed, the existence of a special power is nowhere envisaged in a text and yet has been accepted, as already mentioned, because it was found not to be in violation of article 838 C.C. The true significance of article 838 C.C.—and its latent ambiguity—is therefore heightened and not diminished by the previously decided case of the Court of Appeal in *Trépanier*.[11] Moreoever, decisions of the Quebec Superior Court, one

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[9] [1972] C.A. 700, confirming the judgment of the Superior Court, [1969] R.P. 282.

[10] "... et balance en argent s'il reste au gré de l'exécuteur" (and any money left over as the executor pleases).

[11] Of course, the bequest by way of general power of appointment in this case could not be validated on the basis of article 869 C.C. because the will did not contain any expression of charitable intention at all, which is the only hypothesis envisaged in the article reproduced, *supra*, footnote 4. It was therefore rather an extravagant statement, in the Court of Appeal in this case, to claim that the issue of the general power in non-charitable bequests is "settled" by reason of that article alone or, even, upon the judicial interpretation it has received, notably in *Valois* v. *de Boucherville*, [1929] S.C.R. 234, where the coupling of a general charitable *intention* and a special or limited *power* to carry it out were upheld.

of which at least[12] was cited in argument in *Brodie*, do support, either explicitly or implicitly, the validity of the general power.[13]

For his part, Krever J.A. in *Nicholls* noted two Ontario decisions favourable to the power which were not binding upon him in the context of *stare decisis*.[14] His examination of the question, therefore, took him to the consideration of judicial decisions from cognate jurisdictions to see whether the identification of right principle had been achieved elsewhere.

(3) *Authorities from Cognate Jurisdictions*

Judicial *dicta* from cognate jurisdictions are a powerful tool in the arsenal of common law legal reasoning and their deployment reveals a high point in the etiquette observed by judges of the common law world. The technique is not unknown in Quebec in civil law reasoning. Resort is often had to French decided cases and doctrinal opinion when the respective codal provisions of France and Quebec are similar or when neither Civil Code contains any provisions at all on a given topic.

The exposition by Krever J.A. of the persuasive force of judicial *dicta* from England, Australia, New Zealand and other Canadian common law provinces is an illuminating example of the technique. His survey found no decision that required him to determine in favour of the invalidity of the general power. In effect, the relevant *dicta* hostile to the power, even when emanating from courts of last resort, were found only in decisions concerning trusts and trust powers rather than "mere powers", that is to say powers not vested in trustees.[15] And because Krever J.A. found, in *Nicholls*, that there was no trustee vested with a general power, he concluded that he was not required to apply the well-established rule of certainty of beneficiaries upon which the law of trusts relies.

In *Brodie*, Chouinard J. did not rely, and wisely so in our opinion, upon French authority, which has nonetheless been appealed to in some previous decisions on powers within Quebec law. Fournier J., for example,

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[12] But not referred to in the notes of Chouinard J.: *In re Estate Cantlie: Craig* v. *Montreal Trust Co.*, unreported (C.S. Montreal, 14 February 1974, no. 14-000880-73). Bédard J. there upheld the general power on the basis of the argument (not unknown in the common law) that a general power is "equivalent" to ownership. See also, in the same sense, *In re Estate Godfrey*, unreported (C.S. Montreal, 16 September 1971, no. 17-897). That, in our opinion, is a faulty analysis in civil law just as much as it may be in common law, but its pursuit here would take our enquiry into other avenues. The Court of Appeal has recently denied the suggestion that the grant of a limited or special power is equivalent to ownership: *Todd* v. *Todd*, [1989] R.J.Q. 1176, Rothman J.

[13] Among the reported cases: *Lindsay-Hogg* v. *Ministère du Revenu*, [1976] C.S. 606; *Gemley* v. *Low* (1886), M.L.R. 2 C.S. 311; *contra*, *Doré* v. *Royal Trust*, unreported (C.S. Montreal, 25 January, 1968, no. 624-897).

