TAB 13

Sullivan on the Construction of Statutes

Fifth Edition

by

Ruth Sullivan

Professor of Law
University of Ottawa

LexisNexis®

> avoid conflict.... In this way, the true intention of the Legislature is more likely to be ascertained.[2]

In *Willick v. Willick*, Sopinka J. wrote:

> With respect to the application of the contextual approach, ... the objective is to interpret statutory provisions to harmonize the components of legislation inasmuch as is possible, in order to minimize internal inconsistency....[3]

In *Point-Claire (City) v. Quebec (Labour Court)*, Lamer C.J. wrote:

> There is no doubt that the principle that statutes dealing with similar subjects must be presumed to be coherent means that interpretations favouring harmony among statutes should prevail over discordant ones ....[4]

Overview of strategies for achieving coherence. The presumption of coherence is virtually irrebuttable. Since disputes must be resolved by the courts in a definitive fashion, in accordance with "the law", contradiction or inconsistency cannot be tolerated; some method of reconciliation must be found. The courts have a number of strategies to help ensure this result.

When two provisions are applicable to the same facts, the courts attempt to apply both. If the provisions are not in conflict (and conflict for this purpose is narrowly defined), then it is presumed that both provisions are meant to apply in accordance with their terms. This is the presumption of overlap, examined below. The presumption of overlap is rebutted by evidence that one of the provisions is meant to be an exhaustive account of the applicable law.

If the provisions cannot both apply without conflict, the courts resort to one of the conflict resolution techniques at their disposal. These include (1) legislative intent, whether express or implied; (2) the paramountcy of some categories of legislation over others; (3) implied exception (*generalia specialibus non derogant*); and (4) implied repeal.

Presumption of overlap. When two provisions are applicable without conflict to the same facts, it is presumed that each is meant to operate fully according to its terms. So long as overlapping provisions *can* apply, it is presumed that they are meant to apply. The only issue for the court is whether the presumption is rebutted by evidence that one of the provisions was intended to provide an exhaustive declaration of the applicable law.

This approach is illustrated by the judgment of the Supreme Court of Canada in *R. v. Williams*.[5] In that case the Court was concerned with two sets of regulations made by the Governor in Council. The Foreign Exchange Control Order

---

2 [1989] S.C.J. No. 99, [1989] 2 S.C.R. 796, at 716 (S.C.C.).

3 [1994] S.C.J. No. 94, [1994] 3 S.C.R. 670, at 689 (S.C.C.).

4 [1997] S.C.J. No. 41, [1997] 1 S.C.R. 1015 (S.C.C.).

5 [1944] S.C.J. No. 20, [1944] S.C.R. 226 (S.C.C.). See also *R. v. Charles*, [2006] A.J. No. 825, 210 C.C.C. (3d) 289, at para. 14 (Alta. C.A.); *Antigonish (Town) v. Antigonish (County)*, [2006] N.S.J. No. 85, at paras. 43-45, 48-49 (N.S.C.A.); *2214351 Manitoba Ltd. v. Wallace (Rural Municipality)*, [2005] M.J. No. 7, at paras. 20-21 (Man. C.A.).

TAB 14

Indexed as:

Ontario Public Service Employees' Union v. Ontario (Attorney General)

Ontario Public Service Employees' Union, Marie Wilkinson, Edward E. Faulknor and Russell B. Smith, appellants;
and
Attorney General for Ontario, respondent;
and
The Attorney General of Canada, the Attorney General of Quebec, the Attorney General of Nova Scotia, the Attorney General for New Brunswick, the Attorney General of British Columbia, the Attorney General for Saskatchewan, the Attorney General for Alberta, interveners.

[1987] 2 S.C.R. 2

[1987] S.C.J. No. 48

File No.: 16464.

Supreme Court of Canada

1986: March 18, 19 / 1987: July 29.

Present: Dickson C.J. and Beetz, McIntyre, Chouinard *, Lamer, Le Dain and La Forest JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

* Chouinard J. took no part in the judgment.

Constitutional law -- Division of powers -- Province restricting political activity of provincial civil servants and Crown employees in federal elections -- Whether or not restrictions intra vires the province -- Constitution Act, 1867, ss. 91, 92(1), (4), (13) -- Constitution Act, 1982, s. 45 -- The 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 Ontario Public Service Employees' Union is bargaining agent for Government of Ontario employees subject to The Public Service Act and each of the individual appellants is a Crown em-

ployee, a civil servant and a member of the appellant union. Each individual appellant wishes to engage in political activities currently prohibited by The Public Service Act, including: running for election to Parliament without taking a leave of absence; canvassing and soliciting funds on behalf of federal political parties; and expressing opinions in public on federal political issues. The appellants are concerned that pursuit of these political [page3] activities would subject them to disciplinary measures pursuant to The Public Service Act. A motion for an order declaring ss. 12-16 of the Act unconstitutional was heard prior to the coming into force of the Charter and proceeded simply on distribution of powers grounds. The motion was denied by Labrosse J. The Court of Appeal affirmed this decision and the underlying rationale that provincial jurisdiction was grounded in s. 92(13) of the Constitutional Act, 1867. The three constitutional questions stated before the Supreme Court of Canada dealt with ss. 12-16 of The Public Service Act. Were these sections unconstitutional or inoperative in that (1) they purported to restrain provincial civil servants and Crown employees from engaging in certain federal political activity, (2) they contravened ss. 2, 3 and/or 15(1) of the Charter, and (3) if so, whether or not they were justified under s. 1 of the Charter. Following this Court's decision on a preliminary issue that it would not hear or decide Charter issues, the case proceeded on submissions based upon the distribution of legislative powers and argument relying upon certain statements in Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455.

Held: The appeal should be dismissed and the first constitutional question answered in the negative.

Per Beetz, McIntyre, Le Dain and La Forest JJ.: The impugned provisions constitute an ordinary legislative amendment of the constitution of Ontario, within the meaning of s. 92(1) of the Constitution Act, 1867, and they also relate to the tenure of provincial office within the meaning of s. 92(4). The legislation cannot be constitutionally justified on the sole basis that they are in pith and substance labour relations legislation and therefore a matter of property and civil rights in the province. The impugned provisions are not related to the field of federal elections.

In so far as this legislation can be said to confer rights, individual or collective, upon Ontario residents to have an impartial civil service, such rights are not civil but rather public or political rights. Although the Act provides for the general regulation of the hiring, dismissal and terms and conditions of employment of the provincial public service, many of its provisions, including the impugned provisions, can only be explained and justified by the fact that the employment in question is [page4] public employment. They cannot, therefore, be grounded only in s. 92(13) of the Constitution Act, 1867 but can be fully grounded in s. 92(1) and (4).

The constitution of Ontario is not to be found in a comprehensive, written instrument called a constitution. An enactment can generally be considered as an amendment of the constitution of a province when it bears on the operation of an organ of the government of the province, provided it is not otherwise entrenched as being indivisibly related to the implementation of the federal principle or to a fundamental term or condition of the union, and provided of course it is not explicitly or implicitly excepted from the amending power bestowed upon the province by s. 92(1), such as the offices of Lieutenant-Governor and of the Queen. The fact that a province can validly give legislative effect to a prerequisite condition of responsible government does not necessarily mean it can do anything it pleases with the principle of responsible government itself. Thus, it is uncertain, to say the least, that a province could touch upon the power of the Lieutenant-Governor to dissolve the legislature, or his power to appoint and dismiss ministers, without unconstitutionally touching his office itself. The principle of responsible government could, to the extent that it depends on those important royal powers, be entrenched to a substantial extent. The power of constitutional amendment given

to the provinces by s. 92(1) does not necessarily comprise the power to bring about a profound constitutional upheaval by the introduction of political institutions foreign to and incompatible with the Canadian system.

The provisions impugned here are constitutional for they bear on the operation of the Ontario Public Service, which is an organ of government, and they impose on its members the duty to abstain from certain political activities in order to implement the principle of impartiality of the public service which is considered as an essential prerequisite of responsible government. It can similarly be said that the public service in Ontario is a part of the executive branch of the government of Ontario.

The impugned provisions are not related to the exclusively federal subject of federal elections. Rather than affecting federal elections per se, these provisions create a disability from membership in the Ontario Public Service, thereby affecting a provincially created relationship.

[page5]

This disability extended to federal elections in order to ensure global political independence for provincial officers. The object of political discourse, the ultimate form of political activity, remains indivisible even in federations with divided jurisdictions. Political activities in the federal field, therefore, had to be included in the impugned provisions to ensure the impartiality of the provincial public service. The alternative would have made the legislation miss its target altogether. The aim of the legislation, far from violating the federal principle, was to reinforce it and to secure the operation of responsible government within a federal framework; its effects on federal political activities were necessarily incidental. The constitutional validity of the impugned provisions may also be supported under s. 92(4) of the Constitution Act, 1867, which in any event buttresses the argument already made under s. 92(1).

In a distribution of powers case, once it is demonstrated that the enacting legislature is competent, the balancing of conflicting values depends on the political judgment of such legislature and cannot be reviewed by the courts without their passing upon the wisdom of the legislation.

The fundamental right in Canada to participate in certain political activities is not infringed by the impugned legislation; federal and provincial elections are only affected in an incidental way. The basic structure of the Constitution established by the Constitution Act, 1867 contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels. Neither Parliament nor the provincial legislatures may enact legislation which would substantially interfere with the operation of this basic structure. 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.

Per Dickson C.J.: The Public Service Act is directed to the general regulation of the hiring, dismissal, and terms and conditions of employment in the public service and in essence governs the establishment, functions, responsibilities and employment relationships of the Ontario Public Service. Viewed in its entirety, it is easily and explicitly authorized by s. 92(4) of the Constitution Act, 1867 concerning provincial offices and appointments. The Act, which deals with many of the traditional components of an employer-employee relationship, also falls within the province's property and civil rights power, since labour relations has long been a subject [page6] matter generally within provincial jurisdiction under s. 92(13). Constitutional authority granted under s. 92(4) and

(13) extends to the specific prohibitions against political activity in ss. 12-16 of the Act. There was no reason, given the Act's validity as a whole under both s. 92(4) and (13), to consider s. 92(1) with the attendant difficulties of assigning a precise content to the concept of "a provincial constitution".

The doctrine of interjurisdictional immunity is not a particularly compelling doctrine given its inconsistency with the basic pith and substance doctrine that a law "in relation to" a provincial matter may validly "affect" a federal matter. Furthermore Parliament, while it can easily enact appropriate laws effecting paramountcy over conflicting provincial laws, has not done so here. The Court, in light of the federal government's intervention in support of the Ontario law and its legislation based on the same constitutional approach adopted by Ontario, should be particularly cautious about invalidating a provincial law.

Appellants argued that the prohibitions were overbroad in that the prohibitions applied to all civil servants without distinguishing between the types of jobs performed and that they covered too wide a range of political activities. Overreach in the sense here used is not arguable in a distribution of powers case.

Appellants also argued, relying on a statement in Fraser v. Public Service Staff Relations Board, that Canadian constitutional jurisprudence recognized the existence of certain fundamental political rights and freedoms in the citizens to participate in federal political activities. Freedom of speech and expression is a fundamental animating value in the Canadian constitutional system. No single value, however, no matter how exalted, can bear the full burden of upholding a democratic system of government and some underlying and important values may even conflict. It would be inappropriate to enter into a detailed application of the Fraser principles to the facts of the present case because none of the individual appellants has actually been subjected to disciplinary proceedings.

Per Lamer J.: The Public Service Act is authorized by s. 92(4) of the Constitution Act, 1867; there was no need to consider s. 92(1) or (13).

[page7]

Cases Cited

By Beetz J.

Considered: Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455; In re Initiative and Referendum Act, [1919] A.C. 935; distinguished: McKay v. The Queen, [1965] S.C.R. 798, reversing [1964] 1 O.R. 641, reversing [1963] 2 O.R. 162; referred to: Re United Glass & Ceramic Workers of North America and Domglas Ltd. (1978), 19 O.R. (2d) 353; Maritime Bank of Canada (Liquidators of) v. Receiver-General of New Brunswick, [1892] App. Cas. 437; Attorney-General of Ontario v. Mercer (1883), 8 App. Cas. 767; Re: Resolution to amend the Constitution, [1981] 1 S.C.R. 753; Attorney General of Quebec v. Blaikie, [1979] 2 S.C.R. 1016, affirming [1978] C.A. 351; R. v. Ulmer, [1923] 1 W.W.R. 1, 1 D.L.R. 304; Fielding v. Thomas, [1896] A.C. 600; Jones v. Attorney General of New Brunswick, [1975] 2 S.C.R. 182; Valin v. Langlois (1879), 5 A.C. 115, affirming (1879), 3 S.C.R. 1; Attorney-General for Canada v. Attorney-General for Ontario, [1898] A.C. 247; Lenoir v. Ritchie (1879), 3 S.C.R. 575; Reference re Minimum Wage Act of Saskatchewan, [1948] S.C.R. 248; Johannesson v. Municipality of West St. Paul [1952] 1 S.C.R. 292; Attor-

ney General of Quebec and Keable v. Attorney General of Canada, [1979] 1 S.C.R. 218; Reference re Alberta Statutes, [1938] S.C.R. 100; Switzman v. Elbling, [1957] S.C.R. 285.

By Dickson C.J.

Overruled: McKay v. The Queen, [1965] S.C.R. 798; referred to: Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455; Toronto Electric Commissioners v. Snider, [1925] A.C. 396; John Deere Plow Co. v. Wharton, [1915] A.C. 330; Great West Saddlery Co. v. The King, [1921] 2 A.C. 91; Attorney-General for Manitoba v. Attorney-General for Canada (Manitoba Securities Case), [1929] A.C. 260; Commission du Salaire Minimum v. Bell Telephone Co., [1966] S.C.R. 767; Walter v. Attorney General of Alberta, [1969] S.C.R. 383; Cardinal v. Attorney General of Alberta, [1974] S.C.R. 695; Attorney General of Quebec v. Kellogg's Co. of Canada, [1978] 2 S.C.R. 211; Construction Montcalm Inc. v. Minimum Wage Commission, [1979] 1 S.C.R. 754; Four B Manufacturing Ltd. v. United Garment Workers of America, [1980] 1 S.C.R. 1031; Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161; Oil Chemical and Atomic Workers International Union v. Imperial Oil Ltd., [1963] S.C.R. 584; Re C.F.R.B. and Attorney-General for Canada, [1973] 3 O.R. 819; RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573.

[page8]

By Lamer J.

Overruled: McKay v. The Queen, [1965] S.C.R. 798.

Statutes and Regulations Cited

Canada Elections Act, R.S.C. 1970 (1st Supp.), c. 14.
Canada Elections Act, S.C. 1960, c. 39, s. 71.
Canadian Charter of Rights and Freedoms, ss. 2, 3, 15(1).
Constitution Act, 1867, ss. 58-70, 82-87, 91, 92(1), (4), (13).
Constitution Act, 1982, s. 45.
Crown Employees Collective Bargaining Act, 1972, S.O. 1972, c. 67.
Executive Council Act, R.S.O. 1970, c. 153.
Legislative Assembly Act, R.S.O. 1970, c. 240.
Official Languages Act, R.S.C. 1970, c. O-2.
Public Service Act, R.S.O. 1970, c. 386, ss. 2, 3, 10, 12(1), (2), (3), (4), (5), 13(1), (2), 14, 15, 16, 23, 24, 26, 27, 28, 28a, now R.S.0 1980, c. 418.
Public Service Employment Act, R.S.C. 1970, c. P-32, s. 32.
Representation Act, R.S.O. 1970, c. 413.

Authors Cited

Clement, W.H.P. The Law of the Canadian Constitution, 2nd ed. Toronto: Carswells, 1904.
Garant, Patrice. La fonction publique canadienne et québécoise. Quebec: Presses de l'Université Laval, 1973.
Hogg, Peter W. Constitutional Law of Canada, 2nd ed. Toronto: Carswells, 1985.

APPEAL from a judgment of the Ontario Court of Appeal (1980), 31 O.R. (2d) 321, 118 D.L.R. (3d) 661, dismissing an appeal from a judgment of Labrosse J. (1979), 24 O.R. (2d) 324, 98 D.L.R. (3d) 168. Appeal dismissed; the first constitutional question is answered in the negative.

Stephen T. Goudge and Ian McGilp, for the appellants.
Blenus Wright and Carol Creighton, for the respondent.
Graham R. Garton, for the intervener the Attorney General of Canada.
Real A. Forest and Alain Gingras, for the intervener the Attorney General of Quebec.
William M. Wilson, for the intervener the Attorney General of Nova Scotia.
[page9]
Richard C. Speight, for the intervener the Attorney General for New Brunswick.
Joseph J. Arvay, for the intervener the Attorney General of British Columbia.
Robert G. Richards, for the intervener the Attorney General for Saskatchewan.
William Henkel, Q.C., and Robert J. Normey, for the intervener the Attorney General for Alberta.

Solicitors for the appellants: Gowling & Henderson, Toronto.
Solicitor for the respondent: Attorney General for Ontario, Toronto.
Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.
Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Ste-Foy.
Solicitor for the intervener the Attorney General of Nova Scotia: Attorney General of Nova Scotia, Halifax.
Solicitor for the intervener the Attorney General for New Brunswick: Attorney General for New Brunswick, Fredericton.
Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.
Solicitor for the intervener the Attorney General for Saskatchewan: James B. Taylor, Regina.
Solicitor for the intervener the Attorney General for Alberta: Attorney General for Alberta, Edmonton.

The following are the reasons delivered by

1 **THE CHIEF JUSTICE**:-- This appeal involves an important area of constitutional law, namely, the scope of provincial jurisdiction to regulate certain political activities of provincial civil servants and Crown employees.

I

The Facts

2 The Ontario Public Service Employees' Union is bargaining agent for approximately 50,000 employees of the Government of Ontario who are subject to The Public Service Act, R.S.O. 1970, c. 386, now R.S.O. 1980, c. 418, of that province. Marie Wilkinson is employed by the Ontario Ministry of Community and Social Services as a counsellor at a centre for the care of the mentally retarded. Edward Faulknor is employed by the Ontario Ministry of Revenue as an assessor. Russell Smith is employed by the Ministry of Natural Resources as a laboratory technician.

3 Each of the individual appellants is a Crown employee, a civil servant and a member of the appellant union. Each individual appellant wishes to engage in political activities currently prohibited by The Public Service Act, including: running for election to Parliament without taking a leave of absence; canvassing and soliciting funds on behalf of federal political parties; and expressing opinions in public on federal political issues. The appellants are concerned that pursuit of these political activities [page10] would subject them to disciplinary measures pursuant to The Public Service Act.

II

The Legislation

4 The general thrust of the Ontario Public Service Act is the regulation of the hiring, dismissal and terms and conditions of employment in the public service. Within this general context there are five provisions which prohibit public servants from engaging in some political activities. These sections read as follows:

> 12.--(1) Except during a leave of absence granted under subsection 2, a Crown employee shall not,
>
> (a) be a candidate in a provincial or federal election or serve as an elected representative in the legislature of any province or in the Parliament of Canada;
> (b) solicit funds for a provincial or federal political party or candidate; or
> (c) associate his position in the service of the Crown with any political activity.
>
> (2) Any Crown employee, other than deputy minister or any other Crown employee in a position or classification designated in the regulations under clause u of subsection 1 of section 29, proposes to become a candidate in a provincial or federal election shall apply through his minister to the Lieutenant Governor in Council for a leave of absence without pay for a period,
>
> (a) not longer than that commencing on the day on which the writ for the election is issued and ending on polling day; and
> (b) not shorter than that commencing on the day provided by statute for the nomination of candidates and ending on polling day,
>
> and every such application shall be granted.
>
> (3) Where a Crown employee who is a candidate in a provincial or federal election is elected, he shall forthwith resign his position as a Crown employee.
>
> (4) Where a Crown employee who has resigned under subsection 3,

(a) ceases to be an elected political representative within five years of the resignation; and

(b) applies for reappointment to his former position or to another position in the service of the Crown [page11] for which he is qualified within three months of ceasing to be an elected political representative,

he shall be reappointed to the position upon its next becoming vacant.

