COURT FILE NUMBER	2001-05843
COURT	QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
STATUS ON ORIGINATING APPLICATION:	INTERVENOR (PROPOSED)
RESPONDENT	JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS
STATUS ON ORIGINATING APPLICATION:	APPLICANT
RESPONDENT	HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA
STATUS ON ORIGINATING APPLICATION:	RESPONDENT
DOCUMENT	**BRIEF IN SUPPORT OF APPLICATION TO INTERVENE**

Clerk's Stamp

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BRIEF OF THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION ("BCCLA") BEFORE CASE MANAGEMENT JUSTICE A. KIRKER

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I. INTRODUCTION

1. On April 30, 2020, the Justice Centre for Constitutional Freedoms filed an Originating Application against Her Majesty the Queen in Right of the Province of Alberta (the "Action"). The Action challenges sections 52.1(2)(b) and 52.21(2)(b) of the *Public Health Act*, as amended by the *Public Health (Emergency Powers) Amendment Act, 2020* ("Bill 10"), on the basis that they contravene both the *Constitution Act, 1867* and the unwritten constitutional principles.

2. On May 13, 2020, the Canadian Civil Liberties Association filed an Application for leave to intervene.

3. On June 15, 2020, the British Columbia Civil Liberties Association ("BCCLA") filed an Application for leave to intervene. The BCCLA seeks permission to intervene in the Action on such terms and conditions as this Court finds to be just and appropriate.

II. FACTS

4. As confirmed in the Affidavit of Grace Pastine, the BCCLA has an extensive history of participation in legal proceedings across Canada which engage civil liberties or human rights.

- **Affidavit of Grace Pastine, affirmed June 9, 2020 at para. 17 [Pastine Affidavit]**

5. The BCCLA is a non-profit, non-partisan, unaffiliated advocacy group, whose objects include the promotion, defence, sustainment and extension of civil liberties and human rights throughout British Columbia and Canada.

- **Pastine Affidavit at para. 7**

6. The BCCLA works to achieve its objects through publications and event participation, by making submissions to governmental bodies with respect to proposed legislative and policy initiatives, by providing assistance to individuals with civil liberties or human rights complaints, and by pursuing legal remedies in its own right.

- **Pastine Affidavit at paras. 10, 13**

7. The BCCLA has provided hundreds of educational workshops on civil liberties issues. Its reports on those issues are widely used by legal experts, research institutes, policy advocates, government ministries, as well as the public. Further, in the last decade, the BCCLA has made over 350 law reform submissions to all levels of government and has had hundreds of meetings with legislators and government policy-makers on law reform topics, many of which have resulted in significant law and policy reform.

- **Pastine Affidavit at paras. 14-15**

III. LAW AND ARGUMENT

8. The BCCLA applies to intervene pursuant to Rule 2.10 of the *Rules of Court*, which states:

> **Intervenor status**
>
> **2.10** On application, a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court.

- ***Rules of Court*, Rule 2.10**

The Test for Leave to Intervene

9. As set out by the Supreme Court of Canada, the purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal.

- **See *R. v. Morgentaler*, [1993] 1 S.C.R. 462 at para. 1 [Tab 1]**

10. In *Reference re Workers' Compensation Act, 1983 (Nfld.)*, the Supreme Court stated the following about the useful and different submissions criteria:

> This criteria is easily satisfied by an applicant who has a history of involvement in the issue giving the applicant an expertise which can shed fresh light or provide new information on the matter. As stated by Brian Crane in *Practice and Advocacy in the Supreme Court*, (British Columbia Continuing Legal Education Seminar, 1983), at p. 1.1.05: "an intervention is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important constitutional or public issue"... [Emphasis added]

- ***Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335 at para. 12 [Tab 2]**

11. In Alberta, the test on an intervenor application was most recently re-stated by this Court in *Ecojustice Canada Society v. Alberta*. The Court cited the Court of Appeal case of *Orphan Well Assn v. Grant Thornton Ltd.* and the two-step process set out by the Supreme Court:

    (1) The court must first consider the subject matter of the proceeding; and

    (2) Determine the proposed intervenor's interest in the subject matter.

- ***Ecojustice Canada Society v. Alberta*, 2020 ABQB 364 at paras. 41-42 [*Ecojustice*] [Tab 3]**

12. In determining whether a proposed intervenor has an interest in a proceeding, the court will consider:

    (1) whether the intervenor will be directly and significantly affected by the outcome of the matter before the court; and

    (2) if the intervenor has some expertise or fresh perspective to assist the court in resolving the matter.

- ***Ibid.* at para. 43**

13. Further, the answers to the following questions are relevant factors to consider in determining whether to grant intervenor status:

    (1) Will the intervenor be directly affected by the outcome of the matter?

    (2) Is the presence of the intervenor necessary for the court to properly decide the matter?

    (3) Might the intervenor's interest in the proceedings not be fully protected by the parties?

    (4) Will the intervenor's submission be useful and different or bring particular expertise to the subject matter before the court?

(5) Will the intervention delay the proceedings?

(6) Will there possibly be prejudice to the parties if the intervention is granted?

(7) Will intervention widen the *lis* between the parties?

(8) Will the intervention transform the court into a political arena?

- ***Ibid.* at para. 44**

14. The Court in *Ecojustice* also stated that the standard for intervenor application is more relaxed in a constitutional case:

> Courts are generally more lenient in granting intervenor status in cases involving constitutional issues: ***Papaschase Indian Band (Descendants of) v Canada (Attorney General)***, 2005 ABCA 320 at para 6 [***Papaschase***].

- ***Ibid.* at para. 41**

The BCCLA Meets the Intervenor Test

15. Applying the test set out by the Alberta Courts, the subject matter of the proceedings is a constitutional challenge to certain public health legislative amendments, on the basis that they violate both the written and unwritten text of the Constitution.

16. The BCCLA's interest in this subject matter is two-fold:

(1) Given its objectives of defence and sustainment of civil liberties in B.C. and in Canada, and its history and practice of communicating with governmental bodies with respect to legislative changes that may impact those liberties, developments in any provincial legislation that threaten those liberties are profoundly important to the BCCLA and will impact the law reform work that it does going forward; and

(2) Because the BCCLA, through its 50+ years of existence, has gained special expertise in civil liberties and in constitutional matters that engage them, it is able to offer this Court a different and useful perspective on the issues raised in the Action.

17. The BCCLA was granted leave to intervene in a recent appeal with the Alberta Court of Appeal: *UAlberta Pro-Life v. Governors of the University of Alberta*, 2018 ABCA 350 (application to intervene); 2020 ABCA 1 (appeal).

18. In analysing the BCCLA's application, the Court of Appeal stated:

> Concerns about unduly delaying the proceedings, or prejudice, or any concern that the BCCLA would transform this Court into a political arena were not strongly pressed. Any concerns about timelines, or widening of the issues or *lis* between the parties might best be addressed by conditions, if necessary. Thus, the crux of the matter is whether the BCCLA can offer a special expertise in the area of *Charter* rights that may be of assistance to the Court in its deliberations. [Emphasis added]

- ***UAlberta Pro-Life v. Governors of the University of Alberta*, 2018 ABCA 350 at para. 15 [Tab 4]**

19. Ultimately, the Court of Appeal found that the BCCLA possessed special expertise that would benefit the Court and granted it leave to intervene and to make submissions with respect to three issues, including submissions with respect to the relevant Supreme Court authority and section 2(b) of *Charter*.

- ***Ibid.* at paras. 18-25, 32**

20. Note that the BCCLA in that case conceded that "it would not be "specially affected" by the outcome of this appeal and that its interest lies in 'the proper development of the law raised by the issues on appeal…'". Notwithstanding that, based on its application of the relevant factors, the Court of Appeal granted the BCCLA standing to intervene.

- ***Ibid.* at para. 12**

Summary of Proposed Submissions

21. If granted leave to intervene, the BCCLA will make submissions based upon the following points:

    (1) First, the BCCLA will argue that Bill 10 violates the separation of powers, which is an essential written feature of the Canadian Constitution.

(2) Second, the BCCLA will argue that Bill 10 violates the following unwritten constitutional principles: 1) constitutionalism; 2) protection of minority rights; and 3) the principle of democracy.

Separation of Powers

22. The Supreme Court of Canada has made clear that the separation of powers is an essential feature of our constitution. It has held that "the making of 'policy choices' is a legislative function, while the implementation and administration of those choices is an executive function." As the Court explained, "each branch of government 'will be unable to fulfill its role if it is unduly interfered with by the others'".

- ***Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 at paras. 35, 117 [Tab 5]**

23. The separation of powers is deliberately encoded into the Canadian Constitution in the preamble to the *Constitution Act, 1867* which declares that Canada will have "a Constitution similar in Principle to that of the United Kingdom" and in the written constitutional terms constituting the provincial executive and provincial legislatures: ss. 65, s. 92, s. 92A of the *Constitution Act, 1867*.

24. The principle of parliamentary sovereignty to make and unmake laws is necessarily limited by the text and structures imposed by the Constitution in its composition of provincial executives and legislatures, and in the architecture of parliamentary constitutional democracy. The BCCLA will argue that it is beyond the constitutional capacity of parliamentary sovereignty for the executive to exercise legislative functions.

Unwritten Constitutional Principles

25. In *Reference re Secession of Quebec*, the Supreme Court stated that unwritten constitutional principles may give rise to substantive legal obligations, which constitute substantive limitations upon government action:

> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in the *Patriation Reference*, *supra*, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very

> abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. "In other words", as this Court confirmed in the *Manitoba Language Rights Reference*, *supra*, at p. 752, "in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada". [Emphasis added]

- ***Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 54 [*Secession Reference*] [Tab 6]**

26. In *Reference re Senate Reform*, the Supreme Court restated the importance of these principles, in the context of constitutional interpretation:

> ...Generally, constitutional interpretation must be informed by the foundational principles of the Constitution, which include principles such as federalism, democracy, the protection of minorities, as well as constitutionalism and the rule of law...
>
> These rules and principles of interpretation have led this Court to conclude that the Constitution should be viewed as having an "internal architecture", or "basic constitutional structure"... The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text. [Emphasis added]

- ***Reference re Senate Reform*, 2014 SCC 32 at paras. 25-26 [Tab 7]**

27. Thus, the Supreme Court has made clear that unwritten principles have substantive force and can invalidate executive or legislative measures conflicting with either, or a combination of, the Constitution's written or unwritten terms.

(i) Constitutionalism

28. The constitutionalism principle requires that all government action comply with the Constitution. In *Secession Reference*, the Supreme Court held that "[c]onstitutionalism facilitates – indeed, makes possible – a democratic political system by creating an orderly framework within which people may make political decisions."

- ***Secession Reference*, *supra* Tab 6 at para. 78**

29. The Supreme Court further stated that political institutions are fundamental to the basic structure of our Constitution and for that reason governments cannot undermine the

mechanisms of political accountability which give those institutions definition, direction and legitimacy.

- ***Provincial Court Judges Assn. (Manitoba) v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3 at para. 103 [Tab 8]**

30. See also the Supreme Court in *O.P.S.E.U. v. Ontario (Attorney General)*:

> There is no doubt in my mind that the basic structure of our Constitution, as established by the *Constitution Act, 1867*, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels. In the words of Duff C.J. in *Reference re Alberta Statutes*, at p. 133, "such institutions derive their efficacy from the free public discussion of affairs...." and, in those of Abbott J. in *Switzman v. Elbling*, at p. 328, neither a provincial legislature nor Parliament itself can "abrogate this right of discussion and debate". Speaking more generally, I hold that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure. [Emphasis added]

- ***O.P.S.E.U. v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2 at para. 142 [Tab 9]**

31. With respect to constitutionalism, the BCCLA will point out that constitutionalism demands that all exercises of state power be subject to the limits imposed by the Constitution and its textual and structural imperatives. Further, constitutionalism facilitates a democratic political system by creating an orderly framework within which people may make political decisions. An essential feature of that orderly framework is the separation of powers and judicial protection of the exclusive law-making authority of the legislatures.

(ii) Protection of Minority Rights

32. In *Secession Reference*, the Supreme Court stated that the protection of minority rights is an independent principle underlying our constitutional order and an essential consideration in the design of our constitutional structure, long before the existence of the *Charter*.

- ***Secession Reference, supra* Tab 6 at paras. 80-81**

33. The Supreme Court stated that one of the reasons why a constitution is entrenched beyond the reach of simple majority rule is to "seek to ensure that vulnerable minority groups are

endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority."

- ***Ibid.* at paras. 73-74**

34. With respect to the protection of minority rights, it will be BCCLA's position that the legislative process of introducing, publishing and debating bills with multiple readings provides critical features of rights protection, including for vulnerable minority groups. The BCCLA will highlight the dangers of invisible laws to the minorities by providing examples from Canada's history, such as the shameful interment and incarceration of Japanese Canadians during wartime.

(iii) Democracy

35. In *Reference re Alberta Legislation*, the Supreme Court stated the following in reference to the Constitution:

> The preamble of the statute, moreover, shows plainly enough that the constitution of the Dominion is to be similar in principle to that of the United Kingdom. The statute contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. [Emphasis added]

- ***Reference re Alberta Legislation*, [1938] S.C.R. 100 at para. 106 [Tab 10]**

36. In *Secession Reference*, the Supreme Court further confirmed that the principle of democracy requires a continuous process of discussion:

> Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas" (*Saumur v. City of Quebec*, *supra*, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably,

> there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live. [Emphasis added]

- ***Secession Reference*, *supra* Tab 6 at para. 68**

37. With respect to the principle of democracy, the BCCLA will argue that Bill 10 violates it by depriving the parliamentary institutions of their proper constitutional role, purporting to grant the executive constitutional powers that it does not possess, and abandoning the principles of review, debate, criticism and scrutiny upon which constitutional parliamentary democracy rests.

38. By presenting only appropriate submissions on questions of law, and not raising any new grounds of appeal, the BCCLA's intervention would not prejudice the parties, or widen the *lis*.

39. Further, as the above summary confirms, the BCCLA's submissions would pertain to matters of constitutional law, and not politics. The BCCLA's participation would not transform this Court into a political arena.

40. In all the circumstances, the BCCLA submits that it would be just and appropriate to grant permission to the BCCLA to intervene in this Action.

IV. RELIEF SOUGHT

41. The BCCLA respectfully requests an Order granting it permission to intervene in this Action. The BCCLA does not seek costs, and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of September, 2020.

PEACOCK LINDER HALT & MACK LLP

Per: _____
Perry R. Mack, Q.C./Elena Semenova
Counsel for the BCCLA

TABLE OF AUTHORITIES

TAB	AUTHORITIES
1.	*R. v. Morgentaler,* [1993] 1 S.C.R. 462
2.	*Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335
3.	*Ecojustice Canada Society v. Alberta*, 2020 ABQB 364
4.	*UAlberta Pro-Life v. Governors of the University of Alberta*, 2018 ABCA 350
5.	*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40
6.	*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217
7.	*Reference re Senate Reform*, 2014 SCC 32
8.	*Provincial Court Judges Assn. (Manitoba) v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3
9.	*O.P.S.E.U. v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2
10.	*Reference re Alberta Legislation*, [1938] S.C.R. 100

TAB 1

1993 CarswellNS 429
Supreme Court of Canada

R. v. Morgentaler

1993 CarswellNS 429F, 1993 CarswellNS 429, [1993] 1 S.C.R. 462, [1993] S.C.J. No. 48, J.E. 93-727, EYB 1993-67405

Her Majesty The Queen, Appellant v. Henry Morgentaler, Respondent and Canadian Abortion Rights Action League (CARAL), Intervener

Sopinka J.

Judgment: February 2, 1993
Docket: 22578

Proceedings: Motion for an Order Prohibiting Intervener from Arguing New Issues

Counsel: *Marian Tyson* and *Louise Walsh Poirier*, for the motion.
Mary Eberts and *Ian Godfrey*, for the intervener Canadian Abortion Rights Action League (CARAL).
Anne Derreck, for the respondent.

Related Abridgment Classifications

Civil practice and procedure
XXIII Practice on appeal
XXIII.18 Appeal to Supreme Court of Canada
XXIII.18.d Parties

Headnote

Practice --- Practice on appeal — Appeal to Supreme Court of Canada — Parties — Intervenors on appeal

Widening of issues.

An intervenor is not entitled to add to or widen the points in issue.

The following is the judgment delivered by *Sopinka J.*:

1 The motion brought by the appellant Attorney General of Nova Scotia to prohibit the intervener (respondent on the motion) Canadian Abortion Rights Action League (CARAL) from presenting argument on the federal peace, order and good government power (POGG) is granted. The purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal. See *Reference Re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335.

2 An intervener is not entitled, however, to widen or add to the points in issue. Although it was brought to my attention that Dr. Morgentaler (the respondent in the appeal) raised the peace, order and good government issue in the Nova Scotia Provincial Court, the issue was not considered in the Provincial Court's decision nor did it arise in the Court of Appeal.

Counsel for Dr. Morgentaler conceded at the hearing of this motion that the issue was not raised in the Court of Appeal or in this Court. It is not contested that the evidence in the case was culled for incorporation into the case on appeal on the basis that the federal criminal law power was the basis on which it was alleged that the impugned legislation is *ultra vires*.

3 The basis on which CARAL applied to intervene and on which its application was granted was that it would argue that the *Medical Services Act*, S.N.S. 1989, c. 9, and regulations made thereunder are in the nature of criminal law and therefore *ultra vires* the province. This is made very clear in the affidavit of Jane Holmes, sworn on June 11, 1992, filed in support of CARAL's application for leave to intervene. The constitutional questions framed by the Chief Justice in this case are restricted to the federal criminal law power and there is nothing in the constitutional questions that would give notice that POGG would be in issue. It can be assumed that the various Attorneys General based their decisions to intervene or not to intervene on the constitutional questions as framed. It is possible that their decisions would have been different had the POGG been put in issue in the constitutional questions. In any event, to introduce the issue without amending the constitutional questions would contravene this Court's rules with respect to constitutional questions, the main purpose of which is to give notice to Attorneys General as to the constitutional issue which the Court is asked to decide.

4 CARAL alleges that the challenged arguments are responsive to arguments raised by the appellant. The appellant argues (at paragraphs 77-78 of its factum in the appeal) that the impugned legislation is *intra vires* the province pursuant to the province's jurisdiction over health as a purely local and private matter. CARAL responds to this argument by saying that abortion as a health issue is not purely local and private but has a national dimension bringing it within POGG. The respondent, however, addresses this issue. He also disputes that the matter relates to a purely local and private matter and says that it is of national proportions. He has not, however, invoked POGG and does not attack the legislation on this basis. An intervener cannot introduce a new issue on the ground that it is a response to an argument made by the appellant if the respondent has chosen not to raise the issue.

5 There will be no costs on the motion.

Judgment accordingly.

Solicitors of record:
Solicitor for the appellant: *The Attorney General of Nova Scotia*, Halifax.
Solicitors for the intervener Canadian Abortion Rights Action League (CARAL): *Tory Tory DesLauriers & Binnington*, Toronto.
Solicitors for the respondent: *Buchan, Derrick & Ring*, Halifax.

TAB 2

1989 CarswellNat 740
Supreme Court of Canada

Reference re Workers' Compensation Act, 1983 (Nfld.) (Application to Intervene)

1989 CarswellNat 740F, 1989 CarswellNat 740, [1989] 2 S.C.R. 335, [1989] S.C.J. No. 113, 235 A.P.R. 185, 76 Nfld. & P.E.I.R. 185, 96 N.R. 231, EYB 1989-67246

In The Matter s. 13 of Part I of The Judicature Act, 1986, c. 42, S.N. 1986

In The Matter of ss. 32 and 34 of The Workers' Compensation Act, 1983, c. 48, S.N. 1983

In The matter of a Reference of the Lieutenant-Governor in Council to the Court of Appeal for its hearing, consideration and opinion on the constitutional validity of ss. 32 and 34 of The Workers' Compensation Act, 1983

Sopinka J.

Judgment: December 7, 1988
Judgment: February 13, 1989
Docket: 20697

Proceedings: Motion for leave to intervene

Counsel: *D. Geoffrey Cowper*, for the applicant.
W.G. Burke-Robertson, Q.C., for the respondent.

Related Abridgment Classifications

Civil practice and procedure
XXIII Practice on appeal
XXIII.18 Appeal to Supreme Court of Canada
XXIII.18.d Parties

Headnote

Practice --- Practice on appeal — Appeal to Supreme Court of Canada — Parties — Intervenors on appeal

Requirements of R. 18 — Canadian Charter of Rights and Freedoms, s. 15(1) — Workers' Compensation Act, S.N. 1983, c. 48, ss. 32, 34 — Can. R. 18.

Widow was barred from court action pursuant to ss. 32 and 34 of Act. Widow attempted to invoke s. 15(1) of the Charter claiming that provisions of the Act denied widow her right of access to courts. The trial Judge agreed but stated the Charter did not apply retroactively to the date of the husband's death. The Newfoundland Court of Appeal found ss. 32 and 34 were not inconsistent with s. 15(1). An appeal was launched to the Supreme Court. An application was brought by injured persons challenging similar provisions in British Columbia's Act for leave to intervene. Held, the application should be allowed. The Court discussed the requirements of R. 18 allowing for the Court's discretion to allow parties to intervene..

The following are the reasons for the Order delivered by *Sopinka J.*:

1 This application to intervene arises in an appeal from a reference which was directed to the Newfoundland Court of Appeal by the Newfoundland Lieutenant-Governor in Council (*Reference re Validity of Sections 32 and 34 of the Workers' Compensation Act, 1983* (1987), 44 D.L.R. (4th) 501 (Nfld. C.A.)) The reference has its roots in the case of *Piercey v. General Bakeries Ltd.* (1986), 31 D.L.R. (4th) 373 (Nfld. S.C.T.D.) Samuel Piercey was an employee of General Bakeries Ltd. allegedly in the course of his employment, when he was electrocuted. It was alleged by his wife, Mrs. Shirley Piercey, that her husband's death was due to the negligence of his employer, General Bakeries Ltd.

2 In the Trial Division of the Newfoundland Supreme Court, Mrs. Piercey argued that the employer could not rely upon ss. 32 and 34 of *The Workers' Compensation Act, 1983*, S.N. 1983, c. 48, which provide that the right to compensation for injuries arising in the course of a worker's employment is limited to that specifically provided for by the Act. Mrs. Piercey claimed that ss. 32 and 34 of *The Workers' Compensation Act, 1983* were of no force and effect under s. 52(2) of the *Constitution Act, 1982* as they violated s. 15 of the *Canadian Charter of Rights and Freedoms*.

3 The trial judge, Hickman C.J., agreed that the provisions unjustifiably denied the right of access to the courts which was held to be an element of s. 15 equality rights. However, Hickman C.J. also held that Mrs. Piercey was unable to rely upon the *Charter* as her husband's death occurred on July 22, 1984, prior to April 17, 1985 when s. 15 came into force. It was held that s. 15 could not apply retrospectively.

4 As the opinion of Hickman C.J. on the constitutionality of ss. 32 and 34 of *The Workers' Compensation Act, 1983* was *obiter dictum*, there was no ground upon which the Crown could appeal. Mrs. Piercey did not appeal. As a result, a Reference on this issue was directed to the Newfoundland Court of Appeal.

5 In the Court of Appeal, the Attorney General of Newfoundland presented the Reference. Acting as interveners by original order or by subsequent leave were: the Workers' Compensation Commission of Newfoundland and Labrador; la Commission de la santé et de la sécurité au travail du Quebec; the Attorney General of Nova Scotia; the Workers' Compensation Board of New Brunswick; the Workers' Compensation Board of Manitoba; the Attorney General of British Columbia; the Workers' Compensation Board of British Columbia; the Workers' Compensation Board of Prince Edward Island; the Workers' Compensation Board of Alberta; the Workers' Compensation Board of Yukon; the Canadian Manufacturers Association; the Canadian Labour Congress; the Newfoundland and Labrador Federation of Labour; Canadian National Railways; Marine Atlantic Limited; General Bakeries Limited, and Shirley Piercey. All but Mrs. Piercey supported the legislation. The Court of Appeal held that ss. 32 and 34 of *The Workers' Compensation Act, 1983* were not inconsistent with s. 15(1) of the *Charter*. In addition, Goodridge C.J.N. held that s. 15 does not apply to causes of action arising before April 17, 1985.

6 This application by Mr. Cowper is on behalf of Suzanne Côté to intervene in this case pursuant to Rule 18 of the *Rules of the Supreme Court of Canada*, SOR/83-74. The applicant is an injured person who has brought a challenge of similar British Columbia provisions (ss. 10 and 11 of the *Workers Compensation Act*, R.S.B.C. 1979, c. 437) based on the unconstitutionality of a statutory bar to private compensation. The action of Mrs. Côté has been stayed by an order of the British Columbia Supreme Court pending the outcome of this appeal. Mr. Cowper has been retained by several other plaintiffs who are in circumstances similar to Suzanne Côté and who wish to have him present argument in this appeal.

7 Our Rule 18 gives this Court a wide discretion in deciding whether or not to allow a person to intervene as well as the discretion to determine the terms and conditions of the intervention. As well, s. 55(4) of the *Supreme Court Act*, R.S.C. 1970, c. S-19, provides for submissions from persons interested in a reference.

8 The criteria for the exercise of this discretion were the subject of considerable argument on this motion. Counsel were understandably handicapped because these criteria have, perhaps purposely, not been commented on by this Court in recent cases. Threshold requirements are set out in Rule 18(3)(*a*) and (*c*). These criteria can be summarized as follows: (1) an interest and (2) submissions which will be useful and different from those of the other parties.

9 The application was resisted principally on the basis that having a similar case does not satisfy the interest requirement. It was also argued that the applicant has not demonstrated that his argument will differ from that of Mrs. Piercey's counsel.

(1) Interest

10 One of the few authorities in this Court on the exercise of the Court's discretion is *Norcan Ltd. v. Lebrock*, [1969] S.C.R. 665, in which Pigeon J. held that any interest is sufficient, subject always to the exercise of discretion. From the cases cited by Justice Pigeon, it is apparent that having a similar case can satisfy this requirement. The discretion, however, will not ordinarily be exercised in favour of an applicant just because the applicant has a similar case. Indeed it has been held in some courts that this is not a sufficient interest. See *Solosky v. The Queen*, [1978] 1 F.C. 609, and *Re Schofield and Minister of Consumer and Commercial Relations* (1980), 28 O.R. (2d) 764 (C.A.)

11 I agree with Pigeon J. that "any interest" extends to an interest in the outcome of an appeal when a legal issue to be determined therein will be binding on other pending litigation to which the applicant is a party. Although this is usually a tenuous basis upon which to base an application for intervention, in this appeal Mr. Cowper's client is in the unenviable position of facing an opponent in the British Columbia litigation, the Attorney General of British Columbia, who has the right to intervene in this appeal. There is an aura of unfairness about this which should be remedied by granting this application unless the other criteria dictate the contrary conclusion. This unfairness is exacerbated by the imbalance of representation in favour of those supporting the constitutionality of the legislation which would occur if the applicant were denied the right to intervene.