[14] *Higginson* v. *Kerr* (1898), 30 O.R. 62 (Ont. H.C.); *Re Hayes*, [1938] 4 D.L.R. 775, [1938] O.W.N. 417 (Ont. C.A.).

[15] *Supra*, footnote 1, at pp. 325-327 (D.L.R.), 767-769 (O.R.).

in *Ross* v. *Ross*,[16] an 1896 decision of the Supreme Court of Canada, did so by invoking then contemporary French opinion hostile even to the special power. Nineteenth century French authorities, however, have only limited relevance here: the French *Code civil* of 1804, it is true, has no provision on powers of appointment but, then again, it has no article exactly equivalent to article 838 of the Quebec Civil Code. More importantly, French law, as it existed prior to 1804, was abolished upon the enactment of the Code whereas, in the case of Quebec, the *ancien droit* of France is still in force, save where the Civil Code of 1866 is expressly to some other effect.[17] The point is of importance, from the historical perspective, when one recalls that the special or limited power of appointment, at the least, was extensively permitted in that earlier time.[18] Modern French law, as that of a cognate legal system, is thus unhelpful in the matter of the general power in Quebec, unless the question is to be determined on the basis of a more general principle now common to both jurisdictions and notwithstanding their different historical development.

In effect, therefore, in the decisions under review, both the Ontario and Quebec Courts of Appeal had an opportunity to decide the question of the validity of the general power on the basis of principle or, as law professors sometimes prefer to say, upon policy considerations, guided as may be appropriate by scholarly opinion.

(4) *Scholarly or Doctrinal Opinion*

Scholarly or doctrinal opinion—*la doctrine*, as it is known in French parlance—was invoked in both *Nicholls* and *Brodie.* Krever J.A. referred to no less than seven commentaries from the common law world[19] in which the question, although discussed systematically and at length, was not, in his opinion, conclusively determined. It is remarkable to observe, however, that he felt at liberty to cite the Report of the Ontario Law Reform Commission, The Proposed Adoption in Ontario of the Uniform Wills Act, 1968, and to affirm that it had expressed the relevant principle "correctly and succinctly".[20] In other words, he used the opinion of that

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[16] (1896), 25 S.C.R. 307, at pp. 338-340.

[17] Article 2712 C.C., formerly article 2613 C.C.

[18] The point is exhaustively demonstrated by Henri Regnault in an examination of judicial practice of 17th and 18th century France: Les ordonnances civiles du chancellier Daguesseau, Part I (1965), (a posthumous publication), pp. 358-388; Part II (1938), pp. 78-86; and in Thévenot d'Essaule de Savigny, Traité des substitutions fidéicommissaires (M. Mathieu (ed.), 1888), nos. 1007-1020, pp. 317-321. The historical point was also accepted in a number of lower court decisions in Quebec around the turn of the century. *Cf.*, those cited *infra*, footnote 26.

[19] *Re Nicholls*, *supra*, footnote 1, at pp. 323-324 (D.L.R.), 765-766 (O.R.). Reference was made to English, Canadian and Australian studies.

[20] *Ibid.*, at pp. 330 (D.L.R.), 772 (O.R.). The passage cited from the report (p. 9) reads: "The right of an individual to own and dispose of his assets is basic to our law.

body as the justification entitling him to make a transition to the issue of policy raised in the general power.

In Quebec, on the other hand, Chouinard J. referred to the "many authors" who have declared themselves against the validity of the general power. In fact, only five commentaries are cited and, upon examination of those that are published,[21] it is noteworthy that there is no more than affirmation of the idea that the general power of appointment contravenes the text of article 838 C.C. rather than an analysis of the policy that serves as its basis.[22] In other words, a text of the Civil Code, even when not explicit, is seen in itself as a self-contained expression of policy that excludes other possible enquiry. And yet, as examined below, there are in Quebec law, just as in Ontario law, other competing policy considerations that must be taken into account in an analysis of the question.

(5) *Principle and Policy*

It is in the identification of policy that there is a parting of the ways between the Courts of Appeal of Quebec and Ontario in the matter of the general power. The principle found to be operative is situated, in each case, at a different level.