(5) Where a Crown employee has been granted leave of absence under subsection 2 and was not elected, or resigned his position under subsection 3 and was reappointed under subsection 4, the period of the leave of absence or resignation shall not be computed in determining the length of his service for any purpose, and the service before and after such period shall be deemed to be continuous for all purposes.

13.--(1) A civil servant shall not during a provincial or federal election canvass on behalf of a candidate in the election.

(2) Notwithstanding subsection 1, a deputy minister or any other Crown employee in a position or classification designated in the regulations under clause u of subsection 1 of section 29 shall not at any time canvass on behalf of or otherwise actively work in support of a provincial or federal political party or candidate.

14. Except during a leave of absence granted under subsection 2 of section 12, a civil servant shall not at any time speak in public or express views in writing for distribution to the public on any matter that forms part of the platform of a provincial or federal political party.

15. A Crown employee shall not during working hours engage in any activity for or on behalf of a provincial or federal political party.

16. A contravention of section 11, 12, 13, 14 or 15 shall be deemed to be sufficient cause for dismissal.

5 Most of these prohibitions are qualified by leave of absence provisions. This case arose because the individual appellants either wanted to take part in some of the prohibited activities after working hours, or sought, and were refused, leaves of absence to engage in them.

III

Procedural History

1. Supreme Court of Ontario

6 A motion brought on behalf of the appellants before Labrosse J. for an order declaring unconstitutional ss. 12, 13, 14, 15 and 16 of The Public Service Act was denied: (1979), 24 O.R. (2d) 324, [page12] 98 D.L.R. (3d) 168. The motion was heard prior to the date on which the Canadian Charter of Rights and Freedoms came into force and proceeded simply on distribution of powers grounds. The challenge to the Ontario law was that it could not limit in any way the activities of the appellants in a federal election because jurisdiction over federal elections rested exclusively with Parliament.

7 The position of the Attorney General for Ontario was that the entire law, including the prohibitions as applied to federal elections, was authorized by s. 92(1), (4) and (13) of the Constitution Act, 1867 which provide:

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, --
>
> 1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of Lieutenant Governor.
>
> * * *
>
> 4. The Establishment and Tenure of Provincial offices and the Appointment and Payment of Provincial officers.
>
> * * *
>
> 13. Property and Civil Rights in the Province.

It should be noted that s. 92(1) is now, with some modification of wording but not of substance, s. 45 of the Constitution Act, 1982.

8 At the hearing of the motion, Labrosse J. accepted that the Act, including prohibitions, was essentially a labour relations law and therefore valid under s. 92(13). He noted that the Act provides for the general regulation of the hiring, dismissal, and terms and conditions of employment of the civil service. The impugned sections, therefore, were found to be, in pith and substance, enacted to govern public sector labour relations in the province. In so far as they affected political activities in federal elections, Labrosse J. said they [page13] did so incidentally, as part of a wider legislative scheme to regulate labour relations.

2. The Ontario Court of Appeal

9 A unanimous three-judge panel of the Ontario Court of Appeal ((1980), 31 O.R. (2d) 321, 118 D.L.R. (3d) 661) affirmed both Labrosse J.'s decision and the underlying rationale that provincial jurisdiction was grounded in s. 92(13). Although The Public Service Act includes restrictions on the federal political activities of employees, MacKinnon A.C.J.O., for the Court, found that the Act was essentially labour relations legislation and the prohibitions were conditions of employment designed to preserve the impartiality of the public service. As such, the Act, including the prohibitions, fell within provincial jurisdiction over property and civil rights.

10 MacKinnon A.C.J.O. included an overview of the constitutional significance of the political impartiality of the public service which he held to be crucial to the viability of a system of responsible government in Canada. He asserted that the public has a right to an impartial public service. The Public Service Act was intended to protect the civil rights of Ontario residents and was accordingly valid in a second sense under s. 92(13) of the Constitution Act, 1867.

11 Finally, although he did not decide the point, because of his conclusions about s. 92(13), MacKinnon A.C.J.O. said there was "considerable force" in the Attorney General's argument based on s. 92(1) and (4) of the Constitution Act, 1867.

3. The Supreme Court of Canada

12 Leave to appeal was granted by this Court. The following are constitutional questions as stated by Laskin C.J. and as revised and supplemented by Dickson C.J.:

1. Are ss. 12, 13, 14, 15 and 16 of The Public Service Act R.S.O. 1970, c. 386, as amended, unconstitutional insofar as they purport to restrain provincial Civil Servants [page14] and Crown Employees from engaging in certain federal political activity?
2. Do ss. 12, 13, 14, 15 and 16 of The Public Service Act R.S.O. 1970, c. 386 as amended, infringe or deny the rights and freedoms guaranteed by ss. 2, 3 and/or 15(1) of the Canadian Charter of Rights and Freedoms insofar as they purport to restrain provincial Civil Servants and Crown Employees from engaging in certain federal and provincial political activity?
3. If ss. 12, 13, 14, 15 and 16 of The Public Service Act, R.S.O. 1970, c. 386 as amended, infringe or deny ss. 2 and 3, and/or 15(1) of the Canadian Charter of Rights and Freedoms, are these sections justified by s. 1 of the Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act, 1982?

13 At the start of the hearing of the appeal before this Court, a preliminary issue was raised concerning the hearing of argument on Charter issues. It was contended by the Attorney General for Ontario, supported by several intervening Attorneys General, that the Court should not address the Charter issues because all of the activities in the case were pre-Charter and neither of the Ontario courts had heard Charter arguments. After argument, the Court decided (Dickson C.J. and Chouinard and Le Dain JJ. dissenting) that the Court would not hear or decide the Charter issues. In the result, the case proceeded on submissions based upon the distribution of legislative powers and a hastily constructed argument relying upon certain statements in Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455.

IV

The Distribution of Powers

14 The first step in any distribution of powers case is to characterize the law in question. This is not the ultimate legal step; it is not to classify the law as coming under one of the heads of s. 91 or s. 92. [page15] It is simply a preliminary step, namely to identify and describe the dominant features, the essential coverage, of the law. The Act with which we are here concerned is, as mentioned above, directed to the general regulation of the hiring, dismissal, and terms and conditions of em-

ployment in the public service. In essence it governs the establishment, functions, responsibilities and employment relationships of the Ontario Public Service.

15 In light of this description, it can be seen that the Act, viewed in its entirety, is easily and explicitly authorized by s. 92(4) of the Constitution Act, 1867 which gives the provinces jurisdiction over "the establishment and tenure of provincial offices and the appointment and payment of provincial officers". Additionally, since The Public Service Act deals with many of the traditional components of an employer-employee relationship and since labour relations has long been a subject matter generally within provincial jurisdiction under s. 92(13) of the Constitution Act, 1867 (see Toronto Electric Commissioners v. Snider, [1925] A.C. 396, and many subsequent cases), it follows that The Public Service Act is within provincial property and civil rights jurisdiction. Because the Act as a whole is clearly valid under both s. 92(4) and (13), I see no reason to embark upon a consideration of s. 92(1). I am reinforced in this conclusion by the difficulty of assigning a precise content to the concept of "a provincial constitution".

16 But what of the specific prohibitions against political activity in ss. 12-16 of The Public Service Act. Does the constitutional authority for the Act, viewed as a whole, extend to the prohibitions? In light of the overall labour relations thrust of The Public Service Act it is reasonable to characterize ss. 12-16 of the Act as being also labour relations provisions. The prohibitions against certain types of political activity are essentially terms and conditions of employment and can be supported, therefore, under s. 92(13). Similarly, these prohibitions [page16] are terms and conditions of public employment. As such, they are clearly enacted in relation to the establishment and tenure of provincial offices and are therefore valid under s. 92(4) of the Constitution Act, 1867.

17 The appellants, as I understand their position, do not really deny these conclusions as a matter of general distribution of powers analysis. They do, however, deny the conclusions on two other bases: first, that the prohibitions against political activity by provincial public servants in federal elections are outside the scope of provincial s. 92 jurisdiction; secondly, that the prohibitions are overbroad. It is to these two arguments that I now turn.

1. The Appellants' Federalism Arguments

18 The crux of the appellants' federalism position is that The Public Service Act, admittedly valid in most respects, cannot prohibit the political activities of Ontario public servants in federal elections because:

(1) federal elections are within the exclusive domain of Parliament, and
(2) such a law does not meet the "in the province" limitation on the various heads in s. 92 of the Constitution Act, 1867.

The appellants buttress these arguments by reference to the principle of interjurisdictional immunity and to this Court's decision in McKay v. The Queen, [1965] S.C.R. 798.

(a) Interjurisdictional Immunity

19 The appellants' first argument is based on the principle of interjurisdictional immunity which posits that legislation enacted by one order of government cannot interfere with, or have an impact on, subject matters under the jurisdiction of the other order of government. The doctrine had its origins in the so-called "company law cases" [page17] where it was held that provincial laws could not

sterilize or impair the status or essential powers of a federally incorporated company. See John Deere Plow Co. v. Wharton, [1915] A.C. 330; Great West Saddlery Co. v. The King, [1921] 2 A.C. 91; Attorney-General for Manitoba v. Attorney-General for Canada (Manitoba Securities Case), [1929] A.C. 260.

20 After its initial development in the company cases, the doctrine expanded and had its greatest success in the context of the application of provincial laws to federal works and undertakings. The doctrine came to stand for the proposition that a provincial law could not affect a vital part of the management and operation of a federal undertaking. See, for example, Commission du Salaire Minimum v. Bell Telephone Co., [1966] S.C.R. 767. This formulation of the doctrine is important for two reasons. First, it extended the doctrine into new and important areas. "Federally incorporated companies" is not a particularly large field; "federal works and undertakings" is. Secondly, by using the terminology of "affecting a vital part" rather than the earlier phrasing of "sterilization" or "impairment", the Court perhaps signalled a broader reach for the doctrine.

21 However, even though the doctrine of interjurisdictional immunity has arguably expanded since its company law origins, it is, in my opinion, not a particularly compelling doctrine. Professor Hogg has offered two strong reasons to doubt its value (Constitutional Law of Canada, (2nd ed. 1985), at p. 331). The first, doctrinal, reason is:

> The theory behind the results [in the cases in which the doctrine has been applied] appears to be that federal heads of power not only confer power on the federal Parliament, but also operate "defensively" to deny power to the provincial Legislatures. In my view, this theory is inconsistent with the basic pith and substance doctrine -- that a law "in relation to" a provincial matter [page18] may validly "affect" a federal matter. And, indeed, for every case asserting an interjurisdictional immunity there are dozens which deny such an immunity by application the pith and substance doctrine.

The second, policy, reason is:

> From a policy standpoint, the immunity of federal under takings seems unnecessary, because the federal Parliament can, if it chooses, easily protect undertakings within federal jurisdiction from the operation of provincial laws by enacting appropriate laws which will be paramount over conflicting provincial laws.

22 I favour both of these arguments of caution about the scope of the interjurisdictional immunity doctrine. The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that doctrines like interjurisdictional and Crown immunity and concepts like "watertight compartments" qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines; rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues. See, for example, Walter v. Attorney General of Alberta, [1969] S.C.R. 383; Cardinal v. Attorney General of Alberta, [1974] S.C.R. 695; Attorney General of Quebec v. Kellogg's Co. of Canada, [1978] 2 S.C.R. 211; Construction Montcalm Inc. v. Minimum Wage Commission, [1979] 1 S.C.R. 754; Four B Manufacturing Ltd. v. United Garment Workers of America, [1980] 1 S.C.R. 1031; Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161. In light

of these decisions, I am not prepared to extend the doctrine of interjurisdictional immunity into a field -- federal elections -- which is unrelated to either the company law cases or the federal undertakings [page19] cases, the two historical roots of the doctrine.

23 Furthermore, as Professor Hogg implies, the federal Parliament always has a powerful weapon -- its own legislation. If Parliament does not approve of the application of a provincial law to a matter within federal jurisdiction it can easily legislate to prevent the unwanted application. In the present case, the Canada Elections Act, R.S.C. 1970 (1st Supp.), c. 14, deals with permitted and prohibited activities in federal elections. Some of the provisions of that Act relate to various kinds of disqualification from certain political activities. If Parliament wanted to defend against the prohibitions contained in ss. 12-16 of the Ontario Public Service Act it could do so. It hasn't. Indeed, it has done the opposite. By prohibiting federal public servants from engaging in certain activities during provincial elections, Parliament has indicated that it shares the approach (and the view on legality) of the Ontario legislature. It may be worth adding that most provincial legislatures have enacted legislation limiting the political activity of public servants in both federal and provincial elections.

24 I think it is important to note, and attach some significance to, not only the similar federal legislation but also the fact that the federal government intervened in this appeal to support the Ontario law. The distribution of powers provisions contained in the Constitution Act 1867 do not have as their exclusive addressees the federal and provincial governments. They set boundaries that are of interest to, and can be relied upon by, all Canadians. Accordingly, the fact of federal-provincial agreement on a particular boundary between their jurisdictions is not conclusive of the demarcation of that boundary. Nevertheless, in my opinion the Court should be particularly cautious about invalidating a provincial law when the federal government does not contest its validity or, as in this case, actually intervenes to support it and has [page20] enacted legislation based on the same constitutional approach adopted by Ontario.

(b) McKay v. The Queen

25 The appellants, however, support their argument with strong reliance on an important and factually relevant case, McKay v. The Queen. In McKay the Court held, by a majority of five-four, that a municipal by-law prohibiting the display of signs on residential property was inapplicable to federal election signs. In other words, the Court read down the law so that it would not apply in an impermissible context. The gist of the majority judgment, written by Cartwright J., was that the subject matter of federal elections was within the exclusive jurisdiction of Parliament and that a provincial law could not interfere in any way with this subject matter. He said, at p. 804:

> I cannot think that it was the intention of the Council to so enact or that it was the intention of the legislature to empower it to do so. Such an enactment would, in my opinion, be ultra vires of the provincial legislature. The power of the legislature to enact such a law, if it exists, must be found in s. 92 of the British North America Act. It is argued for the respondent that it falls within head 13, "Property and Civil Rights in the Province." Whether or not the right of an elector at a federal election to seek by lawful means to influence his fellow electors to vote for the candidate of his choice is aptly described as a civil right need not be discussed; it is clearly not a civil right in the province. It is a right enjoyed by the elector not as a resident of Ontario but as a citizen of Canada.

The appellants contend that the current appeal raises a virtually identical issue. They say that the Ontario law prohibits certain types of participation in federal elections and that, on the authority of McKay, such restrictions are unconstitutional.

[page21]

26 The respondent seeks to distinguish McKay by relying on MacKinnon A.C.J.O.'s judgment in this case in the Court of Appeal at pp. 334-35 (O.R.):

> It is interesting to note that the majority does not say, presumably because the by-law itself was not under attack, what was the pith and substance of the by-law. Further, the Court there was concerned with a quasi-criminal offence under the general by-law. In the instant case the Act creates no offence; it is a matter of possible dismissal from the civil service. There was, in other words, an absolute prohibition in the McKay case; in the instant case if the individual were not prepared to accept the limitations of employment imposed upon him, he could seek a leave of absence or leave his job. I can only repeat that I view the legislation here under attack as legislation with relation to labour relations in the province and I do not think that the McKay case is of assistance on the facts of this case.

27 The intervener Attorney General of Canada suggests a different line of distinction between McKay and this case (paragraph 6 of its factum):

> ... in McKay... the effect of the municipal by-law was to proscribe indiscriminately the exercise of a right generally enjoyed by citizens of Canada. There was no proper nexus between the purpose of the by-law and its alleged "incidental" effect on property owners. In the present case, however, it is submitted that the special relationship of public servants to government provides the link between control over labour relations and the regulation of partisan political activity. [Emphasis in original.]

28 With great respect, I am not persuaded by attempts to distinguish McKay. First, I fail to see the significance, in a federalism sense, between prohibition and curtailment. The distinction suggested by the Attorney General of Canada is perhaps stronger. The purpose of the by-law in McKay was undoubtedly aesthetic -- to ensure that lawns were not cluttered with signs, especially (one presumes) commercial signs. Federal election signs, which would be erected only every three or four years and only for several weeks, do not really fit within that aesthetic purpose. There is, in other words, arguably a lack of a nexus between the [page22] purpose of the by-law and its application to federal election signs.

29 Nevertheless, although it is maybe possible logically to distinguish McKay, my own view is that it was wrongly decided. I agree with Martland J.'s dissent (for four judges) to the effect that the by-law was in relation to property, that it was of general application and that it could permissibly have an incidental effect on certain activities in a federal election campaign. I also agree with Professor Hogg's critique of McKay (pp. 328-29 and 332):

> It must be recalled that the "pith and substance" doctrine, exemplified by Bank of Toronto v. Lambe, is that a law which is in relation to a matter within jurisdiction... is not objectionable just because it affects a matter outside jurisdiction.... Surely, therefore, the minority in McKay were right in upholding the impugned by-law even in its application to federal electoral signs. Certainly, the majority did not explain why the pith and substance doctrine should not apply. Indeed less than two years earlier, in the Oil Chemical Workers case (1963), the Supreme Court of Canada had decided, by a majority of four to three, that a provincial labour law could validly prohibit union donations to political parties (federal as well as provincial) of funds obtained by compulsory deduction from workers' pay. Obviously, a prohibition of union contribution has a more serious, biased, impact on the federal electoral process than a prohibition of residential lawn signs; and yet the prohibition of union contributions was upheld as a valid incident of a labour relations law.
>
> * * *
>
> ... I welcome the tendency in the latest cases in the Supreme Court of Canada to limit interjurisdictional immunity by liberal application of the pith and substance doctrine. In A.-G. Que. v. Kellogg's of Canada (1978), a provincial law prohibiting cartoon-style advertising [page23] directed at children was held to be applicable to advertising on television (a federally-regulated medium). In Construction Montcalm v. Minimum Wage Commission (1978), a provincial minimum wage law was held to be applicable to a contractor building a runway for an airport (a federal undertaking) on federal Crown land. In Four B Manufacturing v. United Garment Workers (1979), a provincial labour relations law was held to be applicable to a business owned by Indians on an Indian reserve. In each case, Laskin C.J. in dissent asserted immunity from the provincial law, but Martland J. for the majority and Beetz J. for the majority in Construction Montcalm and Four B, finding that the pith and substance of the law was a matter provincial jurisdiction (that was not controversial, of course), held that the law could also validly affect the federal matter to which it purported to apply. In the light of these decisions, it seems unlike the McKay case would be decided the same way today.

30 I agree with this analysis. As Professor Hogg asserts, McKay is difficult to reconcile with the Court's decision in a very similar case, Oil Chemical and Atomic Workers International Union v. Imperial Oil Ltd., [1963] S.C.R. 584. Moreover, it does not sit well with a leading decision by the Ontario Court of Appeal in an analogous case, Re C.F.R.B. and Attorney-General for Canada, [1973] 3 O.R. 819, where it was held that federal jurisdiction over broadcasting supported a federal law regulating radio advertising during both federal and provincial elections, McKay is also out of step with the doctrinal path marked out by this Court in such cases as Attorney General of Quebec v. Kellogg's Co. of Canada, supra, and Construction Montcalm Inc. v. Minimum Wage Commission, supra. I would overrule McKay. Accordingly, the appellants' strong reliance on McKay does not bear fruit.

[page24]

2. Overbreadth

31 The appellants also argued that the prohibitions were overbroad for two reasons. First, they apply to all civil servants, or in some instances to all Crown employees, without distinguishing between the types of jobs employees perform. Second, they cover too wide a range of political activities. During argument, counsel was asked whether he could cite any case in which the overbreadth or overreach argument had been given effect in a distribution of powers situation. The answer was in the negative. In my view, overreach in the sense here used is simply not arguable in a distribution of powers case. It might be noted in passing that the judgment of the Ontario Court of Appeal is silent on the overreach point although it was apparently argued in that Court.