(2) Useful and Different Submissions

12 This criteria is easily satisfied by an applicant who has a history of involvement in the issue giving the applicant an expertise which can shed fresh light or provide new information on the matter. As stated by Brian Crane in *Practice and Advocacy in the Supreme Court*, (British Columbia Continuing Legal Education Seminar, 1983), at p. 1.1.05: "an intervention is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important constitutional or public issue". It is more difficult for a private litigant to demonstrate that his or her argument will be different. This submission is usually met by the response that the able and experienced counsel already in the case will cover all bases.

13 In my opinion this is not a disqualifying factor here. The only party advancing the position taken by the applicant will be Mrs. Piercey. Her interest in the outcome is somewhat tenuous given the conclusion at trial that s. 15 could not be invoked to retroactively apply to a cause of action arising prior to April 17, 1985. Unlike Mrs. Piercey, the applicant has a definite stake in the outcome. In my view, the applicant can add to the effective adjudication of the issue by ensuring that all the issues are presented in a full adversarial context. This need for an adversarial relationship was one of the factors considered by this Court when granting applicant intervener status in *Norcan, supra*, and in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357.

14 In the circumstances of this case, therefore, I grant leave to the applicant and others in similar circumstances represented by Mr. Cowper to intervene in this appeal. Pursuant to Rule 18, the applicant may file a factum and present oral argument to be limited to not more than fifteen minutes. There will be no costs of the application.

Motion granted.

Solicitors of record:
Solicitors for the applicant: *Russell & DuMoulin*, Vancouver.
Solicitors for the respondent: *The Attorney General of Newfoundland*, St. John's.

TAB 3

2020 ABQB 364
Alberta Court of Queen's Bench

Ecojustice Canada Society v. Alberta

2020 CarswellAlta 1107, 2020 ABQB 364, [2020] A.W.L.D. 2142, 319 A.C.W.S. (3d) 395

Ecojustice Canada Society (Respondent / Applicant on Originating Application) and Her Majesty the Queen in Right of Alberta, the Lieutenant Governor in Council, the Minister of Justice and Solicitor General for Alberta, and Jackson Stephens Allan in his capacity as Commissioner under the Public Inquiries Act (Respondents on Originating Application) and Indian Resource Council Inc., the Explorers and Producers Association of Canada, and W. Brett Wilson (Applicants)

K.M. Horner J.

Heard:
Judgment: June 11, 2020
Docket: Calgary 1901-16255

Counsel: Maureen Killoran, Q.C., Sean Sutherland, Justin Lafferty Osler, for Applicants, Indian Resource Council Inc., Explorers and Producers Association of Canada, and W. Brett Wilson
Barry Robinson, for Respondent / Applicant on Originating Application Ecojustice Canada Society
Doreen Mueller, Q.C., Peter Bujis, for Attorney General of Alberta
David Wachowich, Q.C., for J. Stephens Allen

Related Abridgment Classifications

Civil practice and procedure
III Parties
III.8 Intervenors
III.8.a General principles

Headnote

Civil practice and procedure --- Parties — Intervenors — General principles
Government of Alberta initiated public inquiry into anti-Alberta energy campaigns supported by foreign organizations — Applicant applied for judicial review requesting that court find inquiry was unlawful — Industry consortium consisted of parties representing perspective of First Nation resource owners and industry partners, perspective of junior, mid-sized and independent oil and gas producers in Alberta, and perspective of industry investor — Industry consortium applied for leave to intervene on application for judicial review on two issues, whether inquiry into foreign funding of anti-Alberta energy campaigns was ordered in public interest within s. 2 of Public Inquiries Act such that inquiry was ordered for proper purpose; and whether inquiry fell within constitutional jurisdiction of Province of Alberta — Application granted in part — Industry consortium was comprised of representatives of different facets of Alberta oil and gas industry who wanted inquiry to proceed, and theirs was part of public interest that inquiry stated it sought to protect — If inquiry was halted, perspective of industry consortium would not be considered, and industry consortium were directly affected by outcome of application for judicial review — Industry consortium had expertise as participants in Alberta's oil and gas industry, which was perspective that was not presently before court — It was unlikely that industry consortium could raise constitutional jurisdiction

arguments that would not be raised by respondents, they did not have particular expertise, and their participation as intervenor was not necessary for court to properly decide that issue — On issue of whether inquiry was brought for improper purpose, one of considerations would be whether public interest was served by inquiry, and industry perspective represented by industry consortium was necessary for court to properly consider public interest aspect of that issue — Industry consortium's submissions on public interest aspect of inquiry would be useful and different from submissions of respondents, and it was not clear that perspective would otherwise be presented — Intervention would not delay proceedings or create unfair time pressures for applicant, applicant would not be prejudiced if industry consortium was granted leave to intervene, allowing industry consortium to intervene would not wide lis between parties, and it was unlikely to transform court into political arena — Industry consortium would be directly and significantly affected by outcome of judicial review application, and would provide expertise and fresh perspective on issue of whether inquiry had been brought for improper purpose — Industry consortium was granted leave to intervene on issue of whether inquiry had been brought for improper purpose and was ultra vires authority granted to Lieutenant Governor in Council under s. 2 of Act.

Table of Authorities

Cases considered by *K.M. Horner J.*:

Consortium Developments (Clearwater) Ltd. v. Sarnia (City) (1998), 1998 CarswellOnt 3948, 40 O.R. (3d) 158 (headnote only), 230 N.R. 343, 48 M.P.L.R. (2d) 1, 165 D.L.R. (4th) 25, 114 O.A.C. 92, [1998] 3 S.C.R. 3, 8 Admin. L.R. (3d) 165, 1998 CarswellOnt 3949, 40 O.R. (3d) 158 (note), 40 O.R. (3d) 158 (S.C.C.) — referred to

Edmonton (City) v. Urban Development Institute (2014), 2014 ABCA 340, 2014 CarswellAlta 1875, 61 C.P.C. (7th) 309, 584 A.R. 255, 623 W.A.C. 255, 7 Alta. L.R. (6th) 338 (Alta. C.A.) — considered

Gitxaala Nation v. R. (2015), 2015 FCA 73, 2015 CarswellNat 522, 2015 CAF 73, 2015 CarswellNat 4831 (F.C.A.) — considered

Orphan Well Assn. v. Grant Thornton Ltd. (2016), 2016 ABCA 238, 2016 CarswellAlta 1466, 89 C.P.C. (7th) 14, 39 C.B.R. (6th) 1, 40 Alta. L.R. (6th) 11 (Alta. C.A.) — considered

Papaschase Indian Band No. 136 v. Canada (Attorney General) (2005), 2005 ABCA 320, 2005 CarswellAlta 1407, (sub nom. *Lameman v. Canada (Attorney General))* 380 A.R. 301, (sub nom. *Lameman v. Canada (Attorney General))* 363 W.A.C. 301 (Alta. C.A.) — considered

Pedersen v. Van Thournout (2008), 2008 ABCA 192, 2008 CarswellAlta 648, (sub nom. *Pedersen v. Thournout)* 432 A.R. 219, (sub nom. *Pedersen v. Thournout)* 424 W.A.C. 219 (Alta. C.A.) — considered

Reference re Environmental Management Act (2020), 2020 SCC 1, 2020 CSC 1, 2020 CarswellBC 115, 2020 CarswellBC 116, 29 C.E.L.R. (4th) 181, 30 B.C.L.R. (6th) 1, [2020] 2 W.W.R. 1, 441 D.L.R. (4th) 589 (S.C.C.) — considered

Reference re Greenhouse Gas Pollution Pricing Act (2019), 2019 ABCA 349, 2019 CarswellAlta 1975, 97 Alta. L.R. (6th) 232, 43 C.P.C. (8th) 167 (Alta. C.A.) — considered

Reference re Greenhouse Gas Pollution Pricing Act (2020), 2020 ABCA 74, 2020 CarswellAlta 328, 3 Alta. L.R. (7th) 1, 446 D.L.R. (4th) 1 (Alta. C.A.) — referred to

Reference re Impact Assessment Act (2020), 2020 ABCA 94, 2020 CarswellAlta 385 (Alta. C.A.) — considered

Shoppers Drug Mart Inc. v. Ontario (Minister of Health and Long-Term Care) (2013), 2013 SCC 64, 2013 CarswellOnt 15719, 2013 CarswellOnt 15720, 58 Admin. L.R. (5th) 173, 366 D.L.R. (4th) 62, 451 N.R. 80, 312 O.A.C. 169, [2013] 3 S.C.R. 810, 130 O.R. (3d) 240 (note) (S.C.C.) — referred to

Starr v. Ontario (Commissioner of Inquiry) (1990), [1990] 1 S.C.R. 1366, (sub nom. *Starr v. Houlden)* 68 D.L.R. (4th) 641, (sub nom. *Starr v. Houlden)* 110 N.R. 81, (sub nom. *Starr v. Houlden)* 41 O.A.C. 161, (sub nom. *Starr v. Houlden)*

para 26 [*Consortium Developments*]. These decisions relate to challenges to judicial inquiries initiated pursuant to Ontario legislation to investigate certain incidents, and are not as broad in scope as the OIC and Terms of Reference in this case.

36 If leave to intervene is granted, the Industry Consortium would also argue that the power to order an inquiry should not be lessened by an overly technical and restrictive interpretation of the legislative requirements for exercising that power: *Consortium Developments* at para 26. In its submissions on the Application for Judicial Review, the Industry Consortium would suggest that to find the inquiry was brought for an improper purpose, the purpose must be irrelevant, extraneous or completely unrelated to good government or the public interest. In support of this point, the Industry Consortium refers to a decision of the Supreme Court of Canada regarding whether regulations are *ultra vires* the statutory purposes of their enabling legislation: *Shoppers Drug Mart Inc. v. Ontario (Minister of Health and Long-Term Care)*, 2013 SCC 64 (S.C.C.) at para 28.

37 In respect of the second issue, the Industry Consortium would argue that the Inquiry falls within Alberta's broad constitutional authority over property and civil rights, matters of a local and private nature, and natural resources: *Constitution Act, 1867*, 30 & 31 Vict c 3, ss 92(10), (13) and (16) [*Constitution*]; *Constitution Act, 1982*, Part VI, ss 50-51, Amendment to the *Constitution Act, 1867*, s 92A(1) [*Resource Amendment*]. The Court of Appeal of Alberta has recently considered division of powers related to resource development and management in *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 (Alta. C.A.), which concerned the *Resource Amendment* and the federal *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12. There, the court noted that the provinces have power with respect to their natural resources as a result of the *Resource Amendment* regarding authority over non-renewable natural resources and section 109 of the *Constitution* regarding proprietary rights over lands, mines, minerals and royalties.

38 The Industry Consortium would argue that Alberta has the jurisdiction to inquire into activities that adversely affect economic activity within provincial boundaries, to responsibly regulate natural resources, and to gather the necessary information to defend those interests, which extends to other issues concerning development of Alberta's natural resources. It would argue that while the subject matter may have an incidental impact on federal jurisdiction, the pith and substance relates to subject matter within provincial jurisdiction. The Industry Consortium would submit that the pith and substance of the Inquiry is an investigation into the source of funding which seeks to undermine Alberta's oil and gas industry, which the Terms of Reference defines as including "any and all aspects of Alberta's petroleum and natural gas sectors, including the exploration, development, extraction, storage, processing, upgrading and refining of Alberta's oil and gas resources". On the Application for Judicial Review, the Court will have to consider if an alleged campaign of misleading or false information about the oil and gas industry would fall under provincial economic activity or provincial resource development and management, such that the subject matter of the Inquiry is within provincial jurisdiction.

39 In summarizing these proposed arguments, I do not make any determination on their merits.

III. Issue

40 The sole issue for determination on this Application is whether the Industry Consortium should be granted leave to intervene in the Application for Judicial Review.

IV. Legal Analysis and Decision

A. Test for Intervenor Status

41 The Court has the discretion to grant intervenor status in a proceeding, subject to any terms and conditions and with the rights and privileges it specifies: *Alberta Rules of Court*, AR 124/2010, r 2.10 [*Rules*]. This discretion ought to be exercised sparingly: *Orphan Well Assn. v. Grant Thornton Ltd.*, 2016 ABCA 238 (Alta. C.A.) at para 11 [*Orphan Well*]. Courts are generally more lenient in granting intervenor status in cases involving constitutional issues: *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2005 ABCA 320 (Alta. C.A.) at para 6 [*Papaschase*].

42 In *Orphan Well*, the Court of Appeal of Alberta granted applications for leave to intervene to four entities in a constitutional appeal concerning the interpretation of legislation, the division of powers and the doctrine of paramountcy. In

deciding the applications, Justice Sheilah Martin (as she then was) summarized the test for granting intervenor status, starting with the two-step process set out by the Supreme Court of Canada: the court must first consider the subject matter of the proceeding, and then determine the proposed intervenor's interest in the subject matter: *Orphan Well* at para 8, citing *Papaschase* at para 5.

43 In determining whether a proposed intervenor has an interest in a proceeding, the court will consider: (a) whether the intervenor will be directly and significantly affected by the outcome of the matter before the court; and (b) if the intervenor has some expertise or fresh perspective to assist the court in resolving the matter: *Papaschase* at para 5; *Orphan Well* at para 8. Although *Papaschase* established that intervenor status could be granted if either criterion was met, subsequent decisions have held that establishing an affected interest is not enough; both criteria must be met for leave to intervene to be granted: *Orphan Well* at para 9.

44 The Court of Appeal of Alberta has also established that the answers to the following questions are relevant factors to consider in determining whether to grant intervenor status:

> 1. Will the intervenor be directly affected by the outcome of the matter?
>
> 2. Is the presence of the intervenor necessary for the court to properly decide the matter?
>
> 3. Might the intervenor's interest in the proceedings not be fully protected by the parties?
>
> 4. Will the intervenor's submission be useful and different or bring particular expertise to the subject matter before the court?
>
> 5. Will the intervention delay the proceedings?
>
> 6. Will there possibly be prejudice to the parties if the intervention is granted?
>
> 7. Will intervention widen the *lis* between the parties?
>
> 8. Will the intervention transform the court into a political arena?

Orphan Well at para 10, citing *Pedersen v. Van Thournout*, 2008 ABCA 192 (Alta. C.A.) at para 10 [*Pedersen*]

45 In the applicants' affidavits, the affiants set out how they are directly affected by the outcome of the Application for Judicial Review, as well as the unique perspectives they would provide the Court. The test for granting leave to intervene is applied below.

B. Application of Test

46 Applying the two-step process, I first discuss the subject matter of the Application for Judicial Review, and then determine the proposed intervenor's interest in that application by applying the factors outlined by the Court of Appeal of Alberta in *Pedersen* and deciding (a) whether the proposed intervenor will be directly and significantly affected by the outcome of the matter before the court; and (b) if the proposed intervenor has some expertise or fresh perspective to assist the court in resolving the matter.

Subject matter of Application for Judicial Review

47 On the Application for Judicial Review, Ecojustice seeks to end the Inquiry, and to prevent the publication of the Commissioner's findings or the evidence and submissions provided in the Inquiry. Ecojustice argues that the basis for this relief is that:

> (a) the Inquiry is unlawful, as it has been brought for an improper purpose and not as a matter of public interest pursuant to the *Public Inquiries Act*, and is therefore *ultra vires* the Province of Alberta's statutory powers;

TAB 4

2018 ABCA 350
Alberta Court of Appeal

UAlberta Pro-Life v. Governors of the University of Alberta

2018 CarswellAlta 2440, 2018 ABCA 350, [2018] A.W.L.D. 4707, 298 A.C.W.S. (3d) 6

UAlberta Pro-Life, Amberlee Nicol and Cameron Wilson (Appellants) and Governors of the University of Alberta (Respondent / on appeal and motion) and British Columbia Civil Liberties Association (Applicant)

Frederica Schutz J.A.

Heard: October 23, 2018
Judgment: October 29, 2018
Docket: Edmonton Appeal 1703-0283-AC

Counsel: R.J. Cameron, for UAlberta Pro-Life, Amberlee Nicol, Cameron Wilson
M.A. Woodley, P.T. Buijs, for Governors of the University of Alberta
N.J. Whitling, for British Columbia Civil Liberties Association

Related Abridgment Classifications

Civil practice and procedure
XXIII Practice on appeal
XXIII.9 Parties
XXIII.9.a Adding parties
XXIII.9.a.i Intervenors on appeal

Headnote

Civil practice and procedure --- Practice on appeal — Parties — Adding parties — Intervenors on appeal
Appellants represented approved university student association and they sought appropriate approval from university to hold event on campus — University told appellants that they were to work with campus security on security assessment for event, which they did — Security assessment concluded that costs of security for event would total approximately $17,500 — University approved event, but subject to condition that appellants pay actual costs of security — Chambers judge dismissed appellants' judicial review application of security costs decision — Appellants appealed — Applicant, British Columbia Civil Liberties Association, sought leave to intervene in appeal — Application granted in part — Applicant possessed special expertise regarding highly complex issue of whether and under what circumstances university could be characterized as exercising government function — Applicant was granted leave to intervene on issue of universities performing core public function of providing education — Court would benefit from applicant's submissions on nuances of recently clarified analytical framework, namely that recent Supreme Court decisions in Loyola High School v Quebec (Attorney General), 2015 SCC 12, Law Society of British Columbia v Trinity Western University, 2018 SCC 32, and Trinity Western University v Law Society of Upper Canada, 2018 SCC 33 had altered Doré v Barreau du Québec, 2012 SCC 12 analysis — Applicant was capable of contributing to court's deliberations on question of whether rights under s. 2(b) of Canadian Charter of Rights and Freedoms asserted in this case could be properly characterized as positive or negative — Any discussion of ss. 2(c) and (d) Charter rights would unacceptably widen scope of appeal beyond what was raised by parties, and applicant was not permitted to make any submissions relating to Charter rights other than freedom of expression under s. 2(b) of Charter — Applicant was denied permission to intervene on question of whether disciplinary character of proceedings at issue in Pridgen v University of Calgary, 2012 ABCA 139 was proper basis for distinguishing it from this case, as granting

permission to intervene on that point would unacceptably widen scope of appeal and applicant did not have any special expertise or insight on issue that would benefit court.

Table of Authorities

Cases considered by *Frederica Schutz J.A.*:

BC Civil Liberties Assn. v. University of Victoria (2016), 2016 BCCA 162, 2016 CarswellBC 1008, 385 B.C.A.C. 306, 665 W.A.C. 306, [2016] 8 W.W.R. 678, 85 B.C.L.R. (5th) 310, 353 C.R.R. (2d) 357, 404 D.L.R. (4th) 750 (B.C. C.A.) — referred to

British Columbia Civil Liberties Assn. v. University of Victoria (2016), 2016 CarswellBC 3414, 2016 CarswellBC 3415 (S.C.C.) — referred to

Canadian Centre for Bio-Ethical Reform v. Grande Prairie (City) (2017), 2017 ABCA 280, 2017 CarswellAlta 1571 (Alta. C.A.) — referred to

Doré c. Québec (Tribunal des professions) (2012), 2012 SCC 12, 2012 CarswellQue 2048, 2012 CarswellQue 2049, (sub nom. *Doré v. Barreau du Québec)* 343 D.L.R. (4th) 193, 34 Admin. L.R. (5th) 1, (sub nom. *Doré v. Barreau du Québec)* 428 N.R. 146, [2012] 1 S.C.R. 395, (sub nom. *Doré v. Barreau du Québec)* 255 C.R.R. (2d) 289 (S.C.C.) — referred to

Edmonton (City) v. Urban Development Institute (2014), 2014 ABCA 340, 2014 CarswellAlta 1875, 61 C.P.C. (7th) 309, 584 A.R. 255, 623 W.A.C. 255, 7 Alta. L.R. (6th) 338 (Alta. C.A.) — referred to

Law Society of British Columbia v. Trinity Western University (2018), 2018 SCC 32, 2018 CSC 32, 2018 CarswellBC 1510, 2018 CarswellBC 1511, 35 Admin. L.R. (6th) 1, 10 B.C.L.R. (6th) 217, [2018] 8 W.W.R. 1, 423 D.L.R. (4th) 197 (S.C.C.) — referred to

Loyola High School v. Quebec (Attorney General) (2015), 2015 SCC 12, 2015 CSC 12, 2015 CarswellQue 1533, 2015 CarswellQue 1534, 79 Admin. L.R. (5th) 177, 382 D.L.R. (4th) 195, 468 N.R. 323, [2015] 1 S.C.R. 613, 331 C.R.R. (2d) 24 (S.C.C.) — referred to

McKinney v. University of Guelph (1990), 91 C.L.L.C. 17,004, 2 O.R. (3d) 319 (note), 13 C.H.R.R. D/171, [1990] 3 S.C.R. 229, 2 C.R.R. (2d) 1, 45 O.A.C. 1, 118 N.R. 1, 76 D.L.R. (4th) 545, 1990 CarswellOnt 1019F, 1990 CarswellOnt 1019 (S.C.C.) — referred to

Papaschase Indian Band No. 136 v. Canada (Attorney General) (2005), 2005 ABCA 320, 2005 CarswellAlta 1407, (sub nom. *Lameman v. Canada (Attorney General))* 380 A.R. 301, (sub nom. *Lameman v. Canada (Attorney General))* 363 W.A.C. 301 (Alta. C.A.) — referred to

Pedersen v. Van Thournout (2008), 2008 ABCA 192, 2008 CarswellAlta 648, (sub nom. *Pedersen v. Thournout)* 432 A.R. 219, (sub nom. *Pedersen v. Thournout)* 424 W.A.C. 219 (Alta. C.A.) — referred to

Pridgen v. University of Calgary (2012), 2012 ABCA 139, 2012 CarswellAlta 797, 524 A.R. 251, 545 W.A.C. 251, 350 D.L.R. (4th) 1, 41 Admin. L.R. (5th) 99, [2012] 11 W.W.R. 477, 258 C.R.R. (2d) 134, 66 Alta. L.R. (5th) 215 (Alta. C.A.) — referred to

R. v. N. (L.C.) (1996), 40 Alta. L.R. (3d) 18, [1996] 8 W.W.R. 294, 108 C.C.C. (3d) 126, 184 A.R. 359, 122 W.A.C. 359, 1996 CarswellAlta 530, 1996 ABCA 242 (Alta. C.A.) — referred to

Stewart Estate v. 1088294 Alberta Ltd. (2014), 2014 ABCA 222, 2014 CarswellAlta 1065, 577 A.R. 57, 613 W.A.C. 57 (Alta. C.A.) — referred to

Styles v. Alberta Investment Management Corp. (2016), 2016 ABCA 218, 2016 CarswellAlta 1371, 44 Alta. L.R. (6th) 205, 36 C.C.E.L. (4th) 7, 95 C.P.C. (7th) 227 (Alta. C.A.) — referred to

Telus Communications Inc. v. T.W.U. (2006), 2006 ABCA 297, 2006 CarswellAlta 1310, (sub nom. *Telus Communications Inc. v. Telecommunications Workers Union)* 401 A.R. 57, (sub nom. *Telus Communications Inc. v. Telecommunications Workers Union)* 391 W.A.C. 57 (Alta. C.A.) — referred to

Trinity Western University v. Law Society of Upper Canada (2018), 2018 SCC 33, 2018 CSC 33, 2018 CarswellOnt 9570, 2018 CarswellOnt 9571, 35 Admin. L.R. (6th) 249, 48 C.C.E.L. (4th) 1, 423 D.L.R. (4th) 321 (S.C.C.) — referred to

UAlberta Pro-Life v. Governors of the University of Alberta (2017), 2017 ABQB 610, 2017 CarswellAlta 1815, 31 Admin. L.R. (6th) 152 (Alta. Q.B.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

s. 2(b) — considered

s. 2(c) — considered

s. 2(d) — considered

Post-secondary Learning Act, S.A. 2003, c. P-19.5
Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 14.37(2)(e) — considered

R. 14.58 — considered

R. 14.58(3) — referred to

Frederica Schutz J.A.:

Introduction

1 The British Columbia Civil Liberties Association (the "BCCLA") seeks leave to intervene in the appeal of one of two decisions under appeal from: *UAlberta Pro-Life v. Governors of the University of Alberta*, 2017 ABQB 610 (Alta. Q.B.); namely, the chambers judge's judicial review decision referred to as the "Security Costs Decision".

2 I will review relevant background only to the extent needed to put the proposed intervenor's application into context.

3 The appellants represent an approved University of Alberta student association. In early 2015, the appellants held an event on campus. The event attracted a large number of people who held views contrary to those of the appellants. University of Alberta Protective Services, the University's campus security unit, monitored the event and decided to set up a designated area to which opponents of the appellants' event and displays would be confined. Persons opposed did not remain in the designated area; instead, they positioned themselves in front of the appellants' displays so as to obstruct the view of passers-by and also verbalized their opposition to the appellants' messaging. Subsequently, the appellants initiated a complaint with Protective Services, alleging that approximately 100 people who had not stayed in the designated area had violated the University Code of Student Behaviour (the "Code"). The chambers judge dismissed the appellants' judicial

review of the Discipline Officer's decision that sustained the Protective Services' Director's decision not to proceed with the appellants' complaint. The proposed intervenor is not seeking to intervene in this aspect of the appeal.

4 In January 2016, the appellants sought appropriate approval from the University to hold a second event that would be similar in format to the earlier one. The University told the appellants that they were to work with Protective Services on a security assessment for the event. The appellants did so. The security assessment concluded that costs of security for the event would total approximately $17,500. The University approved the event, but subject to the condition that the appellants pay the actual costs of security, including an initial $9000 deposit ("Security Costs Decision"). The appellants sought judicial review of the Security Costs Decision.

5 In essence, the appellants contended that the Security Costs Decision unjustifiably infringed their freedom of expression guaranteed by s 2(b) of the *Charter*, and its imposition effectively prevented the appellants from fully participating in campus life on an equal footing with other students. The appellants further argued that the University's decision was unreasonable because it framed the appellants' event as the cause of the security concerns, rather than the conduct of the Code-violating opponents of their event. In response, the University argued that the *Charter* did not apply to it and that the common law did not require the University to consider freedom of expression.

6 In dismissing the appellants' judicial review application of the Security Costs Decision, the chambers judge decided there was no need to decide whether the *Charter* applied to universities, on the basis that the University " . . . voluntarily assumed responsibility for considering freedom of expression in this instance": *ibid* at para 46. In apparent support of this view, the chambers judge pointed to statements made in the Code, as well as a statement released by the University President that spoke of the University's respect for students' freedom of expression.

7 The British Columbia Civil Liberties Association seeks leave to intervene only in respect of this aspect of the appeal.

Test for Leave to Intervene

8 Rules 14.37(2)(e) and 14.58 of the *Alberta Rules of Court*, Alta Reg 124/2010 authorize a single judge to consider an application to intervene and to impose conditions. As an exercise of discretion, intervenor status should be granted sparingly: *Telus Communications Inc. v. T.W.U.*, 2006 ABCA 297 (Alta. C.A.) at para 4, (2006), 401 A.R. 57 (Alta. C.A.) [*Telus]*; *Pedersen v. Van Thournout*, 2008 ABCA 192 (Alta. C.A.) at para 4, (2008), 432 A.R. 219 (Alta. C.A.) [*Pedersen*].