In Ontario, on the reasoning of Krever J.A., there was no "contemporary societal interest" constituting an obstacle to the maximization of testamentary power exercised by way of the general power when it is found in conjunction with, rather than annexed to, a trust. The validity of the general power of appointment was thus fully grounded in the policy of testamentary freedom and, in almost an aside, as no more than the counterpart of the general power of appointment contained in an *inter vivos* instrument which, in long-standing common law tradition, is fully valid.[23]

Any effort to restrict or circumscribe that right should only be permitted where the necessity for restriction clearly justifies interference with the basic freedom of the individual to dispose of his property."

[21] The study by L. Renaud, De la nature et du fondement juridique de la faculté d'élire en droit québécois (1967), is, in fact, an unpublished *mémoire* for which the author was awarded a Diplôme d'études supérieures by the Université de Montréal.

[22] Germain Brière, in his useful student manuel, Donations, substitutions et fiducie (1988), devotes no more than six lines to the question, no. 418, p. 284; Hervé Roch, Traité de droit civil du Québec (1953), p. 294, in his treatment of article 838 C.C., does not expressly mention the power of appointment at all; Marcel Faribault, Traité théorique et pratique de la fiducie (1936), nos. 176-181, pp. 196-205, admits only special powers of appointment on the reasoning considered *infra*, in the third part of this comment. Finally, Pothier, the earliest authority cited, Traité des donations testamentaires, Bugnet (ed.), vol. 8 (1845), no. 107, p. 254, was in fact *dubitante*: "Le legs qui serait laissé entièrement à la volonté ... d'un tiers, serait-il valable? Il *semble* que non". (Emphasis added).

[23] *Re Nicholls, supra*, footnote 1, at pp. 324 (D.L.R.), 766 (O.R.): "That the law raises no objection to a general power of appointment created *inter vivos* is accepted without argument". Is there a comparable doctrine in the civil law? The point remains to be demonstrated.

Quebec, of course, has also enjoyed the same policy of freedom of willing for many years. It dates from the Quebec Act[24] of 1774 and was later given expression in article 831 of the Civil Code of 1866.[25] As a policy it has resisted incursion over the years, save through the intervention of matrimonial property schemes between married persons. This fundamental feature of Quebec law was not, however, even alluded to by Chouinard J. in his notes although, in the past, it has been relied upon as the basis upon which to defend at least the special power.[26] In *Brodie*, the operative policy or principle was therefore found to exist at another level than it was in *Nicholls*.

The question of real interest is whether the principle identified in *Brodie* (the need for certainty in the beneficiary) was more, or less, fundamental than the policy selected in *Nicholls* (the willingness to maximize testamentary power). The answer to that question, we believe, lies within the overall juridical context of each legal tradition, that is to say within the fundamental categories of legal thought that civil and common law respectively display.

Juridical Context

The different solutions arrived at in the Ontario decision in *Nicholls* and in the Quebec decision in *Brodie* are ultimately explained in terms of the fundamentally different jural conceptions of property found in the civil and common law traditions.

The general power of appointment was upheld in *Nicholls* on the basis of testamentary freedom because Krever J.A. was able to distinguish clearly between the realm of trusts and the realm of powers,[27] two highly

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[24] An Act for making more effectual Provision for the Government of the Province of Quebec in North America, 14 Geo. 3, c. 83, s. 10.

[25] "Every person of full age, of sound intellect, and capable of alienating his property, may dispose of it freely by will, without distinction as to its origin or nature, ... in favour of ... any ... person capable of acquiring and possessing and without reserve, restriction or limitation; saving the prohibitions, restrictions, and causes of nullity mentioned in this code, and all dispositions and conditions contrary to public order or good morals."