V

The Fraser Argument

32 At paragraph 75 of their factum, the appellants argued that:

> ... Canadian constitutional jurisprudence recognizes the existence of certain fundamental political rights and freedoms in the citizens of this country to participate in federal political activities. No province has the power to reduce or to derogate from these rights and freedoms.

This is the entire written argument of the appellants on this point, which is not surprising because the appellants had expected to make their civil liberties arguments in a Charter context. Once the Court decided, at the beginning of the oral hearing, not to hear Charter arguments, the appellants were forced to ground their civil liberties submission in an alternative approach.

33 In oral argument, primary reliance was placed upon a passage from this Court's unanimous judgment in Fraser, at pp. 462-63:

> ... "freedom of speech" is a deep-rooted value in our democratic system of government. It is a principle of our common law constitution inherited from the United [page25] Kingdom by virtue of the preamble to the Constitution Act, 1867.

This principle was recently reaffirmed in RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, where McIntyre J., speaking for a unanimous Court, held at p. 584:

> Prior to the adoption of the Charter, freedom of speech and expression had been recognized as an essential feature of Canadian parliamentary democracy. Indeed, this Court may be said to have given it constitutional status.

Both of these passages manifest a clear recognition that freedom of speech and expression is a fundamental animating value in the Canadian constitutional system.

34 It must not be forgotten, however, that no single value, no matter how exalted, can bear the full burden of upholding a democratic system of government. Underlying our constitutional system are a number of important values, all of which help to guarantee our liberties, but in ways which

may sometimes conflict. It is for that reason that the passage in Fraser upon which the appellants rely so heavily is followed immediately by these words, at p. 463:

> But [freedom of speech] is not an absolute value. Probably no values are absolute. All important values must be qualified, and balanced against, other important, and often competing, values. This process of definition, qualification and balancing is as much required with respect to the value of "freedom of speech" as it is for other values.

35 The Fraser case, which of course raised issues similar to those in the present appeal, stands for the proposition then, that the freedom of expression of public servants is a fundamental value but that certain reasonable abridgements, motivated by other competing values, may validly be authorized by a legislature. The relevant considerations in evaluating the reasonableness of the limitations are set out in Fraser.

[page26]

36 It would not be appropriate to enter into a detailed application of the Fraser principles to the facts of the present case because none of the individual appellants has actually been subjected to disciplinary proceedings. As the respondent and interveners have pointed out, in determining the proper scope of application of the restrictions on political activity contained in The Public Service Act, the relevant decision makers, and in particular any grievance arbitrator, must interpret the scope of the Act in light of the principles set out in Fraser. For example, Fraser establishes that the scope of the restrictions in the Act must be considered in relation to the position and public visibility of the civil servant against whom the restrictions are said to apply.

37 In sum, it has been determined that The Public Service Act in its entirety is a valid exercise of provincial legislative jurisdiction. Furthermore, the Act must be interpreted in light of Fraser. I would add only that nothing I have said should be taken to predetermine the relevant analysis in any potential challenge to the Act launched under the Canadian Charter of Rights and Freedoms.

VI

Conclusion

38 The appeal should be dismissed. The first constitutional question should be answered as follows: Sections 12, 13, 14, 15 and 16 of The Public Service Act, R.S.O. 1970, c. 386, as amended, are constitutional in so far as they purport to restrain provincial civil servants and Crown employees from engaging in certain federal political activity. The second and third constitutional questions are not answered.

39 I would not award costs.

The judgment of Beetz, McIntyre, Le Dain and La Forest JJ. was delivered by

40 BEETZ J.:-- The issue has been stated by Laskin C.J. in the following constitutional question:

[page27]

> Are ss. 12, 13, 14, 15 and 16 of The Public Service Act, R.S.O. 1970 c. 386 as amended, unconstitutional insofar as they purport to restrain provincial Civil Servants and Crown Employees from engaging in certain federal political activity?

I

The Facts

41 The facts have been described in an agreed statement of facts, a summary of which appears in appellants' factum:

> The appellant Ontario Public Service Employees Union is the bargaining agent for approximately 50,000 employees of the government of Ontario, who are subject to the Ontario Public Service Act.
>
> The Appellant Marie Wilkinson is employed by the Ontario Ministry of Community and Social Services as a counsellor at a centre for the care of the mentally retarded in Blenheim, Ontario. The Appellant Edward E. Faulknor is employed by the Ministry of Revenue (Ontario) as an Assessor in Hamilton-Wentworth Office. The Appellant Russell B. Smith is employed as a lab technician by the Ministry of Natural Resources.
>
> Each of the individual Appellants is a Crown employee, a civil servant and a member of an appellant union.
>
> Each of the individual Appellants wishes to engage in political activities currently prohibited by the Public Service Act, including running for election to Parliament, canvassing and soliciting funds on behalf of political parties, and expressing opinions on political issues.
>
> For purposes of this Appeal the organization and philosophy of the various political parties both federally and provincially are agreed to be the same.

42 The political activities in which the individual appellants wished to engage were in connection with the 1979 federal elections. The individual appellants became concerned that the pursuit of such activities would subject them to disciplinary measures pursuant to The Public Service Act. By an originating notice of motion, they, together with their union, applied to the Supreme Court of Ontario for an order declaring unconstitutional [page28] ss. 12, 13, 14, 15 and 16 of The Public Service Act, hereafter referred to as the Act.

II

The Legislation

43 The impugned sections of the Act provide as follows:

> 12.--(1) Except during a leave of absence granted under subsection 2, a Crown employee shall not,
>
> (a) be a candidate in a provincial or federal election or serve as an elected representative in the legislature of any province or in the Parliament of Canada;
> (b) solicit funds for a provincial or federal political party or candidate; or
> (c) associate his position in the service of the Crown with any political activity.
>
> (2) Any Crown employee, other than a deputy minister or any other employee in a position or classification designated in the regulation under clause u or subsection 1 of section 29, who proposes to become a candidate in a provincial or federal election shall apply through his minister to the Lieutenant Governor in Council for leave of absence without pay for a period,
>
> (a) not longer than that commencing on the day on which the writ for the election is issued and ending on polling day; and
> (b) not shorter than that commencing on the day provided by statute for the nomination of candidates and ending on polling day,
>
> and every such application shall be granted.
>
> (3) Where a Crown employee who is a candidate in a provincial or federal election is elected, he shall forthwith resign his position as a Crown employee.
>
> (4) Where a Crown employee who has resigned under subsection 3,
>
> (a) ceases to be an elected political representative within five years of the resignation; and
> (b) applies for reappointment to his former position or to another position in the service of the Crown for which he is qualified within three months of ceasing to be an elected political representative,
>
> he shall be reappointed to the position upon its next becoming vacant.
>
> [page29] (5) Where a Crown employee has been granted leave of absence under subsection 2 and was not elected, or resigned his position under subsection 3 and was reappointed under subsection 4, the period of the leave of absence or resignation shall not be computed in determining the length of his service for

any purpose, and the service before and after such period shall be deemed to be continuous for all purposes.

13.--(1) A civil servant shall not during a provincial or federal election canvass on behalf of a candidate in the election.

(2) Notwithstanding subsection 1, a deputy minister or any other Crown employee in a position or classification designated in the regulations under clause u of subsection 1 of section 29 shall not at any time canvass on behalf of or otherwise actively work in support of a provincial or federal political party or candidate.

14. Except during a leave of absence granted under subsection 2 of section 12, a civil servant shall not at any time speak in public or express views in writing for distribution to the public on any matter that forms part of the platform of a provincial or federal political party.

15. A Crown employee shall not during working hours engage in any activity for or on behalf of a provincial or federal political party.

16. A contravention of section 11, 12, 13, 14 or 15 shall be deemed to be sufficient cause for dismissal.

44 Civil servants and Crown employees are defined in s. 1(a) and (e) of the Act:

1. ...

(a) "civil servant" means a person appointed to the service of the Crown by the Lieutenant Governor in Council on the certificate of the Commission or by the Commission, and "civil service" has a corresponding meaning;

* * *

(e) "Crown employee" means a person employed in the service of the Crown or an& agency of the Crown, but does not include an employee of Ontario Hydro or the Ontario Northland Transportation Commission;

III

Procedural History and Judgments of the Courts Below

45 The case was heard and decided by the Supreme Court of Ontario (1979), 24 O.R. (2d) 324, 98 [page30] D.L.R. (3d) 168, and the Ontario Court of Appeal (1980), 31 O.R. (2d) 321, 118 D.L.R. (3d) 661, before the Canadian Charter Of Rights and Freedoms came into force and it proceeded on grounds related to the distribution of powers between Parliament and the legislatures.

46 The main challenge to the impugned provisions was that they allegedly relate to federal elections, a field reserved to the exclusive legislative competence of Parliament. It was alternatively submitted that even if the impugned provisions are otherwise valid as relating to a provincial object, they cannot constitutionally be construed so as to extend to or embrace the core of a federal matter such as federal elections.

47 The Attorney General for Ontario took the position that the impugned provisions were entirely authorized by s. 92(1), (4) and (13) of the Constitution Act, 1867:

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, --
>
> 1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.
>
> * * *
>
> 4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
>
> * * *
>
> 13. Property and Civil Rights in the Province.

48 In his oral reasons, Labrosse J., who heard and dismissed the application, said he did not reject the submission based on s. 92(1) and (4) but that he found the argument based on s. 92(13) much more persuasive. He said:

> The Public Service Act provides for the general regulation of the hiring, dismissal and terms and conditions of employment of the civil service. The Act is really employer-employee legislation.

[page31]

49 And he held:

> The impugned legislation is in pith and substance labour legislation in relation to conditions of employment to preserve the impartiality of the civil service and therefore constitute property and civil rights in the Province.

50 Labrosse J. further held, quoting Henry J. in Re United Glass & Ceramic Workers of North America and Domglas Ltd. (1978), 19 O.R. (2d) 353, at p. 362, that in so far as the impugned provisions affected the political activities of civil servants in federal elections, they did so "incidentally, as part of a wider legislative scheme to promote labour relations, a valid provincial object".

51 The Ontario Court of Appeal unanimously affirmed the judgment of Labrosse J. as well as its rationale.

52 The lamented MacKinnon A.C.J.O., speaking for himself and for Wilson and Goodman JJ.A., reviewed the principles relating to the political impartiality of the public service and underlined their vital relationship to a system of responsible government in Canada. He wrote at p. 330 (O.R.):

> If one accepts that the political neutrality or impartiality of Crown servants is a necessary and fundamental doctrine of the Canadian Constitution, adopted from the Constitution of the United Kingdom, there is considerable force in the argument that the legislation here attacked, inasmuch as it simply gives legislative effect to an existing convention, is competent under ss. 92(1) and 92(4) of the B.N.A. Act.
>
> However, in answering what Mr. Justice Labrosse described as the real issue, namely whether it is within the competence of the Province to restrict Crown employees and civil servants in federal political activities, I would prefer to rest that answer as he did, on the effect to be given here to s. 92(13) of the B.N.A. Act. There is no question but that, under that head of legislative power, the Provinces have jurisdiction over labour relations in the Province.

53 MacKinnon A.C.J.O. added at p. 331:

[page32]

> The people of Ontario also have a special interest in the impartiality of its civil service. It can be said, accordingly, that, as well as being legislation with relation to labour relations in the Province, the legislation in question, viewed from another perspective is also legislation designed to protect the civil rights of Ontario residents generally to have an impartial civil service.

54 The appeal was accordingly dismissed.

55 Leave to appeal was granted by this Court on March 2, 1981.

56 The following are constitutional questions as stated by Laskin C.J. and as revised and supplemented by Dickson C.J.:

1. Are ss. 12, 13, 14, 15 and 16 of The Public Service Act, R.S.O. 1970, c. 386 as amended, unconstitutional insofar as they purport to restrain provincial Civil Servants and Crown Employees from engaging in certain federal political activity?
2. Do ss. 12, 13, 14, 15 and 16 of The Public Service Act, R.S.O. 1970, c. 386 as amended, infringe or deny the rights and freedoms guaranteed by ss. 2 and 3, and/or 15(1) of the Canadian Charter of Rights and Freedoms insofar as they

purport to restrain provincial Civil Servants and Crown Employees from engaging in certain federal and provincial political activity?

3. If ss. 12, 13, 14, 15 and 16 of The Public Service Act, R.S.O. 1970, Chapter 386 as amended, infringe or deny ss. 2, 3 and/or 15(1) of the Canadian Charter of Rights and Freedoms, are these sections justified by s. 1 of the Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act, 1982?

57 At the start of the hearing before this Court, the Attorney General for Ontario, supported by several intervening Attorneys General, contended that the Court should not entertain the Charter issues because all the political activities in question were pre-Charter and neither of the Courts below had heard Charter submissions. After argument, the Court decided (Dickson C.J. and Chouinard and Le Dain JJ. dissenting) that the Court would not hear or decide the Charter issues.

[page33]

58 The case then proceeded on written and oral submissions based upon the distribution of legislative powers and on oral submissions based upon a fundamental rights and freedoms argument derived from certain statements in Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455.

59 It should also be noted that s. 92(1) of the Constitution Act, 1867 has now been replaced by s. 45 of the Constitution Act, 1982, as qualified by the other provisions of Part V of the latter Act, entitled "Procedure for amending Constitution of Canada". However, the impugned provisions antedate the coming into force of this procedure; their constitutional validity will accordingly be examined in the light of the law in force at the time of their enactment. It may well be thought that the coming into force of the amending procedure has not altered the power of the province to amend its own constitution but I refrain from expressing any view on the matter.

IV

The Distribution of Powers

60 The submissions made to us by the appellants and the respondent with respect to the distribution of powers were, with some amplification, essentially the same as those presented to the Courts below. They are set out above in summary form.

61 All the intervening Attorneys General spoke in support of the conclusions sought by the Attorney General for Ontario.

62 I should state at the outset that I reach the same conclusions as the Courts below. But I reach them for different reasons.

63 In my respectful opinion, the impugned provisions are not related to the field of federal elections, as is submitted by the appellants. But neither can they be constitutionally justified on the basis, or at least on the sole basis, that they are in pith and substance labour relations legislation and therefore a matter of property and civil rights in the province. I am rather of the view that the impugned provisions are an amendment of the [page34] constitution of the province and that they are also related to the tenure of provincial offices.

1. Property and Civil Rights in the Province

64 I begin by saying why I have difficulty in agreeing with the characterization given by the Courts below to the Act as a whole as well as to its impugned provisions.

65 I start with the proposition advanced by the Court of Appeal that the legislation in question can be viewed as "designed to protect the civil rights of Ontario residents generally to have an impartial civil service". It seems to me that in so far as this legislation can be said to confer rights, individual or collective, upon the Ontario residents to have an impartial civil service, such rights are not civil but rather public or political rights. To quote Professor Hogg, in Constitutional Law of Canada (2nd ed. 1985), at p. 454, these rights do not form part of the

> ... body of private law which governs the relationships between subject and subject, as opposed to the law which governs the relationships between the subject and the institutions of government.

66 For much the same reasons, I find it difficult to regard the Act simply as "employer-employee" legislation.

67 Many of the public servants mostly affected by the impugned provisions are more than mere employees of the Crown. They include all deputy ministers, and, under the regulations referred to in s. 12(2) of the Act, they comprise, for instance, for each ministry including agencies, boards and commissions, public servants such as the assistant deputy minister, the executive director, the executive secretary, the general manager, the branch director as well as full-time heads and full-time members of boards, agencies and commissions. In the Ministry of the Attorney General, to take another example, they comprise positions and classifications such as the following ones: court administrator, crown attorney of Toronto and York, crown law officers 1, 2 and 3, judges of the Small Claims Court, justices of the peace, the [page35] local master of the Supreme Court of Ontario, provincial judges, the registrar of boards and commissions, the registrar of the Supreme Court of Ontario. To repeat, these are not mere employees. They are the holders of public office and many of them exercise important powers given to them by law.

68 The Act accordingly provides, in s. 10, that every civil servant shall subscribe an oath of office and secrecy as well as an oath of allegiance to the sovereign, and that any person or class of persons appointed to the unclassified civil service may be required to subscribe either or both the oaths. The oath of office comprises an undertaking to observe and comply with the laws of Canada and Ontario, which include the impugned provisions and it goes without saying that the subscribing of this oath is not negotiable. A provision of this type is unexpected, to say the least, in an employer-employee legislation or in an act regulating labour relations, but is very much in order in a law relating to the constitution of the province and to the tenure of provincial offices.

69 I realize that the number of public servants who fall into the above-described categories constitutes but a minority of the public service. However they are more affected than others by the impugned provisions since they cannot be given a leave of absence to carry on political activity; and it seems to me that they cannot be governed by those provisions except under the constitutional authority of some head of power other than property and civil rights.

70 As for civil servants who do not exercise powers but whose functions are simply advisory, professional or even clerical, they nevertheless hold an office, since they must subscribe what the

Act labels an oath of office. They are not merely hired by the Crown but appointed to the service of the Crown by the Lieutenant-Governor in Council on the certificate of the Civil Service Commission and, under the Act, they are given a special and, in [page36] my view, a public status which extends beyond the limits of civil rights.

71 There remains the category of Crown employees who are not included in the classified service. Their relationship with the Crown may well be governed by the law of contract, whether it be on an individual or on a collective basis, but the obligation to comply with the impugned provisions is not negotiable for them either and does not flow from their contract of employment. It is derived from the Act, a public law of Ontario which imposes this obligation upon them because they are employed in the service of the state.

72 We are not called upon to characterize the Act as a whole, as opposed to the impugned provisions. Yet it is worth observing that the only sections of the Act which can be considered as straight labour relations provisions are ss. 27, 28 and 28a which regulate the collective bargaining of the Ontario Provincial Police Force, a special case. The rest of the Act, a relatively short act comprising 32 sections, contains provisions several of which are not related directly or not related at all to labour relations. Thus, s. 1 is a definition section. Sections 2 and 3 provide for the composition and responsibility of the Civil Service Commission. I have already referred to s. 10 relating to oaths of office, secrecy and allegiance. Section 11 allows political activities in municipal elections at certain conditions, and provided that candidacies, services and activities be not affiliated with or sponsored by provincial or federal political parties. Sections 11, 12, 13, 14, 15 and 16 are the impugned provisions. Sections 23 and 24 provide for delegation of powers by deputy ministers and the Commission. I have already referred also to ss. 26, 27, 28 and 28a which relate to the labour relations of the Ontario Provincial Police Force. Finally, s. 29 confers broad regulatory powers to the Commission, subject to the approval of the Lieutenant-Governor in Council. The objects of these regulations comprise classifications for positions including salaries except classifications in which salaries are determined through bargaining pursuant to The Crown Employees Collective Bargaining Act, 1972, S.O. [page37] 1972, c. 67, defining overtime work, and the regulation of conduct of public servants, including the imposition of fines, removal from employment and demotion, and the designation of positions or classifications for the purpose of s. 11. Subsection 29(3) provides that a collective agreement prevails where it conflicts with a regulation.

73 Thus, the Act does contain some elements relating to labour relations, but they are not its chief characteristics as they are for instance in The Crown Employees Collective Bargaining Act, 1972.

74 While it can be said also that the Act provides for the general regulation of the hiring, dismissal and terms and conditions of employment of the provincial public service, many of its provisions, including the impugned provisions, can only be explained and justified by the fact that the employment in question is public employment. That is why they cannot in my opinion be grounded, or be grounded only in s. 92(13) of the Constitution Act, 1867. But they can be fully grounded in s. 92(1) and (4).

2. The Amendment of the Constitution of the Province

75 Section 92(1) of the Constitution Act, 1867 provides for the process whereby the constitution of the province can be amended. This process is an ordinary law or statute of the provincial legislature. But the Constitution Act, 1867 nowhere defines the expression "constitution of the province".