9 Generally, the Court must first consider the subject matter of the proceeding and then determine the proposed intervenor's interest in that subject matter: *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2005 ABCA 320 (Alta. C.A.) at para 5, (2005), 380 A.R. 301 (Alta. C.A.) [*Papaschase*]. A proposed intervenor's interest in the subject matter is determined by assessing the following considerations:

a. whether the proposed intervenor would be directly and "specially" affected by the outcome of the appeal or,

b. whether the proposed intervenor has special expertise or a unique perspective relating to the subject matter of the appeal that will assist the Court in its deliberations.

Papaschase at para 2; *Telus* at para 4; *Edmonton (City) v. Urban Development Institute*, 2014 ABCA 340 (Alta. C.A.) at para 8, (2014), 584 A.R. 255 (Alta. C.A.) [*Edmonton (City)*].

10 The following questions are also relevant to the consideration of whether an intervenor application ought to be granted:

1. Is the presence of the intervenor necessary for the court to properly decide the matter?

2. Might the intervenor's interest in the proceedings not be fully protected by the parties?

3. Will the intervention unduly delay the proceedings?

4. Will there possibly be prejudice to the parties if intervention is granted?

5. Will intervention widen the dispute between the parties?

6. Will the intervention transform the court into a political arena?

Pedersen at para 3; *Edmonton (City)* at paras 8-14; *Stewart Estate v. 1088294 Alberta Ltd.*, 2014 ABCA 222 (Alta. C.A.) at para 5, (2014), 577 A.R. 57 (Alta. C.A.); *Styles v. Alberta Investment Management Corp.*, 2016 ABCA 218 (Alta. C.A.) at paras 13-15.

11 Further, if intervenor status is granted, an intervenor may not raise or argue issues not raised by the parties to the appeal unless otherwise ordered: Rule 14.58(3). Finally, a proposed intervenor should define the question on which they wish to intervene with particularity: *R. v. N. (L.C.)*, 1996 ABCA 242 (Alta. C.A.) at para 16, (1996), 184 A.R. 359 (Alta. C.A.).

Analysis

12 The BCCLA concedes that it would not be "specially affected" by the outcome of this appeal and that its interest lies in "the proper development of the law raised by the issues on appeal . . . ". The BCCLA submits that it possesses special expertise in the arena of civil liberties, especially as it pertains to freedom of expression.

13 BCCLA senior counsel swore an affidavit in support of this application, in which it is explained that BCCLA has expertise in free expression and the application of the *Charter* to universities, stemming from litigating two freedom of expression cases against the University of Victoria. Further, more generally, the BCCLA has an extensive history of participating in s 2(b) *Charter* cases. The affiant confirmed the BCCLA's experience and competence as an intervenor, having intervened dozens of times at the Supreme Court of Canada and in other courts on issues that engage civil liberties.

14 The respondent University opposes the proposed intervention. The University argues that the BCCLA is not "specially affected" nor does it possess special expertise or insight necessary for this Court to decide the appeal. The appellants support the BCCLA's application.

15 Concerns about unduly delaying the proceedings, or prejudice, or any concern that the BCCLA would transform this Court into a political arena were not strongly pressed. Any concerns about timeliness, or widening of the issues or *lis* between the parties might best be addressed by conditions, if necessary. Thus, the crux of the matter is whether the BCCLA can offer a special expertise in the area of *Charter* rights that may be of assistance to the Court in its deliberations.

16 If granted intervenor status, the BCCLA proposes to make the following four submissions:

a. Universities perform the core public function of providing education;

b. The recent Supreme Court decisions in *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (S.C.C.) [*Loyola*], *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 (S.C.C.) [*TWU 1*], and*Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33 (S.C.C.) [*TWU 2*], have altered the *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12, [2012] 1 S.C.R. 395 (S.C.C.) [*Doré*] analysis;

c. The scope of the ss 2(b), (c) and (d) *Charter* rights at issue must be identified, considered and afforded substantial weight in light of the new *Doré/Loyola* test;

d. *Pridgen v. University of Calgary*, 2012 ABCA 139 (Alta. C.A.) [*Pridgen*] is not distinguishable from the present case.

17 I will discuss each of the areas in which the BCCLA asserts expertise.

a. Universities perform the core public function of providing education

18 I am satisfied that the BCCLA possesses special expertise regarding the highly complex issue of whether, and under what circumstances, a university can be characterized as exercising a government function. *BC Civil Liberties Assn. v.*

University of Victoria, 2016 BCCA 162 (B.C. C.A.) [*University of Victoria*], leave to appeal dismissed, 2016 CanLII 82919 [2016 CarswellBC 3414 (S.C.C.)] is factually very similar. I reject the University's contention that the BCCLA's expertise ought to be discounted because its position did not prevail, since it appears that Alberta cases which bore on the outcome were distinguished, *inter alia*, on the basis that they engaged Alberta legislation.

19 Further, I may properly consider the risk that a party may not fully protect the interests of the proposed intervenor: *Pedersen* at para 3. It appears that the appellants' articulation of a university's public function is narrower than that of the BCCLA; moreover, the BCCLA proposes to offer submissions on the relevance of *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545 (S.C.C.), a dated decision heavily relied upon by the British Columbia Court of Appeal in *University of Victoria*, but not addressed by the appellants.

20 Without saying more than is necessary to dispose of this application, I am satisfied that the BCCLA possesses special expertise sufficient to warrant granting leave to intervene on this issue.

b. The Doré analysis must be interpreted in light of recent Supreme Court decisions

21 As the University rightly points out, an intervenor's submissions are unnecessary where issues have received extensive Supreme Court and appellate guidance: see, for example, *Canadian Centre for Bio-Ethical Reform v. Grande Prairie (City)*, 2017 ABCA 280 (Alta. C.A.) at para 17. The issue the appellants' raised before the chambers judge, and again on appeal, does not benefit from a sustained and settled body of law. *Loyola*, *TWU 1*, and *TWU 2* from the Supreme Court of Canada are of recent vintage and binding appellate authority applying the "*Doré/Loyola* analysis" in light of these cases, is limited.

22 Although the University submits that the parties are "fully capable of discussing" this case law, the parties do not actually aid the Court in their submissions in this regard and the suggestion that this Court be provided last minute cases with no organized submissions to accompany them, is not the most efficient use of court resources.

23 I am satisfied that the panel of this Court hearing this aspect of the appeal would benefit from the BCCLA's submissions on the nuances of what appears to be a recently clarified *Doré/Loyola* analytical framework.

c. The scope of ss 2(b), (c), and (d) rights at issue must be identified, considered and afforded substantial weight in light of the new Doré/Loyola test

24 The BCCLA wishes to make submissions about whether the s 2(b) *Charter* rights asserted in the present case can be properly characterized as "positive" or "negative". I am satisfied that the BCCLA is capable of contributing to this Court's deliberations on this question, since the University asserts the rights are "positive" and the appellants make no express submissions thereon.

25 I also accept the University's objection, however, that any discussion of ss 2(c) and (d) *Charter* rights would unacceptably widen the scope of the appeal beyond what was raised by the parties. Therefore, the BCCLA will not be permitted leave to make any submissions relating to *Charter* rights other than freedom of expression under s 2(b) of the *Charter*.

d. Pridgen is not distinguishable from the present case

26 Relying heavily on *Pridgen*, the appellants acknowledge that the *Charter* only applies to universities under certain circumstances, but argue that the Security Costs Decision was made in such a circumstance. Specifically, the appellants argue that participation in university society is an important aspect of the *Post-Secondary Learning Act*, SA 2003, c P-19.5, and the delegation of government authority to the University. The appellants suggest that the University's ability to regulate such activities does not form part of its day-to-day operations such that it falls outside of *Charter* scrutiny.

27 Regardless of the *Charter*'s applicability, the appellants argue in the alternative that their actions were protected by the common law right to freedom of speech and expression.

28 With respect to the reasonableness of the Security Costs Decision itself, the appellants argue that chambers judge made the same error as the University by attributing the cause of danger to the appellants' event when that danger ought to have been attributed to the people who opposed the appellants' event and displays.

29 The parties already discuss *Pridgen* extensively in their submissions. To the extent that the parties do not address the disciplinary character of *Pridgen*, I agree with the University that this is not a matter of contention between the parties. Consequently, granting permission to intervene on this point would unacceptably widen the scope of the appeal.

30 In any event, arguing that an authority is distinguishable from the present case is well within the purview of the parties and leads me to conclude that the BCCLA does not possess any special expertise or insight on this question that would benefit the Court.

31 The BCCLA is denied permission to intervene on the question of whether the disciplinary character of the proceedings at issue in *Pridgen* is a proper basis for distinguishing it from the present case.

Conclusion

32 I am satisfied that the BCCLA has special expertise on this matter that would benefit the Court on appeal. The BCCLA is granted leave to intervene and to make submissions with respect to the following:

a. Universities perform the core public function of providing education;

b. The recent Supreme Court decisions in *Loyola*, *TWU 1*, and *TWU 2*, have altered the *Doré* analysis;

c. The scope of the s 2(b) *Charter* right at issue must be identified, considered and afforded substantial weight in light of the new *Doré/Loyola* test.

33 The BCCLA shall file submissions not to exceed 15 pages, no later than 7 calendar days after the date of issuance of this decision, and shall effect proper service on the same day. The respondent, the Governors of the University of Alberta, shall file its Reply no later than 10 calendar days after the date of service upon it of the BCCLA's submissions.

34 The time limit for the BCCLA's oral submissions shall be 25 minutes. Failing agreement, costs of this application and the appeal shall be heard and determined by the panel at the conclusion of the appeal.

35 I invite immediate contact with the Case Management Office if I have omitted to provide any necessary direction.

Application granted in part.

TAB 5

Mikisew Cree First Nation v. Canada (Governor General in Council)

2018 CarswellNat 5579, 2018 CarswellNat 5580, 2018 SCC 40, 2018 CSC 40, [2018] 2 S.C.R. 765, [2019] 1 C.N.L.R. 277, 20 C.E.L.R. (4th) 1, 296 A.C.W.S. (3d) 451, 420 C.R.R. (2d) 285, 426 D.L.R. (4th) 647

Chief Steve Courtoreille on behalf of himself and the members of the Mikisew First Nation (Appellant) and Governor General in Council, Minister of Aboriginal Affairs and Northern Development, Minister of Finance, Minister of the Environment, Minister of Fisheries and Oceans, Minister of Transport and Minister of Natural Resources (Respondents) and Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Champagne and Aishihik First Nations, Kwanlin Dün First Nation, Little Salmon Carmacks First Nation, First Nation of Na-Cho Nyak Dun, Teslin Tlingit Council, First Nations of the Maa-nulth Treaty Society, Assembly of First Nations, Grand Council of the Crees (Eeyou Istchee), Cree Nation Government, Manitoba Metis Federation Inc., Advocates for the Rule of Law, Federation of Sovereign Indigenous Nations and Gitanyow Hereditary Chiefs (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe, Martin JJ.

Heard: January 15, 2018
Judgment: October 11, 2018
Docket: 37441

Proceedings: affirming *Canada (Governor General in Council) v. Mikisew Cree First Nation* (2016), (sub nom. *Mikisew Cree First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development)*) [2017] 1 C.N.L.R. 354, 5 C.E.L.R. (4th) 302, [2016] F.C.J. No. 1389, 2016 CarswellNat 6599, 2016 FCA 311, [2017] 3 F.C.R. 298, 2016 CarswellNat 9957, 2016 CAF 311, 405 D.L.R. (4th) 721, J.D. Denis Pelletier J.A., Wyman W. Webb J.A., Yves de Montigny J.A. (F.C.A.); reversing *Mikisew Cree First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development)* (2014), (sub nom. *Mikisew Cree First Nation v. Governor General in Council)* 470 F.T.R. 243, 2014 CarswellNat 8413, 2014 CF 1244, 2014 CarswellNat 5539, 2014 FC 1244, 93 C.E.L.R. (3d) 199, [2015] 1 C.N.L.R. 243, Roger T. Hughes J. (F.C.)

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Brandon Kain, Bryn Gray, Asher Honickman, for Intervener, Advocates, for the Rule of Law
Victor Carter, Allison Lachance, Darryl Korell, for Intervener, Federation of Sovereign Indigenous Nations
Karenna Williams, Jeff Huberman, for Intervener, Gitanyow Hereditary Chiefs

Related Abridgment Classifications

Aboriginal and Indigenous law
I Constitutional issues
I.8 Miscellaneous

Environmental law
I Constitutional issues
I.2 Jurisdiction to enact environmental legislation
I.2.a General principles

Headnote

Aboriginal and indigenous law --- Constitutional issues — Miscellaneous
Duty to consult — Ancestors of First Nation entered into Treaty No. 8 ceding territory to Crown in exchange for certain guarantees, including right to hunt, trap, and fish — Parliament enacted legislation affecting Canada's environmental laws and potentially impacting First Nation's rights without consulting First Nation at any stage — Trial judge allowed First Nation's application for judicial review, finding that Ministers had duty to give First Nation notice and reasonable opportunity to make submissions on introduction of bills — Federal Court of Appeal allowed Ministers' appeal, finding that importing duty to consult into legislative process offended separation of powers doctrine and principle of parliamentary privilege and that judicial review was only available with respect to decisions of federal board, commission or other tribunal — First Nation appealed — Appeal dismissed — Process of developing, passing and enacting legislation was not Crown conduct triggering duty to consult and duty was not to be extended to legislative process — In duty to consult context, Crown conduct only included executive action or action taken on behalf of executive — Federal Court only had jurisdiction to judicially review actions of federal board, commission or other tribunal, not parliamentary activities — When developing legislation, cabinet and ministers act pursuant to powers under Pt. IV of Constitution Act, 1867, not statutory powers — First Nation's treaty rights were protected under s. 35 of Constitution Act, 1982, and Crown's dealings with those rights engaged honour of Crown, but that did not mean honour gave rise to justiciable duty to consult when ministers developed legislation potentially adversely affecting treaty rights — Parliamentary sovereignty mandated that legislature could make or unmake any law it wished, within confines of its constitutional authority — Imposing consultation obligations on elected legislature might constrain it in pursuing its mandate, undermine its ability to act as voice of electorate, and lead to significant judicial incursion into workings of legislature — Duty to consult was not only means to give effect to honour of Crown when rights might be adversely affected by legislation, conclusions did not apply to development of subordinate legislation which was executive conduct, and conclusions did not affect enforceability of treaty provisions implemented through legislation that explicitly required pre-legislative consultation — Crown was not absolved of duty to act honourably and application of s. 35 of Constitution Act, 1982 was not limited.

Environmental law --- Constitutional issues — Jurisdiction to enact environmental legislation — General principles
Duty to consult — First Nation entered into Treaty No. 8 ceding territory to Crown in exchange for certain guarantees, including right to hunt, trap, and fish — Parliament enacted legislation affecting Canada's environmental laws and potentially impacting First Nation's rights without consulting First Nation at any stage — Trial judge allowed First Nation's application for judicial review, finding that Ministers had duty to give First Nation notice and reasonable opportunity to make submissions on introduction of bills — Federal Court of Appeal allowed Ministers' appeal, finding that importing duty to consult into legislative process offended separation of powers doctrine and principle of parliamentary privilege and that judicial review was only available with respect to decisions of federal board, commission or other tribunal — First Nation appealed — Appeal dismissed — Process of developing, passing and enacting legislation was not Crown conduct triggering duty to consult and duty was not to be extended to legislative process — In duty to consult context, Crown conduct only included executive action or action taken on behalf of executive — Federal Court only had jurisdiction to judicially review actions of federal board, commission or other tribunal, not parliamentary activities — When developing legislation, cabinet and ministers act pursuant to powers under Pt. IV of Constitution Act, 1867, not statutory powers — First Nation's treaty rights were protected under s. 35 of Constitution Act, 1982, and Crown's dealings with those rights engaged honour of Crown, but that did not mean honour gave rise to justiciable duty to consult when ministers developed legislation potentially

adversely affecting treaty rights — Parliamentary sovereignty mandated that legislature could make or unmake any law it wished, within confines of its constitutional authority — Imposing consultation obligations on elected legislature might constrain it in pursuing its mandate, undermine its ability to act as voice of electorate, and lead to significant judicial incursion into workings of legislature — Duty to consult was not only means to give effect to honour of Crown when rights might be adversely affected by legislation, conclusions did not apply to development of subordinate legislation which was executive conduct, and conclusions did not affect enforceability of treaty provisions implemented through legislation that explicitly required pre-legislative consultation — Crown was not absolved of duty to act honourably and application of s. 35 of Constitution Act, 1982 was not limited.

Droit autochtone --- Questions d'ordre constitutionnel — Divers
Obligation de consulter — Ancêtres de la Première Nation ont signé le Traité no 8 en vertu duquel ils cédaient un territoire à la Couronne en échange de certaines garanties, dont celle que leurs droits de chasse, de piégeage et de pêche seraient protégés — Parlement a adopté une loi ayant un impact sur les lois canadiennes en matière d'environnement et susceptible de viser les droits de la Première Nation sans que celle-ci n'ait été consultée — Juge de première instance a accordé la demande en contrôle judiciaire déposée par la Première Nation, estimant que les ministres avaient l'obligation d'aviser la Première Nation et de lui donner une chance raisonnable de faire des observations concernant le dépôt des projets de loi — Cour d'appel fédérale a accueilli l'appel interjeté par les ministres, estimant que l'introduction d'une obligation de consultation dans le processus législatif portait atteinte aux principes de la séparation des pouvoirs et du privilège parlementaire et que seules les décisions d'un office fédéral étaient susceptibles de faire l'objet d'un contrôle — Première Nation a formé un pourvoi — Pourvoi rejeté — Processus relatif au développement et l'adoption d'une loi n'était pas une conduite de la Couronne susceptible de déclencher l'obligation de consulter et cette obligation ne pouvait pas être appliquée à ce processus — Dans le contexte de l'obligation de consultation, la conduite de la Couronne se limitait à l'action exécutive ou à l'action prise au nom de la Couronne — Seules les actions d'un office fédéral, et non pas les activités parlementaires, étaient susceptibles de faire l'objet d'un contrôle judiciaire par la Cour fédérale — Au moment d'élaborer une loi, le Cabinet et les ministres agissent plutôt en vertu des pouvoirs qui leur sont dévolus par la partie IV de la Loi constitutionnelle de 1867 et non en vertu de pouvoirs statutaires — Droits issus de traités de la Première Nation étaient protégés par l'art. 35 de la Loi constitutionnelle de 1982 et les actes de la Couronne touchant ces droits engageaient l'honneur de la Couronne, mais cela ne signifiait pas que l'honneur de la Couronne déclenchait une obligation de consulter justiciable, lorsque des ministres élaborent des projets de loi susceptibles d'avoir un effet préjudiciable sur les droits issus de traités de la Première Nation — Principe de la souveraineté parlementaire supposait que l'Assemblée législative pouvait adopter ou abroger une loi à son gré, dans les limites des pouvoirs que lui confère la Constitution — Imposer des obligations de consultation à une assemblée législative élue risquerait de lui nuire dans l'accomplissement de son mandat, miner sa capacité de se faire la voix de l'électorat et donnerait lieu à une ingérence importante des tribunaux dans les travaux du législateur — Obligation de consulter n'était pas le seul moyen de donner effet au principe de l'honneur de la Couronne lorsque la loi est susceptible d'avoir un effet préjudiciable sur des droits, les conclusions ne s'appliquaient pas à l'élaboration de mesures législatives subordonnées puisqu'une telle conduite relevait du pouvoir exécutif, et les conclusions ne visaient pas l'application des dispositions d'un traité mis en oeuvre au moyen d'une loi qui exigeait explicitement qu'une consultation soit effectuée avant l'adoption d'une loi — Couronne n'était pas relevée de son obligation d'agir honorablement, et l'application de l'art. 35 de la Loi constitutionnelle de 1982 n'était pas limitée.

Droit de l'environnement --- Questions constitutionnelles — Compétence pour adopter une législation en matière d'environnement — Principes généraux
Obligation de consulter — Première Nation a signé le Traité no 8 en vertu duquel ils cédaient un territoire à la Couronne en échange de certaines garanties, dont celle que leurs droits de chasse, de piégeage et de pêche seraient protégés — Parlement a adopté une loi ayant un impact sur les lois canadiennes en matière d'environnement et susceptible de viser les droits de la Première Nation sans que celle-ci n'ait été consultée — Juge de première instance a accordé la demande en contrôle judiciaire déposée par la Première Nation, estimant que les ministres avaient l'obligation d'aviser la Première Nation et de lui donner une chance raisonnable de faire des observations concernant le dépôt des projets de loi — Cour d'appel fédérale a accueilli l'appel interjeté par les ministres, estimant que l'introduction d'une obligation de consultation dans le processus législatif portait atteinte aux principes de la séparation des pouvoirs et du privilège parlementaire et que seules les décisions d'un office fédéral étaient susceptibles de faire l'objet d'un contrôle — Première Nation a formé un pourvoi — Pourvoi rejeté — Processus relatif au développement et l'adoption d'une loi n'était pas une conduite de la Couronne susceptible de déclencher l'obligation de consulter et cette obligation ne pouvait pas être appliquée à ce processus — Dans le contexte de l'obligation de consultation, la conduite de la Couronne se limitait à l'action exécutive ou à l'action prise au nom de la Couronne — Seules les actions d'un office fédéral, et non pas les activités parlementaires, étaient susceptibles de faire l'objet

d'un contrôle judiciaire par la Cour fédérale — Au moment d'élaborer une loi, le Cabinet et les ministres agissent plutôt en vertu des pouvoirs qui leur sont dévolus par la partie IV de la Loi constitutionnelle de 1867 et non en vertu de pouvoirs statutaires — Droits issus de traités de la Première Nation étaient protégés par l'art. 35 de la Loi constitutionnelle de 1982 et les actes de la Couronne touchant ces droits engageaient l'honneur de la Couronne, mais cela ne signifiait pas que l'honneur de la Couronne déclenchait une obligation de consulter justiciable, lorsque des ministres élaborent des projets de loi susceptibles d'avoir un effet préjudiciable sur les droits issus de traités de la Première Nation — Principe de la souveraineté parlementaire supposait que l'assemblée législative pouvait adopter ou abroger une loi à son gré, dans les limites des pouvoirs que lui confère la Constitution — Imposer des obligations de consultation à une assemblée législative élue risquerait de lui nuire dans l'accomplissement de son mandat, miner sa capacité de se faire la voix de l'électorat et donnerait lieu à une ingérence importante des tribunaux dans les travaux du législateur — Obligation de consulter n'était pas le seul moyen de donner effet au principe de l'honneur de la Couronne lorsque la loi est susceptible d'avoir un effet préjudiciable sur des droits, les conclusions ne s'appliquaient pas à l'élaboration de mesures législatives subordonnées puisqu'une telle conduite relevait du pouvoir exécutif, et les conclusions ne visaient pas l'application des dispositions d'un traité mis en oeuvre au moyen d'une loi qui exigeait explicitement qu'une consultation soit effectuée avant l'adoption d'une loi — Couronne n'était pas relevée de son obligation d'agir honorablement et l'application de l'art. 35 de la Loi constitutionnelle de 1982 n'était pas limitée.

The ancestors of the appellant First Nation entered into Treaty No. 8 ceding territory to the Crown in exchange for certain guarantees, including the right to hunt, trap, and fish. Parliament enacted legislation affecting Canada's environmental laws and potentially impacting the First Nation's rights without consulting the First Nation at any stage. The First Nation's application for judicial review under the Federal Courts Act was allowed by a Federal Court judge who found that the Ministers developing and passing the legislation had a duty to give the First Nation notice and a reasonable opportunity to make submissions on the introduction of the bills. The Federal Court of Appeal allowed the Ministers' appeal, finding that importing a duty to consult into the legislative process offended the separation of powers doctrine and the principle of parliamentary privilege, and that judicial review was only available with respect to decisions of a federal board, commission or other tribunal, not with respect to decisions of ministers and the Governor General in Council acting in a legislative capacity. The First Nation appealed.

Held: The appeal was dismissed.

Per Karakatsanis J. (Wagner C.J.C., Gascon J. concurring): The process of developing, passing and enacting legislation was not Crown conduct triggering a duty to consult and the duty to consult was not to be extended to that process. In the duty to consult context, Crown conduct only included executive action or action taken on behalf of the executive. The Federal Court only had jurisdiction to judicially review the actions of a federal board, commission or other tribunal, not parliamentary activities. When developing legislation, cabinet and ministers act pursuant to their powers under Pt. IV of the Constitution Act, 1867, not statutory powers. The First Nation's treaty rights were protected under s. 35 of the Constitution Act, 1982, and the Crown's dealings with those rights engaged the honour of the Crown, but that did not mean the honour gave rise to a justiciable duty to consult when the ministers developed legislation potentially adversely affecting the First Nation's treaty rights. Parliamentary sovereignty mandated that the legislature could make or unmake any law it wished, within the confines of its constitutional authority. Imposing consultation obligations on an elected legislature might constrain it in pursuing its mandate, undermine its ability to act as a voice of the electorate, and lead to a significant judicial incursion into the workings of the legislature. The duty to consult was not the only means to give effect to the honour of the Crown when rights might be adversely affected by the legislation. The court's conclusions did not apply to the development of subordinate legislation as such conduct was executive, its conclusions did not affect the enforceability of treaty provisions implemented through legislation that explicitly required pre-legislative consultation, and its conclusions did mean that the Crown was absolved of its duty to act honourably or limit the application of s. 35 of the Constitution Act, 1982. Aboriginal groups would not be able to challenge legislation on the basis the duty to consult was not fulfilled, but the duty to consult was not the only means to give effect to the honour of the Crown.

Per Abella J. (concurring) (Martin J. concurring): The judicial review under the Federal Courts Act is not available for the actions of federal ministers in the parliamentary process, but the enactment of legislation with the potential to adversely affect rights protected by s. 35 of the Constitution Act, 1982 does give rise to a duty to consult, and legislation enacted in breach of that duty may be challenged directly for relief. The honour of the Crown gives rise to a duty to consult and accommodate that applies to all contemplated government conduct with the potential to adversely impact asserted or established Aboriginal and treaty rights, including legislative action. The duty arises based on the effect, not the source, of the government action. As a

constitutional imperative, the honour of the Crown cannot be undermined, let alone extinguished, by the legislature's assertion of parliamentary sovereignty. Indigenous groups will be entitled to declaratory relief where the Crown has failed to consult during the process leading to the enactment of legislation that could adversely affect its interests. Such a remedy had the practical effect of clarifying the obligations and rights of both parties in their special relationship and the process of reconciliation.

Per Brown J. (concurring): The question of whether a court may impose a duty to consult upon the process by which legislative power was exercised was a question of constitutionality going to the limits of judicial power. The majority left open the possibility that legislation which did not infringe s. 35 rights but may adversely affect them, might be found to be inconsistent with the honour of the Crown, undercutting the same principles which led the majority to conclude that imposing a duty to consult would be inappropriate in these circumstances. The majority has thrown this area of law into uncertainty by raising the possibility, without having been asked to do so, that validly enacted and constitutionally compliant legislation which has not or could not be the subject of a successful s. 35 infringement claim can nonetheless be declared by a court to be not consistent with the honour of the Crown.