[26] For example, Andrews J. in *Ross* v. *Ross* (1892), 2 C.S. 8, at p. 18; Lavergne J. in *Doré* v. *Brosseau* (1904), 26 C.S. 466, at p. 471; Paré J. in *In re Estate Godfrey*, *supra*, footnote 12; Lajoie J. in *Tremblay* v. *Binette*, [1977] C.A. 23, at p. 24. The argument appears to recede in importance as litigation proceeds upwards within the judicial hierarchy. Doctrinal opinion invoking the policy is, on the whole, exceptional: M. Faribault, *op. cit.*, footnote 22, no. 178; C.-H. Lalonde, Traité de droit civil du Québec (1958), t. 6, p. 281, qualifies the special power as a "necessary and evident consequence" and, again, as a "corollary or complement" of freedom of willing.

[27] *Re Nicholls*, *supra*, footnote 1, at pp. 324 (D.L.R.), 766 (O.R.): "The real contest is between ... trusts on the one hand and ... general powers of appointment on the other hand". Krever J.A. found the analysis of Gresson J. in a New Zealand decision, *Re McEwen*, [1955] N.Z.L.R. 575, at p. 583, to be "instructive" in this connection. No reference was made to the leading English cases of *Re Gulbenkian's Settlement, sub. nom.*

developed categories of legal thought in the common law tradition. The power, not being a trust, was not subject to the rule articulated in the law of trusts requiring certainty in the beneficiary (or "object") of the trust. In other words, because a trust, in its essence, involves an obligation on the part of a trustee, a court must be able to see how that obligation is to be enforced and, to do that, there must be a certainty in the designation of the beneficiary of the trust. A mere power, on the other hand, involves only that, a power and not an obligation, and therefore the question of enforceability in respect of certain persons does not figure as a requirement. A general power annexed to a trust, as a "trust power" is, however, subject to the same principle of certainty and would be bad, whereas a general power that exists only in conjunction with a trust, as in *Nicholls*, and is a "mere" power, would be good.

In common law, therefore, the autonomy of "pure" powers (those not vested in trustees) and trusts is established. All the principles found in the latter do not operate in the former. The notion of certainty necessary in trusts and its corollary, the principle of non-delegation of testamentary power, are relegated to the background in the case of mere powers, as almost secondary considerations. That being so, and the policy of freedom of willing taken into account, there is no obstacle to the validity of the general power when vested in one other than a trustee.

The general power of appointment was struck down in *Brodie*, on the other hand, because the device of a power, like the notion of a trust itself, is perceived to be no more than a modality of gratuitous dispositions of property and, in particular, dispositions by will. Trusts and powers do not now appear to enjoy an autonomous or independent status apart from the law's recognized modes for transferring property by gratuitous title.[28] That general law is to the effect that a disposition of ownership by one person, the owner (the person divesting), necessarily requires that there be certainty in the person to whom the ownership is transferred (the person to be vested). The notion of certainty in the beneficiary, which is necessarily excluded in the attempt to create a general power, is thus a requirement *not only* in the case of a Quebec trust, as it is in the common law trust, but in *any context* in which property is transferred. Hence the importance of article 838 C.C. which, in the case of wills, is seen as no more than a particular application of a more general principle, one universally required in property transfers, which is to the effect that when a person disposes there must be someone who receives.

Whishaw v. *Stephens*, [1970] A.C. 508, [1968] 3 All E.R. 785 (H.L.), or *Re Baden's Deed Trusts, sub nom. McPhail* v. *Doulton*, [1971]A.C. 424, [1970] 2 All E.R. 228 (H.L.).

[28] The formal arrangement of the Civil Code of 1866 necessarily implies as much: in respect of trusts, because articles 981a *et seq.*, inserted into the Code in 1888, are designated as "Chapter Fourth (A)" of the title laying out how property may be disposed and acquired by gift or by will and, in the case of powers of appointment in such gratuitous acts, even though not envisaged in any text, because the device must be inserted within the same legislative framework.