76 The constitution of Ontario, like that of the other provinces and that of the United Kingdom, but unlike that of many states, is not to be found in a comprehensive, written instrument called a constitution. It is partly contained in a variety of statutory provisions. Some of these provisions have been enacted by the Parliament at Westminster, such as ss. 58 to 70 and ss. 82 to 87 of the [page38] Constitution Act, 1867. Other provisions relating to the constitution of Ontario have been enacted by ordinary statutes of the Legislature of Ontario, for instance The Legislative Assembly Act, R.S.O. 1970, c. 240; The Representation Act, R.S.O. 1970, c. 413, and The Executive Council Act, R.S.O. 1970, c. 153.

77 Another part of the constitution of Ontario consists of the rules of the common law, developed or recognized over the years by the courts. Many of these common law rules concern the royal prerogative. For instance, they have put the Crown in right of the province in a preferred position as a creditor (Maritime Bank of Canada (Liquidators of) v. Receiver-General of New Brunswick, [1892] App. Cas. 437) and with respect to the inheritance of lands for defect of heirs (Attorney-General of Ontario v. Mercer (1883), 8 App. Cas. 767).

78 As was explained in Re: Resolution to amend the Constitution, [1981] 1 S.C.R. 753, at pp. 876-78, with respect to the Constitution of Canada -- but the same can generally be said of the constitution of Ontario -- "those parts which are composed of statutory rules and common law rules are generically referred to as the law of the constitution". In addition, the constitution of Ontario comprises rules of a different nature but of great importance called conventions of the constitution. The most fundamental of these is probably the principle of responsible government which is largely unwritten, although it is implicitly referred to in the preamble of the Constitution Act, 1867, and one of its facets is articulated in s. 83 of this Act -- possibly spent -- which, in Ontario and Quebec, "Until the Legislature of Ontario or of Quebec otherwise provides", puts a restriction on the election of holders of offices other than ministerial offices.

79 If Ontario were a unitary state, like the United Kingdom, the question whether a given enactment forms part of its constitution or amends its constitution could be resolved in the affirmative by only one relatively simple test: is the enactment constitutional [page39] in nature? In other words, is the enactment in question, by its object, relative to a branch of the government of Ontario or, to use the language of this Court in Attorney General of Quebec v. Blaikie, [1979] 2 S.C.R. 1016, at p. 1024, does "it [bear] on the operation of an organ of the government of the Province"? Does it for instance determine the composition, powers, authority, privileges and duties of the legislative or of the executive branches or their members? Does it regulate the interrelationship between two or more branches? Or does it set out some principle of government? In a unitary state without a comprehensive written constitution, this test is the only one available.

80 Because Ontario, following the British model, is without a comprehensive written constitution, its laws do not qualify as constitutional laws unless they also satisfy first the test as to whether they are constitutional in nature.

81 This first test, however, even if prima facie satisfied, is not determinative of the issue whether an Ontario statute forms part of the constitution of Ontario or is an amendment of the constitution of Ontario, within the meaning of s. 92(1) of the Constitution Act, 1867. The main reason for the insufficiency of the first test is that Ontario is not a unitary state. It is an integral part of a federal one and provisions relating to the constitution of the federal state, considered as a whole, or essential to the implementation of the federal principle, are beyond the reach of the amending power bestowed upon the province by s. 92(1). An obvious example is the whole of s. 92 itself. With respect to On-

tario, it is in a sense constitutional in nature in so far as it defines the legislative competence of the legislature of this province. But it also sets limits to the legislative competence of Parliament. It lies at the core of the scheme under which legislative competence is distributed in the federation. It forms part of the constitution of the federation considered as a whole rather than of the constitution of Ontario, within the meaning of s. 92(1) of the Constitution Act, 1867. Prior to 1982, that part of the constitution of the federation was [page40] therefore entrenched in the sense that it could only be amended by the Parliament at Westminster, in accordance with constitutional conventions.

82 Furthermore, other provisions of the Constitution Act, 1867 could be similarly entrenched and held to be beyond the reach of s. 92(1), not because they were essential to the implementation of the federal principle, but because, for historical reasons, they constituted a fundamental term or condition of the union formed in 1867. Thus, s. 133 of the Constitution Act, 1867 was held in Blaikie, supra, to constitute such a provision and to be a "part of the Constitution of Canada and of Quebec in an indivisible sense" and not a part of the constitution of Quebec within s. 92(1).

83 To sum up, therefore, and subject to the caveat I will mention later, an enactment can generally be considered as an amendment of the constitution of a province when it bears on the operation of an organ of the government of the province, provided it is not otherwise entrenched as being indivisibly related to the implementation of the federal principle or to a fundamental term or condition of the union, and provided of course it is not explicitly or implicitly excepted from the amending power bestowed upon the province by s. 92(1), such as the office of Lieutenant-Governor and, presumably and a fortiori, the office of the Queen who is represented by the Lieutenant-Governor.

84 The above-described approach seems to me to be consistent with the line followed by this Court in Blaikie, supra, where it explicitly declined to adopt a narrower line. It had been held by the Appellate Division of the Alberta Supreme Court in R. v. Ulmer, [1923] 1 W.W.R. 1, 1 D.L.R. 304, and by the Quebec Court of Appeal in Procureur général du Quebec c. Blaikie, [1978] C.A. 351, that s. 92(1) of the Constitution Act, 1867 should be given a restricted meaning embracing only those provisions included under the number and heading V of the Constitution Act, 1867, entitled "Provincial Constitutions". This restrictive interpretation [page41] could not be reconciled with Fielding v. Thomas, [1896] A.C. 600, where it had been held that the privileges and immunities of members of the Nova Scotia Legislative Assembly, and legislation giving immunity from civil liability in respect of words and conduct in the Assembly, were matters coming within s. 92(1). These matters could not conceivably be included under heading V of the Constitution Act, 1867. In Blaikie, supra, this Court had this to say about the question at pp. 1024-25:

> The fact that Fielding v. Thomas concerned matters relating to the Constitution of the Province, in the sense that it bore on the operation of an organ of the government of the Province, does not help to establish the appellant's position as to the unlimited scope of s. 92(1). The latter may, of course, cover such changes as were dealt with in Fielding v. Thomas and, also, other matters not expressly covered by the British North America Act but implicit in the Constitution of the Province. That does not, however, carry the necessary conclusion that s. 133 is unilaterally amendable. Indeed, the argument goes too far because, as pressed, it would permit amendment of the catalogue of legislative powers in the succeeding catalogue of classes of subjects in s. 92 and this was not suggested. [Emphasis added.]

85 We must now apply these tests to the provisions impugned in the case at bar.

86 It is clear to me that those provisions are constitutional in nature in the sense that they bear on the operation of an organ of government in Ontario and that they impose duties on the members of a branch of government in order to implement a principle of government. The organ of government is the Ontario Public Service. The duty is the one imposed upon the members of the public service to abstain from the political activities contemplated by the impugned provisions. The principle of government is the impartiality of the public service considered as an essential prerequisite of responsible government.

87 In Fraser, supra, Dickson C.J., speaking for the full Court, stressed "the importance and necessity [page42] of an impartial and effective public service" at p. 469. He then continued as follows on the same page and on pp. 469-70:

> There is in Canada a separation of powers among the three branches of government -- the legislature, the executive and the judiciary. In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy.
>
> The federal public service in Canada is part of the executive branch of Government. As such, its fundamental task is to administer and implement policy. In order to do this well, the public service must employ people with certain important characteristics. Knowledge is one, fairness another, integrity a third.
>
> As the Adjudicator indicated, a further characteristic is loyalty. As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty owed is to the Government of Canada, not the political party in power at any one time. A public servant need not vote for the governing party. Nor need he or she publicly espouse its policies. [The underlining is mine.]

88 It can similarly be said that the public service in Ontario is a part of the executive branch of the government of Ontario. The ministers and the executive council of Ontario would be powerless and quite incapable of administering the province if they were deprived of the public service and left to their own device. The government of a large modern state is impossible to manage without a relatively large public service which effectively participates in the exercise of political power under the supervision of responsible ministers:

> [TRANSLATION] However, while a public servant always remains a citizen he is also a servant of the State. As the holder of a small part of governmental authority and possessor of exceptional prerogatives at common law, the public servant shares in the exercise of power. This is indeed the reason that the State imposes a duty of loyalty and silence on him. Would not allowing public servants to exercise their political freedoms to the fullest risk compromising the action, even the very existence, of established governments, paralyze political control

> and waken the confidence of individuals in government, if the public servant were to fail to demonstrate the impartiality expected of the government?

[page43]

> (Patrice Garant, La fonction publique canadienne et québécoise (Quebec 1973), at pp. 347-48.)

89 So much for the branch of government which is regulated by the impugned provisions. As for the principles of government which they purport to fulfil, I think that much of what the Ontario Court of Appeal had to say on the matter in the case at bar is apposite. MacKinnon A.C.J.O. wrote:

> In Vol. II, Part 2, of Law and Custom of the Constitution (1908), Anson wrote at p, 69 that a principal feature of responsible government in colonial Canada was "the permanent tenure of office by the civil servant, and his exclusion from the Legislature". It was clearly the intention of those who framed the British North America Act, 1867, that responsible government should continue in Canada when they stated in the preamble to that Act that Canada was to have "a Constitution Principle to that of the United Kingdom".
>
> * * *
>
> The history of the development of the Legislature's control over the civil service and the gradual emancipation of civil service appointment from political patronage is of importance in determining what conventions existed in this connection at the time of Confederation. It helps determine what was imported into Canada in this regard by the words "a Constitution similar in Principle to that of the United Kingdom".
>
> In 1914 the MacDonnell Commission in the United Kingdom, in its report, pointed out that, as part of responsible government, it was necessary to impose upon civil servants some restraint on partisan political activities; this in turn would ensure and promote efficiency of public administration by civil servants. This view was adopted in 1949 by the Masterman Committee in its report on "The Political Activities of Civil Servants".

90 MacKinnon A.C.J.O. then quoted a passage of the MacDonnell Committee Report including the following one which was also quoted later by Dickson C.J. in Fraser supra, at p. 471:

> Speaking generally, we think that if restrictions on the political activities public servants were withdrawn two results would probably follow. The public might cease to believe, as we think they do now with reason believe, in the impartiality of the permanent Civil Service; and Ministers might cease to feel the well-merited confidence which they possess at present in the loyal and faithful support

> of their official subordinates; indeed [page44] they might be led to scrutinize the utterances or writings of such subordinates, and to select for positions of confidence only those whose sentiments were known to be in political sympathy with their own.
>
> If this were so, the system of recruitment by open competition would provide but a frail barrier against Ministerial patronage in all but the earlier years of service; the Civil Service would cease to be in fact an impartial, non-political body, capable of loyal service to all Ministers and parties alike; the change would soon affect the public estimation of the Service, and the result would be destructive of what undoubtedly is at present one of the greatest advantages of our administrative system, and one of the most honourable traditions of our public life.

91 MacKinnon A.C.J.O. continued:

> The Masterman Committee, in its summary of conclusions, stated that "the political neutrality of the Civil Service is a fundamental feature of British democratic government and is essential for its efficient operation. It must be maintained even at the cost of some loss of political liberty by certain of those who elect to enter the Service". A subsequent committee on the subject in the United Kingdom (the Armitage Committee) reported in the same fashion in 1978.

92 MacKinnon A.C.J.O. then proceeded to make findings which in my view are as crucial as they are unassailable:

> Clearly there was a convention of political neutrality of Crown servants at the time of Confederation and the reasoning in support of such convention has been consistent throughout the subsequent years. Whether it was honoured fully at that time in practice is irrelevant. The consideration is, as stated earlier, not as to the social desirability of the legislation but rather the fact that historically there was such a convention existing in 1867. It is difficult to take exception to Mr. Justice Labrosse's conclusion that: "Public confidence in the civil service requires its political neutrality and impartial service to whichever political party is in power" (p. 173 O.R., p. 328 D.L.R.). The impugned provisions seem to do no more than reflect the existing convention.

[page45]

93 I agree with these findings. I would however express the last one in more positive terms: to me, the impugned provisions do not merely seem to reflect the existing convention; they clearly give it the additional force and precision of legislative effect, and they are constitutional provisions by nature and prima facie competent under s. 92(1) of the Constitution Act 1867.

94 I do not think that this prima facie conclusion can be altered by the negative parts of the above-described tests.

95 Far from violating a fundamental term or condition of the union as was the case in Blaikie, supra, the impugned provisions give additional legislative effect to one of its basic tenets, the principle of responsible government. In this respect, the impugned provisions bear a closer relationship to those of the federal official Languages Act, R.S.C. 1970, c. O-2, found constitutionally valid by this Court in Jones v. Attorney General of New Brunswick, [1975] 2 S.C.R. 182.

96 I do not think either that the rules introduced by the impugned provisions can be said to be incompatible with the implementation of the federal principle.

97 I understand that, according to the appellants' first submission, the impugned provisions are related to the exclusively federal subject of federal elections (Valin v. Langlois (1879), 3 S.C.R. 1, 5 A.C. 115), and that, related to a provincial object, they cannot constitutionally extend to the federal subject of federal elections.

98 I doubt that either of these submissions reaches the level of the federal principle argument. But, be that as it may, I agree with neither of these submissions. I will deal with the second and alternative submissions in a separate chapter.

99 As for the first submission, I take the view that it should be dismissed for the following reasons. [page46] The impugned provisions constitute properly framed legislation which in no way affects the validity of federal elections or eligibility to the House of Commons, or qualifications or disqualifications to sit in this House; nor do they make the political activities which they contemplate unlawful; what they do is to create a disability from membership in the Ontario Public Service, thereby affecting a provincially created relationship; the impugned provisions are not aimed specifically at federal political activity; they are comprehensively aimed at regulating the political activities of Ontario public servants as such, that is as members of the executive branch of government, in order to safeguard their neutrality and impartiality. With all due respect, I can find no merits in the appellants' first submission.

100 In my opinion, the impugned provisions constitute an ordinary legislative amendment of the constitution of Ontario, within the meaning of s. 92(1) of the Constitution Act, 1867.

101 However, let me say one word of caution before I conclude this chapter. The fact that a province can validly give legislative effect to a prerequisite condition of responsible government does not necessarily mean it can do anything it pleases with the principle of responsible government itself. Thus, it is uncertain, to say the least, that a province could touch upon the power of the Lieutenant Governor to dissolve the legislature, or his power to appoint and dismiss ministers, without unconstitutionally touching his office itself. It may very well be that the principle of responsible government could, to the extent that it depends on those important royal powers, be entrenched to a substantial extent.

102 But there may be more to it.

103 In In re Initiative and Referendum Act, [1919] A.C. 935, the Judicial Committee invalidated legislative provisions which empowered the electors of Manitoba to legislate directly by way of a referendum procedure. The Judicial Committee found the legislation in question invalid on somewhat [page47] narrow grounds related to the office of Lieutenant-Governor. The Judicial Committee was undoubtedly conscious of the fact that the technical flaws it found in the legislation could easily be corrected without any effect on the major feature of the legislation. Viscount Haldane,

who delivered the reasons of the Judicial Committee, accordingly pronounced a deliberate and important obiter at p. 945, reading as follows:

> No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done when in Hodge v. The Queen [9 App. Cas. 117], the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise.

104 While this obiter is confined to the particular facts of that case, it may stand for the wider proposition that the power of constitutional amendment given to the provinces by s. 92(1) of the Constitution Act, 1867 does not necessarily comprise the power to bring about a profound constitutional upheaval by the introduction of political institutions foreign to and incompatible with the Canadian system.

3. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers

105 Section 92(4) of the Constitution Act, 1867 empowers the province to make laws in relation to "The Establishment and Tenure of Provincial offices and the Appointment and Payment of Provincial officers". Parliament has been given a corresponding albeit differently described power by s. 91(8) relating to "The fixing of and providing for the Salaries and Allowances of Civil and other officers of the Government of Canada".

[page48]

106 Neither of these provisions seems to have been the object of much comment, doctrinal or judicial.

107 In the second edition of The Law of the Canadian Constitution (1904), at p. 261, Clement writes that the item covered by s. 92(4) "is the guarantee for the continuance of 'responsible government.'" In Attorney-General for Canada v. Attorney-General for Ontario, [1898] A.C. 247, the Judicial Committee implicitly overruling Lenoir v. Ritchie (1879), 3 S.C.R. 575, relied upon s. 92(4), in combination with s. 92(1) and (14), to find intra vires an Ontario statute empowering the Lieutenant-Governor to confer precedence by patents upon such members of the bar of the province as he thinks fit to select.

108 However, what matters much more than the paucity of comment is the fact that the powers bestowed upon Parliament and the legislature by ss. 91(8) and 92(4) of the Constitution Act, 1867 have been exercised on a large scale without challenge ever since 1867. The lack of challenge does not mean that these powers are either axiomatic or unimportant. If the federal level of government were made entirely dependent upon provincial instrumentalities by the Constitution, Canada would

run the risk of becoming but a loose and precarious confederacy. On the other hand, it might become a highly centralized state if the converse situation were to prevail. Furthermore, the rules of responsible government might become hopelessly blurred in such hypothetical cases. Sections 91(8) and 92(4) of the Constitution Act, 1867 thus constitute provisions of fundamental importance, essential to the federal principle and to responsible government.

109 The impugned provisions are aimed at federal as well as provincial political activities and constitute a term or condition of tenure of provincial office, enforced by compulsory resignation or dismissal. Their object is to ensure in this respect, not partial virtue, but global political independence for provincial officers. Far from violating the federal principle, their aim is to reinforce it and to secure the operation of responsible government within a federal framework.

[page49]

110 In my opinion, the constitutional validity of the impugned provisions may also be supported under s. 92(4) of the Constitution Act, 1867 which in any event buttresses the argument already made under s. 92(1).

4. The McKay Case and Other Related Matters

111 The appellants sought to support their main challenge, but more particularly their alternative challenge to the impugned provisions, by relying on several judgments of this Court, among which Reference re Minimum Wage Act of Saskatchewan, [1948] S.C.R. 248; Johannesson v. Municipality of West St. Paul, [1952] 1 S.C.R. 292; McKay v. The Queen, [1965] S.C.R. 798, and Attorney General of Quebec and Keable v. Attorney General of Canada, [1979] 1 S.C.R. 218.

112 I propose to discuss only the McKay case on which appellants put special reliance.

113 In McKay, the Court held that a municipal by-law prohibiting the display of signs in a residential zone was inapplicable to federal election signs.

114 Moses and Sarah McKay had been convicted by a Justice of the Peace on a charge of unlawfully maintaining a sign on their premises, contrary to the by-law in question, and fined $25 each. The sign was displayed by the appellants on the railing of a veranda forming part of their residence during the period of a federal election. The sign urged the people to vote for a certain candidate. The by-law forbade all display of signs except those of a type not including the sign displayed by the appellants. The validity of the by-law or of the enabling legislation was not raised, but it was contended by the appellants that, on its true construction, the by-law was not intended to have the effect of forbidding the use of such a sign during the period of an election to Parliament.

115 On a stated case, the conviction was quashed by a judge of the Supreme Court of Ontario -- [1963] [page50] 2 O.R. 162 -- but restored by the Court of Appeal, [1964] 1 O.R. 641.

116 This Court, by a majority of five to four, allowed the appeal and set aside the conviction.

117 Cartwright J., as he then was, delivered the reasons of the majority. He took the view that the Justice of the Peace and the Court of Appeal had given effect to the by-law as if it specifically provided that, during an election to Parliament, no owner of property in the particular zone covered by the by-law should display any sign soliciting votes for a candidate at such election. Such an enact-

ment, he held, would be ultra vires of the province as being in relation to proceedings at a federal election.

118 Furthermore, Cartwright J. wrote at p. 804: "A political activity in the federal field which has theretofore been lawful can ... be prohibited only by Parliament". And, at p. 805, he went on to say that if the by-law was construed as it had been by the Justice of the Peace and the Court of Appeal, "it does not merely affect, it destroys the right of the appellants to engage in a form of political activity in the federal field which has heretofore been possessed and exercised by electors without question". Cartwright J. accordingly concluded that the by-law should be "read down" so that its operation be restricted to matters within the power of the enacting body, which included neither proceedings at a federal election nor the right of federal electors to engage in a lawful form of political activity.