Per Rowe J. (concurring) (Moldaver, Côté JJ. concurring): Excluding the duty to consult as a procedural requirement in the legislative process does not leave Aboriginal claimants without effective means to have their rights vindicated by the courts. Recognizing a constitutionally mandated duty to consult with Indigenous peoples during the process of preparing legislation would be highly disruptive to the carrying out of that work, and the courts should not be called upon to supervise interactions between Indigenous parties and those preparing legislation.

Les ancêtres de la Première Nation appelante ont signé le Traité no 8 en vertu duquel ils cédaient un territoire à la Couronne en échange de certaines garanties, dont celle que leurs droits de chasse, de piégeage et de pêche seraient protégés. Le Parlement a adopté une loi ayant un impact sur les lois canadiennes en matière d'environnement et susceptible de viser les droits de la Première Nation sans que celle-ci n'ait été consultée. La demande en contrôle judiciaire déposée par la Première Nation en vertu de la Loi sur les Cours fédérales a été accordée par un juge de la Cour fédérale qui a conclu que les ministres ayant élaboré et adopté la loi en question avaient l'obligation d'aviser la Première Nation et de lui donner une chance raisonnable de faire des observations concernant le dépôt des projets de loi. La Cour d'appel fédérale a accueilli l'appel interjeté par les ministres, estimant que l'introduction d'une obligation de consultation dans le processus législatif portait atteinte aux principes de la séparation des pouvoirs et du privilège parlementaire et que seules les décisions d'un office fédéral étaient susceptibles de faire l'objet d'un contrôle judiciaire et non pas celles des ministres et du Gouverneur en conseil agissant dans le cadre de leur compétence en matière législative. La Première Nation a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Karakatsanis, J. (Wagner, J.C.C., Gascon, J., souscrivant à son opinion) : Le processus relatif au développement et l'adoption d'une loi n'était pas une conduite de la Couronne susceptible de déclencher l'obligation de consulter et cette obligation ne pouvait pas être appliquée à ce processus. Dans le contexte de l'obligation de consultation, la conduite de la Couronne se limitait à l'action exécutive ou à l'action prise au nom de la Couronne. Seules les actions d'un office fédéral, et non pas les activités parlementaires, étaient susceptibles de faire l'objet d'un contrôle judiciaire par la Cour fédérale. Au moment d'élaborer une loi, le Cabinet et les ministres agissent plutôt en vertu des pouvoirs qui leur sont dévolus par la partie IV de la Loi constitutionnelle de 1867 et non en vertu de pouvoirs statutaires. Les droits issus de traités de la Première Nation étaient protégés par l'art. 35 de la Loi constitutionnelle de 1982 et les actes de la Couronne touchant ces droits engageaient l'honneur de la Couronne, mais cela ne signifiait pas que l'honneur de la Couronne déclenchait une obligation de consulter justiciable, lorsque des ministres élaborent des projets de loi susceptibles d'avoir un effet préjudiciable sur les droits issus de traités de la Première Nation. Le principe de la souveraineté parlementaire supposait que l'Assemblée législative pouvait adopter ou abroger une loi à son gré, dans les limites des pouvoirs que lui confère la Constitution. Imposer des obligations de consultation à une assemblée législative élue risquerait de lui nuire dans l'accomplissement de son mandat, miner sa capacité de se faire la voix de l'électorat et donnerait lieu à une ingérence importante des tribunaux dans les travaux du législateur. L'obligation de consulter n'était pas le seul moyen de donner effet au principe de l'honneur de la Couronne lorsque la loi est susceptible d'avoir un effet préjudiciable sur des droits. Les conclusions de la Cour ne s'appliquaient pas à l'élaboration de mesures législatives subordonnées puisqu'une telle conduite relevait du pouvoir exécutif, ses conclusions ne visaient pas l'application des dispositions d'un traité mis en oeuvre au moyen d'une loi qui exigeait explicitement qu'une consultation soit effectuée avant l'adoption d'une loi, et ses conclusions ne signifiaient pas que la Couronne était relevée de son obligation d'agir honorablement ni ne restreignaient l'application de l'art. 35 de la Loi constitutionnelle de 1982. Même si un groupe

32 For the reasons that follow, I conclude that the law-making process — that is, the development, passage, and enactment of legislation — does not trigger the duty to consult. The separation of powers and parliamentary sovereignty dictate that courts should forebear from intervening in the law-making process. Therefore, the duty to consult doctrine is ill-suited for legislative action.

33 The Mikisew ask us to recognize that the duty to consult applies to ministers in the development of legislation. There is no doubt overlap between executive and legislative functions in Canada; Cabinet, for instance, is "a combining committee — a *hyphen* which joins, a *buckle* which fastens, the legislative part of the state to the executive part of the state" (*Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525 (S.C.C.), at p. 559, quoting W. Bagehot, *The English Constitution* (1872), at p. 14 (emphasis in original)). I do not accept, however, the Mikisew's submission that ministers act in an executive capacity when they develop legislation. The legislative development at issue was not conducted pursuant to any statutory authority; rather, it was an exercise of legislative powers derived from Part IV of the *Constitution Act, 1867*. As the majority of the Court of Appeal noted, the departmental statutes relied on by the Mikisew to show that the Ministers acted in an executive capacity when developing legislation do not "refer even implicitly to ... the development of legislation for introduction into Parliament" (C.A. reasons, at para. 28; *Department of Indian Affairs and Northern Development Act*, R.S.C. 1985, c. I-6; *Department of the Environment Act*, R.S.C. 1985, c. E-10; *Department of Fisheries and Oceans Act*, R.S.C. 1985, c. F-15; *Department of Transport Act*, R.S.C. 1985, c. T-18; *Department of Natural Resources Act*, S.C. 1994, c. 41; *Financial Administration Act*, R.S.C. 1985, c. F-11).

34 The development of legislation by ministers is part of the law-making process, and this process is generally protected from judicial oversight. Further, this Court's jurisprudence makes clear that, if Cabinet is restrained from introducing legislation, then this effectively restrains Parliament (*Canada Assistance Plan*, at p. 560). This Court has emphasized the importance of safeguarding the law-making process from judicial supervision on numerous occasions. In *Resolution to amend the Constitution*, [1981] 1 S.C.R. 753 (S.C.C.), a majority of the Court stated that "[c]ourts come into the picture when legislation is enacted and not before" (p. 785). In *Canada Assistance Plan*, the Court underscored that "[t]he formulation and introduction of a bill are part of the legislative process with which the courts will not meddle" (p. 559).

35 Longstanding constitutional principles underlie this reluctance to supervise the law-making process. The separation of powers is "an essential feature of our constitution" (*Wells v. Newfoundland*, [1999] 3 S.C.R. 199 (S.C.C.), at para. 52; see also *R. v. Imona-Russell*, 2013 SCC 43, [2013] 3 S.C.R. 3 (S.C.C.), at para. 27). It recognizes that each branch of government "will be unable to fulfill its role if it is unduly interfered with by the others" (*Criminal Lawyers' Association*, at para. 29). It dictates that "the courts and Parliament strive to respect each other's role in the conduct of public affairs"; as such, there is no doubt that Parliament's legislative activities should "proceed unimpeded by any external body or institution, including the courts" (*Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667 (S.C.C.), at para. 20). Recognizing that a duty to consult applies during the law-making process may require courts to improperly trespass onto the legislature's domain.

36 Parliamentary sovereignty mandates that the legislature can make or unmake any law it wishes, within the confines of its constitutional authority. While the adoption of the *Canadian Charter of Rights and Freedoms* transformed the Canadian system of government "to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy" (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.), at para. 72), democracy remains one of the unwritten principles of the Constitution (*Secession Reference*, at paras. 61-69). Recognizing that the elected legislature has specific consultation obligations may constrain it in pursuing its mandate and therefore undermine its ability to act as the voice of the electorate.

37 Parliamentary privilege, a related constitutional principle, also demonstrates that the law-making process is largely beyond the reach of judicial interference. It is defined as "the sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, without which they could not discharge their functions" (*Vaid*, at para. 29(2)). Once a category of parliamentary privilege is established, "it is for Parliament, not the courts, to determine whether in a particular case the *exercise* of the privilege is necessary or appropriate" (*Vaid*, at para. 29(9) and paras. 47-48 (emphasis in original)). Canadian jurisprudence makes clear that parliamentary privilege protects control over "debates or proceedings in Parliament" (*Vaid*, at para. 29(10); J. P. J. Maingot, *Parliamentary Immunity in Canada* (2016), at pp. 166-71; see also *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 (S.C.C.), at p. 385; P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at s. 1.7; Article 9 of the U.K. *Bill of Rights* of 1689). The existence of this privilege generally prevents courts from enforcing

114 Mikisew Cree First Nation's application for judicial review therefore impugns the conduct of ministers who were acting as members of Parliament and who were, like all members of Parliament, empowered to legislate by Part IV of the *Constitution Act, 1867*. This fortifies my conclusion that the Federal Court did not have jurisdiction to consider Mikisew Cree First Nation's application for judicial review.

115 Even absent this jurisdictional bar, however, the separation of powers, parliamentary privilege, the scope of judicial review properly understood and this Court's jurisprudence on the duty to consult all lead me to conclude that Mikisew Cree First Nation's application for judicial review cannot succeed.

B. The Formulation and Introduction of Bills Is Protected From Judicial Review by the Separation of Powers and by Parliamentary Privilege

(1) Separation of Powers

116 There was disagreement, before this Court and the Court of Appeal, about the scope of activity which is protected by the separation of powers and by parliamentary privilege. Mikisew Cree First Nation argues that, while the formulation and introduction of a bill before Parliament is unreviewable legislative action, the development of policies that inform the formulation and introduction of a bill is carried out by public servants at the direction of ministers, and must therefore be viewed as executive conduct that is judicially reviewable. By contrast, Canada contends that the entire law-making process — from initial policy development to royal assent — is legislative activity that cannot be supervised by the courts.

117 I agree with the majority of the Court of Appeal that the entire law-making process — from initial policy development to and including royal assent — is an exercise of legislative power which is immune from judicial interference. As this Court explained in *R. v. Imona-Russell*, 2013 SCC 43, [2013] 3 S.C.R. 3 (S.C.C.), at para. 28, the making of "policy choices" is a legislative function, while the implementation and administration of those choices is an executive function. This precludes judicial imposition of a duty to consult in the course of the law-making process.

118 The separation of powers protects the process of legislative policy-making by Cabinet and the preparation and introduction of bills for consideration by Parliament (and provincial legislatures) from judicial review. Again in *Criminal Lawyers' Association*, at para. 28, this Court recognized each branch of the Canadian state as having a distinct role:

> The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.

In order for each branch to fulfill its role, it must not be "unduly interfered with by the others" (*Criminal Lawyers' Association*, at para. 29).

119 Admittedly, the separation of powers in our parliamentary system "is not a rigid and absolute structure" (*Wells v. Newfoundland*, [1999] 3 S.C.R. 199 (S.C.C.), at para. 54) which follows neatly drawn lines. Ministers of the Crown play an essential role in, and are an integral part of, the legislative process (*Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525 (S.C.C.), at p. 559). The fact that "except in certain rare cases, the executive frequently and *de facto* controls the legislature" (*Wells*, at para. 54) does not, however, mean that ministers' dual membership in the executive and legislative branches of the Canadian state renders their corresponding executive and legislative roles indistinguishable for the purposes of judicial review. In *Re Canada Assistance Plan*, at p. 559, this Court *rejected* British Columbia's argument that, while parliamentary privilege protected internal parliamentary procedures, the doctrine of legitimate expectations could nevertheless apply to the executive, so as to preclude it from developing and introducing the impugned bill: "The formulation and introduction of a bill", the Court said, "are part of the legislative process with which the courts will not meddle.... [I]t is not the place of the courts to interpose further procedural requirements in the legislative process."

120 As a matter of applying this Court's jurisprudence, then, the legislative process begins with a bill's formative stages, even where the bill is developed by ministers of the Crown. While a minister acts in an executive capacity when exercising

statutory powers to advance government policy, that is not what happened here. The named Ministers took a set of policy decisions that eventually led to the drafting of a legislative proposal which was submitted to Cabinet. This ultimately led to the formulation and introduction of the omnibus bills in the House of Commons. All of the impugned actions form part of the legislative process of introducing bills in Parliament and were taken by the Ministers acting in a legislative capacity.

121 Moreover, the impugned actions in this case did not become "executive" as opposed to "legislative" simply because they were carried out by, or with the assistance of, public servants. Public servants making policy recommendations prior to the formulation and introduction of a bill are not "executing" existing legislative policy or direction. Their actions, rather, are directed to informing potential changes to legislative policy and are squarely legislative in nature.

(2) Parliamentary Privilege

122 Imposing a duty to consult with respect to legislative policy development would also be contrary to parliamentary privilege, understood as freedom from interference with "the parliamentary work of a Member of Parliament — *i.e.*, any of the Member's activities that *have a connection* with a proceeding in Parliament" (J. P. J. Maingot, *Parliamentary Immunity in Canada* (2016), at p. 16 (emphasis added)). This is no anachronism or technical nicety. Parliamentary privilege is "the necessary immunity that the law provides for Members of Parliament ... in order for these legislators to do their legislative work, 'including the assembly's work in holding the government to account'" (Maingot, at p. 15, citing *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667 (S.C.C.), at para. 46). Since "holding the government to account" is the *raison d'être* of Parliament (Maingot, at p. 317, citing W. Gladstone, U.K. House of Commons Debates (Hansard), January 29, 1855, at p. 1202; see also *Vaid*, at para. 46), parliamentary privilege is therefore essential to allowing Parliament to perform its constitutional functions. As this Court said in *Re Canada Assistance Plan*, at p. 560, "[a] restraint ... in the introduction of legislation is a fetter on the sovereignty of Parliament itself." Parliament therefore has the right to "exercise unfettered freedom in the formulation, tabling, amendment, and passage of legislation" (*Galati v. Johnston*, 2015 FC 91, [2015] 4 F.C.R. 3 (F.C.), at para. 34).

123 I acknowledge that parliamentary privilege operates within certain constraints imposed by the Constitution of Canada. For example, in *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 (S.C.C.), the Court held that s. 23 of the *Manitoba Act, 1870*, S.C. 1870, c. 3, entrenches a mandatory requirement to enact, print and publish provincial statutes in both official languages. In doing so, it imposed a constitutional duty on the Manitoba Legislature with respect to the manner and form by which legislation could be validly enacted. Other manner and form requirements are contained in Part IV of the *Constitution Act, 1867* (for example, in s. 48 ("Quorum of House of Commons") and s. 49 ("Voting in House of Commons"), and in s. 52(1) of the *Constitution Act, 1982*).

124 Mikisew Cree First Nation argues that s. 35 of the *Constitution Act, 1982* also creates a manner and form requirement which applies to the legislative process in the form of a constitutional and justiciable duty to consult. But the duty to consult is distinct from the constitutionally mandated manner and form requirements with which Parliament must comply in order to enact valid legislation. Applied to the exercise of legislative power, it is a claim *not* about the *manner and form* of enactment, but about the *procedure* of (or leading to) enactment. And, as this Court said in *Authorson (Litigation Guardian of) v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40 (S.C.C.), at para. 37, "the only procedure due any citizen of Canada is that proposed legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent". In a similar vein, although legislation which substantially interferes with the right to collective bargaining protected by s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* can be declared invalid, "[l]egislators are not bound to consult with affected parties before passing legislation" (*Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 (S.C.C.), at para. 157). In short, while the Constitution's status as the supreme law of Canada operates to render of no force and effect enacted legislation that is inconsistent with its provisions, it does not empower plaintiffs to override parliamentary privilege by challenging the process by which legislation was formulated, introduced or enacted.

125 Understanding the development and discussion of policy options related to the development and introduction of bills as being legislative in nature is most consistent with our law's understanding of the scope of judicial review (in the sense of judicial review for constitutionality, as opposed to judicial review of administrative action). Judicial review is "the power to determine whether [a] particular *law* is valid or invalid" (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 15-2 (emphasis added)). It therefore contemplates review of enacted legislation for constitutional compliance and does not, as

TAB 6

1998 CarswellNat 1299
Supreme Court of Canada

Reference re Secession of Quebec

1998 CarswellNat 1299, 1998 CarswellNat 1300, [1998] 2 S.C.R. 217, [1998] S.C.J. No. 61, 161 D.L.R. (4th) 385, 228 N.R. 203, 55 C.R.R. (2d) 1, 81 A.C.W.S. (3d) 798, J.E. 98-1716

In the matter of section 53 of the Supreme Court Act, R.S.C., 1985, c. S-26

In the matter of a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, as set out in Order in Council P.C. 1996-1497, dated the 30th day of September, 1996

Lamer C.J.C., L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache, Binnie JJ.

Heard: February 16, 17, 18 and 19, 1998
Judgment: August 20, 1998*
Docket: 25506

Counsel: *L. Yves Fortier, Q.C.*, *Pierre Bienvenu*, *Warren J. Newman*, *Jean-Marc Aubry, Q.C.*, and *Mary Dawson, Q.C.*, for the Attorney General of Canada.
André Joli-Coeur, *Michel Paradis*, *Louis Masson*, *André Binette*, *Clément Samson*, *Martin Bédard* and *Martin St-Amant*, for the *amicus curiae*.
Donna J. Miller, Q.C., and *Deborah L. Carlson*, for the intervener the Attorney General of Manitoba.
Graeme G. Mitchell and *John D. Whyte, Q.C.*, for the intervener the Attorney General for Saskatchewan.
Bernard W. Funston, for the intervener the Minister of Justice of the Northwest Territories.
Stuart J. Whitley, Q.C., and *Howard L. Kushner*, for the intervener the Minister of Justice for the Government of the Yukon Territory.
Agnès Laporte and *Richard Gaudreau*, for the intervener Kitigan Zibi Anishinabeg.
Claude-Armand Sheppard, *Paul Joffe* and *Andrew Orkin*, for the intervener the Grand Council of the Crees (Eeyou Estchee).
Peter W. Hutchins and *Carol Hilling*, for the intervener the Makivik Corporation.
Michael Sherry, for the intervener the Chiefs of Ontario.
Raj Anand and *M. Kate Stephenson*, for the intervener the Minority Advocacy and Rights Council.
Mary Eberts and *Anne Bayefsky*, for the intervener the *Ad Hoc* Committee of Canadian Women on the Constitution.
Guy Bertrand and *Patrick Monahan*, for the intervener Guy Bertrand.
Stephen A. Scott, for the interveners Roopnarine Singh, Keith Owen Henderson, Claude Leclerc, Kenneth O'Donnell and Van Hoven Petteway.
Vincent Pouliot on his own behalf.

Related Abridgment Classifications

Constitutional law
II General principles of interpretation of constitutional statutes

Constitutional law
VI Nature and status of Dominion and provinces
VI.3 Status and constitution of legislatures
VI.3.a Of provinces
VI.3.a.i General principles

Constitutional law
VII Distribution of legislative powers

VII.3 Nature of general provincial powers
VII.3.c Rights outside province

Constitutional law
XIV Procedure in constitutional challenges
XIV.1 Jurisdiction of courts
XIV.1.a General principles

International law
II Application of international law
II.2 Miscellaneous

Judges and courts
XIX References to courts
XIX.1 Reference by Lieutenant Governor or Governor-General in Council
XIX.1.a Powers and duties of court on reference

Headnote

Constitutional law --- Distribution of legislative powers — Nature of general provincial powers — Rights outside province
Unilateral secession of Quebec and principled negotiations — Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, s. 101 — Supreme Court Act, R.S.C. 1985, c. S-26, s. 53, 53(1)(a), 53(1)(d), 53(2).

Droit constitutionnel --- Distribution des pouvoirs législatifs — Nature des pouvoirs généraux des provinces — Droits à l'extérieur de la province
Sécession unilatérale du Québec et négociations fondées sur des principes — Loi constitutionnelle de 1867 (R.-U.), 30 & 31 Vict., c. 3, art. 101 — Loi sur la Cour suprême, L.R.C. 1985, ch. S-26, art. 53, 53(1)a), 53(1)d), 53(2).

Constitutional law --- General principles of interpretation of constitutional statutes
Reference concerning certain questions relating to secession of Quebec from Canada — Fundamental principles for appreciation of constitutional rights and obligations are federalism, democracy, constitutionalism and rule of law, and respect for minorities — Supreme Court Act, R.S.C. 1985, c. S-26, s. 53.

Droit constitutionnel --- Principes généraux d'interprétation des lois constitutionnelles
Renvoi au sujet de certaines questions ayant trait à la sécession du Québec du Canada — Principes fondamentaux pour saisir les droits et les obligations constitutionnels sont le fédéralisme, la démocratie, le constitutionnalisme, la primauté du droit et le respect des groupes minoritaires — Loi sur la Cour suprême, L.R.C. 1985, ch. S-26, art. 53.

Constitutional law --- Nature and status of Dominion and provinces — Status and constitution of legislatures — Of provinces — General
Unilateral secession of Quebec and principled negotiations — Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, s. 101 — Supreme Court Act, R.S.C. 1985, c. S-26, s. 53, 53(1)(a), 53(1)(d), 53(2).

Droit constitutionnel --- Nature et statut du Dominion et des provinces — Statut et constitution des législatures — Des provinces — En général
Sécession unilatérale du Québec et négociations fondées sur des principes — Loi constitutionnelle de 1867 (R.-U.), 30 & 31 Vict., c. 3, art. 101 — Loi sur la Cour suprême, L.R.C. 1985, ch. S-26, art. 53, 53(1)a), 53(1)d), 53(2).

Constitutional law --- Procedure in constitutional challenges — Jurisdiction of courts — General
Reference concerning certain questions relating to secession of Quebec from Canada — Ordinary and appellate jurisdiction — No supervisory role over political aspects of constitutional negotiations — Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, s. 101 — Supreme Court Act, R.S.C. 1985, c. S-26, s. 53.

Droit constitutionnel --- Procédure lors de contestations constitutionnelles — Compétence des tribunaux — En général
Renvoi au sujet de certaines questions ayant trait à la sécession du Québec du Canada — Compétence usuelle et compétence

en appel — Pouvoir judiciaire n'a pas de contrôle sur les aspects politiques des négociations constitutionnelles — Loi constitutionnelle, 1867 (U.K.), 30 & 31 Vict., c. 3, art. 101 — Loi sur la Cour suprême, L.R.C. 1985, ch. S-26, art. 53.

International law --- Application of international law — Miscellaneous issues
International law neither grants nor denies right of unilateral secession — Creation of new state to be determined by domestic law of existing state of which seceding entity forms part — Prerequisite to be colonial or oppressed people or to be denied meaningful access to government to pursue political, economic, cultural and social devleopment — National Assembly, legislature or government of Quebec do not have right under international law to unilaterally secede from Canada — Supreme Court Act, R.S.C. 1985, c. S-26, s. 53.

Droit international --- Application du droit international — Sujets divers
Droit international n'accorde pas ni ne proscrit le droit à la sécession unilatérale — Création du nouvel état procède selon le droit interne de l'état dont l'entité sécessionniste fait partie — Droit à l'autodétermination sous-tend l'existence d'un peuple colonisé, opprimé ou privé d'un accès réel au gouvernement pour assurer son développement politique, économique, culturel et social — Ni l'Assemblée nationale, ni la législature, ni le gouvernement du Québec n'a le droit en vertu du droit international de procéder à la sécession unilatérale du Québec du Canada — Loi sur la Cour suprême, L.R.C. 1985, ch. S-26, art. 53.

Judges and courts --- References to courts — Reference by Lieutenant Governor or Governor-General in Council — Powers and duties of court on reference
Reference concerning questions relating to secession of Quebec from Canada — On exceptional basis Supreme Court of Canada can receive original jurisdiction which is not incompatible with its appellate jurisdiction — No constitutional bar to receiving jurisdiction to perform advisory role — Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, s. 101 — Supreme Court Act, R.S.C. 1985, c. S-26, s. 53, 53(1)(a), 53(1)(d), 53(2).

Juges et tribunaux --- Renvois aux tribunaux — Renvoi par le Lieutenant gouverneur ou le Gouverneur général en conseil — Pouvoirs et obligations du tribunal lors d'un renvoi
Renvoi au sujet de certaines questions ayant trait à la sécession du Québec du Canada — Exceptionnellement, la Cour suprême du Canada peut se voir attribuer une compétence de première instance qui n'est pas incompatible avec sa compétence en appel — Droit constitutionnel n'interdisait pas d'attribuer à la Cour un rôle consultatif — Loi constitutionnelle, 1867 (U.K.), 30 & 31 Vict., c. 3, art. 101 — Loi sur la Cour suprême, L.R.C. 1985, ch. S-26, art. 53, 53(1)a), 53(1)d), 53(2).

Judges and courts --- References to courts — Reference by Lieutenant Governor or Governor-General in Council — Questions properly subject of reference
Questions relating to secession of Quebec from Canada — Supreme Court Act, R.S.C. 1985, c. S-26, s. 53, 53(1)(a), 53(1)(d), 53(2).

Juges et tribunaux --- Renvois aux tribunaux — Renvoi par le Lieutenant gouverneur ou le Gouverneur général en conseil — Sujets étant matière à renvoi
Questions au sujet de la sécession du Québec du Canada — Loi sur la Cour suprême, L.R.C. 1985, ch. S-26, art. 53, 53(1)a), 53(1)d), 53(2).

The Governor-in-Council acted pursuant to s. 53 of the *Supreme Court Act* and referred three questions to the court relating to the secession of Quebec from Canada. Question one was whether under the Constitution of Canada, the National Assembly, legislature or government of Quebec can effect the secession of Quebec from Canada unilaterally. Question two was whether international law gives the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally, and whether there is a right to self-determination under international law that would give the right to effect secession unilaterally. Question three was, in the event of a conflict between domestic and international law regarding the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada.

The amicus curiae challenged the reference jurisdiction under s. 53 of the Act as being unconstitutional. The amicus curiae contended that the questions were outside the scope of s. 53. The amicus curiae submitted that the questions were not justiciable.

Held: Section 53 of the *Supreme Court Act* is constitutional; the questions should be answered. For question one, the secession of Quebec from Canada cannot be accomplished unilaterally without principled negotiations and be considered a lawful act. For question two, neither the population of Quebec nor its representative institutions possesses a right under international law to unilaterally secede from Canada. For question three, there was no conflict between domestic and international law to be addressed in the context of this reference.

Pursuant to s. 101 of the *Constitution Act, 1867*, Parliament has the authority to grant to the Supreme Court of Canada the reference jurisdiction in s. 53 of the *Supreme Court Act.* The phrase "general court of appeal" in s. 101 means the status of the court in the national court structure. The phrase is not a restrictive definition of the functions of the court. On an exceptional basis, the Supreme Court of Canada can receive original jurisdiction which is not incompatible with its appellate jurisdiction. Even if there were a conflict between the reference jurisdiction of the Supreme Court of Canada and the original jurisdiction of the provincial superior courts, such conflict must be resolved in favour of Parliament's exercise of its plenary power to establish a "general court of appeal." Even though the rendering of advisory opinions is done outside the framework of adversarial litigation and such opinions are traditionally obtained by the executive from law officers of the Crown, there is no constitutional bar to the court's receiving jurisdiction to undertake an advisory role.