In Quebec law, the technical requirement of certainty in the beneficiary, expressed as a capacity to receive, thus overshadows the policy of freedom of willing of article 831 C.C. On this basis, therefore, the earlier holding of the Quebec Court of Appeal in *Trépanier* v. *Fagan*,[29] is fully justified because, in that case, the testator abdicated completely his testamentary power by purporting to attribute it to his executor to whom no conveyance was made. The testator himself did not dispose, nor was there anyone to receive. Freedom of willing can only be exercised when there is certainty in the beneficiary. In a word, when there is no certainty in the beneficiary, there can be no disposition at all. The interposing of a trust, in this reasoning, makes no difference to this fundamental reality. So too, the general power of appointment, even when found in conjunction with a trust, as in *Brodie*, defies the possibility of a vested titulary of the property.

Royal Trust v. Brodie: A Critique

Such is the reasoning implicit in the Quebec Court of Appeal's decision in *Brodie* and, indeed, in all scholarly opinion in Quebec down to the present time.[30] Another face, however, can be put on the matter in the wake of the decision of the Supreme Court of Canada in 1982 in *Tucker* v. *Royal Trust*.[31] It is suggested, with respect, that the Quebec Court of Appeal, in overlooking the thrust of that decision, has missed, in *Brodie*, an opportunity to explore whether it is desirable policy to maximize testamentary freedom by recognizing the validity of the general power—*not* by way of importing a principle now established in Canadian common law,[32] as exemplified by *Nicholls*, but rather by failing to situate the question of the general power squarely within the context of Quebec law as it has now been discovered in *Tucker*.

The Supreme Court of Canada in *Tucker* v. *Royal Trust* established two interlocking propositions of far-reaching importance: (1) that the trustee to whom property is conveyed in an *inter vivos* or *mortis causa* gratuitous

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[29] *Supra*, footnote 9.

[30] I put aside, for present purposes, the anomalous situation resulting from the fact that the general power of appointment was textually envisaged, at one time, under the Quebec Succession Duty Act (now abolished), as well as in federal fiscal legislation applying in Quebec, and the evident embarrassment of some Quebec commentators to situate it within the framework of civil law principles: for example, Eugène Rivard, Les droits sur les successions dans la province de Québec (1956), no. 90-102, pp. 43-49.

[31] [1982] 1 S.C.R. 250, Beetz J. for the court, allowing the appeal from the Quebec Court of Appeal, [1979] C.A. 308. It should be noted that all doctrinal opinion referred to in *Brodie*, *supra*, footnotes 21 and 22, except that of G. Brière, antedates this Supreme Court decision.

[32] The point must be made because the sensitivity, within Quebec, to that mode of reasoning runs deep: Chouinard J., for example, on another aspect of the question, found it appropriate to affirm that "L'affaire ne peut se régler par renvoi à certaines règles relatives aux successions et à l'interprétation des testaments en Common law"; *Royal Trust* v. *Brodie*, *supra*, footnote 2, at p. 32.

disposition (*i.e.* by gift or will) is a *sui generis* "owner" of the trust property and that his acceptance is necessary and sufficient to constitute a trust;[33] and (2) that not all the restraints and prohibitions found in the general Quebec law of gifts and wills are to be transposed into the context of the trust established by either device.

The facts in *Tucker* gave rise to the question of the validity of a trust created by gift *inter vivos* for the benefit of an identifiable person not in existence at the moment of the creation of the trust.[34] The general law of the contract of gift unquestionably calls for the existence of the donee in order that someone be vested with the property transferred (article 771 C.C. expresses the principle, which, in gifts, is analogous to article 838 C.C. in wills). The court found, however, that acceptance by the trustee (as "owner") was sufficient to constitute a valid trust for the benefit of a future person.[35] In effect, therefore, a rule in gifts, itself representing a particular instance of the general principle of property law that the beneficiary of a disposition must exist, was not transposed to the context of the trust. The express motive of the court for breaking this new ground in Quebec law was for precisely the same policy reason as that formulated in *Nicholls*, namely the goal of maximizing freedom in the disposition of property and, further, of allowing, in Quebec, at least some of the uses to which the express trust of the common law can be put.