119 Martland J. delivered the reasons of the minority. He held in essence that the by-law was a law of general application in relation to property. It should apply to the facts of that case because, assuming it had some effect on proceedings at federal elections and on the means of propaganda used by an individual or by a political party during a federal election campaign, such effect was permissible as being incidental and in no way interfering [page51] with the working of parliamentary institutions of Canada.

120 The appellants submit that McKay is determinative of the case at bar. They contend that the two cases raise an almost identical issue, that the impugned provisions prohibit certain types of participation in federal elections and that such prohibitions are unconstitutional on the authority of McKay.

121 Both Labrosse J. and the Ontario Court of Appeal distinguished McKay from the case at bar and, respectfully, I think they were right in doing so.

122 The prohibition in McKay was an absolute one, and it was enforced with penal consequences. In his reasons for judgment in McKay, Cartwright J. repeatedly emphasized the prohibition aspect of the by-law under consideration in that case. I should add that municipal by-laws of the same nature are in force by the thousand in the cities and towns of Canada, a consideration which, although it was not referred to in McKay, may explain the reluctance of the majority to accept the proposition that by-laws of this type affected the proceedings at federal elections in an incidental manner only.

123 In the case at bar, by contrast, the political activities contemplated by the impugned provisions are not made unlawful. These provisions are in the nature of detailed regulations. Failure to comply with them is a ground for dismissal. No other sanction is prescribed. The public servant who is not prepared to accept them can resign. Nor do I think that such a public servant is thereby deprived of any "right" unless it be thought that he has a right to his office. But at common law, and apart from statute, a civil servant holds office during pleasure. As was correctly put by the respondent in his factum,

> The challenged provisions in effect confer rights and protect the service by making ... provisions for leaves of absence and securing a position in the service to those who cease to hold elective office within five years.

[page52]

124 Such regulations in my view are quite distinct from a blanket prohibition.

125 The distinction between prohibition and regulation is admittedly more frequently made in administrative law than in constitutional law. But I believe it is relevant in a case such as the case at bar where what has to be measured is the impact, direct or indirect, of provincial legislation upon a federal area of legislative competence. I am of the view that, whatever effect the impugned provisions may have upon the subject of federal elections and the right of federal electors to engage in political activities, it is an indirect or incidental effect; and the reason is that, far from being in the nature of a prohibition, they are in fact permissive at certain conditions which are imposed as incidents of the status of provincial public servants.

126 The McKay case can be further distinguished by the fact that s. 71 of the Canada Elections Act, S.C. 1960, c. 39, provided that "Every printed advertisement, handbill, placard, poster or dodger having reference to any election shall bear the name and address of its printer and publisher ...." It had been submitted by Counsel for the appellants McKay that Parliament had thereby "occupied the field". Cartwright J. did not find it necessary to reach a definite conclusion on this submission but he said he inclined to agree with it and, at p. 805, he commented on s. 71 of the Canada Elections Act as follows:

> This indicates that Parliament contemplates that persons other than candidates may post up placards and posters having reference to an election and subjects the practice to a limited form of regulation. The impugned by-law forbids such posting up altogether on residential property, which will often be the only place on which the owner of that property has the right to post up such a placard.

127 In regulating the posting of placards and posters during a federal election, Parliament had implicitly recognized the right to do so, subject to the regulations. The by-law under consideration in McKay deprived the appellants of that right and collided with a paramount provision of the Canada [page53] Elections Act. In the case at bar, it has not been argued that the impugned provisions were in conflict with any federal enactment.

128 It seems to me also that the provisions which are impugned in the case at bar present distinguishing features which are almost unique in that they form part of an integrated scheme of both orders of government in Canada. Under s. 32 of Public Service Employment Act, R.S.C. 1970, c. P-32, federal civil servants are also prevented, except under certain conditions, from engaging into political activities in the provincial as well as in the federal field. And, according to the Ontario Court of Appeal, six other provinces and the two territories have enacted similar legislation. This integrated scheme, considered as a whole, is meant to protect the principle of responsible government which is common to both orders of government. To accept the appellants' submission would mean that the federal legislation is unconstitutional in so far as it is directed at political activities in the provincial field. But so to hold would be to create a constitutional gap which neither level of government would be able to fill since obviously, it is not open to Parliament to determine the terms and conditions under which provincial civil servants hold office in Ontario any more than it is open to Ontario to do the same with respect to federal civil servants. But to leave a constitutional gap im-

possible to fill even by the joint legislative action of both orders of government violates the principle according to which, under the Constitution Act, 1867, the distribution of legislative competences is an exhaustive one.

129 The fallacy of the appellants' position, this being said with respect, is reflected in the following submission written in their factum:

> It is submitted that control over political activity by civil servants in federal elections is not integral to the provincial objective of maintaining impartiality in the development and application of public policy in Ontario because:
>
> (1) federal and provincial governments have different areas of jurisdiction, and federal and provincial elections raise different political issues.

[page54]

130 I have a few comments to make on this submission. First, it does not make allowance for nor respond to the paragraph of the agreed statement of facts according to which the organization and philosophy of the various political parties both federally and provincially are agreed to be the same.

131 Furthermore, and quite apart from that paragraph of the agreed statement of facts, it seems to me that the submission expresses a point of view totally divorced from the facts of political life in a federation such as Canada, and from certain features of the Canadian Constitution itself.

132 Under the Constitution Act, 1867, some legislative powers are shared by Parliament and the legislatures, as in the case of old age pensions, agriculture and immigration.

133 Other areas of constitutional competence are closely complementary. Thus the criminal law power is federal and the power over the administration of justice is provincial.

134 But even the fact that, in many areas, legislative competence is distributed in exclusive terms, does not change the nature of politics and political activity which is essentially to choose between various priorities. Should more of the public funds be spent on the armed forces, an exclusively federal field, or on education, an exclusively provincial one? Such a dilemma could arise in a federal as well as in a provincial election for there is no specific forum for it. The plain fact is that even in a federation with divided jurisdictions, the object of the political discourse, the ultimate form of political activity, remains indivisible.

135 It follows therefore that if Ontario wanted to ensure the impartiality of its public servants, it had no choice but to include political activities in the federal field in the impugned provisions. The alternative would have made it miss its target altogether. The effect of these provisions on federal political [page55] activities is not only incidental, it is necessarily incidental.

V

The Fundamental Rights and Freedoms Argument

136 In their factum, the appellants made the following argument:

> ... Canadian constitutional jurisprudence recognizes the existence of certain fundamental political rights and freedoms in the citizens of this country to participate in federal political activities. No province has the power to reduce or to derogate from these rights and freedoms.

137 They sought to support this submission by referring inter alia to Reference re Alberta Statutes, [1938] S.C.R. 100, and Switzman v. Elbling, [1957] S.C.R. 285.

138 Their counsel then launched into an oral argument based upon certain statements made in the unanimous judgment of this Court in Fraser and more particularly upon the following passage at pp. 462-63:

> ... "freedom of speech" is a deep-rooted value in our democratic system of government. It is a principle of our common law constitution, inherited from the United Kingdom by virtue of the preamble to the Constitution Act, 1867.

139 Counsel also referred to pp. 466-68 of Fraser relating to the balance that has to be struck between a federal employee's freedom of expression and the government's desire to maintain an impartial public service and stating the principles which ought to guide the balancing of conflicting values, starting with the proposition that some speech by public servants concerning public issues must be permitted. In the same pages, the factors to be taken into consideration are underlined, including the growth of the public sector, the inadmissibility of a blanket prohibition which would deny fundamental democratic rights to far too many people, the relative position of individual public servant within the service and the like.

[page56]

140 Counsel argued that the same kind of free speech is in issue in the Fraser case and in the case at bar and he submitted that the impugned provisions do not comply with the principles and guidelines stated in Fraser. Counsel argued more particularly that the impugned provisions are overbroad in that they apply to all civil servants, and, in some cases, to all Crown employees without any distinction between the types of jobs they perform. Furthermore, the impugned provisions cover too wide a range of political activities.

141 It can be seen that this line of argument is tantamount to one based on the Canadian Charter of Rights and Freedoms. It constitutes a valiant attempt to go to the validity of the impugned provisions without the help of the Charter. I have never heard the overbreadth argument being made in a distribution of powers case except perhaps where colourability was alleged. As for the test relating to the balancing of conflicting values, it is of course highly relevant under s. 1 of the Charter, or in a common law or administrative law context such as the Fraser case. But in a distribution of powers case, once it is demonstrated that the enacting legislature is competent, the balancing of conflicting values depends on the political judgment of such legislature and cannot be reviewed by the courts without their passing upon the wisdom of the legislation.

142 Perhaps the Fraser case might have given some ammunition to the appellants if they had been allowed to rely on the Charter. I refrain from expressing any view on this point. But one thing

is certain: the Fraser case had nothing to do with the validity of legislation in a distribution of powers sense, and, in my view, it does not help the appellants.

143 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 [page57] on such cases as Reference re Alberta Statutes and Switzman v. Elbling, supra.

144 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. 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.

145 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

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

[page58]

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

The following are the reasons delivered by

148 LAMER J.:-- For the reasons given by Dickson C.J. and Beetz J., 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.

149 I agree with Dickson C.J. that McKay v. The Queen, [1965] S.C.R. 798, was wrongly decided.

150 As regards the other points in issue and the disposition of this case, I agree with Dickson C.J. and Beetz J.

qp/mem

TAB 15

Indexed as:

Prince Edward Island (Potato Marketing Board) v. H.B. Willis Inc.

The Prince Edward Island Potato Marketing Board (Nominal Plaintiff), Appellant; and
H.B. Willis Incorporated (Nominal Defendant), Respondent; and
The Attorney General of Canada and others, Interveners.

[1952] 2 S.C.R. 392

Supreme Court of Canada

1952: May 7, 8, 9 / 1952: June 30.

Present: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

ON APPEAL FROM THE SUPREME COURT (IN BANCO) FOR PRINCE EDWARD ISLAND

Constitutional Law -- Regulation of interprovincial and export trade -- Competence of Parliament to enact The Agricultural Products Marketing Act (Can.) 1949, 1st Sess. c. 16 -- Of Governor General in Council to delegate powers to provincially organized Board -- Validity of Scheme established under the Agricultural Products Marketing (P.E.I.) Act, 1940, c. 40.

The Agricultural Products Marketing (Prince Edward Island) Act, (S. of P.E.I., 1940, c. 40) as amended, delegated to the Lt. Governor in Council authority to establish schemes for the marketing within the Province of any natural products and to constitute boards to administer such schemes. On Sept. 5, 1950 the Lt. Governor in Council appointed the appellant Board and delegated to it power to regulate the marketing of potatoes within the Province. The Agricultural Products Marketing Act (Can.) 1949, 1st Sess., c. 16, authorized the Governor in Council to delegate to marketing boards which had been established under legislation of any province to regulate the marketing therein of agricultural products, like powers in the interprovincial and export trade. On Oct. 25, 1950 the Governor in Council by P.C. 5159 delegated to the appellant Board powers in relation to the interprovincial and export trade in P.E.I. potatoes similar to those it had had conferred upon it with regard to local sales thereof. The Board thereafter issued several orders of which No. 1 imposed an annual licence fee on dealers engaged in marketing potatoes in P.E.I.; No. 2 a levy on dealers for every cwt. shipped from the Island; No. 3 a minimum price below which certain types of potatoes could not be bought from local producers and forbade consignment or export sales; No. 6 imposed a

levy on producers in respect of all potatoes marketed by P.E.I. producers and made the dealers agents of the Board for the purpose of collecting the levy. No. 2 was repealed but any existing liability for the levy under No. 2 was continued.

Held: reversing the judgment of the Supreme Court of Prince Edward Island in banco, that the four questions referred to it by the Lieutenant-Governor-in-Council should be answered as follows:

1. Is it within the jurisdiction and competence of the Parliament of Canada to enact The Agricultural Products Marketing Act, (1949) 13 George VI., (1st Sess.) c. 16?

Answer: Yes (unanimous).

2. If the answer to question No. 1 is yes, it is within the jurisdiction and competence of the Governor-General-in-Council to pass P.C. 5159?

Answer: Yes (unanimous).

3. Is it within the jurisdiction and competence of the Lieutenant-Governor-in-Council to establish the said Scheme and in particular section 16 thereof?

Answer: Yes except as to s. 19 (Kerwin, Taschereau, Estey, Cartwright, Fauteux, JJ.); Yes (the Chief Justice); Yes except as to ss. 4 and 19 (Rand J.); No (Kellock and Locke JJ.).

4. Is it within the jurisdiction and competence of the Prince Edward Island Potato Marketing Board to make the Orders made under the said Scheme or any of the Orders so made?

Answer: Yes except as to Orders numbers 2 and 6 (Kerwin, Taschereau, Rand, Estey, Cartwright, Fauteux JJ.); Yes (the Chief Justice); No (Kellock and Locke JJ.).

APPEAL from a judgment of the Supreme Court of Prince Edward Island in banco [29 M.P.R. 93; [1952] 4 D.L.R. 146.] upon a reference by the Lieutenant Governor in Council of the four questions set out in the preceding head note. By order of the Chief Justice of Prince Edward Island, the Attorney General of Prince Edward Island and the Attorney General of Canada were at the outset granted leave to intervene at any stage of the proceedings. The Attorneys General of Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Quebec and Newfoundland were by order of the Chief Justice of Canada, notified of the Reference on appeal to this Court. The arguments submitted sufficiently appear in the reasons for judgment that follow.

R.H. Milliken Q.C. and H.F. MacPhee Q.C., for the appellant.
J.W. de B. Farris Q.C. and K.M. Martin Q.C., for the respondent.
F.P. Varcoe Q.C. and J.T. Gray, for the Attorney General of Canada, Intervenant.
W.E. Darby Q.C., for the Attorney General of Prince Edward Island, Intervenant.
C.J.A. Hughes, for the Attorney General of New Brunswick, Intervenant.
L.A. Kelley Q.C., for the Attorney General of British Columbia, Intervenant.
J.R. Dunnet, for the Attorney General of Saskatchewan, Intervenant.

RINFRET C.J.:-- In my opinion, the appeal of the Prince Edward Island Potato Marketing Board should be upheld.

The judgment of the Supreme Court of Prince Edward Island in banco was delivered on the 31st of January, 1952. The Lieutenant-Governor-in-Council had referred to that Court for hearing and consideration the following questions:

> (1) Is it within the jurisdiction and competence of the Parliament of Canada to enact The Agricultural Products Marketing Act, (1949) 13 George VI, (1st Session) c. 16?
>
> (2) If the answer to question No. 1 is yes, is it within the jurisdiction and competence of the Governor-General-in-Council to pass P.C. 5159?
>
> (3) Is it within the jurisdiction and competence of the Lieutenant-Governor-in-Council to establish the said Scheme and in particular s. 16 thereof?
>
> (4) Is it within the jurisdiction and competence of the Prince Edward Island Potato Marketing Board to make the Orders made under the said Scheme or any of the Orders so made?

Tweedy J. wrote the main judgment, in which the Chief Justice and MacGuigan J. concurred, the Chief Justice simply adding a few additional reasons.

The main ground of the judgment of Tweedy J. appears to have been that the Supreme Court of Canada in A.G. of N.S. v. A.G. of Can. [[1951] S.C.R. 31.] which held that the Parliament of Canada and each provincial legislature were not capable of delegating one to the other the powers with which it had been vested, nor of receiving from the other the powers with which the other has been vested. In the opinion of the Supreme Court in banco of Prince Edward Island that judgment was really decisive with respect to the first two questions in the reference under appeal.

With deference, such is not the effect of the judgment of this Court in the Nova Scotia reference. It was made quite clear in our reasons for judgment that they only applied to the questions as put and which had to deal only with an Act respecting the delegation from the Parliament of Canada to the Legislature of Nova Scotia and vice versa. The unanimous opinion of this Court was that each legislature could only exercise the legislative powers respectively given to them by ss. 91 and 92 of the Act, that these sections indicated a settled line of demarcation and it did not belong to the Parliament of Canada or the Legislatures to confer their powers upon the other. At the same time it was pointed out that In re Gray [(1918) 57 Can. S.C.R. 150.] and The Chemical Reference [[1943] S.C.R. 1.], the delegations there dealt with were delegations to a body subordinate to Parliament and were, therefore, of a character different from the delegation meant by the Bill submitted to the Court in the Nova Scotia reference.

But, on the other hand, the delegations passed upon by this Court In Re Gray and The Chemical Reference were along the same lines as those with which we are concerned in the present ap-

peal. It follows that our judgment in the Nova Scotia reference can be no authority for the decision which we have to give in the present instance. It may be added that at bar counsel did not rely upon that ground in this Court.

The first question submitted to the Supreme Court in banco of Prince Edward Island had to do with the jurisdiction and competence of the Parliament of Canada to enact The Agricultural Products Marketing Act (1949), 13 George VI, (1st Session) c. 16. That Act was assented to on the 30th of April, 1949. The preamble, among other things, stated that it was "desirable to co-operate with the provinces and to enact a measure respecting the marketing of agricultural products in interprovincial and export trade." S. (2) of the Act reads as follows:--

> 2. (1) The Governor in Council may be order grant authority to any board or agency authorized under the law of any province to exercise powers of regulation in relation to the marketing of any agricultural product locally within the province, to regulate the marketing of such agricultural product outside the province in interprovincial and export trade and for such purposes to exercise all or any powers like the powers exercisable of such board or agency in relation to the marketing of such agricultural product locally within the province.
>
> (2) The Governor in Council may by order revoke any authority granted under subsection one.

The effect of that enactment is for the Governor-in-Council to adopt as its own a board, or agency already authorized under the law of a province, to exercise powers of regulation outside the province in interprovincial and export trade, and for such purposes to exercise all or any powers exercisable by such board, or agency, in relation to the marketing of such agricultural products locally within the province. I cannot see any objection to federal legislation of this nature. Ever since Valin v. Langlois [(1879) 5 App. Cas. 115.], when the Privy Council refused leave to appeal from the decision of this Court [(1879) 3 Can. S.C.R. 1.], the principle has been consistently admitted that it was competent for Parliament to "employ its own executive officers for the purpose of carrying out legislation which is within its constitutional authority, as it does regularly in the case of revenue officials and other matters which need not be enumerated". The latter are the words of Lord Atkin, who delivered the judgment of the Judicial Committee in Proprietary Articles Trade Association et al. v. A.G. for Canada et al. [[1931] A.C. 310.]. The words just quoted are preceded in the judgment of Lord Atkin by these other words:--

> Nor is there any ground for suggesting that the Dominion may not * * * *

It will be seen, therefore, that on that point the Judicial Committee did not entertain the slightest doubt.

In The Agricultural Products Marketing Act of 1949 that is precisely what Parliament has done. Parliament has granted authority to the Governor-in-Council to employ as its own a board, or agency, for the purpose of carrying out its own legislation for the marketing of agricultural products outside the province in interprovincial and export trade, two subject-matters which are undoubtedly within its constitutional authority. Moreover, it may be added, that in doing so Parliament was following the advice of the Judicial Committee in the several judgments which it rendered on similar

Acts and, more particularly, on the Reference concerning the Natural Products Marketing Act, [[1937] A.C. 377 at 389.] adopted by Parliament in 1934 (S. of C. 24 and 25 George V, c. 57), (1937), that the proper way to carry out legislation of that character in Canada, in view of the distribution of legislative powers under the British North America Act, was for Parliament and the Legislatures to act by co-operation.

I would, therefore, answer question (1) in the affirmative.

Question two was not answered by the Supreme Court in banco of Prince Edward Island as a result of the fact that it had answered question one in the negative. As my answer to question one is in the affirmative, so will be my answer to question two.