The questions are within the scope of s. 53. Question one is within the scope of s. 53(1)(a) because the question is, in part, directed to the interpretation of the *Constitution Acts.* Questions one and two are within the scope of s. 53(1)(d) because they relate to the powers of the legislature or government of a Canadian province whether or not the particular power has been or is proposed to be exercised. All three questions are within s. 53(2) because they are "important questions of law or fact concerning any matter." The court is not purporting to act as an international tribunal and thereby exceeding its jurisdiction when it answers question two. The court is providing an advisory opinion in its capacity as a national court on legal questions touching and concerning the future of Canadian federation. Question two is not beyond the competence of the court as a domestic court because it requires an examination of international law rather than domestic law. Nor is question two an abstract question of "pure" international law. Rather, question two seeks to determine the legal rights and obligations of the legislature or government of Quebec. Those institutions exist as part of the Canadian legal order. International law must be addressed because it has been invoked as a consideration in the context of this reference.

The reference questions are justiciable and should be answered. The court is not being asked to usurp any democratic decision that the people of Quebec may be called upon to make. The questions are strictly limited to aspects of the legal framework in which the democratic decision is to be taken. The reference questions may clearly be interpreted as directed to legal issues; thus, the court is in a position to answer them. The questions raise issues of fundamental public importance. The questions are not too imprecise or ambiguous to permit a proper legal answer. It does not matter that the issues might otherwise be considered not yet ripe for decision.

The Constitution of Canada is more than a written text. It consists of the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of Canada. Four fundamental and organizing principles which are relevant to the issue of unilateral secession are: federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform an overall appreciation of constitutional rights and obligations that would come into play in the event that a clear majority of the people of Quebec votes on a clear question in favour of secession.

Arguments that Quebec has the right to unilateral secession were primarily based on the principle of democracy. Democracy means more than simple majority rule. Democracy exists in the larger context of other constitutional values. Since 1867, the people of the provinces and territories have created close ties of interdependence based on those principles.

Secession is the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state to achieve statehood for a new territorial unit on the international plane. Secession of a province from Canada must be considered in legal terms to require an amendment to the Constitution which requires negotiation.

Secession "under the Constitution" cannot be unilateral without principled negotiations with other participants in Confederation within the existing constitutional framework. Each participant in the federation has the right to initiate constitutional change. The right implies a reciprocal duty on the other participants to discuss legitimate initiatives. A clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on a secession initiative which other participants would have to recognize. A "clear majority" is a qualitative evaluation. The referendum result, if it is to be taken as an expression of democratic will, must be free of ambiguity in terms of the question asked and the

support it achieves. Notwithstanding a clear referendum result, Quebec could not invoke a right of self-determination to dictate terms to other parties to the federation. Such a vote could not override the principles of federalism, rule of law, rights of individuals and minorities or the operation of democracy in other provinces or Canada as a whole. The vote could not be ignored. Negotiations would be necessary to address the interests of other provinces, the federal government and Quebec and the rights of all Canadians within and outside Quebec, and specifically, the rights of minorities. Negotiations would require the reconciliation of various rights and obligations by the representatives of two legitimate majorities; the majority of Quebec and Canada as a whole. A political majority at either level that does not act pursuant to underlying principles puts at risk the legitimacy of the exercise of its rights and the ultimate acceptance of the result in the international community.

The role of the court is to identify the relevant aspects of the Constitution in their broadest sense. The court has clarified the legal framework within which political decisions are to be taken under the Constitution, but the court will not usurp prerogatives of political forces in that framework. The court has no supervisory role over the political aspects of the constitutional negotiations. It is for politicians to determine what constitutes "a clear majority on a clear question" in the circumstances in which a future referendum vote can be taken. The content and process of the negotiations is for politicians to determine. The reconciliation of the various legitimate constitutional interests is for politicians to negotiate.

International law does not specifically grant component parts of sovereign states the right to secede unilaterally from their parent state. International law contains neither a right of unilateral secession nor an explicit denial of such right. It places great importance on the territorial integrity of nation states and leaves the creation of a new state to be determined by the domestic law of the existing state of which the seceding entity forms a part. The right to secession arises only under the principle of self-determination of a people at international law where "a people" is governed as part of a colonial empire or subject to alien subjugation, domination or exploitation, and possibly where "a people is deprived of any meaningful exercise of its right to self-determination within the state of which it forms a part. A state whose government represents the whole of the people or people resident within its territories, on a basis of equality and without discrimination, and respects the principle of self-determination in its internal arrangements is entitled to maintain its territorial integrity under international law and to have that territorial integrity respected by other states.

The population of Quebec is not a colonial people or oppressed people, nor has it been denied meaningful access to government to pursue its political, economic, cultural and social development. The National Assembly, legislature or government of Quebec do not have unilateral right to secede. The possibility of an unconstitutional declaration of secession leading to de facto secession is not ruled out. Success of that depends on recognition by the international community. Even if granted, such recognition would not retroactively justify the act of secession either under the Constitution of Canada or at international law.

Le gouverneur en conseil a agi suivant l'art. 53 de la *Loi sur la Cour suprême* et a soumis trois questions à la Cour relatives à la sécession du Québec du Canada. La première question était de savoir si en vertu de la Constitution du Canada, l'Assemblée Nationale, la législature ou le gouvernement du Québec peut procéder unilatéralement à la sécession du Québec du Canada. La deuxième question était de déterminer si le droit international donne à l'Assemblée Nationale, la législature ou le gouvernement du Québec le droit de procéder unilatéralement à la sécession du Québec du Canada, et s'il existe un droit à l'autodétermination en vertu du droit international qui donnerait le droit de procéder unilatéralement à la sécession. La troisième question visait à trancher, dans l'éventualité d'un conflit entre le droit interne et le droit international relativement au droit de l'Assemblée Nationale, de la législature ou du gouvernement du Québec de procéder unilatéralement à la sécession du Québec du Canada, lequel aurait préséance au Canada.

L'amicus curiae a contesté la compétence en matière de renvoi prévue à l'art. 53 de la Loi comme étant inconstitutionnelle. L'amicus curiae a soutenu que les questions ne relevaient pas du champ d'application de l'art. 53. L'amicus curiae a soumis que les questions n'étaient pas justiciables.

Arrêt: L'article 53 de la *Loi sur la Cour suprême* est constitutionnellement valide; les questions devraient recevoir une réponse.À l'égard de la première question, la sécession du Québec du reste du Canada ne peut s'effectuer unilatéralement, sans aucune négociation préalable fondée sur des principes, et être considérée comme un acte juridique valide. Quant à la deuxième question, ni la population du Québec, ni les institutions qui la représentent, ne possèdent le droit, en vertu du droit international, de procéder unilatéralement à la sécession du reste du Canada. Quant à la troisième question, il n'y avait pas, dans le cadre du présent renvoi, de conflit à résoudre entre le droit interne et le droit international.

En vertu de l'art. 101 de la *Loi constitutionnelle de 1867*, le Parlement a le pouvoir de conférer à la Cour suprême du Canada

The federal-provincial division of powers was a legal recognition of the diversity that existed among the initial members of Confederation, and manifested a concern to accommodate that diversity within a single nation by granting significant powers to provincial governments. The *Constitution Act, 1867* was an act of nation-building. It was the first step in the transition from colonies separately dependent on the Imperial Parliament for their governance to a unified and independent political state in which different peoples could resolve their disagreements and work together toward common goals and a common interest. Federalism was the political mechanism by which diversity could be reconciled with unity.

44 A federal-provincial division of powers necessitated a written constitution which circumscribed the powers of the new Dominion and Provinces of Canada. Despite its federal structure, the new Dominion was to have "a Constitution similar in Principle to that of the United Kingdom" (*Constitution Act, 1867*, preamble). Allowing for the obvious differences between the governance of Canada and the United Kingdom, it was nevertheless thought important to thus emphasize the continuity of constitutional principles, including democratic institutions and the rule of law; and the continuity of the exercise of sovereign power transferred from Westminster to the federal and provincial capitals of Canada.

45 After 1867, the Canadian federation continued to evolve both territorially and politically. New territories were admitted to the union and new provinces were formed. In 1870, Rupert's Land and the Northwest Territories were admitted and Manitoba was formed as a province. British Columbia was admitted in 1871, Prince Edward Island in 1873, and the Arctic Islands were added in 1880. In 1898, the Yukon Territory and in 1905, the provinces of Alberta and Saskatchewan were formed from the Northwest Territories. Newfoundland was admitted in 1949 by an amendment to the *Constitution Act, 1867*. The new territory of Nunavut was carved out of the Northwest Territories in 1993 with the partition to become effective in April 1999.

46 Canada's evolution from colony to fully independent state was gradual. The Imperial Parliament's passage of the *Statute of Westminster, 1931* (U.K.), 22 & 23 Geo. 5, c. 4, confirmed in law what had earlier been confirmed in fact by the Balfour Declaration of 1926, namely, that Canada was an independent country. Thereafter, Canadian law alone governed in Canada, except where Canada expressly consented to the continued application of Imperial legislation. Canada's independence from Britain was achieved through legal and political evolution with an adherence to the rule of law and stability. The proclamation of the *Constitution Act, 1982* removed the last vestige of British authority over the Canadian Constitution and re-affirmed Canada's commitment to the protection of its minority, aboriginal, equality, legal and language rights, and fundamental freedoms as set out in the *Canadian Charter of Rights and Freedoms*.

47 Legal continuity, which requires an orderly transfer of authority, necessitated that the 1982 amendments be made by the Westminster Parliament, but the legitimacy as distinguished from the formal legality of the amendments derived from political decisions taken in Canada within a legal framework which this Court, in the *Patriation Reference*, had ruled were in accordance with our Constitution. It should be noted, parenthetically, that the 1982 amendments did not alter the basic division of powers in ss. 91 and 92 of the *Constitution Act, 1867*, which is the primary textual expression of the principle of federalism in our Constitution, agreed upon at Confederation. It did, however, have the important effect that, despite the refusal of the government of Quebec to join in its adoption, Quebec has become bound to the terms of a Constitution that is different from that which prevailed previously, particularly as regards provisions governing its amendment, and the *Canadian Charter of Rights and Freedoms*. As to the latter, to the extent that the scope of legislative powers was thereafter to be constrained by the *Charter*, the constraint operated as much against federal legislative powers as against provincial legislative powers. Moreover, it is to be remembered that s. 33, the" notwithstanding clause", gives Parliament and the provincial legislatures authority to legislate on matters within their jurisdiction in derogation of the fundamental freedoms (s. 2), legal rights (ss. 7 to 14) and equality rights (s. 15) provisions of the *Charter*.

48 We think it apparent from even this brief historical review that the evolution of our constitutional arrangements has been characterized by adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability. We now turn to a discussion of the general constitutional principles that bear on the present Reference.

(3) Analysis of the Constitutional Principles

(a) Nature of the Principles

49 What are those underlying principles? Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. The following discussion addresses the four foundational constitutional principles that are most germane for resolution of this Reference: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.

50 Our Constitution has an internal architecture, or what the majority of this Court in *O.P.S.E.U. v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2 (S.C.C.), at p. 57, called a "basic constitutional structure". The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole. As we recently emphasized in the *Provincial Judges Reference*, certain underlying principles infuse our Constitution and breathe life into it. Speaking of the rule of law principle in the *Manitoba Language Rights Reference, supra*, at p. 750, we held that "the principle is clearly implicit in the very nature of a Constitution". The same may be said of the other three constitutional principles we underscore today.

51 Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the *Constitution Act, 1867*, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.

52 The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a "living tree", to invoke the famous description in *Edwards v. Canada (Attorney General)* (1929), [1930] A.C. 124 (Canada P.C.), at p. 136. As this Court indicated in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 (S.C.C.), Canadians have long recognized the existence and importance of unwritten constitutional principles in our system of government.

53 Given the existence of these underlying constitutional principles, what use may the Court make of them? In the *Provincial Judges Reference, supra*, at paras. 93 and 104, we cautioned that the recognition of these constitutional principles (the majority opinion referred to them as "organizing principles"and described one of them, judicial independence, as an "unwritten norm") could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary, we confirmed that there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review. However, we also observed in the *Provincial Judges Reference* that the effect of the preamble to the *Constitution Act, 1867* was to incorporate certain constitutional principles by reference, a point made earlier in *Fraser v. Canada (Treasury Board, Department of National Revenue)*, [1985] 2 S.C.R. 455 (S.C.C.), at pp. 462-63. In the *Provincial Judges Reference*, at para. 104, we determined that the preamble "invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text".

54 Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force" as we described it in the *Patriation Reference, supra*, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. "In other words" as this Court confirmed in the *Manitoba Language Rights Reference, supra*, at p. 752, "in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada". It is to a discussion of those underlying constitutional principles that we now turn.

(b) Federalism

55 It is undisputed that Canada is a federal state. Yet many commentators have observed that, according to the precise terms of the *Constitution Act, 1867*, the federal system was only partial. See, e.g., K. C. Wheare, *Federal Government* (4th

66 It is, of course, true that democracy expresses the sovereign will of the people. Yet this expression, too, must be taken in the context of the other institutional values we have identified as pertinent to this Reference. The relationship between democracy and federalism means, for example, that in Canada there may be different and equally legitimate majorities in different provinces and territories and at the federal level. No one majority is more or less" legitimate"than the others as an expression of democratic opinion, although, of course, the consequences will vary with the subject matter. A federal system of government enables different provinces to pursue policies responsive to the particular concerns and interests of people in that province. At the same time, Canada as a whole is also a democratic community in which citizens construct and achieve goals on a national scale through a federal government acting within the limits of its jurisdiction. The function of federalism is to enable citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level.

67 The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will"is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will"or majority rule alone, to the exclusion of other constitutional values.

68 Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas" (*Saumur v. Quebec (City), supra*, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.

69 The *Constitution Act, 1982* gives expression to this principle, by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of governance.

(d) Constitutionalism and the Rule of Law

70 The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.), at p. 142, is "a fundamental postulate of our constitutional structure." As we noted in the *Patriation Reference, supra*, at pp. 805-6, "[t]he 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority". At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.

71 In the *Manitoba Language Rights Reference, supra*, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order". It was this second aspect of the rule of law that was primarily at issue in the *Manitoba Language Rights Reference* itself. A third aspect of the rule of law is, as recently confirmed in the *Provincial Judges Reference, supra*, at para. 10, that"

the exercise of all public power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.

72 The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s. 52(1) of the *Constitution Act, 1982*, which provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.), at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.

73 An understanding of the scope and importance of the principles of the rule of law and constitutionalism is aided by acknowledging explicitly why a constitution is entrenched beyond the reach of simple majority rule. There are three overlapping reasons.

74 First, a constitution may provide an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible to government interference. Although democratic government is generally solicitous of those rights, there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection. Second, a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority. And third, a constitution may provide for a division of political power that allocates political power amongst different levels of government. That purpose would be defeated if one of those democratically elected levels of government could usurp the powers of the other simply by exercising its legislative power to allocate additional political power to itself unilaterally.

75 The argument that the Constitution may be legitimately circumvented by resort to a majority vote in a province-wide referendum is superficially persuasive, in large measure because it seems to appeal to some of the same principles that underlie the legitimacy of the Constitution itself, namely, democracy and self-government. In short, it is suggested that as the notion of popular sovereignty underlies the legitimacy of our existing constitutional arrangements, so the same popular sovereignty that originally led to the present Constitution must (it is argued) also permit "the people"in their exercise of popular sovereignty to secede by majority vote alone. However, closer analysis reveals that this argument is unsound, because it misunderstands the meaning of popular sovereignty and the essence of a constitutional democracy.

76 Canadians have never accepted that ours is a system of simple majority rule. Our principle of democracy, taken in conjunction with the other constitutional principles discussed here, is richer. Constitutional government is necessarily predicated on the idea that the political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted. These rules are "binding" not in the sense of frustrating the will of a majority of a province, but as defining the majority which must be consulted in order to alter the fundamental balances of political power (including the spheres of autonomy guaranteed by the principle of federalism), individual rights, and minority rights in our society. Of course, those constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled.

77 In this way, our belief in democracy may be harmonized with our belief in constitutionalism. Constitutional amendment often requires some form of substantial consensus precisely because the content of the underlying principles of our Constitution demand it. By requiring broad support in the form of an" enhanced majority"to achieve constitutional change, the Constitution ensures that minority interests must be addressed before proposed changes which would affect them may be enacted.

78 It might be objected, then, that constitutionalism is therefore incompatible with democratic government. This would be

an erroneous view. Constitutionalism facilitates — indeed, makes possible — a democratic political system by creating an orderly framework within which people may make political decisions. Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it. Without that relationship, the political will upon which democratic decisions are taken would itself be undermined.

(e) Protection of Minorities

79 The fourth underlying constitutional principle we address here concerns the protection of minorities. There are a number of specific constitutional provisions protecting minority language, religion and education rights. Some of those provisions are, as we have recognized on a number of occasions, the product of historical compromises. As this Court observed in *Reference re Roman Catholic Separate High Schools Funding*, [1987] 1 S.C.R. 1148 (S.C.C.), at p. 1173, and in *Renvoi relatif à la Loi sur l'instruction publique, 1988 (Québec)*, [1993] 2 S.C.R. 511 (S.C.C.), at pp. 529-30, the protection of minority religious education rights was a central consideration in the negotiations leading to Confederation. In the absence of such protection, it was felt that the minorities in what was then Canada East and Canada West would be submerged and assimilated. See also *Greater Montreal Protestant School Board c. Québec (Procureur général)*, [1989] 1 S.C.R. 377 (S.C.C.), at pp. 401-2, and *Adler v. Ontario*, [1996] 3 S.C.R. 609 (S.C.C.). Similar concerns animated the provisions protecting minority language rights, as noted in *Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch v. Société des Acadiens du Nouveau-Brunswick Inc.*, [1986] 1 S.C.R. 549 (S.C.C.), at p. 564.

80 However, we highlight that even though those provisions were the product of negotiation and political compromise, that does not render them unprincipled. Rather, such a concern reflects a broader principle related to the protection of minority rights. Undoubtedly, the three other constitutional principles inform the scope and operation of the specific provisions that protect the rights of minorities. We emphasize that the protection of minority rights is itself an independent principle underlying our constitutional order. The principle is clearly reflected in the *Charter*'s provisions for the protection of minority rights. See, e.g., *Reference re s. 79(3), (4), & (7) of the Public Schools Act (Manitoba)*, [1993] 1 S.C.R. 839 (S.C.C.), and *Mahe v. Alberta*, [1990] 1 S.C.R. 342 (S.C.C.).

81 The concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the *Charter*. Undoubtedly, one of the key considerations motivating the enactment of the *Charter*, and the process of constitutional judicial review that it entails, is the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the *Charter*. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation: *Senate Reference, supra*, at p. 71. Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.

82 Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982* included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples. The "promise"of s. 35, as it was termed in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.), at p. 1083, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.

(4) The Operation of the Constitutional Principles in the Secession Context

83 Secession is the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane. In a federal state, secession typically takes the form of a territorial unit seeking to withdraw from the federation. Secession is a legal act as much as a political one. By the terms of Question 1 of this Reference, we are asked to rule on the legality of unilateral secession "under the Constitution of Canada". This is an appropriate question, as the legality of unilateral secession must be evaluated, at least in the first instance, from the perspective of the domestic legal order of the state from which the unit seeks

TAB 7

2014 SCC 32, 2014 CSC 32
Supreme Court of Canada

Reference re Senate Reform

2014 CarswellNat 1178, 2014 CarswellNat 1179, 2014 SCC 32, 2014 CSC 32, [2014] 1 S.C.R. 704, 239 A.C.W.S. (3d) 907, 369 D.L.R. (4th) 577, 457 N.R. 206

In the Matter of a Reference by the Governor in Council concerning reform of the Senate, as set out in Order in Council P.C. 2013-70, dated February 1, 2013

McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: November 12-14, 2013
Judgment: April 25, 2014
Docket: 35203

Counsel: Robert J. Frater, Christopher M. Rupar, Warren J. Newman, for Attorney General of Canada
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Related Abridgment Classifications

Constitutional law
XIII Amendment of Constitution of Canada

Headnote

Constitutional law --- Amendment of Constitution of Canada
Federal government referred five questions to Supreme Court of Canada, dealing with parliamentary authority for enacting fixed terms for senators, consultative elections for senators and establishing provincial framework for such elections, repealing property requirements for senators, and abolishing senate — Questions referred to three bills tabled in 2006 — Implementation of consultative elections and senatorial term limits required consent of Senate, House of Commons, and

legislative assemblies of at least seven provinces representing half of population of all provinces as stated under s. 38 and s. 42(1)(b) of Constitution Act, 1982 — Full repeal of property qualifications required consent of legislative assembly of Quebec under s. 43 of Constitution Act, 1982 — Senate abolition required unanimous consent of Senate, House of Commons, and provinces as set out in s. 41(e) of Constitution Act, 1982 — Consultative elections would significantly alter Senate's fundamental nature and role — Each of proposed consultative elections would constitute amendment to Constitution of Canada and require substantial provincial consent under general amending procedure, without provincial right to opt out of amendment — Proposed consultative elections would fundamentally alter architecture of Constitution, as text of Part V expressly makes general amending procedure applicable to change, and proposed change was beyond scope of unilateral federal amending procedure in s. 44 of Constitution Act, 1982 — Changes to senatorial tenure did not fall residually within unilateral federal power of amendment in s. 44 — Language of s. 42 did not encompass changes to duration of senatorial terms, but it did not follow that all changes to Senate that fall outside of s. 42 came within scope of unilateral federal amending procedure in s. 44 — Unilateral federal amendment procedure limited — Net worth requirement in s. 23(4) of Constitution Act could be repealed by Parliament under unilateral federal amending procedure — Full repeal of real property requirement in s. 23(3) required consent of Quebec's legislative assembly — Full repeal of that provision would also constitute amendment in relation to s. 23(6), which contains special arrangement applicable only to province of Quebec — Removing net worth requirement of senators would not affect independence of senators — Removal of real property requirement for Quebec's Senators would constitute amendment in relation to special arrangement, and would thus attract special arrangements procedure and require consent of Quebec's National Assembly under s. 43, Constitution Act, 1982 — Full repeal of s. 23(3) would render inoperative option in s. 23(6) for Quebec Senators to fulfill their real property qualification in their respective electoral divisions, effectively making it mandatory for them to reside in electoral divisions for which they are appointed — Abolition of Senate would fundamentally alter constitution by removing bicameral government that shapes Constitution Act, 1867 — This involves Part V, which requires unanimous consent of Parliament and provinces under s. 41(e), Constitution Act, 1982.

Droit constitutionnel --- Modification à Constitution du Canada

Gouvernement fédéral a soumis cinq questions à la Cour suprême du Canada concernant le pouvoir du Parlement de prévoir des mandats d'une durée fixe pour les sénateurs, de déclencher des élections consultatives au sujet des sénateurs et d'instaurer un régime encadrant de telles élections, d'abroger les exigences imposées aux sénateurs relatives à la propriété et de procéder à l'abolition du Sénat — Questions faisaient écho à trois projets de loi déposés en 2006 — Mise en place d'élections consultatives et les limites imposées aux mandats des sénateurs étaient soumises au consentement du Sénat, de la Chambre des communes et des législatures d'au moins sept provinces représentant la moitié de la population de toutes les provinces, tel que le prévoient les art. 38 et 42(1)b) de la Loi constitutionnelle de 1982 — Abolition complète des conditions relatives à l'avoir foncier exigeait le consentement de l'Assemblée nationale du Québec en vertu de l'art. 43 de la Loi constitutionnelle de 1982 — Abolition du Sénat exigeait le consentement unanime du Sénat, de la Chambre des communes et des provinces, comme le prévoit l'art. 41e) de la Loi constitutionnelle de 1982 — Élections consultatives auraient pour effet de modifier de façon importante la nature et le rôle fondamentaux du Sénat — Chacune des élections consultatives proposées constituerait une modification à la Constitution du Canada et requerrait un degré appréciable de consentement provincial en vertu de la formule générale d'amendement, sans que les provinces aient le droit de se soustraire à la modification — Élections consultatives proposées auraient pour effet de modifier de manière fondamentale l'architecture de la Constitution, étant donné que le texte de la Partie V rend expressément la procédure normale de modification applicable à une modification de cette nature, et la modification proposée se situait en dehors du champ d'application de la procédure de modification unilatérale fédérale prévue à l'art. 44 de la Loi constitutionnelle de 1982 — Changements apportés au mandat des sénateurs ne relevaient pas du pouvoir unilatéral résiduel du Parlement de modifier la Constitution prévu à l'art. 44 — Libellé de l'art. 42 ne mentionnait pas les changements à la durée du mandat des sénateurs, mais cela ne voulait pas dire pour autant que la procédure de modification unilatérale par le Parlement prévue à l'art. 44 s'appliquait à tous les changements relatifs au Sénat qui n'étaient pas visés par l'art. 42 — Procédure unilatérale fédérale de modification de la Constitution a une portée restreinte — En vertu de l'art. 23 de la Loi constitutionnelle, le Parlement peut agir seul, en vertu de la procédure de modification unilatérale fédérale, pour abroger la condition relative à l'avoir net — Abrogation complète de la condition relative à l'avoir foncier prévue à l'art. 23(3) requérait le consentement de l'assemblée législative du Québec — Abrogation complète de cette disposition constituerait également une modification de l'art. 23(6), lequel prévoit un arrangement spécial applicable uniquement à la province de Québec — Suppression de la condition relative à l'avoir net n'aurait aucune influence sur l'indépendance des sénateurs — Suppression de la condition relative à l'avoir net pour les sénateurs du Québec constituerait une modification relative à un arrangement spécial et entraînerait donc l'application de la procédure relative à de tels arrangements et exigerait le consentement de l'Assemblée nationale du Québec en application de l'art. 43 de la Loi constitutionnelle de 1982 — Abrogation complète de l'art. 23(3) aurait pour effet de rendre inopérante la possibilité offerte

aux sénateurs du Québec en vertu de l'art. 23(6) de posséder leur qualification foncière dans leur collège électoral respectif, ce qui les obligerait effectivement à résider dans le collège électoral qu'ils représentent — Abolition du Sénat changerait fondamentalement la Constitution en supprimant la structure bicamérale de gouvernement qui sous-tend l'architecture de la Loi constitutionnelle de 1867 — Ceci aurait pour effet de modifier la partie V, ce qui exige, selon l'art. 41e) de la Loi constitutionnelle de 1982, le consentement unanime du Parlement et des provinces.

The federal government referred five questions to the Supreme Court of Canada, dealing with the parliamentary authority for enacting fixed terms for senators, consultative elections for senators and establishing a provincial framework for such elections, repealing the property requirements for senators, and abolishing the senate. The questions referred to three bills tabled in 2006.

Held: The implementation of consultative elections and senatorial term limits required consent of the Senate, the House of Commons, and the legislative assemblies of at least seven provinces representing, in the aggregate, half of the population of all the provinces as stated under s. 38 and s. 42(1)(b) of the Constitution Act, 1982. Full repeal of the property qualifications requires the consent of the legislative assembly of Quebec under s. 43 of the Constitution Act, 1982. Senate abolition required the unanimous consent of the Senate, the House of Commons, and the legislative assemblies of all Canadian provinces as set out in s. 41(e) of the Constitution Act, 1982.