Tucker is thus of considerable significance because it takes a step towards attributing to the trust, as an institution, a new degree of autonomy within Quebec's general property law principles. It suggests that the trust is no longer simply a modality of a gift or a will and that it exists in its own right as a mode of disposition of property, even if the *instrument* in which it is contained remains a will or contract of gift. In this reasoning, it follows therefore that the "inherent constraints"[36] in the law of gifts and wills need not apply in trusts, saving of course rules of public order.

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[33] The first branch of the proposition has been criticized as an excessively bold judicial invention: M. Cantin Cumyn, La propriété fiduciaire: mythe ou réalité?, in L'affaire Tucker sous les feux du droit comparé (1984), 15 R.D.U.S. 7-23. *Adde* M. Boodman, Case Comment: *Royal Trust* v. *Tucker* (1983), 43 R. du B. 801.

[34] The deed of gift also contained a clause vesting the settlor with a special power of appointment to select, by will, the beneficiaries from among her future children or grand-children. This feature was not, however, litigated.

[35] In *Curran* v. *Davis*, [1933] S.C.R. 283, [1934] 1 D.L.R. 161, the court had already established that acceptance by the trustee was sufficient and necessary in the case of the trust intended to benefit an existing and named beneficiary who had not accepted the gift.

[36] The phrase is that of Beetz J., *Royal Trust Co.* v. *Tucker*, *supra*, footnote 31, at p. 275. Beetz J. also found, in further support of the position, that it is legitimate to refer to English law of trusts, with a view to ascertaining Quebec law on trusts, "in so far as it [English law] is compatible with arts. 981a *et seq.* of the *Civil Code*"; *ibid.*, at p. 261. The extent of this incorporation by reference to English law is, of course, highly problematical.

The same, it is now submitted, is arguably true of powers of appointment.

Seen in the focus of this new interpretation of the trust, the question of the validity of the general power of appointment in Quebec can be placed in a fresh perspective. Is the requirement of certainty in the beneficiary, as expressed in article 838 C.C., an essential ingredient in the recognition of a valid power, or indeed of a valid disposition, when the power exists in conjunction with a trust, as in *Brodie* or, as in *Nicholls*, if one wants to transpose its facts to Quebec?

It may be argued that the several considerations, previously discussed, now converge in favour of recognition of the general power in such a context: (1) the testator has disposed because the trust is constituted upon acceptance by the trustee; (2) the beneficiary of the trust need not be in existence at that moment (as determined in *Tucker*); (3) the eventual identification of a certain beneficiary is achieved, however, upon his designation by the person vested with the power, whether in the context of a charitable bequest under article 869 C.C. or a non-charitable bequest as already admitted; (4) the power, as such, does not involve enforceable obligations because it is a power and the traditional criterion of a certain beneficiary therefore has no operational scope;[37] (5) the trust, nonetheless, is enforceable once the beneficiary is designated upon the exercise of the power; (6) testamentary freedom, a basic value in the Quebec law of property, is maximized and, so too, is the use of the trust as an institution for arranging private property interests, as demonstrated by the Supreme Court in *Tucker*.

On this basis, the holding in *Trépanier* v. *Fagan*[38] would be distinguishable from *Brodie* because, in the latter, the power is found in conjunction with a trust (and ownership is accounted for in the trustee) whereas, in the former, no trust was created and the traditional property principles prevail. The Quebec Court of Appeal in *Brodie* does not appear to have been asked to consider the above argument, even though it referred to *Tucker* for another purpose. If the matter at hand had been considered in the light of the reasoning in that case, and of the fundamental policy of the law there expressed, the result might well have been different.

As a further refinement, however, it must also be said that, upon the facts in *Brodie*, a difficulty nonetheless remains. In *Brodie*, the recipients

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[37] This fundamental point, which was perfectly understood in the *ancien droit*, as Regnault, *op. cit.*, footnote 18, has shown, has rarely been invoked in modern jurisprudence and has never been "tested". But does it have to be? A power or *faculté* in the civil law does not involve an obligation or correlative right any more than it does in the common law. To argue that the power is bad because it confers no rights on a certain beneficiary, and is therefore unenforceable, is to miss the point entirely. It may, at the discretion of the person vested, be exercised or not; and whether or not it has been exercised, in fact, is the more central question, as demonstrated in *Gemley* v. *Low*, *supra*, footnote 13. P.-B. Mignault, Le droit civil canadien, t. V (1901), p. 145, called the power "un pur fait".