The Governor-in-Council by P.C. 5159, passed on the 25th October, 1950, has done nothing else, nor more, than act in accordance with the powers conferred upon it by s. (2) of The Agricultural Products Marketing Act of 1949. Indeed the text of the Order-in-Council is practically and substantially the same as the text of the Act itself. Applying it to the Prince Edward Island Potato Marketing Board, the Order-in-Council refers to the Scheme for the marketing of potatoes, made by the Lieutenant-Governor-in-Council on the 5th September, 1950, and particularly to paras. (a), (b), (c), (f), (g), (i), (j), (o) and (p) of s. 16 of the Scheme. The evident object of that enumeration was for purposes of interprovincial and export trade to limit the exercise of the powers conferred upon The Potato Marketing Board by the Lieutenant-Governor-in-Council of Prince Edward Island to those powers which are exercisable by The Potato Marketing Board under the paragraphs so enumerated. As the Scheme itself, and, in particular s. 16, are the subject of question three, they will be considered by me in my answer to that question.

It will be noted that no question was put in the reference with regard to the validity of the Agricultural Products Marketing (Prince Edward Island) Act, 1940, 4 George VI, c. 40. The reference, therefore, assumes that the Act itself is valid; and the question is merely whether the Lieutenant-Governor-in-Council had the required jurisdiction and competence to establish the Scheme and, in particular, s. 16.

The purpose and intent of the Provincial Act, as stated in s. 4(1), is "to provide for the control and regulation in any or all respects of the transportation, packing, storage and marketing of natural products within the Province, including the prohibition of such transportation, packing, storage and marketing in whole or in part". Ss. (2) of s. 4 is as follows:--

> 4. (2) The Lieutenant-Governor-in-Council may from time to time establish, amend and revoke schemes for the control and regulation within the Province of the transportation, packing, storage and marketing of any natural products, and may constitute marketing boards to administer such schemes, and may vest in those boards respectively any powers considered necessary or advisable to enable them effectively to control and regulate the transportation, packing, storage and marketing of any natural products within the Province, and to prohibit such transportation, packing, storage and marketing in whole or in part.

Then s. 5, without limiting the generality of any of the other provisions of the Act, authorizes the Lieutenant-Governor-in-Council to vest in any Provincial board any or all of the additional powers enumerated in sub-paras. (a) to (k) inclusive.

When s. 6 was first enacted it stated that every provincial board was authorized to co-operate with the Dominion Board to regulate the marketing of any natural product of the Province and to act conjointly with the Dominion Board, and perform such functions and duties and exercise such powers as were prescribed by the Act or the regulations. This was amended in 1950 by striking out the words "Dominion Board" in the second and fourth lines thereof and substituting therefor in each instance the words "Provincial Marketing Boards of other Provinces".

Then s. 7 of the Prince Edward Island Act enacted that every Provincial Board might, with the approval of the Lieutenant-Governor-in-Council, perform any function or duty and exercise any power imposed or conferred upon it by or pursuant to the Dominion Act, with reference to the marketing of a natural product, to which was added, in 1950, the following:--

> and, with the like approval, may accept and exercise all and any powers or authority granted by the Governor-in-Council pursuant to the Dominion Act.

S. (8), which authorizes the Dominion Board to exercise its powers with reference to the marketing of a natural product, was repealed in 1950 and should no longer be considered.

S. (9) of the Provincial Act, as amended in 1950, no longer contained the words "in co-operation with the Dominion Board", and should now be read without those words.

I have referred to these amendments merely to indicate the present state of the Provincial Act, but, I repeat, that its validity is not submitted in the Reference, and the question is only whether the Scheme, adopted on the 5th September 1950, was within the jurisdiction of the Lieutenant-Governor-in-Council to establish.

In fact, the only doubt suggested with regard to the validity of the Scheme concerns s. (16) thereof. Now, it is obvious that the Provincial Act itself had no other object than to deal with the local marketing within the province, and that intention is emphasized throughout the several sections of the Act.

The same intention appears in s. (16) of the Scheme. The opening words give the Potato Board powers exercisable in Prince Edward Island in relation to the marketing of potatoes therein. The Scheme defines what is meant by the words "regulated area" and that area is thereby limited to the Province of Prince Edward Island. Then these same words are repeated throughout the Scheme and, particularly, in the several paras. of s. (16).

It should be noted that although the Scheme is that of the Prince Edward Island Potato Marketing Board, it has received the approval and, in fact, was made by the Lieutenant-Governor-in-Council, and that question No. (3), therefore, should be considered only in respect of the jurisdiction and competence of the latter.

There could be no ground for suggesting that the Lieutenant-Governor-in-Council could not vest in the Boards constituted by it any powers considered necessary or advisable to enable those Boards effectively to control and regulate the transportation, packing, storage and marketing of natural products within the province. This is especially given to the Lieutenant-Governor-in-Council by ss. (2) of s. (4) of the Act. I can see nothing in s. (16) of the Scheme which is not covered by the authorities so conferred upon the Lieutenant-Governor-in-Council, either under s. (4) or under s. (5) of the Act. We must come to that conclusion more particularly in view of the absence in

the Reference of any question concerning the authority of the Provincial Act and that, therefore, its validity must be assumed for the purpose of considering the Scheme.

In that connection it is significant that the answers of the Supreme Court in banco of Prince Edward Island were that the Scheme in general, and s. (16) in particular, were not within the jurisdiction of the Lieutenant-Governor-in-Council "unless and insofar as the Scheme can be limited in its operation to affect only transactions intended to be wholly and ultimately carried out within the Province". That answer would have been more complete if the Supreme Court in banco had stated that it could be and should be so limited. It is sufficient for this Court to say that it must of necessity be limited to transactions within the Province. Far from there being any intention on the part of the Legislature of Prince Edward Island to extend its scope to transactions outside the Province, the Act itself and the Scheme took particular care to limit it to the local trade, and under all canons of construction, including, of course, The Interpretation Act (s. 31) they must be so understood.

Question (4) of the Reference submits certain orders made by the Prince Edward Island Potato Marketing Board and asks whether they were within the jurisdiction and competence of that Board and again the answer of the Supreme Court in banco was in the negative "unless and insofar as the Scheme can be limited in its operation to affect only transactions intended to be wholly and ultimately carried out within the Province". This, in my view, is practically an answer in the affirmative for none of those orders pretend to affect transactions outside the Province. However, Board orders Nos. 2 and 6(2) are singled out in the answer of the Court below. There is no object in directing our attention to Order No. (2), because, prior to the Reference being submitted to that Court, Order No. 2 was repealed.

The objection to Order 6(2) is stated to be that it might be regarded as indirect taxation, and also that the tax or impost levied under that Order "is clearly far in excess of the valid requirements of the Board for intra vires administration expenses, and must be taken to be imposed in contemplation of activities beyond the jurisdiction of the Board". For that reason it was held that "the levy is therefore ultra vires and invalid".

The first answer to that objection is that it is based entirely upon a pure question of fact, of which there is not the slightest evidence in the record, and it is not to be assumed that the Board would levy any tax or impost in excess of its requirements. Moreover, the Provincial Act authorizes the Lieutenant-Governor-in-Council to vest in the Board any powers considered necessary or advisable to enable it effectively to control and regulate the transportation, packing, storage and marketing of natural products within the province (s. 4(2) of the Act). The Board is undoubtedly competent to act in accordance with those powers. This Court cannot take judicial notice of facts which may be said to indicate that they levy is beyond the requirements of the Board for the objectives which it is to carry out. No facts of that character appear in the record. It will be time enough to pass upon that question whenever, in some litigation, it is shown that the Board has, in a particular instance, exceeded its requirements.

I have no doubt that the Act itself and the Scheme approved by the Lieutenant-Governor-in-Council were amply sufficient to justify the Orders mentioned in Question (4).

With deference, I am unable to see how the word "regulate" in s. 19 of the Scheme indicates an intention on the part of the Provincial Legislature to extend the scope of this whole enactment beyond the confines of provincial jurisdiction. On the contrary, it seems to me that s. 19 should be "regarded as harmless authority to confer and collaborate informally with representatives of the

Nova Scotia Potato Marketing Board, the New Brunswick Potato Marketing Board and the Newfoundland Vegetable Marketing Board", and for those Boards to "act conjointly" with the representatives of the Prince Edward Island Potato Marketing Board. Moreover, it should be pointed out that any action of the local potato board is "subject to the approval of the Prince Edward Island Potato Marketing Board".

As to the vague suggestion that the levy provided for in s. 16(k) of the Scheme might be looked upon as "a measure of indirect taxation", it has not been made a point for the decision appealed from, but it would seem to have lost its weight -- and I do not consider that it ever had any weight -- since the adoption of the Board by the Governor-in-Council.

The ingenious argument of Mr. Farris that the Provincial Board had no capacity to receive the delegation of powers from the Federal Government has failed to convince me. As stated above, Parliament could choose its own executive officers for the carrying out of this legislation, and when so chosen the Provincial Board became the agent authorized by the Governor-in-Council with "all or any powers like the powers exercisable by such Board or agent in relation to the marketing of such agricultural product locally with the province". That, of course, must be understood mutatis mutandis. The Board did not need the enabling capacity provided for in s. (7) of the Prince Edward Island Act. It became a body, or an entity, and it was not necessary for the Province to give it the power to "perform any function or duty and exercise any power imposed or conferred upon it by or pursuant to the Dominion Act, with reference to the marketing of a natural product"; or, in the words of the amendment of 1950, "to accept and exercise all and any powers or authority granted by the Governor-in-Council pursuant to the Dominion Act".

Such authority, as contained in s. (7) of the Provincial Act, was not necessary, except perhaps for the province to express its desire that the Provincial Board should not accept any authority from the Governor-in-Council except "with the approval of the Lieutenant-Governor-in-Council". In the present case, the Provincial Board received its powers directly from the Federal Government. But s. (7) can do no harm, since, in the exercise of the powers delegated to the Provincial Board by the Federal Government, the Board becomes the agent of the latter government and gets its powers from such appointment.

On the whole, I would answer each of the questions in the affirmative.

The judgment of Kerwin and Fauteux JJ. was delivered by:--

KERWIN J.:-- In delivering the judgment of the Judicial Committee in A.G. for British Columbia v. A.G. for Canada (Natural Marketing Act Case) [[1937] A.C. 377.], Lord Atkin, at page 389, remarked:--

> It was said that as the Provinces and the Dominion between them possess a totality of complete legislative authority, it must be possible to combine Dominion and Provincial legislation so that each within its own sphere could in co-operation with the other achieve the complete power of regulation which is desired. Their Lordships appreciate the importance of the desired aim. Unless and until a change is made in the respective legislative functions of Dominion and Province it may well be that satisfactory results for both can only be obtained by co-operation. But the legislation will have to be carefully framed, and will not be

> achieved by either party leaving its own sphere and encroaching upon that of the other.

In A.G. of N.S. v. A.G. of Canada [(1951) S.C.R. 31.], this Court decided that the method proposed to be adopted by the Legislature of Nova Scotia to meet this test was not authorized. In the present case, in the Court below reliance was placed upon what was there said by the several members of this Court but the opinion of none of the latter justifies the conclusion reached by the Supreme Court of Prince Edward Island in banco, or the reasons upon which that conclusion was based. In the Nova Scotia case, it was proposed that the Legislature should enact that the Lieutenant-Governor-in-Council of Nova Scotia might, by proclamation, from time to time delegate to and withdraw from the Parliament of Canada authority to make laws in relation to any matter relating to employment in any industry, work or undertaking in respect of which such matter was, by s. 92 of the British North America Act, 1867, exclusively within the legislative jurisdiction of the Legislature and that any laws so made by Parliament should, while such delegation was in force, have the same effect as if enacted by the Legislature. All the members of this Court decided that this could not be done as a contrary conclusion would be obnoxious to the tenor and scheme of the British North America Act. By that Act certain powers were conferred upon the Parliament of Canada and the Legislature of a province, and we held that neither could transfer its authority to the other.

What is here attempted to carry out Lord Atkin's suggestion is an entirely different matter. At the outset, it should be emphasized that no question is submitted as to the validity of the provincial statute "Agricultural Products Marketing (Prince Edward Island) Act" (1940, c. 40). In substance, and, as will later appear, in very important respects, that Act is the same as the British Columbia statute which was held to intra vires in Shannon v. Lower Mainland Dairy Products Board [[1938] A.C. 708.]. Having provided for the constitution by the Lieutenant-Governor-in-Council of a Board to be known as "Prince Edward Island Marketing Board" s. 4 enacts:--

> 4.(1) The purpose and intent of this Act is to provide for the control and regulation in any or all respects of the transportation, packing, storage and marketing of natural products within the Province, including the prohibition of such transportation, packing, storage and marketing in whole or in part.
>
> (2) The Lieutenant-Governor-in-Council may from time to time establish, amend and revoke schemes for the control and regulation within the Province of the transportation, packing, storage and marketing of any natural products, and may constitute marketing boards to administer such schemes, and may vest in those boards respectively any powers considered necessary or advisable to enable them effectively to control and regulate the transportation, packing, storage and marketing of any natural products within the Province, and to prohibit such transportation, packing, storage and marketing in whole or in part.

Provision was then made whereby the Lieutenant-Governor-in-Council might vest in any provincial board, without limiting the generality of any of the other provisions, certain specified powers of regulation, including the registration of all persons engaged in the production, packing, transporting, storing or marketing of the regulated product and to fix and collect licence fees therefrom. S. 7 (as amended in 1950) enacts:--

> 7. Every Provincial board may, with the approval of the Lieutenant-Governor-in-Council, perform any function or duty and exercise any power imposed or conferred upon it by or pursuant to the Dominion Act, with reference to the marketing of a natural product and, with the like approval, may accept and exercise all and any powers or authority granted by the Governor-in-Council pursuant to the Dominion Act.

By the interpretation section, as amended in 1950, "Dominion Act" means "The Agricultural Products Marketing Act" of Canada. This Canadian Act is c. 16 of the Statutes of 1949 (1st Session) and s. 2 thereof provides:-- (As to which see p--).

My answer to the first question as to whether this Act is within the jurisdiction and competence of Parliament is in the affirmative. Parliament, legislating with reference to inter-provincial and export trade which it and not any provincial legislature has the power to do, may validly authorize the Governor General in Council to confer upon a provincial board appointed under the Prince Edward Island statute of 1940, the power to regulate such marketing. This Court held in Valin v. Langlois [(1879) 3 Can. S.C.R. 1.], that Parliament could confer authority and impose a duty upon a provincial Court in connection with contested elections under the Canada Elections Act. In refusing leave to appeal [(1879) 5 App. Cas. 115.], the Judicial Committee indicated its approval of that judgment. Admitting, as counsel for the respondent argued, that the Island Board was not made a corporation and that its members are distinct from the Board as a whole, I reiterate the view expressed in Labour Relations Board, Sask. v. Dominion Fire Brick and Clay Products Ltd. [[1947] S.C.R. 336 at 339.], that such a Board is a legal entity. Having been validly established by the Legislature, it has the capacity to receive and accept the authority authorized by Parliament to be conferred upon it by the Governor-General-in-Council. Counsel for the respondent further submitted that in overruling the judgment of this Court in Bonanza Creek Gold Mining Co. v. The King [(1914) 50 Can. S.C.R. 534.], the Judicial Committee [[1916] A.C. 566.], drew a distinction between powers and rights exercisable within a province and capacity to accept extraprovincial powers. That is quite true but what was in issue there was the extent of the power of the Ontario Legislature under 92(11) of the British North America Act "The Incorporation of Companies with Provincial Objects". While the judgment of the Judicial Committee in that particular case proceeded upon the basis that the Bonanza Creek Gold Mining Company had really been incorporated by virtue of the Royal prerogative, there is nothing in the reasons of Chief Justice Fitzpatrick and Duff J., relied upon by the respondent, to indicate that they were dealing with anything more than the limitation of "provincial objects". In fact the latter pointed out that the question whether capacity to enter into a given transaction is compatible with this limitation was one to be determined upon the particular facts, and he held that on the true construction of the Ontario Companies Act the Company only acquired capacity to carry on its business as an Ontario business and that there was no legislation by the Dominion or the Yukon professing to enlarge that capacity.

The second question is as to the jurisdiction and competency of the Governor-General-in-Council to pass P.C. 5159. That Order-in-Council granted authority to the Prince Edward Island Products Marketing Board, as established by the Lieutenant-Governor of the Province, to regulate the marketing outside the province in interprovincial and export trade of Island products, and that for such purposes the Board might with reference to persons and property situated within the Island exercise powers like the powers exercisable by it in relation to the marketing of Island products locally within the province under certain paragraphs of s. 16 of the Island's Products Marketing

Scheme as amended from time to time. It was not contended that, if the answer to the first question be in the affirmative, the answer to the second should not be the same.

Question 3 is as to the jurisdiction and competency of the Lieutenant-Governor-in-Council to establish the Scheme referred to, and particularly s. 16 thereof. In dealing with this question it is necessary to bear in mind the provisions of the Act under which the Scheme was adopted by the Lieutenant-Governor-in-Council. Subsections 1 and 2 of s. 4 have already been extracted and it is important to note that what is being dealt with is the control and regulation of the transportation, packing, storage and marketing of natural products within the Province. This same wording appeared in the British Columbia statute considered in the Shannon case. There, the Privy Council stated that it was apparent that the legislation was confined to regulating transactions that took place wholly within the province. After pointing out that natural products as defined were not confined to those produced in British Columbia, the judgment proceeded: "It was suggested that 'transportation' would cover the carriage of goods in transit from one Province to another, or overseas. The answer is that on the construction of the Act as a whole it is plain that 'transportation' is confined to the passage of goods whose transport begins within the Province to a destination also within the Province." Therefore, in view of the similarity of the British Columbia and Prince Edward Island statutes, unless a fair reading of the Scheme as a whole leads one to the opposite conclusion, it should not be held that the Lieutenant-Governor-in-Council exceeded the powers conferred upon him by the statute and attempted something beyond provincial jurisdiction. For that reason, s. 4 of the Scheme, which provides: "This Scheme shall apply to all persons who grow, pack, store, buy or sell potatoes of any kind or grade thereof in the regulated area", is in my view valid.

S. 16 of the Scheme is the one conferring specified powers upon the Potato Board and as it provides that "The Potato Board shall have the following Powers exercisable in Prince Edward Island in relation to the marketing of potatoes therein", it also is valid unless some particular clause thereof clearly goes beyond the statutory powers. The only clauses requiring consideration are (d), (e) and (k). I can find no objection to clause (d) which merely authorizes the licensing of potato dealers. Clause (e) authorizes the Board

> (e) to fix and collect yearly, half-yearly, quarterly or monthly licence fees from any or all persons producing, packing, transporting, storing, or marketing potatoes with power to classify such persons into groups and fix the licence fees payable by the members of the different groups in different amounts and to recover any such licence fees by suit in any Court of competent jurisdiction;

In substance this is the same as s. 5(d) of the Prince Edward Island Act:--

> (d) To fix and collect yearly, half-yearly, quarterly or monthly licence fees from any or all persons producing, packing, transporting, storing, or marketing the regulated product; and for this purpose to classify such persons into groups, and fix the licence fees payable by the members of the different groups in different amounts; and to recover any such licence fees by suit in any Court of competent jurisdiction;

This s. 5(d) is in the same terms as s. 4A(d) of the British Columbia statute considered in the Shannon case and as to which the Judicial Committee held (page 721):--

> A licence itself merely involves a permission to trade subject to compliance with specified conditions. A licence fee, though usual, does not appear to be essential. But, if licences are granted, it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province, or for both purposes.

Clause (e) of s. 16 of the Scheme is therefore valid. Clause (k) authorizes the Board

> (k) to establish a fund in connection with this Scheme to be utilized in such manner as may be deemed necessary or advisable by the Potato Board for the proper administration of the Scheme:

and may stand as it is comparable to section 4A(j) of the British Columbia statute:--

> 4A(j). To use in carrying out the purposes of the scheme and paying the expenses of the board any moneys received by the board.

which the Judicial Committee also held unobjectionable for the same reasons.