The argument that introducing consultative elections does not constitute an amendment to the Constitution was a matter of form over substance, and was a narrow approach inconsistent with the broad and purposive manner in which the Constitution is understood and interpreted. Consultative elections would significantly alter the Senate's fundamental nature and role.

The proposed consultative elections would require substantial provincial consent under the general amending procedure, without the provincial right to opt out of the amendment.

The consultative election proposals set out in the Reference questions would amend the Constitution of Canada by changing the Senate's role within our constitutional structure from a complementary legislative body of sober second thought to a legislative body endowed with a popular mandate and democratic legitimacy. The proposed consultative elections would fundamentally alter the architecture of the Constitution. The Constitution Act, 1867 contemplates a specific structure for the federal Parliament, similar in Principle to that of the United Kingdom. The framers sought to endow the Senate with independence from the electoral process to which members of the House of Commons were subject, in order to remove senators from a partisan political arena that required unremitting consideration of short-term political objectives. Correlatively, the choice of executive appointment for senators was also intended to ensure that the Senate would be a complementary legislative body, rather than a rival of the House of Commons in the legislative process. The assumption that senators would not overstep their role is the reason the framers did not deem it necessary to textually specify how the powers of the Senate relate to those of the House of Commons or how to resolve a deadlock between the two chambers. Consultative elections would weaken the Senate's role of sober second thought and would give it the democratic legitimacy to systematically block the House of Commons, contrary to its constitutional design.

The bills at issue were designed to bring about the appointment of senators with a popular mandate. Although in theory future Prime Ministers could ignore election results, a legal analysis of the constitutional nature and effects of proposed legislation cannot be premised on the assumption that the legislation will fail to bring about the changes it seeks to achieve.

The text of Part V of the Constitution Act expressly made the general amending procedure applicable. The words employed in Part V are guides to identifying the aspects of the system of government that form part of the protected content of the Constitution. Section 42(1)(b) of the Constitution Act, 1982 provides that the general amending procedure in s. 38(1) applies to constitutional amendments in relation to the method of selecting senators. The broad wording covers the implementation of consultative elections, indicating that a constitutional amendment is required and making that amendment subject to the general procedure.

The wording included more than the formal appointment of senators by the Governor General. By employing this language, the framers of the Constitution Act, 1982 extended the constitutional protection provided by the general amending procedure to the entire process by which senators are selected. The implementation of consultative elections fell within the scope of s. 42(1)(b) and was subject to the general amending procedure, without the provincial right to opt out. The doctrine of pith and substance was not relevant to the analysis of the matter.

The scope of s. 44 of the Constitution Act is limited and does not encompass consultative elections. The proposed change was beyond the scope of the unilateral federal amending procedure.

The parties did not dispute that a change in the duration of senatorial terms would amend the Constitution of Canada, by requiring a modification to the text of s. 29 of the Constitution Act, 1867. Changes to senatorial tenure did not fall residually within the unilateral federal power of amendment in s. 44. The language of s. 42 did not encompass changes to the duration of senatorial terms, but it did not follow that all changes to the Senate that fall outside of s. 42 come within the scope of the unilateral federal amending procedure in s. 44. The unilateral federal amendment procedure is limited. It is not a broad procedure that encompasses all constitutional changes to the Senate which are not expressly included within another procedure in Part V of the Constitution Act, 1867. The Senate is a core component of the Canadian federal structure of government, and changes that affect its fundamental nature and role engage the interests of the stakeholders in constitutional design could not be achieved by Parliament acting alone. The duration of senatorial terms was directly linked to the conception of the senate as a complementary legislative body to the House of Commons, and the proposed fixed term was a qualitative rather than minor difference. A fixed term so lengthy that it provides a security of tenure functionally equivalent to that provided by life tenure might be possible but it was difficult to objectively identify the precise term duration that guarantees an equivalent degree of security of tenure.

The net worth requirement in s. 23(4) of the Constitution Act could be repealed by Parliament under the unilateral federal amending procedure. However, a full repeal of the real property requirement in s. 23(3) requires the consent of Quebec's legislative assembly. A full repeal of that provision would also constitute an amendment in relation to s. 23(6), which contains a special arrangement applicable only to the province of Quebec.

Removing the net worth requirement of senators would not affect the independence of senators or otherwise affect the Senate's role as a complementary legislative chamber of sober second thought. Therefore, removing the net worth requirement did not engage the interests of the provinces. The repeal of s. 23(4) was the type of amendment that the framers of the Constitution Act, 1982 intended to capture under s. 44. It updated the constitutional framework relating to the Senate without affecting the institution's fundamental nature and role.

The removal of the real property requirement in s. 23(3) of the Constitution Act, 1867 would not alter the fundamental nature and role of the Senate. However, the removal of the real property requirement for Quebec's senators would constitute an amendment in relation to a special arrangement. It would thus attract the special arrangements procedure and require the consent of Quebec's National Assembly under s. 43, Constitution Act, 1982. Full repeal of s. 23(3) would render inoperative the option in s. 23(6) for Quebec senators to fulfill their real property qualification in their respective electoral divisions, effectively making it mandatory for them to reside in the electoral divisions for which they are appointed. However, the real property qualification in s. 23(3) could be partially removed by making the provision inapplicable to Senators from all provinces except those from Quebec.

Abolition of the Senate was not merely a matter of powers or members under s. 42(1)(b) and (c) of the Constitution Act, 1982. Rather, abolition of the Senate would fundamentally alter the constitutional architecture by removing the bicameral form of government that gives shape to the Constitution Act, 1867. This involves Part V, which requires the unanimous consent of Parliament and the provinces under s. 41(e), Constitution Act, 1982. To interpret s. 42 as embracing Senate abolition would depart from the ordinary meaning of its language and was not supported by the historical record. The mention of amendments in relation to the powers of the Senate and the number of senators for each province presupposes the continuing existence of a Senate and makes no room for an indirect abolition of the Senate. Within the scope of s. 42, it is possible to make significant changes to the powers of the Senate and the number of senators, but not strip the senate of its powers and reduce its number of members to zero.

Le gouvernement fédéral a soumis cinq questions à la Cour suprême du Canada concernant le pouvoir du Parlement de prévoir des mandats d'une durée fixe pour les sénateurs, de déclencher des élections consultatives au sujet des sénateurs et d'instaurer un régime encadrant de telles élections, d'abroger les exigences imposées aux sénateurs relatives à la propriété et de procéder à l'abolition du Sénat. Les questions faisaient écho à trois projets de loi déposés en 2006.

Arrêt: La mise en place d'élections consultatives et les limites imposées aux mandats des sénateurs étaient soumises au consentement du Sénat, de la Chambre des communes et des législatures d'au moins sept provinces représentant la moitié de la population de toutes les provinces, tel que le prévoient les art. 38 et 42(1)b) de la Loi constitutionnelle de 1982. L'abrogation complète de la condition relative à l'avoir foncier requérait le consentement de l'Assemblée nationale du

23 The Constitution of Canada is "a comprehensive set of rules and principles" that provides "an exhaustive legal framework for our system of government": *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.) ("*Secession Reference*"), at para. 32. It defines the powers of the constituent elements of Canada's system of government — the executive, the legislatures, and the courts — as well as the division of powers between the federal and provincial governments: *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.) ("*Provincial Court Judges Reference*"), at para. 108. And it governs the state's relationship with the individual. Governmental power cannot lawfully be exercised, unless it conforms to the Constitution: s. 52(1), *Constitution Act, 1982*; *Secession Reference*, at paras. 70-78; *Reference re Supreme Court Act, R.S.C. 1985 (Canada)*, 2014 SCC 21 (S.C.C.) ("*Supreme Court Act Reference*"), at para. 89.

24 The Constitution of Canada is defined in s. 52(2) of the *Constitution Act, 1982* as follows:

> **52.** . . .
>
> (2) The Constitution of Canada includes
>
> (a) the *Canada Act 1982*, including this Act;
>
> (b) the Acts and orders referred to in the schedule; and
>
> (c) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

The documents listed in the Schedule to the *Constitution Act, 1982* as forming part of the Constitution include the *Constitution Act, 1867*. Section 52 does not provide an exhaustive definition of the content of the Constitution of Canada: *Supreme Court Act Reference*, at paras. 97-100; *Secession Reference*, at para. 32.

25 The Constitution implements a structure of government and must be understood by reference to "the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning": *Secession Reference*, at para. 32; see generally H. Cyr, "L'absurdité du critère scriptural pour qualifier la constitution" (2012), 6 *J.P.P.L.* 293. The rules of constitutional interpretation require that constitutional documents be interpreted in a broad and purposive manner and placed in their proper linguistic, philosophic, and historical contexts: *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145 (S.C.C.), at pp. 155-56; *Edwards v. Canada (Attorney General)* (1929), [1930] A.C. 124 (Canada P.C.), at p. 136; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.), at p. 344; *Supreme Court Act Reference*, at para. 19. Generally, constitutional interpretation must be informed by the foundational principles of the Constitution, which include principles such as federalism, democracy, the protection of minorities, as well as constitutionalism and the rule of law: *Secession Reference*; *Provincial Court Judges Reference*; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 (S.C.C.); *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 & s. 133 of Constitution Act, 1867*, [1985] 1 S.C.R. 721 (S.C.C.).

26 These rules and principles of interpretation have led this Court to conclude that the Constitution should be viewed as having an "internal architecture", or "basic constitutional structure": *Secession Reference*, at para. 50; *O.P.S.E.U. v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2 (S.C.C.), at p. 57; see also *Supreme Court Act Reference*, at para. 82. The notion of architecture expresses the principle that "[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole": *Secession Reference*, at para. 50; see also the discussion on this Court's approach to constitutional interpretation in M. D. Walters, "Written Constitutions and Unwritten Constitutionalism", in G. Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (2008), 245, at pp. 264-65. In other words, the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text.

B. Amendments to the Constitution of Canada

27 The concept of an "amendment to the Constitution of Canada", within the meaning of Part V of the *Constitution Act,*

TAB 8

1997 CarswellNat 3038
Supreme Court of Canada

Provincial Court Judges Assn. (Manitoba) v. Manitoba (Minister of Justice)

1997 CarswellNat 3038, 1997 CarswellNat 3039, [1997] 10 W.W.R. 417, [1997] 3 S.C.R. 3, [1997] S.C.J. No. 75, 118 C.C.C. (3d) 193, 11 C.P.C. (4th) 1, 121 Man. R. (2d) 1, 150 D.L.R. (4th) 577, 156 Nfld. & P.E.I.R. 1, 156 W.A.C. 1, 206 A.R. 1, 217 N.R. 1, 35 W.C.B. (2d) 513, 46 C.R.R. (2d) 1, 483 A.P.R. 1, 49 Admin. L.R. (2d) 1, 73 A.C.W.S. (3d) 592

In The Matter of a Reference from the Lieutenant Governor in Council pursuant to Section 18 of the Supreme Court Act, R.S.P.E.I. 1988, Cap. S-10, Regarding the Remuneration of Judges of the Provincial Court of Prince Edward Island and the Jurisdiction of the Legislature in Respect Thereof

In The Matter of a Reference from the Lieutenant Governor in Council pursuant to Section 18 of the Supreme Court Act, R.S.P.E.I. 1988, Cap. S-10, Regarding the Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island

Merlin McDonald, Omer Pineau and Robert Christie, Appellants v. The Attorney General of Prince Edward Island, Respondent and The Attorney General of Canada, the Attorney General of Quebec, the Attorney General of Manitoba, the Attorney General for Saskatchewan, the Attorney General for Alberta, the Canadian Association of Provincial Court Judges, the Conférence des juges du Québec, the Saskatchewan Provincial Court Judges Association, the Alberta Provincial Judges' Association, the Canadian Bar Association and the Federation of Law Societies of Canada, Interveners

Her Majesty The Queen, Appellant v. Shawn Carl Campbell, Respondent

Her Majesty The Queen, Appellant v. Ivica Ekmecic, Respondent

Her Majesty The Queen, Appellant v. Percy Dwight Wickman, Respondent and The Attorney General of Canada, the Attorney General of Quebec, the Attorney General of Manitoba, the Attorney General of Prince Edward Island, the Attorney General for Saskatchewan, the Canadian Association of Provincial Court Judges, the Conférence des juges du Québec, the Saskatchewan Provincial Court Judges Association, the Alberta Provincial Judges' Association, the Canadian Bar Association and the Federation of Law Societies of Canada, Interveners

The Judges of the Provincial Court of Manitoba as represented by the Manitoba Provincial Judges Association, Judge Marvin Garfinkel, Judge Philip Ashdown, Judge Arnold Conner, Judge Linda Giesbrecht, Judge Ronald Myers, Judge Susan Devine and Judge Wesley Swail, and the Judges of the Provincial Court of Manitoba as represented by Judge Marvin Garfinkel, Judge Philip Ashdown, Judge Arnold Conner, Judge Linda Giesbrecht, Judge Ronald Myers, Judge Susan Devine and Judge Wesley Swail, Appellants v. Her Majesty The Queen in right of the province of Manitoba as represented by Rosemary Vodrey, the Minister of Justice and the Attorney General of Manitoba, and Darren Praznik, the Minister of Labour as the Minister responsible for The Public Sector Reduced Work Week and Compensation Management Act, Respondent and The Attorney General of Canada, the Attorney General of Quebec, the Attorney General of Prince Edward Island, the Attorney General for Saskatchewan, the Attorney General for Alberta, the Canadian Judges Conference, the Canadian Association of Provincial Court Judges, the Conférence des juges du Québec, the Saskatchewan Provincial Court Judges Association, the Alberta Provincial Judges' Association, the Canadian Bar Association and the Federation of Law Societies of Canada, Interveners

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, Iacobucci JJ.

Heard: December 3 and 4, 1996
Judgment: September 18, 1997
Docket: 24508, 24778, 24831, 24846

Proceedings: additional reasons at (February 10, 1998), Doc. 24508, 24778, 24831, 24846 (S.C.C.); reversing in part (1994), 33 C.P.C (3d) 76 (P.E.I.C.A.); and reversing in part (1995), 124 D.L.R (4th) 258 (P.E.I.C.A.); and reversing in part *R. v. Campbell* (1995), 31 Alta. L.R.(3d) 190 (Alta C.A.); affirming (1994), 25 Alta. L.R. (3d) 158 (Alta. Q.B.); and reversing (1995), 5 W.W.R. 641 (Man. C.A.)

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Related Abridgment Classifications

Constitutional law
VII Distribution of legislative powers
  VII.4 Areas of legislation
    VII.4.l Judicature
      VII.4.l.ii Payment of judges' income

Constitutional law
VII Distribution of legislative powers
  VII.4 Areas of legislation
    VII.4.l Judicature
      VII.4.l.iii Provincial jurisdiction

Constitutional law
XI Charter of Rights and Freedoms
  XI.3 Nature of rights and freedoms
    XI.3.f Life, liberty and security
      XI.3.f.i General principles

Criminal law
IV Charter of Rights and Freedoms
  IV.19 Presumption of innocence [s. 11(d)]
    IV.19.a Right to fair trial

Criminal law
XXXIII Appeals

XXXIII.1 Appeal from conviction or acquittal
XXXIII.1.d Right of appeal of provincial Attorney General
XXXIII.1.d.ii Statutory authority to appeal

Criminal law
XXXV Extraordinary remedies
XXXV.7 Miscellaneous

Judges and courts
I Constitutional issues
I.3 Payment of judges' incomes (Constitution Act, 1867, s. 100)

Judges and courts
I Constitutional issues
I.4 Provincial jurisdiction over administration of justice (Constitution Act, 1867, s. 92(14))

Judges and courts
II Appointment, removal, disqualification and discipline of judges and other court officers
II.2 Removal

Judges and courts
V Justices, magistrates and provincial courts
V.1 Nature of offices and courts
V.1.c Provincial courts

Judges and courts
V Justices, magistrates and provincial courts
V.6 Remuneration

Headnote

Constitutional law --- Charter of rights and freedoms — Nature of rights and freedoms — Life, liberty and security — General
Right to fair and impartial hearing — Judicial independence is at root unwritten constitutional principle exterior to particular sections of Constitution Acts and recognized and affirmed in preamble to Constitution Act, 1867 — Judicial independence is principle extending to all courts and not just superior courts — Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, s. 11(d) — Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5.

Criminal law --- Charter of Rights and Freedoms — Right to fair and impartial hearing
Prince Edward Island and Alberta legislating to reduce salaries of provincial court judges and other public sector employees as part of cost-cutting schemes — References in each province determined that salary reductions not infringing judicial independence as guaranteed by s. 11(d) of Charter and appeals made to Supreme Court of Canada — Independence protected by s. 11(d) of Charter is independence of judiciary from other branches of government — Constitutional parameters of power to change or freeze superior court judges' salaries under s. 100 of Constitution Act, 1867 are equally applicable to guarantee of financial security provided by s. 11(d) of Charter to provincial court judges. — Provincial governments free to reduce, increase or freeze salaries of provincial court judges as part of overall economic measure or directed at such judges as class but provinces required to establish independent commissions to review any such changes in judicial remuneration — Other provisions in impugned legislation giving government control over granting of leaves of absence and judges' discretionary benefits not unconstitutional — Provinces did not make submissions regarding establishment of salary commissions and therefore violations of s. 11(d) not justified under s. 1 of Charter — Appeals allowed in part — Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, ss. 1, 11(d) — Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94 — Provincial Court Judges Act, S.A. 1981, c. P-20.1 — Public Sector Pay Reduction Act, S.P.E.I. 1994, c. 51.

Judges and courts --- Constitutional issues — Payment of judge's incomes (s. 100)
Prince Edward Island and Alberta legislating to reduce salaries of provincial court judges and other public sector employees as part of cost-cutting schemes — References in each province determined that salary reductions not infringing judicial independence as guaranteed by s. 11(d) of Charter and appeals made to Supreme Court of Canada — Independence protected by s. 11(d) of Charter is independence of judiciary from other branches of government — Constitutional parameters of power to change or freeze superior court judges' salaries under s. 100 of Constitution Act, 1867 are equally applicable to guarantee of financial security provided by s. 11(d) of Charter to provincial court judges — Provincial governments free to reduce, increase or freeze salaries of provincial court judges as part of overall economic measure or directed at such judges as class but provinces required to establish independent commissions to review any such changes in judicial remuneration — Other provisions in impugned legislation giving government control over granting of leaves of absence and judges' discretionary benefits not unconstitutional — Provinces did not make submissions regarding establishment of salary commissions and therefore violations of s. 11(d) not justified under s. 1 of Charter — Appeals allowed in part — Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, ss. 1, 11(d) — Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94 — Provincial Court Judges Act, S.A. 1981, c. P-20.1 — Public Sector Pay Reduction Act, S.P.E.I. 1994, c. 51.

Judges and courts --- Justices, magistrates and provincial courts — Remuneration
Prince Edward Island and Alberta legislating to reduce salaries of provincial court judges and other public sector employees as part of cost-cutting schemes — References in each province determined that salary reductions not infringing judicial independence as guaranteed by s. 11(d) of Charter and appeals made to Supreme Court of Canada — Independence protected by s. 11(d) of Charter is independence of judiciary from other branches of government — Constitutional parameters of power to change or freeze superior court judges' salaries under s. 100 of Constitution Act, 1867 are equally applicable to guarantee of financial security provided by s. 11(d) of Charter to provincial court judges. — Provincial governments free to reduce, increase or freeze salaries of provincial court judges as part of overall economic measure or directed at such judges as a class provinces required to establish independent commissions to review any such changes in judicial remuneration — Other provisions in impugned legislation giving government control over granting of leaves of absence and judges' discretionary benefits not unconstitutional — Provinces did not make submissions regarding establishment of salary commissions and therefore violations of s. 11(d) not justified under s. 1 of Charter — Appeals allowed in part — Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, ss. 1, 11(d) — Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94 — Provincial Court Judges Act, S.A. 1981, c. P-20.1 — Public Sector Pay Reduction Act, S.P.E.I. 1994, c. 51.

Criminal law --- Extraordinary Remedies — General
Province of Alberta legislated to reduce salaries of provincial court judges and other public sector employees as part of cost-cutting scheme — Many accused challenged constitutionality of their proceedings on basis that provincial court not impartial given salary reductions so that accuseds' rights under s. 11(d) of Charter violated — Provincial court judge refusing remedy but finding parts of Provincial Court Judges Act unconstitutional — Crown appeal dismissed on basis that Court of Appeal did not have jurisdiction under s. 784(1) of Criminal Code because Crown was successful party at trial — Not clear that s. 784(1) available to unsuccessful parties only and, in any event, Crown losing on underlying finding of constitutionality — Declaratory relief granted at trial was prohibitory in nature and therefore within scope of s. 784(1) — Court of Appeal had jurisdiction and Supreme Court is able to exercise that jurisdiction and consider appeals — Criminal Code, R.S.C. 1985, c. C-46, s. 784(1) — Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, s. 1, 11(d) — Provincial Court Judges Act, S.A. 1981, c. P-20.1.

Criminal law --- Post-trial procedure — Appeal from conviction or acquittal — Indictable offence — Right of appeal of provincial Attorney General — Statutory authority to appeal
Province of Alberta legislated to reduce salaries of provincial court judges and other public sector employees as part of cost-cutting scheme — Many accused challenged constitutionality of their proceedings on basis that provincial court not impartial given salary reductions so that accuseds' rights under s. 11(d) of Charter violated — Provincial court judge refusing remedy but finding parts of Provincial Court Judges Act unconstitutional — Crown appeal dismissed on basis that Court of Appeal did not have jurisdiction under s. 784(1) of Criminal Code because Crown was successful party at trial — Not clear that s. 784(1) available to unsuccessful parties only and, in any event, Crown losing on underlying finding of constitutionality — Declaratory relief granted at trial was prohibitory in nature and therefore within scope of s. 784(1) — Court of Appeal had jurisdiction and Supreme Court is able to exercise that jurisdiction and consider appeals — Criminal Code, R.S.C. 1985, c. C-46, s. 784(1) — Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the

Canada Act 1982 (U.K.), 1982, c. 11, s. 1, 11(d) — Provincial Court Judges Act, S.A. 1981, c. P-20.1.

Judges and courts --- Constitutional issues — Payment of judge's incomes (s. 100)
Province of Manitoba legislated to reduce salaries of provincial court judges — Provincial court judges' association challenged legislation on basis that salary cuts infringing judicial independence guaranteed by s. 11(d) of Charter and also unconstitutional because salary committee not involved in decision — Association also alleged judicial independence threatened by unpaid days of leave instituted by government to cut costs and by improper pressure exerted by government to thwart association's constitutional challenge — Trial judge finding salary reduction unconstitutional as not part of overall economic measure affecting all citizens — Constitutional challenges rejected on appeal and appeal made to Supreme Court of Canada — Provincial government failed to respect independent process involving salary committee and effective suspension of such committee not justified under s. 1 of Charter — Mandamus to issue directing government to perform statutory duty and if salary reduction to continue, matter to be remanded to salary committee — Government also violated judicial independence by attempting to negotiate salary directly with association and by closing courts to save money pursuant to s. 4 of Public Sector Reduced Work Week and Compensation Management Act — Section 4 to be read as exempting provincial court staff from effect of Act — Appeal allowed — Public Sector Reduced Work Week and Compensation Management Act, S.M. 1993, s. 21, s. 4 — Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, ss. 1, 11(d).

Judges and courts --- Constitutional issues — Provincial jurisdiction over administration of justice (s. 92(14))
Province of Manitoba legislated to reduce salaries of provincial court judges — Provincial court judges' association challenged legislation on basis that salary cuts infringing judicial independence guaranteed by s. 11(d) of Charter and also unconstitutional because salary committee not involved in decision — Association also alleged judicial independence threatened by unpaid days of leave instituted by government to cut costs and by improper pressure exerted by government to thwart association's constitutional challenge — Trial judge finding salary reduction unconstitutional as not part of overall economic measure affecting all citizens — Constitutional challenges rejected on appeal and appeal made to Supreme Court of Canada — Provincial government failed to respect independent process involving salary committee and effective suspension of such committee not justified under s. 1 of Charter — Mandamus to issue directing government to perform statutory duty and if salary reduction to continue, matter to be remanded to salary committee — Government also violated judicial independence by attempting to negotiate salary directly with association and by closing courts to save money pursuant to s. 4 of Public Sector Reduced Work Week and Compensation Management Act — Section 4 to be read as exempting provincial court staff from effect of Act — Appeal allowed — Public Sector Reduced Work Week and Compensation Management Act, S.M. 1993, s. 21, s. 4 — Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, ss. 1, 11(d).

Droit constitutionnel --- Charte des droits et libertés — Nature des droits et libertés — Vie, liberté et sécurité — En général
Droit à une audition équitable et impartiale — Indépendance judiciaire est à l'origine un principe constitutionnel non écrit, en dehors des dispositions particulières des lois constitutionnelles, mais reconnu et énoncé dans le préambule de la Loi constitutionnelle de 1867 — Indépendance judiciaire est un principe qui s'étend à tous les tribunaux, et non seulement à la Cour supérieure — Charte canadienne des droits et libertés, Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (U.-R.), 1982, c. 11, art. 11d) — Loi constitutionnelle de 1867, (U.K.), 30 & 31 Vict., c. 3, réimprimée L.R.C. 1985, App. II, No. 5.

Droit criminel --- Questions constitutionnelles en droit criminel — Charte des droits et libertés — Droits et libertés — Droit à une audition équitable et impartiale
Île-du-Prince-Édouard et l'Alberta ont adopté des lois réduisant les salaires des juges des tribunaux provinciaux et d'autres employés de la fonction publique dans la cadre d'un plan de réduction des dépenses — Renvois dans les deux provinces ont conclu que les réductions de salaires n'entravaient pas l'indépendance judiciaire telle que garantie par l'art. 11d) de la Charte, et des pourvois ont été formés à la Cour suprême du Canada — Indépendance garantie par l'art. 11d) est l'indépendance du pouvoir judiciaire face aux autres pouvoirs de l'État — Critères constitutionnels relatifs au pouvoir de modifier ou de geler les salaires des juges de la Cour supérieure, en vertu de l'art. 100 de la Loi constitutionnelle de 1867, sont également applicables à la garantie de sécurité financière que confère l'art. 11d) de la Charte aux juges des tribunaux provinciaux — Gouvernements provinciaux sont libres de réduire, augmenter ou geler les salaires des juges des tribunaux provinciaux dans le cadre d'une mesure économique globale ou touchant des juges regroupés par catégories, à la condition que les provinces forment des commissions indépendantes chargées de réviser les changements à la rémunération des juges — Autres dispositions dans les lois contestées conférant au gouvernement le pouvoir d'accorder des congés sans solde et des bénéfices

discrétionnaires ne sont pas inconstitutionnelles — Provinces n'ont pas fait de représentations au sujet de l'établissement de commissions sur les salaires des juges; par conséquent, les violations de l'art. 11d) n'étaient pas justifiables en vertu de l'art. 1 de la Charte — Pourvois accueillis en partie — Charte canadienne des droits et libertés, Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (U.-R.), 1982, c. 11, art. 1, 11d) — Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94 — Provincial Court Judges Act, S.A. 1981, c. P-20.1 — Public Sector Pay Reduction Act, S.P.E.I. 1994, c. 51.