[38] *Supra*, footnote 9.

of the general power (the children) who were originally named only as beneficiaries of revenues in their father's estate did, in fact, upon the death of their mother, accede to the status of trustees under the terms of a codicil attached to their father's will. This combination of a general power of appointment annexed to a trust might well, in common law, have been fatal for the maintenance of the power for reasons already examined, namely that the power is no longer a "pure power" but a "trust power" that must then fulfil the need for certainty in the beneficiary, unless it could be argued that while the children became trustees they nonetheless still held the power in their personal rather than in their fiduciary capacity. That possibly fatal combination—a trustee vested with a general power of appointment—was certainly not, however, the pivotal consideration in *Brodie*, where the power was struck down in its own right.

The question remains open, therefore, whether in Quebec a general power found in conjunction with a trust and vested in one *other than* a trustee, as in the original will in *Brodie* (or as in *Nicholls*), would be good. The burden of this comment has been to show that, in Quebec, just as in Ontario, there was no irresistible policy consideration raised in *Brodie* to deny it and that, in addition, it is technically justifiable in the context of Quebec property law principles themselves, as now determined in *Tucker* v. *Royal Trust*. The ultimate meaning of the principle of freedom of willing is, however, no doubt one upon which reasonable persons may legitimately differ as the two decisions illustrate.

Conclusion

Both the institution of the trust and the device of powers of appointment sit uneasily within the whole body of Quebec civil law at the present time. The explanation lies within the historical development of its categories of legal thought and, in particular, because of its concept of property and its unitary vision of ownership. The reach of the doctrine of indivisible ownership has heretofore been more determining than the limited concept of trust introduced in the last century and, in turn, than the admitted, but curtailed, vision of powers of appointment in testamentary gifts. Neither yet constitutes a fundamental category of legal thought as found in the common law tradition.

The current measures for the reform of the Civil Code, adopted but not yet in force, do lift the civilian trust beyond gifts and wills into a general property concept and this will require a radical change in the traditional methodology of legal reasoning.[39] In conjunction with the "new

[39] An act to add the reformed law of persons, successions and property to the Civil Code of Québec, S.Q. 1987, chapter 18, sanctioned 15 April 1987 ("Bill 20"). The trust, regulated at arts. 1300-1337, will be susceptible of creation by contract, whether by onerous or gratuitous title, or by will. It is given expression as a "patrimony by appropriation" (*patrimoine d'affectation*) in which neither the trustee nor the beneficiary has a real right,

law" of trusts, textual provisions on powers of appointment will also appear for the first time. They may be vested in a trustee or any other person.[40] For reasons not immediately apparent, however, because there are no explanatory notes accompanying the bill or other *travaux préparatoires* published to date, the legislature has taken a restricted view of the matter by textually recognizing only the special or limited power, and excluding the general power *even* in the context of a power vested in one other than a trustee.[41] The decision to give legislative expression to powers of appointment as only an adjunct of trusts, and in the form of only a special or limited power, demonstrates that powers of appointment are still not conceived as amounting to a distinct category of legal thought. The grip of traditional jural concepts, namely that the beneficiary must invariably be certain, is therefore very great.

Post Scriptum

It remains to add a few comments on the final disposition of the litigation in *Royal Trust* v. *Brodie* and the effect of the finding by the Quebec Court of Appeal that the general power of appointment is null. It will be recalled that the children were revenue beneficiaries of that portion of the capital remaining in trust after the death of their mother and that, in the event of the non-exercise of the power of appointment in their own wills, the testator had provided for a subsidiary scheme of distribution of the capital among his grandchildren as alternative beneficiaries.