S. 19 of the Scheme reads as follows:--

> 19. The Potato Board may name two representatives to act conjointly with representatives named by the Nova Scotia Marketing Board, the New Brunswick Potato Marketing Board and the Newfoundland Vegetable Marketing Board as a committee to regulate and co-ordinate the marketing of potatoes produced in the said provinces and in the regulated area, and the Potato Board may, subject to the approval of the Board, delegate to said committee such of its powers as it may deem advisable.

No authority can be found for the kind of sub-delegation therein provided for and, in my opinion, this clause is not within the jurisdiction and competence of the Lieutenant-Governor in Council.

The fourth question is with reference to the jurisdiction and competence of the Board to make certain Orders under the Scheme. Order No. 1 provides that the dealers must take out a licence and pay a fee therefor of five dollars. Order No. 2 provides:--

> (1) For the purpose of establishing a fund in connection with the Prince Edward Island Potato Marketing Scheme every dealer shall pay to the Board a charge at the rate of One Cent (1c) for every One hundred pounds of potatoes shipped or exported by such dealer from the Province of Prince Edward Island.
>
> (2) Each dealer shall render to the Potato Board on the 6th day of each month a statement of all cars of potatoes shipped during the preceding month which statement shall correctly show the quantity of potatoes shipped in each car. With each such statement the dealer shall forward to the Potato Board his remit-

> tance to cover the charge or levy provided by paragraph one hereof calculated at the said rate on the volume of potatoes shown by said statement.

Order 6, made February 14, 1951, by para. (1) repealed Order No. 2 "subject to the provision that every dealer shall continue liable to pay to the Potato Board the full amount of the charge or levy which is now due or accruing due and unpaid in respect of potatoes shipped or marketed up to this date." By paragraphs 2, 3, 4 and 5 of Order No. 6:--

> (2) For the purpose of establishing a fund in connection with the Prince Edward Island Potato Marketing Scheme every producer shall pay to the Potato Board a charge or levy at the rate of one cent per hundred pounds of potatoes in respect of all potatoes sold or marketed by such producer.
>
> (3) Every dealer shall be an agent for the Potato Board for the collection of said levy or charge from the producers whose potatoes such dealer ships or exports.
>
> (4) Every dealer when purchasing potatoes in Prince Edward Island shall deduct from the amount payable by him to the Vendor of same the amount of the said levy or charge in respect of the potatoes so purchased by him.
>
> (5) Every dealer shall render to the Potato Board on the 6th day of each month a true and correct statement of all cars of potatoes shipped by such dealer during the preceding month, which statement shall clearly show the quantity of potatoes shipped in each case. With each such statement the dealer shall forward to the Potato Board his remittance to cover the charge or levy provided by paragraph 2 hereof calculated at the said rate on the volume of potatoes shown by said statement.

These paragraphs are clearly referable to export trade and cannot be supported. While Order No. 2 was repealed before the Order of Reference was made by the Lieutenant-Governor in Council, the revoking Order (No. 6) provides for the continuance of any existing liability for the levy.

I would therefore answer the questions as follows:

1. Yes.
2. Yes.
3. Yes, except as to section 19.
4. Yes, except as to Orders Nos. 2 and 6.

TASCHEREAU J.:-- The Lieutenant-Governor-in-Council of the Province of Prince Edward Island has referred for advice to the Supreme Court of that Province in banco, four questions which are the following: (As to which see p. 394)

The unanimous opinion of the Court of Appeal was that the questions should be answered as follows:--

1. No.
2. No answer.

3. As to section 19 of the scheme -- No. As to the scheme in general, and section 16 in particular, -- No, unless and insofar as the scheme can be limited in its operation to affect only transactions intended to be wholly and ultimately carried out within the Province.

4. As to Board Order Number 6(2), and the now-repealed Board Order Number 2 -- No. As to the Board Orders in general -- No, subject to the proviso set out in the answer to question 3.

I fully concur with the view that the two first questions should be answered in the affirmative. I have no doubt that the Parliament of Canada has the necessary competence to regulate the marketing of agricultural products in interprovincial and export trade, and to co-operate with the provinces which have enacted legislation respecting the marketing of such products within the province. (Vide Lawson v. Interior Tree Fruit Committee [[1931] S.C.R. 357 at 371.]; (Marketing Act Reference [[1936] S.C.R. 398.]) and [[1937] A.C. 377 at 389.].

It was also I think, within the jurisdiction of the Governor-General to pass P.C. 5159, and to vest in the Board powers which are identical with those authorized to be vested by the statute. (Shannon v. Lower Mainland [[1938] A.C. 708 at 722.]; (Chemicals Reference [[1943] S.C.R. 1.]).

The Supreme Court of Prince Edward Island relied upon A.G. of Nova Scotia v. A.G. of Canada [[1951] S.C.R. 31.] to answer in the negative, but I do not think that that case supports the view that has been adopted. The judgment merely decided that neither Parliament nor the legislatures can delegate powers to each other so as to change the distribution of powers provided for in ss. 91 and 92 of the British North America Act. Here the issue is entirely different. The Federal legislation does not confer any additional powers to the legislature but vests in a group of persons certain powers to be exercised in the interprovincial and export field. It is immaterial that the same persons be empowered by the legislature to control and regulate the marketing of Natural Products within the Province. It is true that the Board is a creature of the Lieutenant-Governor-in-Council, but this does not prevent it from exercising duties imposed by the Parliament of Canada. (Valin v. Langlois [(1879) 5 App. Cas. 115.]).

As to question No. 3, for the reasons given by my brother Kerwin, whose judgment I had the advantage of reading, it is my opinion that the scheme is valid including s. 16. However, s. 19 is not authorized by the Act. We find in s. 6 of the Act the necessary authority given to the Board to co-operate with other Provincial Marketing Boards to regulate the marketing of natural products, but nowhere do we find that the Potato Board is empowered to appoint a committee and delegate to it, subject to the approval of the Board, such of its powers, as it may deem advisable.

The charge or levy imposed in Order No. 2 and in Order No. 6 for the purpose of establishing a fund in connection with the Marketing Scheme, seems in either case to be clearly indirect. In the first case it is imposed upon the dealer, and upon the producer in the second, and, therefore, it remains that it is charged upon an article of commerce in course of trade and not against the final purchaser. The effect of this charge or levy necessarily tends to increase the sale price by the amount of the tax. (Atlantic Smoke Shops v. Conlon [[1941] S.C.R. 670.] and [[1943] A.C. 550.]). Order No. 2 was repealed by Order No. 6, but as the revoking Order imposed a liability upon every dealer to pay to the Potato Board the full amount of the charge or levy due or accruing due and unpaid in respect of potatoes shipped or marketed, it follows that both must be held invalid.

I would therefore answer the interrogatories as follows:--

1. Yes.
2. Yes.
3. Yes, except as to section 19.
4. Yes, except as to Orders Nos. 2 and 6.

RAND J.:-- This appeal arises out of a Reference by the Lieutenant-Governor-in-Council of Prince Edward Island to the Supreme Court of that province of questions relating to both Dominion and Provincial legislation dealing with agricultural products.

Under The Agricultural Products Marketing (Prince Edward Island) Act of 1940, authority was conferred on the Lieutenant-Governor-in-Council to establish schemes for the regulation within the province of the marketing of any natural product, to be administered by a principal Board and marketing boards.

By such a scheme a board might be authorized, among other things, to require all persons engaged in a trade within the province to register and obtain licences, to prescribe licence fees therefor, and to fix maximum and minimum prices at which the product might be bought or sold in the province. A board could co-operate with the Marketing Board constituted under The Agricultural Products Marketing Act of the Dominion, and, conjointly, exercise its powers under the local law. With the approval of the Lieutenant-Governor-in-Council, a board could accept and exercise any power conferred upon it pursuant to the Dominion Act in relation to the marketing of a natural product.

A scheme for the regulation of the marketing of potatoes throughout the province was established by order-in-council of September 5, 1950. A Potato Board was constituted of five members which, besides the general powers already mentioned, was authorized to establish a fund for carrying out the scheme for which it might fix and collect charges in the manner as for licence fees; to borrow money for the objects of the scheme within a maximum aggregate of obligations of $10,000; to distribute among producers proceeds of the sales of potatoes; and generally to do such things as might be ancillary to these objects.

The Governor-in-Council, under the Dominion Marketing Act, by order-in-council of October 25, 1950 granted authority to the Potato Board "to regulate the marketing outside the province of Prince Edward Island an interprovincial and export trade of Prince Edward Island potatoes produced" in that province and for such purpose "to exercise powers like the powers exercisable by it in relation to the marketing of Prince Edward Island potatoes locally within the province" under specified paragraphs of s. 16 of the scheme as from time to time amended. Among the paragraphs omitted were (d) dealing with the licensing of dealers, (e) the collection of licence fees, (k) establishing a fund in connection with the scheme, (l) borrowing money, (m) distributing the proceeds of sales among producers, and (n) establishing technical and advisory committees and the employment of experts.

The questions submitted to and the answers given by the court were:--

> 1. Is it within the jurisdiction and competence of the Parliament of Canada to enact The Agricultural Products Marketing Act, (1949) 13 George VI, (1st Session) Chapter 16? Answer, No.

2. If the answer to question No. 1 is yes, is it within the jurisdiction and competence of the Governor-General-in-Council to pass P.C. 5159? No answer.

3. Is it within the jurisdiction and competence of the Lieutenant-Governor-in-Council to establish the said Scheme and in particular section 16 thereof?

Answer: As to section 19 of the Scheme -- "No." As to the Scheme in general, and Section 16 in particular -- "No, unless and insofar as the Scheme can be limited in its operation to affect only transactions intended to be wholly and ultimately carried out within the Province."

4. Is it within the jurisdiction and competence of the Prince Edward Island Potato Marketing Board to make the Orders made under the said Scheme or any of the Orders so made?

Answer: As to the Board Order Number 6(2), and the now-repealed Board Order Number 2 -- "No." As to the Board Orders in general -- "No, subject to the proviso set out in the answer to Question 3."

From the answers this appeal has been brought.

The validity of the provincial legislation generally was not impugned since its provisions are virtually identical with those of the Act of British Columbia which was approved by the Judicial Committee in Shannon v. Lower Mainland Dairy Products Board [[1938] A.C. 708.]. The Committee there construed the Act as a whole to be limited to transactions strictly within the field of local or provincial trade. The administration of the Act so circumscribed, apart from co-operative Dominion legislation, may encounter serious practical difficulties if not insuperable obstacles; but that cannot affect its constitutional validity nor its administration conjointly with Dominion powers.

The principal point of attack was the efficacy of the Dominion delegation. Mr. Farris argued that the province was incompetent to confer on the Board capacity to accept such powers from the Governor-in-Council. This question was not involved in Shannon, supra, as the administration there was provincial only and s. 7 of the Act was not expressly considered. The Potato Board is not, under the statute, a corporation, and the contention is this: the power to create such an entity and to clothe it with jural attributes and capacities is derived from head 13 of s. 92 of the Act of 1867 which deals with property and civil rights within the province; as the incorporation of companies under head 11 has its source in the prerogative, a body so created may have unlimited "capacities"; the prerogative is not drawn on for a body created under any other head than 11; a board created as here can have, then, only a capacity in relation to local law. From this it follows that the purported grant of authority from the Dominion is inoperative.

The central feature of this argument is the notion of the creation of an "entity". That a group of human beings acting jointly in a certain manner, with certain scope and authority and for certain objects, can be conceived as an entirety, different from that of the sum of the individuals and their

actions in severalty, is undoubted; and it is the joint action so conceived that is primarily the external counterpart of the mental concept.

But to imagine that total counterpart as an organic creation fashioned after the nature of a human being with faculties called "capacities" and to pursue a development of it logically, can lead us into absurdities. We might just as logically conceive it as a split personality with co-ordinate creators investing it with two orders of capacities. These metaphors and symbolisms are convenient devices to enable us to aggregate incidents or characteristics but carried too far they may threaten common sense.

What the law in this case has done has been to give legal significance called incidents to certain group actions of five men. That to the same men, acting in the same formality, another co-ordinate jurisdiction in a federal constitution cannot give other legal incidents to other joint actions is negated by the admission that the Dominion by appropriate words could create a similar board, composed of the same persons, bearing the same name, and with a similar formal organization, to execute the same Dominion functions. Twin phantoms of this nature must, for practical purposes, give way to realistic necessities. As related to courts, the matter was disposed of in Valin v. Langlois [(1879) 5 App. Cas. 115.]. No question of disruption of constitutive provincial features or frustration of provincial powers arises: both legislatures have recognized the value of a single body to carry out one joint, though limited, administration of trade. At any time the Province could withdraw the whole or any part of its authority. The delegation was, then, effective.

The next challenge was to certain provisions of the scheme. In the approach to them it should be assumed that, generally, they are intended only for the regulation of local trade, but several of them are couched in language that must be examined.

By clause 4 the scheme is declared to apply "to all persons who grow, pack, store, buy or sell potatoes of any kind or grade" in the province. I find it difficult to limit this language to local business, but to answer the question finally I take it in its application to the substantive provisions.

These are to be found chiefly in clause 16. para. (a) which enables the Potato Board to prescribe the manner of marketing generally; (b) to designate the agencies through which potatoes will be marketed; and (c) prohibiting they buying, selling, etc. of potatoes which do not conform to quality standards set by the Potato Board. So considered, there is clearly a regulation of external trade which renders clause 4 ultra vires.

The same result follows in the case of para. (g) which enables the Board to fix the minimum prices at which potatoes may be bought or sold "for delivery in Prince Edward Island." If the latter were an exclusively ultimate delivery for consumption, there would be no excess: but there may be intermediate deliveries in the course of external trade. Likewise, the application of para. (m), authorizing any agency designated by the Potato Board to distribute among producers the proceeds of the sales of potatoes, carries regulation beyond the provincial field.

Para. (d) (1), providing for licensing dealers and fixing fees, construed to apply to all dealers requires a distinction to be made between fees primarily for revenue and primarily for regulation. In Brewers & Malsters' v. A.G. (Ont.), [[1897] A.C. 231.], distillers and brewers operating under licenses from the Dominion were held subject to a provincial license carrying a fee of $100 whether the product was solely for local consumption, for export, or for both. The fee was justified both as direct taxation and under head 9. Lord Herschell emphasized the uniformity of the fee, its relatively small amount, and that it was imposed without regard to the quantity of goods sold.

In Lawson v. Interior Committee [[1931] S.C.R. 357.], the levy was part of a local regulation of interprovincial and local trade; the tax imposed might vary with the quantity of the product marketed subject to a minimum and maximum amount of charge; and it was held invalid both as indirect taxation and as not being within head 9.

In Shannon, supra, the Judicial Committee held that in the regulation of exclusively local business by a system of licences, fees under head 9 were not restricted to direct taxation.

In Lower Mainland Products v. Crystal Dairy Ltd. [[1933] A.C. 168.], there were two local levies; a compulsory transfer of money from one set of dealers to another, and an assessment for expenses; in each case the levy was related to the quantity of product sold. Here, too, external trade was affected. Both were held to be indirect taxation and invalid.

The scheme before us is primarily one of trade regulation. Apart from taxation, so far as it extends to external trade it is invalid. Licence fees for revenue purposes with only an incidental regulation on local and external trade, as in the Malsters' case, can be imposed on the latter if not indirect in their incidence, but if related to sales they become a burden on that trade and, as in Lawson's case, are ultra vires.

Clause 19 of the scheme was challenged. This authorizes the Potato Board to name two representatives to act with representatives of the Nova Scotia, New Brunswick and Newfoundland marketing boards as a committee "to regulate and co-ordinate the marketing of potatoes produced in the said provinces and in the regulated area"; and, "subject to the approval of the (Provincial) Board, to delegate to that committee such of its powers as it may deem advisable." Co-operative action between boards of different provinces having the same administrative objects is quite unobjectionable; but I find nothing in the statute permitting a sub-delegation of powers of this nature.

Finally, order No. 6 of the Potato Board was attacked. It provides that "for the purpose of establishing a fund in connection with the scheme, every dealer shall pay to the Board a charge at the rate of one cent (1c) for every hundred pounds of potatoes shipped from the province." As mentioned, neither para. (e) of clause 16, which authorizes licence fees nor (k) which permits the establishment of a fund by means of similar fees, was adopted by the Dominion order-in-council, and I cannot take it that that express omission can be supplied by either (o) or (p) which authorize generally such acts as may be considered necessary to the execution of the scheme. On the contrary view, (o) and (p) would be sufficient in themselves for the entire administration on behalf of the Dominion; but the order-in-council specifies with particularity only nine paragraphs out of sixteen in clause 16 and adopts no other clause. The assessment is clearly a mode of indirect taxation effecting primarily a regulation of trade: and as the cases examined indicate, its application to trade beyond the province puts it ultra the powers of the Board.

This order purported to repeal order No. 2 which provided for a similar assessment and which for the same reasons was invalid; and the purported preservation in order No. 6 of unpaid levies under No. 2 likewise fails.

I would, therefore, answer the questions as follows:--

1. Yes.
2. Yes.
3. Except as to sections Nos. 4 and 19, Yes.
4. Except as to orders Nos. 2 and 6, Yes.

The judgment of Kellock and Locke, JJ. was delivered by:--

KELLOCK J.:-- The central question in this appeal is as to the respective jurisdictions of Parliament and the provincial legislature with respect to regulation of the marketing of a natural product. It is now settled that neither jurisdiction is competent without the other to cover the entire field of local as well as interprovincial and international marketing. The limitation upon the legislative jurisdiction of Parliament was settled by the decisions in The King v. Eastern Terminal Elevator Co. [[1925] S.C.R. 434.], and A.G. for B.C. v. A.G. for Canada [[1937] A.C. 377.], (Natural Products Marketing Act Reference). While on the other hand, the limitation under which the legislature of a province labours is illustrated by the decision in Lawson v. Interior Tree, Fruit and Vegetable Committee [[1931] S.C.R. 357.]. It was pointed out by Lord Atkin in the Natural Products Reference supra, at 389, that satisfactory results cannot be achieved by either legislature leaving its own sphere and encroaching upon that of the other.

The scheme here in question was established by a provincial Order-in-Council under the provisions of the Agricultural Products Marketing (P.E.I.) Act (1940) 4 Geo. VI c. 40, as amended in 1950 by 14 Geo. VI c. 18. The purpose and intent of the statute is stated in s. 4, ss. 1, to be

> to provide for the control and regulation in any or all respects of the transportation, packing, storage and marketing of natural products within the province, including the prohibition of such transportation, packing, storage and marketing in whole or in part.

By ss. 2, the Lieutenant-Governor-in-Council is authorized to establish, amend and revoke schemes for the control and regulation within the province of the transportation, packing, storage and marketing of any natural products, to constitute marketing boards to administer such schemes, and to vest in such boards any powers considered necessary or advisable for the purpose.

This statute, with some minor differences, is essentially in the form of the statute of British Columbia, in question in Shannon v. Lower Mainland Dairy Products Board [[1938] A.C. 708.], which was held to be intra vires of the provincial legislature. In that case, after pointing out that it is now well settled that s. 91(2) of the British North America Act does not give the Dominion the power to regulate for legitimate provincial purposes particular trades or businesses so far as the trade or business is confined to the province, Lord Atkin said at p. 719:--

> And it follows that to the extent that the Dominion is forbidden to regulate within the province, the Province itself has the right under its legislative powers over property and civil rights within the Province.

At p. 720 he added:

> The pith and substance of this Act is that it is an Act to regulate particular businesses entirely within the Province, and it is therefore intra vires of the Province.

None of the questions on the present reference relates to the competency of the provincial statute here in question, no doubt because of the decision in Shannon's case.

The grounds of attack upon the scheme in the case at bar are that (a) its whole purpose and result is to control extra provincial trade; (b) the legislative powers of Parliament cannot be delegated to a provincial legislature or any agency thereof; and (c) the taxes imposed by rules Nos. 2 and 6 of the Potato Board are not authorized by the statute and in any event are indirect.