Juges et tribunaux --- Questions d'ordre constitutionnel — Paiement de la rémunération des juges (art. 100)
Île-du-Prince-Édouard et l'Alberta ont adopté des lois réduisant les salaires des juges des tribunaux provinciaux et d'autres employés de la fonction publique dans la cadre d'un plan de réduction des dépenses — Renvois dans les deux provinces ont conclu que les réductions de salaires n'entravaient pas l'indépendance judiciaire telle que garantie par l'art. 11d) de la Charte, et des pourvois ont été formés à la Cour suprême du Canada — Indépendance garantie par l'art. 11d) est l'indépendance du pouvoir judiciaire face aux autres pouvoirs de l'État — Critères constitutionnels relatifs au pouvoir de modifier ou de geler les salaires des juges de la Cour supérieure, en vertu de l'art. 100 de la Loi constitutionnelle de 1867, sont également applicables à la garantie de sécurité financière que confère l'art. 11d) de la Charte aux juges des tribunaux provinciaux — Gouvernements provinciaux sont libres de réduire, augmenter ou geler les salaires des juges des tribunaux provinciaux dans le cadre d'une mesure économique globale ou touchant des juges regroupés par catégories, à la condition que les provinces forment des commissions indépendantes chargées de réviser les changements à la rémunération des juges — Autres dispositions dans les lois contestées conférant au gouvernement le pouvoir d'accorder des congés sans solde et des bénéfices discrétionnaires ne sont pas inconstitutionnelles — Provinces n'ont pas fait de représentations au sujet de l'établissement de commissions sur les salaires des juges; par conséquent, les violations de l'art. 11d) n'étaient pas justifiables en vertu de l'art. 1 de la Charte — Pourvois accueillis en partie — Charte canadienne des droits et libertés, Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (U.-R.), 1982, c. 11, art. 1, 11d) — Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94 — Provincial Court Judges Act, S.A. 1981, c. P-20.1 — Public Sector Pay Reduction Act, S.P.E.I. 1994, c. 51.

Juges et tribunaux --- Juges, magistrats et tribunaux provinciaux — Rémunération
Île-du-Prince-Édouard et l'Alberta ont adopté des lois réduisant les salaires des juges des tribunaux provinciaux et d'autres employés de la fonction publique dans la cadre d'un plan de réduction des dépenses — Renvois dans les deux provinces ont conclu que les réductions de salaires n'entravaient pas l'indépendance judiciaire telle que garantie par l'art. 11d) de la Charte, et des pourvois ont été formés à la Cour suprême du Canada — Indépendance garantie par l'art. 11d) est l'indépendance du pouvoir judiciaire face aux autres pouvoirs de l'État — Critères constitutionnels relatifs au pouvoir de modifier ou de geler les salaires des juges de la Cour supérieure, en vertu de l'art. 100 de la Loi constitutionnelle de 1867, sont également applicables à la garantie de sécurité financière que confère l'art. 11d) de la Charte aux juges des tribunaux provinciaux — Gouvernements provinciaux sont libres de réduire, augmenter ou geler les salaires des juges des tribunaux provinciaux dans le cadre d'une mesure économique globale ou touchant des juges regroupés par catégories, à la condition que les provinces forment des commissions indépendantes chargées de réviser les changements à la rémunération des juges — Autres dispositions dans les lois contestées conférant au gouvernement le pouvoir d'accorder des congés sans solde et des bénéfices discrétionnaires ne sont pas inconstitutionnelles — Provinces n'ont pas fait de représentations au sujet de l'établissement de commissions sur les salaires des juges; par conséquent, les violations de l'art. 11d) n'étaient pas justifiables en vertu de l'art. 1 de la Charte — Pourvois accueillis en partie — Charte canadienne des droits et libertés, Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (U.-R.), 1982, c. 11, art. 1, 11d) — Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94 — Provincial Court Judges Act, S.A. 1981, c. P-20.1 — Public Sector Pay Reduction Act, S.P.E.I. 1994, c. 51.

Droit criminel --- Recours extraordinaires — Questions diverses
Province de l'Alberta a adopté une loi réduisant les salaires des juges des tribunaux provinciaux et d'autres employés dans la fonction publique dans le cadre d'un vaste plan de réduction des dépenses — Plusieurs accusés ont contesté la constitutionnalité des poursuites entreprises contre eux au motif que la Cour provinciale n'offrait plus de garantie d'indépendance à la suite des compressions salariales, ce qui portait atteinte au droit des accusés en vertu de l'art. 11d) de la Charte — Juge de la Cour provinciale a refusé d'accorder la réparation demandée, mais a statué que certaines parties de la loi contestée étaient inconstitutionnelles — Pourvoi du ministère public a été rejeté au motif que la Cour d'appel n'avait pas la compétence requise en vertu de l'art. 784(1) du Code criminel puisque le ministère public a eu gain de cause au procès — Il n'était pas évident que seules les parties perdantes au procès pouvaient se prévaloir du droit d'appel prévu à l'art. 784(1), et, de toute manière, le ministère public n'a pas eu gain de cause sur la question constitutionnelle — Jugement déclaratoire

accordé au procès était de la nature d'une interdiction et, par conséquent, tombait sous le coup de l'art. 784(1) — Cour d'appel avait la compétence requise, et la Cour suprême était maintenant capable d'exercer cette compétence et de disposer des pourvois — Code criminel, L.R.C. 1985, c. C-46, art. 748(1) — Charte canadienne des droits et libertés, Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (U.-R.), 1982, c. 11, art. 1, 11d) — Provincial Court Judges Act, S.A. 1981, c. P-20.1.

Droit criminel --- Pourvois — Pourvoi à l'encontre d'une infraction punissable par voie de mise en accusation — Pourvoi à l'encontre d'un verdict de culpabilité ou d'acquittement — Droit d'appel du procureur général d'une province — Pouvoir de former un pourvoi en vertu de la loi
Province de l'Alberta a adopté une loi réduisant les salaires des juges des tribunaux provinciaux et d'autres employés dans la fonction publique dans le cadre d'un vaste plan de réduction des dépenses — Plusieurs accusés ont contesté la constitutionnalité des poursuites entreprises contre eux au motif que la Cour provinciale n'offrait plus de garantie d'indépendance à la suite des compressions salariales, ce qui portait atteinte au droit des accusés en vertu de l'art. 11d) de la Charte — Juge de la Cour provinciale a refusé d'accorder la réparation demandée, mais a statué que certaines parties de la loi contestée étaient inconstitutionnelles — Pourvoi du ministère public a été rejeté au motif que la Cour d'appel n'avait pas la compétence requise en vertu de l'art. 784(1) du Code criminel puisque le ministère public a eu gain de cause au procès — Il n'était pas évident que seules les parties perdantes au procès pouvaient se prévaloir du droit d'appel prévu à l'art. 784(1), et, de toute manière, le ministère public n'a pas eu gain de cause sur la question constitutionnelle — Jugement déclaratoire accordé au procès était de la nature d'une interdiction et, par conséquent, tombait sous le coup de l'art. 784(1) — Cour d'appel avait la compétence requise, et la Cour suprême était maintenant capable d'exercer cette compétence et de disposer des pourvois — Code criminel, L.R.C. 1985, c. C-46, art. 748(1) — Charte canadienne des droits et libertés, Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (U.-R.), 1982, c. 11, art. 1, 11d) — Provincial Court Judges Act, S.A. 1981, c. P-20.1.

Juges et tribunaux --- Questions d'ordre constitutionnel — Paiement de la rémunération des juges (art. 100)
Province du Manitoba a adopté une loi réduisant les salaires des juges des tribunaux provinciaux — Association des juges de la Cour provinciale a attaqué la loi au motif que les compressions de salaires portaient atteinte à l'indépendance judiciaire garantie par l'art. 11d) de la Charte et au motif que la loi était inopérante parce que le comité de révision des salaires n'a pas pris part à la décision — Association a aussi prétendu que l'indépendance judiciaire était menacée par une mesure prise par le gouvernement de laisser impayés les congés de maladie et par les pressions exercées par le gouvernement pour empêcher l'association d'attaquer la constitutionnalité de la loi — Juge du procès a statué que les compressions salariales étaient inconstitutionnelles parce qu'elles ne s'inscrivaient pas dans une mesure globale d'économie des deniers publics touchant tous les citoyens — Recours en contestation de la constitutionnalité ont été rejetés en appel, et un pourvoi a été formé à la Cour suprême du Canada — Gouvernement provincial n'a pas suivi un processus indépendant s'articulant autour d'une commission sur la rémunération des magistrats, et la suspension d'une telle commission n'était pas justifiée en vertu de l'art. 1 de la Charte — Bref de mandamus a été émis obligeant le gouvernement à respecter l'obligation légale qui pesait sur lui, et, si d'autres compressions salariales se dessinaient à l'horizon, la question devrait alors être soumise à une commission sur la rémunération des magistrats — Gouvernement a aussi porté atteinte à l'indépendance judiciaire en tentant de négocier les salaires directement avec l'association des juges et en fermant cette cour pendant quelques jours dans le but d'économiser en vertu de l'art. 4 de la Loi sur la réduction de la semaine de travail et la gestion des salaires dans le secteur public — Article 4 devait être interprété dans le sens qu'il excluait de l'application de la Loi le personnel de la cour — Pourvoi a été accueilli — Loi sur la réduction de la semaine de travail et la gestion des salaires dans le secteur public, Loi sur la, L.M. 1993, c. 21, art. 3, 4, 9 — Charte canadienne des droits et libertés, Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (U.-R.), 1982, c. 11, art. 1, 11d).

Juges et tribunaux --- Questions d'ordre constitutionnel — Compétence provinciale sur l'administration de la justice (art. 92(14))
Province du Manitoba a adopté une loi réduisant les salaires des juges des tribunaux provinciaux — Association des juges de la Cour provinciale a attaqué la loi au motif que les compressions de salaires portaient atteinte à l'indépendance judiciaire garantie par l'art. 11d) de la Charte et au motif que la loi était inopérante parce que le comité de révision des salaires n'a pas pris part à la décision — Association a aussi prétendu que l'indépendance judiciaire était menacée par une mesure prise par le gouvernement de laisser impayés les congés de maladie et par les pressions exercées par le gouvernement pour empêcher l'association d'attaquer la constitutionnalité de la loi — Juge du procès a statué que les compressions salariales étaient inconstitutionnelles parce qu'elles ne s'inscrivaient pas dans une mesure globale d'économie des deniers publics touchant tous les citoyens — Recours en contestation de la constitutionnalité ont été rejetés en appel, et un pourvoi a été formé à la

Cour suprême du Canada — Gouvernement provincial n'a pas suivi un processus indépendant s'articulant autour d'une commission sur la rémunération des magistrats, et la suspension d'une telle commission n'était pas justifiée en vertu de l'art. 1 de la Charte — Bref de mandamus a été émis obligeant le gouvernement à respecter l'obligation légale qui pesait sur lui, et, si d'autres compressions salariales se dessinaient à l'horizon, la question devrait alors être soumise à une commission sur la rémunération des magistrats — Gouvernement a aussi porté atteinte à l'indépendance judiciaire en tentant de négocier les salaires directement avec l'association des juges et en fermant cette cour pendant quelques jours dans le but d'économiser en vertu de l'art. 4 de la Loi sur la réduction de la semaine de travail et la gestion des salaires dans le secteur public — Article 4 devait être interprété dans le sens qu'il excluait de l'application de la Loi le personnel de la cour — Pourvoi a été accueilli — Loi sur la réduction de la semaine de travail et la gestion des salaires dans le secteur public, Loi sur la, L.M. 1993, c. 21, art. 3, 4, 9 — Charte canadienne des droits et libertés, Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (U.-R.), 1982, c. 11, art. 1, 11d).

Four appeals from references in three provinces were heard together in the present proceedings as they all related to the independence of provincial courts, particularly the issue as to whether and how the guarantee of judicial independence in s. 11(d) of the *Charter* restricted the manner and extent to which provincial governments and legislatures could reduce the salaries of provincial court judges.

Prince Edward Island had enacted the *Public Sector Pay Reduction Act* which purported to reduce the salaries of provincial court judges and others paid from the public purse. Many accused then challenged the constitutionality of their proceedings in Provincial Court on the basis that the court, given the salary reductions, could no longer be said to be an independent and impartial tribunal as guaranteed by s. 11(d) of the *Charter*. The matter was referred to the Court of Appeal as a series of questions regarding financial security, security of tenure and administrative independence of provincial court judges. The Court of Appeal held that the Act did not affect the independence and impartiality of the Provincial Court except with regard to s. 10 of the Act which made it possible for the executive to remove a judge without probable cause and without prior inquiry. Section 10 deprived provincial court judges of the necessary degree of security of tenure to meet the standard of independence and impartiality set by s. 11(d).

Similarly, in Alberta, where the provincial government had reduced the salaries of provincial court judges pursuant to the *Payment to Provincial Judges Amendment Regulation* and s. 17(1) of the *Provincial Court Judges Act*, several accused challenged the constitutionality of their proceedings, alleging a breach of s. 11(d) of the *Charter*. The Alberta Court of Queen's Bench concluded that the salary reduction was unconstitutional because it was not part of an overall economic measure and that those parts of the *Provincial Courts Judges Act* which dealt with the process for disciplining judges and the grounds for their removal failed to protect their security of tenure and were also unconstitutional as were those parts designating a judge's place of residence and the court's sitting days. The Crown's appeal to the Alberta Court of Appeal was dismissed on the ground that that court did not have jurisdiction under s. 784(1) of the *Criminal Code* to hear the matter because the Crown had been the successful party at trial.

In Manitoba, when the provincial government enacted the *Public Sector Reduced Work Week and Compensation Management Act* and reduced the salaries of provincial court judges, the judges through their association, commenced a constitutional challenge alleging that the salary cut was unconstitutional because it infringed s. 11(d) of the *Charter* and because it suspended the operation of a commission created by the province to report to the legislature on judges' remuneration. Also, they claimed that judicial independence was interfered with by the government's closing down of the provincial court offices for unpaid days of leave to save money. At trial, it was held that the salary reduction was unconstitutional because it was not part of an overall economic measure. However, the Alberta Court of Appeal rejected all constitutional challenges and the judges' Association appealed.

Held: The appeals regarding the Prince Edward Island and Alberta references were allowed in part; the appeal regarding the Manitoba reference was allowed.

Per Lamer C.J. (L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ. concurring): Although the present appeals were argued on the basis of s. 11(d) of the *Charter*, they also addressed the larger question of where the constitutional home of judicial independence lies. Sections 96-100 of the *Constitution Act, 1867* and s. 11(d) of the *Charter* together do not on their face provide an exhaustive code of judicial independence for all courts although they have been interpreted as so doing. The only way to explain this is by reference to an unwritten constitutional principle of judicial independence exterior to the particular sections of the Constitution Acts and recognized and affirmed in the preamble to the Constitution Act, 1867. The

preamble refers to "a Constitution similar in principle to that of the United Kingdom". The unwritten consititution of the United Kingdom historically protected judicial independence and this principle has now sbeen extended to all courts in Canada and not just the superiour courts.

The independence protected by s. 11(d) of the *Charter* is independence of the judiciary from the other branches of government. The three core characteristics of such judicial independence are security of tenure, financial security and administrative independence. The constitutional parameters of the power to change or freeze superior court judges' salaries under s. 100 of the *Constitution Act, 1867* are equally applicable to the guarantee of financial security provided by s. 11(d) of the *Charter* to provincial court judges. Therefore, as a general constitutional principle, provincial governments are free to reduce, increase or freeze the salaries of provincial court judges either as part of an overall economic measure or as part of a measure directed to such judges as a class. However, to avoid the possibility or appearance of political interference through economic manipulation, a independent and objective body, such as a commission, should be established in each province to be interposed between the judiciary and the other branches of government. The purpose of such commissions would be to issue reports on the salaries and benefits of judges to the executive and legislature of the respective provinces and thereby to depolitisize the process of changes and freezes in judicial remuneration. The commissions would convene at fixed periods of time, for example, every three or five years, in order to consider the adequacy of judges' salaries in light of the cost of living. Each commission's recommendations would not be binding, but if the executive or legislature departed from them, it would have to justify so doing, if need be, in a court of law. Under no circumstances is it permissible for the judiciary to engage in negotiations over remuneration with either the executive or the legislature as such negotiations would be fundamentally at odds with judicial independence.

Regarding the Prince Edward Island references, the issue of the unconstitutionality of s. 10 of the *Public Sector Pay Reduction Act* for removing provincial court judges without probable cause had been rendered moot by changes to the legislation. However, the salary reduction imposed by the Act was unconstitutional since it was made by the legislature without recourse to an independent commission on judges' remuneration. Such a commission did not exist in the province, but if one were set up, a salary reduction such as the impugned one would probably be justified as it would be part of an overall economic measure to reduce the salaries of all those paid from the public purse. Since the province had made no submissions on the absence of such a commission, the violation of s. 11(d) could not be said to be justified under s. 1 of the *Charter*.

None of the other provisions in the Prince Edward Island Act were unconstitutional from the perspective of provincial court independence. The granting of leaves of absence and sabbatical leaves did not affect the individual financial security of judges. The location of the provincial courts in the same building as the Crown Attorneys' offices did not infringe the administrative independence of the courts as the courts' offices were separate. Also, the fact that judges did not administer their own budget did not violate s. 11(d) as the matter did not bear directly on the exercise of the judicial function. Nor did the designation of a place of residence of a particular provincial court judge undermine the administrative independence of the judiciary. The Act vested control over decisions touching on the provincial court's administrative independence in the Chief Justice and therefore the fact that the Act also gave the Lieutenant Governor in Council the power to make regulations respecting the duties and powers of the Chief Justice did not undermine the administrative independence of the court.

The Alberta Court of Appeal had jurisdiction to hear the Crown's appeals under s. 784(1) of the *Criminal Code* as the Crown had in fact lost on the underlying findings of unconstitutionality and because the declaratory relief sought was essentially prohibitory in nature and so came within the scope of s. 784(1). Accordingly, the Supreme Court of Canada could exercise the Alberta Court of Appeal's jurisdiction and hear the appeal

The salary reduction imposed in Alberta by the *Payment to Provincial Judges Amendment Regulation* was unconstitutional for the same reason that the Prince Edward Island reduction of judges' salaries was unconstitutional - the absence of any independent commission to report on judges' remuneration. Furthermore, s. 17(1) of the *Provincial Court Judges Act*, which stated that the Lieutenant Governor in Council "may" set judicial salaries, violated s. 11(d) as it did not lay down in mandatory terms that provincial court judges shall be provided with salaries. Sections 13(1)(a) and (1)(b) of the Act which conferred the power to designate a judge's place of residence and the days of court sittings respectively, were also unconstitutional as both provisions conferred power on the Attorney General to make decisions infringing on the administrative independence of the provincial court, s. 13(1)(a) by not being limited to the initial appointment of judges, and s. (1)(b) because control over the sittings of the court was part of the administrative independence of the judiciary. As the province had made no submissions under s. 1 of the *Charter*, the violations of s. 11(d) were not justified.

Manitoba did have an independent commission to consider judges' remuneration but as it had not been involved in the salary reduction imposed by the *Public Sector Reduced Work Week and Compensation Management Act*, such salary reduction violated s. 11(d) of the *Charter*. If the Manitoba government persisted in its decision to reduce salaries, it had to remand the matter to its commission and only after the commission had issued its report would it be constitutionally permissible for the legislature to reduce salaries. The Manitoba government had also violated the judicial independence of the Provincial Court by attempting to engage in salary negotiations with the judges' Association. As such negotiations were not authorized by a legal rule, they were incapable of being justified under s. 1 of the *Charter* because they were not prescribed by law. The court's administrative independence had also been infringed by the government, pursuant to s. 4 of the Act, closing the court for a number of days. As the government attempted to justify the closure solely on the basis of financial considerations, the closure could not be justified under s. 1. Rather than striking down s.4 entirely, the best solution and the least intrusion on the role of the legislature was to read it as exempting provincial court staff.

Per La Forest J. (dissenting in part): Salary commissions and a policy of not discussing judges' remuneration except through the making of representations to such commissions may be good legislative policy but was not mandated by s. 11(d) of the *Charter*.To read such a requirement into s. 11(d) was both an unjustified departure from established precedents and a partial usurption of the provinces' power to set the salaries of inferior court judges pursuant to ss. 92(4) and 92(14) of the *Constitution Act, 1867*. Judges were able, by employing the reasonable perception test, to distinquish between changes to their remuneration effected for a valid public purpose and those designed to influence their decisions, and in most circumstances, a reasonable and informed person would not view direct consultations between the government and the judiciary over salaries as imperiling judicial independence.

The governments of Prince Edward Island and Alberta were not required to use salary commissions and therefore the wage reductions they imposed on provincial court judges as part of an overall economic measure were consistent with s. 11(d). There was no evidence that such reductions were imposed to influence or manipulate the judiciary and a reasonable person would not perceive them as threatening judicial independence. Also, since salary commissions were not constitutionally required, the Manitoba government's avoidance of the commission process did not violate s. 11(d). However, the Manitoba government's refusal to sign a joint recommendation to the commission unless the judges agreed to forego their legal challenge of the *Public Sector Reduced Work Week and Compensation Management Act* did constitute a violation of s. 11(d) as the government was placing economic pressure on the judges so that they would concede the constitutionality of the salary reductions.

Quatre pourvois portant sur des renvois présentés dans trois provinces ont été entendus conjointement au sein des présentes procédures puisque chacun touchait à l'indépendance judiciaire des cours provinciales, notamment quant à la question de savoir comment la garantie d'indépendance judiciaire énoncée à l'art. 11d) de la *Charte* restreignait la manière et l'étendue avec lesquelles les gouvernements provinciaux et leur assemblée législative pouvaient réduire le traitement des juges des cours provinciales.

L'Île-du-Prince-Édouard a adopté la *Public Sector Reduction Act* qui visait à réduire les salaires des juges des tribunaux provinciaux ainsi que d'autres personnes payées à même les fonds publics. Plusieurs accusés ont alors attaqué la constitutionnalité des poursuites intentées contre eux au motif que la cour, après les compressions salariales, ne pouvait plus être considérée comme un tribunal impartial offrant les garanties prévues à l'art. 11d) de la *Charte*. La question a fait l'objet d'un renvoi à la Cour d'appel sous la forme de plusieurs questions sur la sécurité financière, l'inamovibilité et l'indépendance administrative des juges de la Cour provinciale. La Cour d'appel a statué que la Loi n'affectait pas l'indépendance ni l'impartialité de la Cour provinciale, excepté l'art. 10 de la Loi qui permettait à l'exécutif de destituer un juge sans motif raisonnable et sans enquête préalable. L'article 10 privait les juges de la Cour provinciale du degré d'inamovibilité qu'exige la norme d'indépendance et d'impartialité édictée à l'art. 11d).

En Alberta, le gouvernement provincial avait déjà réduit les salaires des juges de la Cour provinciale en vertu de la *Payment to Provincial Judges Amendment Regulation* et de l'art. 17 de la *Provincial Court Judges Act*. Plusieurs accusés ont attaqué la constitutionnalité des poursuites entamées contre eux, alléguant une violation de l'art. 11d) de la *Charte*. La Cour du Banc de la Reine de l'Alberta a conclu que les compressions salariales étaient inconstitutionnelles parce qu'elles ne s'inscrivaient pas dans le cadre d'une mesure économique globale et parce que les sections de la *Provincial Court Judges AcT* qui régissaient la procédure disciplinaire à l'égard des juges, y compris les motifs de leur destitution, n'offraient pas de garantie suffisante d'inamovibilité - et donc étaient inconstitutionnels -, tout comme les articles de la Loi qui stipulaient le lieu de résidence des juges et les jours d'audience de la cour. Le pourvoi du ministère public à la Cour d'appel d'Alberta a été rejeté

> from the free public discussion of affairs, from criticism and answer and answer and countercriticism, from attack upon policy and administration and defence and counter-attack, from the freest and fullest analysis and examination from every point of view of political proposals.
>
> (*Reference re Alberta Legislation*, [1938] S.C.R. 100 (S.C.C.), at p. 133, *per* Duff C.J.)

Political freedoms, such as the right to freedom of expression, are not enumerated heads of jurisdiction under ss. 91 and 92 of the *Constitution Act, 1867*; the document is silent on their very existence. However, given the importance of political expression to national political life, combined with the intention to create one country, members of the Court have taken the position that the limitation of that expression is solely a matter for Parliament, not the provincial legislatures: *Reference re Alberta Statutes, supra*, at p. 134, *per* Duff C.J., and at p. 146, *per* Cannon J.; *Saumur*, *supra*, at pp. 330-31, *per* Rand J., and at pp. 354-56, *per* Kellock J.; *Switzman*, *supra*, at p. 307, *per* Rand J., and at p. 328, *per* Abbott J.

103 The logic of this argument, however, compels a much more dramatic conclusion. Denying jurisdiction over political speech to the provincial legislatures does not limit Parliament's ability to do what the provinces cannot. However, given the interdependence between national political institutions and free speech, members of the Court have suggested that Parliament itself is incompetent to "abrogate this right of discussion and debate": *Switzman*, *supra*, at p. 328, *per* Abbott J.; also see Rand J. at p. 307; *Saumur*, *supra*, at p. 354, *per* Kellock J.; *O.P.S.E.U. v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2 (S.C.C.), at p. 57, *per* Beetz J. In this way, the preamble's recognition of the democratic nature of Parliamentary governance has been used by some members of the Court to fashion an implied bill of rights, in the absence of any express indication to this effect in the constitutional text. This has been done, in my opinion, out of a recognition that political institutions are fundamental to the "basic structure of our Constitution" (*OPSEU, supra*, at p. 57) and for that reason governments cannot undermine the mechanisms of political accountability which give those institutions definition, direction and legitimacy.

104 These examples — the doctrines of full faith and credit and paramountcy, the remedial innovation of suspended declarations of invalidity, the recognition of the constitutional status of the privileges of provincial legislatures, the vesting of the power to regulate political speech within federal jurisdiction, and the inferral of implied limits on legislative sovereignty with respect to political speech — illustrate the special legal effect of the preamble. The preamble identifies the organizing principles of the *Constitution Act, 1867*, and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text.

105 The same approach applies to the protection of judicial independence. In fact, this point was already decided in *Beauregard*, and, unless and until it is reversed, we are governed by that decision today. In that case (at p. 72), a unanimous Court held that the preamble of the *Constitution Act, 1867*, and in particular, its reference to "a Constitution similar in Principle to that of the United Kingdom", was "textual recognition" of the principle of judicial independence. Although in that case, it fell to us to interpret s. 100 of the *Constitution Act, 1867*, the comments I have just reiterated were not limited by reference to that provision, and the courts which it protects.

106 The historical origins of the protection of judicial independence in the United Kingdom, and thus in the Canadian Constitution, can be traced to the *Act of Settlement* of 1701. As we said in *Valente (No. 2)*, *supra*, at p. 693, that Act was the "historical inspiration" for the judicature provisions of the *Constitution Act, 1867*. Admittedly, the Act only extends protection to judges of the English superior courts. However, our Constitution has evolved over time. In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the *Constitution Act, 1982*, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country.