Upon finding that the general power was bad, for the reason that it did not amount to a disposition, the court also found that the subsidiary scheme intended to come into effect in the absence of the exercise of the power was, as part of the same disposition, also bad. The reasoning on this point is not clear. How can the validity or invalidity of the general power necessarily entail the validity or invalidity of the subsidiary scheme? The latter aspired to substitute the grandchildren to those who were not selected, or could not be selected, under the general power. The two dispositions were not *incidental* the one to the other, but *alternative* and, therefore, distinct. The false step in the reasoning of Chouinard J. derives from the consideration that he saw the subsidiary scheme as a disposition *conditional* upon non-exercise of the power and thus as one that had to

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and without relying upon a division of ownership into the legal and equitable titles known in common law. The innovation is daring, but can be reconciled with traditional civilian legal concepts: see, in general, J.E.C. Brierley, Substitutions, stipulations d'inaliénabilité, fiducies et fondations, in Chambre des notaires, Cours de perfectionnement du notariat, 1987, p. 243, at pp. 264-279; A.J. McClean, The Quebec Trust: Civilized at Last?, in E. Caparros (ed.), Mélanges Louis-Philippe Pigeon (1989), 285, pp. 299-303.

[40] Articles 1321-1322.

[41] "... the power to appoint may be exercised by the trustee or the third person only if the class of persons from which he may appoint the beneficiary is sufficiently determined in the constituting instrument" (art. 1321, para. 2, in part). The person vested with the power cannot appoint himself, even if he is within the class (art. 1322, para. 2).

be read out. Even in that case, however, a true reading of article 760 C.C. would have allowed the subsidiary scheme to stand because that article strikes down bad *conditions* while maintaining the *dispositions* to which they attach. The disposition to the grandchildren was not contrary to law (article 831 C.C.) in any sense.

However that may be, one would have expected that, upon finding for the lapse or nullity of the subsidiary disposition, the court would then have concluded that an intestacy had resulted in respect of the capital remaining in trust. In that event, it would normally follow that it was necessary to determine who were the testator's intestate heirs at the moment of his death in respect of the capital remaining. However, in a surprise move, the court found that the children were "the only legatees validly designated by the will"[42] and, on that account, it attributed them ownership of the remaining capital.

The conversion of the revenue beneficiaries of the trust into owners of the capital is surely not correct on any terms (although they might, of course, have taken as intestate heirs).[43] There was no testamentary intention expressed to that effect; indeed, the whole tenor of the will was otherwise. The reasoning adopted on this final point is therefore much to be regretted: it violates a fundamental principle of the general law of inheritance and exhibits, with respect, a flawed conception of the nature of the revenue beneficiaries' vocation within the trust. The latter point is, perhaps, explained by the theme invoked earlier, namely the difficulty of adapting a new category of legal thought, the trust, within a conceptual jurisprudence that is traditionally thought to be inhospitable to it.

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[42] "... aux deux seuls légataires valablement désignés en vertu du testament"; *Royal Trust* v. *Brodie, supra*, footnote 2, at p. 32.

[43] The trial judge, Barbeau J., whose reasons are reproduced, *ibid.*, at pp. 24-26, had reached the same result, and was ready to wind up the trust in order to attribute ownership to the children, on the basis of the consideration that the grandchildren had filed "records of renunciation, release and discharge" of any rights they had under their grandfather's trust. That conclusion is open to doubt for two reasons, the first of fact and the second of law: (1) the class of the grandchildren entitled to receive under the subsidiary scheme (applicable in the absence of the exercise of the power or, as determined, its nullity) could only close and therefore be fully identifiable upon the death of the children who were both living (*cf. Baril & Baril* v. *Trust Général*, [1975] C.S. 892); (2) the renunciations of the grandchildren may well have to be viewed as stipulations in regard to successions not yet devolved in their regard and, thus, as violations of articles 1061 and 658 C.C., which lay down a general (but sometimes forgotten) principle. On these points, in appeal, and in a further paradox of legal reasoning, Chouinard J. found it more appropriate to advance the argument (*ibid.*, at pp. 29-30) that the common law rule articulated in *Saunders* v. *Vautier* did not apply in Quebec. The legal imbroglio was thus compounded at both levels.