107 I also support this conclusion on the basis of the presence of s. 11(*d*) of the *Charter*, an express provision which protects the independence of provincial court judges only when those courts exercise jurisdiction in relation to offences. As I said earlier, the express provisions of the Constitution should be understood as elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*. Even though s. 11(*d*) is found in the newer part of our Constitution, the *Charter*, it can be understood in this way, since the Constitution is to be read as a unified whole: *Reference re Roman Catholic Separate High Schools Funding*, [1987] 1 S.C.R. 1148 (S.C.C.), at p. 1206. An analogy can be drawn between the express reference in the preamble of the *Constitution Act, 1982* to the rule of law and the implicit inclusion of that principle in the *Constitution Act, 1867: Reference re Manitoba Language Rights, supra*, at p. 750. Section 11(*d*), far from indicating that judicial independence is constitutionally enshrined for provincial courts only when those

TAB 9

1987 CarswellOnt 945
Supreme Court of Canada

O.P.S.E.U. v. Ontario (Attorney General)

1987 CarswellOnt 945, 1987 CarswellOnt 968, [1987] 2 S.C.R. 2, [1987] S.C.J. No. 48, 23 O.A.C. 161, 28 Admin. L.R. 141, 41 D.L.R. (4th) 1, 59 O.R. (2d) 671 (note), 59 O.R. (2d) 671, 5 A.C.W.S. (3d) 164, 77 N.R. 321, 87 C.L.L.C. 14,037, J.E. 87-870, EYB 1987-67477

ONTARIO PUBLIC SERVICES EMPLOYEES UNION et al. v. ATTORNEY GENERAL FOR ONTARIO

Dickson C.J.C., Beetz, McIntyre, Chouinard,* Lamer, Le Dain and LaForest JJ.

Heard: March 18 and 19, 1986
Judgment: July 29, 1987
Docket: No. 16464

Counsel: *Stephen T. Goudge*, and *Ian McGilp*, for appellants.
Blenus Wright, and *Carol Creighton*, for respondent.
Graham R. Garton, for intervener, Attorney General of Canada.
Réal A. Forest and *Alain Gingras* for intervener, Attorney General of Quebec.
William M. Wilson, for intervener, Attorney General of Nova Scotia.
Richard C. Speight, for intervener, Attorney General of New Brunswick.
Joseph J. Arvay, for intervener, Attorney General of British Columbia.
Robert G. Richards, for intervener, Attorney General of Saskatchewan.
William Henkel, Q.C. and *Robert J. Normey*, for intervener, Attorney General of Alberta.

Related Abridgment Classifications

Constitutional law
VII Distribution of legislative powers
VII.3 Nature of general provincial powers
VII.3.b Amendment of provincial constitution

Public law
II Elections
II.2 Legislation
II.2.c Statutes affecting rights of civil servants

Headnote

Constitutional Law --- Distribution of legislative powers — Nature of general provincial powers — Amendment of provincial constitution

Constitutional law — Division of powers — Province restricting political activity of provincial civil servants and Crown employees in federal elections — Restrictions intra vires the province — Constitution Act, 1867, ss. 91, 92(1), (4), (13) — Constitution Act, 1982, s. 45 — Public Service Act, R.S.O. 1970, c. 386, ss. 12(1), (2), (3), (4), (5), 13(1), (2), 14, 15, 16, now R.S.O. 1980, c. 418.

The appellant Union was bargaining agent for employees of the Government of Ontario, who were subject to the *Public*

Service Act (Ontario) (the Act). The individual appellants were members of the Union and Crown employees. Certain provisions of the Act prohibited Crown employees from engaging in particular political activities without taking a leave of absence from their employment. These activities included: running for election to Parliament; canvassing and soliciting funds on behalf of federal political parties; and expressing opinions in public on federal political issues.

A motion for an order declaring the relevant sections of the Act unconstitutional was dismissed by Labrosse J. (1979), 24 O.R. (2d) 324 and that judgment was affirmed by the Ontario Court of Appeal (1980), 31 O.R. (2d) 321.

Of the three questions stated before the Supreme Court of Canada, two dealt with issues arising under the *Canadian Charter of Rights and Freedoms*. At the beginning of the hearing the Court (Dickson C.J.C., Chouinard and Le Dain JJ. dissenting) decided that it would not hear or decide Charter issues and the hearing proceeded on the question whether the impugned sections of the Act were unconstitutional insofar as they purported to restrain provincial civil servants and Crown employees from engaging in certain federal political activity.

Held:

The appeal was dismissed. The constitutional question was answered in the negative.

Per Dickson C.J.C.

The impugned legislation could, in general, be characterized as directed at general regulation of the hiring and dismissing and the terms and conditions of employment of public servants. So characterized, the legislation was, in general, an exercise of the provincial power under s. 92(4) and (13) of the *Constitution Act, 1867*. The prohibitions contained in the impugned sections were essentially terms of employment and therefore validly enacted under the provincial power to legislate in relation to property and civil rights in the province. Since the prohibitions governed the terms and conditions of *public* employment, they were enacted in relation to the establishment and tenure of provincial officers.

The "interjurisdictional immunity" doctrine, which states that legislation enacted by one level of government could not interfere with or have impact upon subject matters under the jurisdiction of another level of government, is not compelling doctrine. The dominant doctrines of constitutional interpretation have allowed for a fair interplay and overlap between federal and provincial powers. As well, the federal government is capable of protecting its undertakings by enacting appropriate laws which would be paramount over the conflicting provincial laws. Not only did the federal government intervene in support of the provincial legislation, it had in fact enacted very similar provisions with respect to the political activities of federal civil servants.

The argument that a particular enactment was overbroad in pursuit of its valid purpose was not available in distribution of powers cases.

While freedom of speech was a fundamental animating value in the Canadian constitutional system, no single value could bear the full burden of upholding a democratic system of government. Certain reasonable abridgments, motivated by competing values, could validly be authorized by a Legislature.

Per Beetz (McIntyre, Le Dain and La Forest JJ. concurring)

The impugned provisions were not related to the field of federal elections. The provisions could not be justified by provincial competence in relation to property and civil rights in the province. Insofar as the legislation could be said to confer on the citizens of Ontario the right to an impartial civil service, such a right was not civil but rather public or political in nature. Nor was the impugned legislation simply labour legislation. The provisions could be explained and justified only by the fact that *public* employment was involved.

The legislation was a valid exercise of the provinces' power under s. 92(1) of the *Constitution Act, 1867*, to amend the constitution of the province. The public service, as a part of the executive branch of government, was an organ of government. The legislation was constitutional in nature in that it imposed a duty on that organ of government to abstain from certain political activities in order to implement the governmental principle of the impartiality of the public service as an essential prerequisite of responsible government. The impugned provisions were not specifically aimed at federal political activity, did not affect the validity of federal elections or eligibility for membership in the House of Commons and did not

make the political activities in question unlawful. The provisions merely created a disability from membership in the Ontario public service, thereby affecting a solely provincially created relationship.

The legislation was also valid as an exercise of the s. 92(4) provincial power in relation to the establishment and tenure of provincial offices and the appointment and payment of provincial officers. The legislation created a term or condition of tenure of provincial office, with the object of ensuring global political independence for provincial officers. The prohibition of activity in both the federal and provincial sphere was necessary to ensure that object.

In a distribution of powers case, once it was demonstrated that the enacting Legislature was competent, the balancing of the conflicting values of an impartial civil service and freedom of speech for civil servants depends upon the political judgment of the Legislature. The Court could not review this judgment without judging upon the wisdom of the legislation.

The structure of the *Constitution Act, 1867*, contemplates the existence of certain political institutions, including freely elected bodies at the provincial and federal levels. However, the impugned provisions affected provincial and federal elections only incidentally.

Per Lamer J.

The Act, viewed in its entirety, was authorized by s. 92(4) of the *Constitution Act, 1867*. Subsections 92(13) and (1) of the *Constitution Act, 1867*, did not need to be considered.

Table of Authorities

Cases considered:

Per Dickson C.J.C.:

A.G. Man. v. A.G. Can. (Man. Securities Case), [1929] A.C. 260, [1929] 1 W.W.R. 136, [1929] 1 D.L.R. 369 (P.C.) — *referred to*

A.G. Que. v. Kellogg's Co., [1978] 2 S.C.R. 211, 19 N.R. 271, 83 D.L.R. (3d) 314 (S.C.C.) — *referred to*

C.F.R.B. and A.G. Can. (No. 2), Re, [1973] 3 O.R. 819, 14 C.C.C. (2d) 345, 38 D.L.R. (3d) 335 (Ont. C.A.) — *referred to*

Cardinal v. A.G. Alta., [1974] S.C.R. 695, [1973] 6 W.W.R. 205, 13 C.C.C. (2d) 1, 40 D.L.R. (3d) 553 (S.C.C.) — *referred to*

Comm. du Salaire Minimum v. Bell Telephone Co., [1966] S.C.R. 767, 59 D.L.R. (2d) 145, 66 C.L.L.C. 591 (S.C.C.) — *referred to*

Construction Montcalm Inc. v. Minimum Wage Comm., [1979] 1 S.C.R. 754, 79 C.L.L.C. 14,190, (sub nom. *Montcalm Construction Inc. v. Minimum Wage Comm.)* 93 D.L.R. (3d) 641, 25 N.R. 1 (S.C.C.) — *referred to*

Four B Manufacturing Ltd. v. United Garment Workers of America, [1980] 1 S.C.R. 1031, 80 C.L.L.C. 14,006, 102 D.L.R. (3d) 385, 30 N.R. 421 (S.C.C.) — *referred to*

Fraser v. P.S.S.R.B., [1985] 2 S.C.R. 455, 18 Admin. L.R. 72, 9 C.C.E.L. 233, 86 C.L.L.C. 14,003, 63 N.R. 161, 23 D.L.R. (4th) 122, 19 C.R.R. 152 (S.C.C.) — *considered*

Great West Saddlery Co. v. R., [1921] 2 A.C. 91, [1921] All E.R. 605, [1921] 1 W.W.R. 1034, 58 D.L.R. 1 (P.C.) — *referred to*

John Deere Plow Co. v. Wharton, [1915] A.C. 330, 7 W.W.R. 706, 18 D.L.R. 353 (P.C.) — *referred to*

McKay v. R., [1965] S.C.R. 798, 53 D.L.R. (2d) 532 (S.C.C.) — *overruled*

141 Perhaps the appellants' strongest argument was the one based on the existence in Canada of certain fundamental rights to participate in certain political activities. For this argument, they relied on such cases as *Re Alberta Legislation* and *Switzman v. Elbling*.

142 There is no doubt in my mind that the basic structure of our Constitution as established by the *Constitution Act, 1867* contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels. In the words of Duff C.J.C. in *Re Alberta Legislation* at p. 133 [S.C.R.], "such institutions derive their efficacy from the free public discussions of affairs ..." and, in those of Abbott J. in *Switzman v. Elbling* at p. 328 [S.C.R.], neither a provincial Legislature nor Parliament itself can "abrogate this right of discussion and debate". Speaking more generally, I hold that neither Parliament nor the provincial Legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure. On the whole, though, I am inclined to the view that the impugned legislation is in essence concerned with the constitution of the province and with regulating the provincial public service and affects federal and provincial elections only in an incidental way.

143 I should perhaps add that issues like the last will in the future ordinarily arise for consideration in relation to the political rights guaranteed under the *Canadian Charter of Rights and Freedoms*, which, of course, gives broader protection to these rights and freedoms than is called for by the structural demands of the Constitution. However, it remains true that, quite apart from Charter considerations, the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them. The present legislation does not go so far as to infringe upon the essential structure of free Parliamentary institutions.

VI Conclusion

144 I would answer the first constitutional question in the negative. I would not answer the second and third constitutional questions.

145 I would dismiss the appeal and would not award costs.

***Lamer J.*:**

146 For the reasons given by the Chief Justice and Justice Beetz, I agree that the *Public Service Act*, R.S.O. 1970, c. 386 as amended, viewed in its entirety, is authorized by s. 92(4) of the *Constitution Act, 1867*. I therefore need not consider s. 92(13) or (1) of the *Constitution Act, 1867*.

147 I agree with the Chief Justice that *McKay v. R.*, [1965] S.C.R. 798, 53 D.L.R. (2d) 532 (S.C.C.), was wrongly decided.

148 As regards the other points in issue and the disposition of this case, I agree with the Chief Justice and Justice Beetz.

M. le juge en chef *Dickson*:

Version française des motifs

149 Ce pourvoi touche à un domaine important du droit constitutionnel, savoir celui de la portée de la compétence des provinces pour réglementer certaines activités politiques des fonctionnaires et des employés provinciaux de Sa Majesté.

I Les Faits

150 Le Syndicat des employés de la Fonction publique de l'Ontario est l'agent négociateur d'environ 50 000 employés du gouvernement de l'Ontario qui sont assujettis à la loi de cette province, dite *the Public Service Act*, R.S.O. 1970, chap. 396, maintenant R.S.O. 1980, chap. 418. Marie Wilkinson est employée par le ministère des Services sociaux et communautaires de l'Ontario en tant que conseillère en réadaption dans un centre pour déficients mentaux. Edward Faulknor travaille pour le

TAB 10

1938 CarswellAlta 88
The Supreme Court of Canada

Reference re Alberta Legislation

1938 CarswellAlta 88, [1938] 2 D.L.R. 81, [1938] S.C.R. 100, [1938] S.C.J. No. 2

In the Matter of Three Bills Passed by The Legislative Assembly of the Province of Alberta at the 1937 (Third Session) thereof, Entitled Respectively: "An Act Respecting the Taxation of Banks"; "An Act to Amend and Consolidate the Credit of Alberta Regulations Act"; and "An Act to Ensure the Publication of Accurate News and Information"; and reserved by the Lieutenant-Governor for the signification of the Governor General's pleasure

Duff C.J. and Cannon, Crocket, Davis, Kerwin and Hudson JJ.

Judgment: January 11, 1938
Judgment: January 12, 1938
Judgment: January 13, 1938
Judgment: January 14, 1938
Judgment: January 17, 1938
Judgment: March 4, 1938

Counsel: *Aimé Geoffrion K.C., J. Boyd McBride K.C.* and *C.P. Plaxton K.C.* for the Attorney-General of Canada.
O.M. Biggar K.C., W.S. Gray K.C. and *J.J. Frawley K.C.* for the Attorney-General for Alberta.
W.N. Tilley K.C., R.C. McMichael K.C., W.F. Chipman K.C. and *A.W. Rogers K.C.* for the Chartered Banks.
W.N. Tilley K.C. and *H.P. Duchemin K.C.* for the Canadian Press.
J.L. Ralston K.C., S.W. Field K.C. and *R. de W. MacKay K.C.* for the Alberta newspapers.

Related Abridgment Classifications

Constitutional law
VII Distribution of legislative powers
VII.1 General principles

Constitutional law
VII Distribution of legislative powers
VII.4 Areas of legislation
VII.4.d Taxation
VII.4.d.iii Provincial taxes
VII.4.d.iii.A General principles

Constitutional law
VII Distribution of legislative powers
VII.5 Relation between federal and provincial powers
VII.5.e Colourability
VII.5.e.ii Taxing statutes

Constitutional law
IX Determining constitutionality
IX.1 General principles

Criminal law
II Constitutional authority
II.2 Provincial powers in quasi-criminal law matters
II.2.d Public morals

Evidence
XVIII Judicial notice
XVIII.5 Miscellaneous

Financial institutions
I Constitutional issues
I.2 Legislative powers
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Banking and banks

"Money".

Per Duff C.J.: "Bankers' credit may be described as the `right to draw cheques on a bank'; and the practical exercise of this right involves either the transfer of credit to another on the books of the same bank, or on the books of another bank, or payment to the payee in legal tender at his discretion.... A banker has been defined as `as dealer in credit'. True, in ordinary speech, bank credit implies a credit which is convertible into money. But money as commonly understood is not necessarily legal tender. Any medium which by practice fulfils the function of money and which everybody will accept in payment of a debt is money in the ordinary sense of the words even although it may not be legal tender".

Banking and banks --- Legislative powers of Dominion and Provinces

Constitution Act, 1867 (30 & 31 Vict.), c. 3, s. 91(15).

The Alberta Legislature enacted three bills which the Lieutenant Governor reserved for the signification of the Governor General's pleasure. By Order in Council, the Governor General referred the bills to the Supreme Court of Canada. Bill No. 8, entitled "An Act to Amend and Consolidate the Credit of Alberta Regulation Act, 1937", applied to "credit institutions", i.e., persons or corporations whose business was that of dealing in credit. Such business was defined in the Bill, which the Court found was unquestionably directed, chiefly, if not entirely, to transactions of persons carrying on the business of banking. The Bill required credit institutions carrying on business in the Province to take out licences from the Provincial Credit Commission constituted by s. 4 of the Alberta Social Credit Act, 1937. Applications for licences were to be accompanied by an undertaking, signed by the applicant, to refrain from acting, or assisting or encouraging any person to act, in a manner which restricted or interfered with the property and civil rights of any person in the Province. A breach of this undertaking might be visited by the Provincial Credit Commission with suspension or revocation of the licence, subject to a right of appeal by the Social Credit Act. A credit institution, carrying on the business of dealing in credit in the Province, without

having obtained a licence, was subject to a penalty of $10,000 for each day during which it carried on business without a licence. Before a licence could be granted to a credit institution, one or more Local Directorates were to be appointed to supervise, direct, and control the policy of the institutions dealing in credit for the purpose of preventing any act constituting a restriction or interference with full enjoyment of property and civil rights by any person within the province. A Local Directorate was to consist of a majority appointed and removable by the Social Credit Board, and a minority appointed and removable by the credit institution. The definition in the Bill of the business of dealing in credit expressly excluded transactions which were banking within the meaning of the word "banking" as used in s. 91(15) of the Constitution Act; and it was also expressly provided in the Bill that no provision thereof should be so construed as to authorize the doing of any act or thing which was not within the legislature. Held, Bill No. 8 was ultra vires of the provincial Legislature.

Constitutional law --- Distribution of legislative powers

Criminal Code, R.S.C. 1927, c. 36, s. 133(a).

Bill No. 9, entitled "Act to Ensure the Publication of Accurate News and Information", applied to newspapers or periodicals published in Alberta. Where any such paper published a statement relating to any policy or activity of the provincial government the proprietor, editor, publisher or manager was to be bound, when so required by the chairman of the Social Credit Board, to publish in the paper a statement of no less length than, and of equal prominence and type with, the previous statement. The object of the Chairman's statement was to be the correcting or amplifying of the previous statement, and it was to be stated that it was published by his direction. Newspapers were also required, on requisition of the Chairman, to divulge the particulars of every source of information upon which any statement appearing in the paper was based. Penalties were provided for contravention of these provisions. Held, this Bill was ultra vires, since it was ancillary legislation dependent upon the Alberta Social Credit Act, which was itself ultra vires. The right of public discussion is subject to legal restrictions, those based upon consideration of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means "freedom governed by law". No doubt the Parliament of Canada possesses authority to legislate for the protection of this right. That authority rests upon the principle that the powers requisite for the protection of the constitution itself arise by necessary implication from the Constitution Act, 1867 as a whole. Since the subject matter in relation to which the power is exercised is not exclusively a provincial matter, it is necessarily vested in Parliament. But this by no means exhausts the matter. Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting and through the press) would be incompetent to the Legislatures of the provinces, or to the Legislature of any one of the provinces, as repugnant to the provisions of the Constitution Act, 1867. The subject matter of such legislation could not be described as a provincial matter purely, as in substance exclusively a matter of property and civil rights within the province or as a matter private or local within the province. It would not be "legislation directed solely to the purposes specified in section 92." Some degree of regulation of newspapers everybody would concede to the provinces. Indeed, there is a very wide field in which the provinces undoubtedly are invested with legislative authority over newspapers. But the limit is reached when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada as contemplated by the provisions of the Constitution Act, 1867 and the statutes of the Dominion of Canada. Such a limitation is necessary in order to afford scope for the working of such parliamentary institutions. In this region of constitutional practice, it is not permitted to a provincial legislature to do indirectly what cannot be done directly. The Bill deals with the regulation of the press of Alberta, not from the viewpoint of private wrongs or civil injuries resulting from any alleged infringement or deprivation of civil rights which belong to individuals, considered as individuals, but from the viewpoint of public wrongs or crimes, i.e., involving a violation of the public rights and duties to the whole community, considered as a community in its social aggregate capacity. The Bill is an attempt to revive the old theory of the crime of seditious libel and is an attempt by the Legislature to amend the Criminal Code in this respect and to deny the advantage of s. 133(a) of the Code to Alberta newspaper publishers. The mandatory provisions of the Bill interfere with the free working of the political organizations of the Dominion. They have a tendency to nullify the political rights of the inhabitants of Alberta, as citizens of Canada, and cannot be considered as dealing with matters purely private and local in that province. The Federal Parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press in discussing public affairs and the equal rights in that respect of all citizens throughout the Dominion. These subjects were matters of criminal law before Confederation, have been recognized by Parliament as criminal matters, and have been expressly dealt with by the Criminal Code. The Bill is therefore ultra vires. Pending an appeal to the Privy Council the Alberta Social Credit Act was repealed. The Privy Council therefore declined to hear arguments on the appeal in so far as it related to Bill No. 9, saying, however, that it did not "intend to intimate any doubt as to the correctness of the decision of the Supreme Court" as regards this Bill.

Constitutional law --- Distribution of legislative powers — Areas of legislation — Taxation — Provincial taxes

Constitutional law --- Distribution of legislative powers — Relation between federal and provincial powers — Colourability — Taxing statutes

Constitutional law --- Determining constitutionality

Criminal law --- Constitutional issues in criminal law — Constitutional responsibility for criminal law — Provincial legislation in quasi-criminal matters — Public morals — Censorship and obscenity

Constitution Act, 1867 (30 & 31 Vict.), c. 3.

Bill No. 9, entitled "An Act to Ensure the Publication of Accurate News and Information," applied to newspapers or periodicals published in Alberta. Where any such paper published a statement relating to any policy or activity of the provincial Government, the proprietor, editor, publisher or manager was to be bound, when so required by the chairman of the Social Credit Board, to publish in the paper a statement of no less length than, and of equal prominence and type with, the previous statement. The object of the Chairman's statement was to be the correcting or amplifying of the previous statement, and it was to be stated that it was published by his direction. Newspapers were also required, on requisition of the Chairman, to divulge the particulars of every source of information upon which any statement appearing in the paper was based. Penalties were provided for contravention of these provisions. Held, this Bill was ultra vires, since it was ancillary legislation dependent upon the Alberta Social Credit Act, which was itself ultra vires. Per Duff C.J.C. and Davis J.: The right of public discussion is, of course, subject to legal restrictions; those based upon consideration of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means "freedom governed by law". No doubt the Parliament of Canada assesses authority to legislate for the protection of this right. That authority rests upon the principle that the powers requisite for the protection of the Constitution itself arise by necessary implication from the Constitution Act as a whole. Since the subject matter in relation to which the power is exercised is not exclusively a provincial matter, it is necessarily vested in Parliament. Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting and through the press) would be incompetent to the Legislatures of the provinces, or to the Legislature of any one of the provinces, as repugnant to the provisions of the Constitution Act. Per Cannon J.: The Bill deals with the regulation of the press of Alberta, not from the viewpoint of private wrongs or civil injuries resulting from any alleged infringement or deprivation of civil rights which belong to individuals, considered as individuals, but from the viewpoint of public wrongs or crimes, i.e., involving a violation of the public rights and duties to the whole community, considered as a community in its social aggregate capacity. The Bill is an attempt to revive the old theory of the crime of seditious libel and is an attempt by the Legislature to amend the Criminal Code in this respect and to deny the advantage of s. 133(a) of the Code to Alberta newspaper publishers. Pending an appeal to the Privy Council the Alberta Social Credit Act was repealed. The Privy Council therefore declined to hear arguments on the appeal in so far as it related to Bill No. 9, saying, however, that it did not "intend to intimate any doubt as to the correctness of the decision of the Supreme Court" as regards this bill.

Evidence --- Legal proof — Judicial notice

Effect of taxing statute passed in one province if passed in all provinces.

Per Duff C.J.C.: "It is our duty, as judges, to take judicial notice of facts which are known to intelligent persons generally.".

Statutes --- Interpretation — Rules of interpretation — Consequences

Repugnancy or inconsistency between different parts of statute.

The Courts will not presume an intention on the part of the Legislature to enact a meaningless statute or section. Where there is a repugnancy of such a character that if effect were to be given to certain words, they would empty the section of all meaning as a definition and the statute of its intended effect they should be totally disregarded.

prohibitive is not a valid exercise of provincial legislative authority under section 92. Such legislation, though in the form of a taxing statute, is "directed to" the frustration of the system of banking established by the Bank Act, and to the controlling of banks in the conduct of their business.

100 The answer, therefore, to the question concerning this Bill is that it is *ultra vires* .

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102 We now turn to Bill No. 9.

103 This Bill contains two substantive provisions. Both of them impose duties upon newspapers published in Alberta which they are required to perform on the demand of "the Chairman," who is, by the interpretation clause, the Chairman of "the Board constituted by section 3 of *The Alberta Social Credit Act* ."

104 The Board, upon the acts of whose Chairman the operation of this statute depends, is, in point of law, a nonexistent body (there is, in a word, no "board" in existence "constituted by section 3 of *The Alberta Social Credit Act"*) and both of the substantive sections, sections 3 and 4, are, therefore, inoperative. The same, indeed, may be said of sections 6 and 7 which are the enactments creating sanctions. It appears to us, furthermore, that this Bill is a part of the general scheme of Social Credit legislation, the basis of which is *The Alberta Social Credit Act;* the Bill presupposes, as a condition of its operation, that *The Alberta Social Credit Act* is validly enacted; and, since that Act is *ultra vires* , the ancillary and dependent legislation must fall with it.

105 This is sufficient for disposing of the question referred to us but, we think, there are some further observations upon the Bill which may properly be made.

106 Under the constitution established by *The British North America Act* , legislative power for Canada is vested in one Parliament consisting of the Sovereign, an upper house styled the Senate, and the House of Commons. Without entering in detail upon an examination of the enactments of the Act relating to the House of Commons, it can be said that these provisions manifestly contemplate a House of Commons which is to be, as the name itself implies, a representative body; constituted, that is to say, by members elected by such of the population of the united provinces as may be qualified to vote. The preamble of the statute, moreover, shows plainly enough that the constitution of the Dominion is to be similar in principle to that of the United Kingdom. The statute contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.

107 The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in *James v. Commonwealth*[38] , "freedom governed by law."

108 Even within its legal limits, it is liable to abuse and grave abuse, and such abuse is constantly exemplified before our eyes; but it is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions.

109 We do not doubt that (in addition to the power of disallowance vested in the Governor General) the Parliament of Canada possesses authority to legislate for the protection of this right. That authority rests upon the principle that the powers requisite for the protection of the consti tution itself arise by necessary implication from *The British North America Act* as a whole (*Fort Frances Pulp & Power Co. Ltd. v. Manitoba Free Press Co. Ltd.*[39]); and since the subject-matter in relation to which the power is exercised is not exclusively a provincial matter, it is necessarily vested in Parliament.