The provincial Order-in-Council was made on September 5, 1950, subsequent to the Dominion Act which had been assented to on April 30, 1949, but before P.C. 5159 was made thereunder on October 25, 1950. With respect to the second ground of attack, with which I shall deal first, there is in fact no question here of any delegation of legislative authority by Parliament either to the provincial legislature or to the Lieutenant-Governor-in-Council. Neither the Dominion statute nor P.C. 5159 purports to empower either to do anything. Mr. Farris contends that the Canadian Act is incompetent to confer any authority on the provincial board for the reason that the board, although not a corporation, is an entity apart from its members, and the provincial legislature is without legislative competence to endow it with capacity to accept powers from Parliament exercisable with respect to international and interprovincial trade. He referred to the judgment of Farwell J. in Taff Vale Ry. Co. v. Amalgamated Society of Ry. Servants [[1901] A.C. 426.].

In my opinion, the provincial board "is but a name for the individuals that compose it," to adopt the language of Atkin L.J., as he then was in Mackenzie-Kennedy v. Air Council [[1927] 2 K.B. 517.]. Under the legislation there in question, the Air Council was given attributes more closely resembling those of a corporation than in the case of the provincial board. But, like the board, the Council was not expressly created a corporation. It was held by all the members of the court that the Council was not a corporation. Atkin L.J., in the course of his judgment, pointed out that there were in existence prior to the Act of 1917, by which the Air Council was constituted, other statutes expressly constituting department of state, corporations. At p. 534, after referring to the language of Littledale J. in Tone River Conservators v. Ash [(1829) 10 B. & C. 349 at 384.], namely, that "To create a corporation by charter or Act of Parliament it is not necessary that any particular form of words be used. It is sufficient if the intent to incorporate be evident," the learned Lord Justice said:

> If it had been intended to incorporate the Air Council one would have expected the well known precedents to be followed with express words of incorporation, and express definition of the purposes for which the department was incorporated.

In these circumstances, he found himself unable to find, in the language employed by the Legislature, "the manifest intention to incorporate" which Littledale J. thought essential.

In the case at bar there is, in my opinion, a clear indication to be found in the legislation that it was not the intention of the provincial Legislature to incorporate. The statute of 1940 followed and repealed the earlier P.E.I. Natural Products Marketing Act (1934) 24 Geo. V c. 17. By s. 3 of that statute the Lieutenant-Governor-in-Council was authorized to establish a board for the purposes of the statute, and the board, by ss. 6, was expressly made a body corporate, but when the Act of 1940, was passed, ss. 6 of the earlier legislation was dropped. A further indication of the legislative intention may be gathered from s. 7 of the Act to amend the statute law, c. 1 of the statute of 1951, which adds a new section to the Act of 1940, as follows:

> 16. No action shall be brought against any person who since the fifth day of September, 1950, has acted or purported to act or who hereafter acts or purports to act as a member of any board appointed under or pursuant to the provisions of this Act for anything done by him in good faith in the performance or intended performance of his duties under this Act.

I therefore think that there is no question of incorporation in the case of the provincial board, and that the principle to which Mr. Farris called our attention does not apply. There is, accordingly, no lack of capacity on the part of the individuals, from time to time, who make up the potato board to receive authority from Parliament.

Coming to the scheme itself, it must depend for its validity upon the provincial statute alone, as the Lieutenant-Governor-in-Council derives his authority to establish the scheme from that statute and from that statute alone. Para. 4 of the scheme provides that it shall apply to "all" persons who grow, pick, store, buy or sell potatoes of any kind or grade thereof in the regulated area. Para. 16 provides that the Potato Board shall have certain powers exercisable "in Prince Edward Island" in relation to the marketing of potatoes "therein", including the power (a) to prescribe the manner in which potatoes shall be marketed, (b) to designate the agency through which potatoes shall be marketed, (c) to prohibit the buying, selling, packing, storing or transporting of potatoes which do not conform to quality standards, (d) to license potato dealers and determine the amount of licence fees and the terms and conditions upon which dealers may buy, sell, transport and otherwise handle potatoes, (e) to fix and collect licence fees from all or any persons so engaged, (f) to exempt any person or class from the scheme, (g) to fix the minimum price or prices at which potatoes may be bought or sold "in Prince Edward Island for delivery in Prince Edward Island," (h) to require production of records, (i) to regulate the shipment and marketing of potatoes in such manner as the board may deem advisable, (j) to establish a fund in connection with the scheme and to fix and collect charges in a similar manner to the collection of licence fees from all or any persons producing, packing, transporting, storing or marketing potatoes. Para. 18 provides that every person who buys, sells, transports, or otherwise handles potatoes shall have a licence issued by the board, and no person may buy, sell, offer for sale, or otherwise deal in potatoes produced in the regulated area unless he is in possession of a licence.

On November 6, 1950, the board issued its Order No. 1 providing that no dealer should engage in the marketing of potatoes without a dealer's licence obtained from the board. On December 18, 1950, by Order No. 3 the board fixed certain minimum prices at which potatoes might be bought from producers deliver at "Prince Edward Island shipping points." Sub-para. 3 provided that from and after midnight of December 20, 1950, no dealer or other person should sell or market potatoes on consignment or ship potatoes "from" Prince Edward Island for sale on consignment.

On November 6, 1950, Order No. 2 had been passed levying a charge of one cent for every one hundred pounds of potatoes "shipped or exported" by dealers "from" the province, but by Order No. 6 of February 14, 1951, Order No. 2 was repealed, but the liability of dealers for amounts then due was preserved. Order No. 6 goes on to provide that every producer shall pay a levy of one cent per one hundred pounds of potatoes in respect of "all potatoes sold or marketed by such producer." Every dealer is to be an agent of the board for the purpose of collection of this levy.

By para. 19 the board is authorized to name two representatives to act conjointly with representatives named under the authority of legislation of Nova Scotia and Newfoundland to "regulate

and co-ordinate the marketing of potatoes produced in the said provinces" and in Prince Edward Island, and to delegate to such committee the powers of the board.

In my view, the powers so given go beyond the mere regulation of the potato trade within the province or carriage thereof from one provincial point to another, and encroach upon the sphere of the regulation of interprovincial and export trade. There is no attempt to confine the scheme or the orders under it to local as distinguished from export trade, and it is to be remembered, as was admitted at the bar, that the business of marketing potatoes in the province is preponderantly an export business.

The order of the Lieutenant-Governor-in-Council would appear to have been passed on the theory that in so far as it went beyond the matter of regulation of purely local trade, the powers of the board could be supplemented by an Order-in-Council under the Dominion statute. That this is so was quite frankly admitted by the Attorney-General for Prince Edward Island in his argument before this court. The provincial Order-in-Council is to be judged, however, on the basis of that which was authorized by the provincial statute alone, as the competency of the Lieutenant-Governor-in-Council could not be increased by anything which might be done by the Governor-General-in-Council under the Dominion Act; A.G. for N.S. v. A.G. for Canada [[1951] S.C.R. 31.]. I see no basis upon which the good may be severed from the bad. I therefore conclude that the scheme is invalid. While the Dominion Order-in-Council is valid to clothe the designated individuals with authority to regulate interprovincial and international trade, it is clear, in my view, that the orders made by the board apply and were intended to apply indiscriminately over the whole field, local, interprovincial and international, and are therefore incapable of being supported in the restricted field.

In the result, while it is clearly within the competence of Parliament and a provincial legislature to authorize an agency such as the agency contemplated by the legislation here in question so as to bring about regulation of the whole field of trade in a natural product, it is necessary that the Dominion and provincial legislation respectively be confined to the legislative jurisdiction of each legislature.

While in the Reference re the Minimum Wage Act of Saskatchewan [[1948] S.C.R. 248.], it was found possible to construe the legislation there under consideration as applicable only to persons subject to provincial jurisdiction, I do not think it practicable so to construe the provincial Order-in-Council here in question, having regard not only to the form of its enactment but also to its subject matter. The legislative intention, as expressly disclosed by para. 4, extends over the whole field of trade, and even if that paragraph could be written out of the scheme, the same intent is expressed in sub-paras. (a), (b), (f) and (i) of para. 16. In my view, to strike out any one or more of these provisions, leaving the rest standing, would be to rewrite the Order-in-Council, which I do not think it is open to the court to do.

I would therefore answer questions 1 and 2 in the affirmative, and questions 3 and 4 in the negative.

The judgement of Estey and Cartwright, JJ. was delivered by:--

ESTEY J.:-- This reference is concerned with the validity of a plan for co-operation between the Parliament of Canada and the provincial legislatures in the marketing of natural products.

The legislature of Prince Edward Island enacted in 1940 the Agricultural Products Marketing (Prince Edward Island) Act (S. of P.E.I. 1940, c. 40) which authorized the Lieutenant Governor in Council to set up a scheme for the marketing of natural products. The language of this statute anticipated co-operation with the Parliament of Canada.

The Parliament of Canada in 1949 enacted The Agricultural Products Marketing Act (S. of C. 1949 (1st Sess.), c. 16) designed particularly to make possible co-operation with the provinces in the marketing of natural products.

The legislature of Prince Edward Island in 1950 amended (S. of P.E.I. 1950, c. 18) its statute of 1940 in order to make it more in accord with that of the Parliament of Canada.

In this reference the validity of the provincial act is not questioned, no doubt because its provisions are, in all material particulars, to the same effect as those of the act of British Columbia declared to be within the competence of the provincial legislature in Shannon v. Lower Mainland Dairy Products Board [[1938] A.C. 708; Plax. 379.].

On September 5, 1950, as authorized by the provisions of the above-mentioned provincial statute, the Lieutenant-Governor-in-Council, by Order-in-Council, established a scheme "for the control and regulation within the Province of the transportation, packing, storage and marketing" of potatoes. The Order-in-Council also provides for a board of five members designated as the Prince Edward Island Potato Marketing Board (hereinafter referred to as the Potato Board) to carry out the provisions of the scheme. The board elects its own chairman and may appoint a secretary-treasurer and such other officers and employees as the members may deem expedient. In para. 16 in the Order-in-Council its powers are particularly set out.

The Governor General in Council, under the authority of s. 2 of The Agricultural Products Marketing Act, passed P.C. 5159, October 25, 1950, granting to the Potato Board "powers like the powers exercisable by" that board "in relation to the marketing of Prince Edward Island potatoes locally within the province" as set out in nine of the sub-paras. of para. 16 of the scheme under the provincial Order-in-Council.

The Government of Prince Edward Island referred to the Supreme Court of that province the following four questions: (As to which see p. 394).

This is an appeal from the answers given to the questions by the Supreme Court of Prince Edward Island.

The Agricultural Products Marketing Act is restricted to the interprovincial and export trade and neither purports to nor does it interfere with provincial trade as did earlier legislation declared to be ultra vires. Re The Natural Products Marketing Act 1934, as amended, 1935, [[1936] S.C.R. 398.] and [[1937] A.C. 377; Plax. 327.]. It is however, contended that the statute is ultra vires in so far as it provides for the delegation of power by the Governor in Council as set forth in s. 2:

> 2. (1) The Governor in Council may by order grant authority to any board or agency authorized under the law of any province to exercise powers of regulation in relation to the marketing of any agricultural product locally within the province, to regulate the marketing of such agricultural product outside the province in interprovincial and export trade and for such purposes to exercise all or

> any powers like the powers exercisable by such board or agency in relation to the marketing of such agricultural product locally within the province.
>
> (2) The Governor in Council may by order revoke any authority granted under subsection one.

The Supreme Court of Prince Edward Island concluded that the Parliament of Canada, in the foregoing s. 2, had provided for a delegation of a type this Court held to be ultra vires in A.G. of N.S. v. A.G. of Canada [[1951] S.C.R. 31.]. It was there held the delegation of legislative powers by the Parliament of Canada to a provincial legislature, or by a provincial legislature to the Parliament of Canada, of their respective legislative powers was beyond the competence of these bodies. The problem here presented is quite different in that it is the delegation by the Governor General in Council to the Potato Board, an agency created by the Legislature of the province.

The constitution of this Potato Board is similar to that of the Labour Relations Board of Saskatchewan in respect of which Mr. Justice Kerwin, with whom my Lord the Chief Justice concurred, stated: "* * * the Board is a legal entity, and * * * 'has a right to be heard in Court'" Labour Relations Board, Sask. v. Dominion Fire Brick and Clay Products Limited [[1947] S.C.R. 336.].

It is, however, contended that the Parliament of Canada cannot confer upon this Potato Board the powers the Governor General in Council sought to do by Order-in-Council P.C. 5159. Our attention was directed to the distinction between capacity and powers as expressed by Viscount Haldane in The Bonanza Creek Gold Mining Co. v. Rex [[1916] 1 A.C. 566; 2 Cam. 75 at 89.], where he stated:

> But actual powers and rights are one thing and capacity to accept extra-provincial powers and rights is quite another * * * In the case of a company the legal existence of which is wholly derived from the words of a statute, the company does not possess the general capacity of a natural person and the doctrine of ultra vires applies.

That the legislature appreciated the foregoing distinction between capacity and powers is evidenced both by the history of the legislation and the language adopted in the enactment itself. The legislature, in passing The Agricultural Products Marketing Act in 1940, repealed (s. 14) The Natural Products Marketing Act 1934 (S. of P.E.I. 1934, c. 17), which provided that the Lieutenant Governor in Council might establish a board to be known as the Provincial Marketing Board and, under s. 3(6) thereof, it was expressly created "a body corporate." In the 1940 act the Lieutenant Governor in Council was again authorized to constitute a board to be known as the "Prince Edward Island Marketing Board" and to "constitute marketing boards," but it does not contain a provision making either a body corporate.

The language of the 1940 statute is equally indicative of the intention of the legislature where, in relation to the marketing boards, it authorizes only the vesting of powers therein. S. 4(2), under which the Potato Board was created, provides that the Lieutenant-Governor-in-Council "may constitute marketing boards to administer such schemes, and may vest in those boards respectively any powers" and again in s. 5 the Provincial Board (which includes the Potato Board) may be vested with "additional powers." Then the Lieutenant-Governor-in-Council, in constituting the board, provided in the opening words of para. 16 that it "shall have the following powers." Whatever the pre-

cise nature and character of such a statutory unincorporated body, as ultimately determined, may be, it is sufficient here to observe that the legislature, in constituting this board as it did, without making it a corporate body, intended that the board should exercise the capacities of natural persons, but restricted the exercise thereof to the powers vested in them as a board. As stated by Farwell J., whose language was approved by the House of Lords, when speaking in reference to an unincorporated body, "The Legislature has legalized it, and it must be dealt with by the Courts according to the intention of the Legislature." Taff Vale Railway v. Amalgamated Society of Railway Servants [[1901] A.C. 426 at 429.].

It is conceded that the Governor-General-in-Council might appoint the five individual members of the Potato Board and vest them with the same powers as set out in P.C. 5159. When, however, it is appreciated that this Potato Board is an unincorporated legal entity with the capacity of a natural person, there appears to be nothing in principle or authority to prevent the Governor-General-in-Council designating and authorizing it to discharge such duties and responsibilities as may be deemed desirable within the legislative competency of the Parliament of Canada.

The province, under s. 7 of the provincial act, retains control over its board. The Governor-General-in-Council may, of course, from time to time, change, alter or withdraw any authority it has conferred upon the board under P.C. 5159. The scheme here created is, throughout, a co-operative effort on the part of the respective governing bodies in which each maintains its own respective legislative fields. The board, under the scheme, is responsible to the respective governments in the discharge of those powers which each has competently conferred upon it.

The principle of the delegation and imposition of duties by the Parliament of Canada upon bodies created under provincial legislation was recognized in Valin v. Langlois [(1879) 3 Can. S.C.R. 1.]. With the greatest possible respect to the learned judges in the Appellate Court who held a contrary opinion, I think question No. 1 should be answered in the affirmative.

The Governor General's Order-in-Council P.C. 5159 appears to be within the provisions of the Agricultural Products Marketing Act as enacted by the Parliament of Canada in 1949 and, therefore, the answer to question No. 2 should be in the affirmative.

Under question No. 3, if the Lieutenant-Governor-in-Council has established the scheme within the limits of the act of 1940, the competence of which is here not questioned, it is valid. It is suggested, however, that the Lieutenant-Governor-in-Council, in passing para. 4 of the scheme, has exceeded the limits of the power authorized by the provincial act. Para. 4:

> 4. This Scheme shall apply to all persons who grow, pack, store, buy or sell potatoes * * * *

The respective provisions of the scheme must be read and construed together. The general language setting forth the scope and application of the scheme in para. 4 must be read with the provisions of para. 16 granting to the board its powers. This para. 16 at the outset expressly states:

> The Potato Board shall have the following powers exercisable in Prince Edward Island in relation to the marketing of potatoes therein.

The several powers enumerated in subparas. (a) to (k) are in accord with the opening words. When, therefore, the general language of para. 4 is read in relation to the powers as vested in the

board under para. 16, it becomes clear that it was intended para. 4 should be construed and ought to be construed to apply only within the field of competent provincial jurisdiction.

In so far as the Lieutenant-Governor-in-Council, in para. 16(d) and (e), authorized the Potato Board to require licences and to impose fees therefor, the act was within the competence of the province. Shannon v. Lower Mainland Dairy Products Board supra at p. 391:

> A licence itself merely involves a permission to trade subject to compliance with specified conditions. A Licence fee, though usual, does not appear to be essential. But, if licences are granted, it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province, or for both purposes. The object would appear to be in such a case to raise a revenue for either local or Provincial purposes.

It was also contended that subpara. 16(k) is invalid. It provides for the establishment of a fund "for the proper administration of the scheme" and contemplates that it shall be fixed and collected in the manner provided by subpara. 16(e). Such an imposition would appear to be within the competence of the Province, so long as it is not made in a manner and an amount that would cause it to enter into the price of the commodity and, therefore, to be in reality an indirect tax. Lord Herschell, in relation to the imposition of a uniform licence fee of $100, when considering it as a matter of direct or indirect taxation, stated:

> They do not think there was either an expectation or intention that he should indemnify himself at the expense of some other person. No such transfer of the burden would in ordinary course take place or can have been contemplated as the natural result of the legislation in the case of a tax like the present one, a uniform fee trifling in amount imposed alike upon all brewers and distillers without any relation to the quantity of goods which they sell. Brewers and Maltster's Association of Ont. v. A.G. for Ont. [[1897] A.C. 231; 1 Cam. 529 at 534.].

The language of para. 16(k) so read and construed does not appear to be objectionable.

Para. 19 of the scheme provides for an interprovincial committee "to regulate and co-ordinate the marketing of potatoes produced" in the provinces of Prince Edward Island, Nova Scotia, New Brunswick and Newfoundland and provides that, subject to the approval of the Prince Edward Island Marketing Board, the Potato Board may delegate to that committee "such of its powers as it may deem advisable." This provision contemplates the provinces dealing with interprovincial and export trade and is beyond the competence of the province to enact. I would, therefore, answer question No. 3 yes, except para. 19.

The scheme, as constituted by the Lieutenant-Governor-in-Council, may be valid, and yet the board, in adopting orders and regulations, may exceed its authority and it is suggested in question No. 4 that the board has done so. The board has made seven orders, an examination of which would indicate that all but Orders Nos. 2 and 6 are within the authority of the board. Under Order No. 2 the board imposed, for the purpose of establishing a fund in connection with the scheme, upon every dealer a charge or levy at the rate of one cent for every 100 pounds of potatoes shipped or exported by such dealer. This Order was repealed by Order No. 6, but it was provided that any amount due or

accruing due and unpaid under Order No. 2 remained an outstanding liability. Order No. 6 then proceeded to impose a similar charge or levy of one cent per 100 pounds of potatoes upon every producer in respect of all potatoes sold or marketed by such producer. It might be sufficient to say that neither the act nor the scheme authorizes the Potato Board to make a levy of the sort contemplated by these Orders, but there is a further objection to their validity. This charge or levy is in relation to a sale of potatoes and its nature and character is such that it would be passed on by the dealer as part of, and, therefore, would enter into, the price of the commodity. It is, therefore, in substance an indirect tax and cannot be competently enacted by the province or any agency thereof. Question No. 4 should be answered yes, except as to Orders No. 2 and 6.

The questions submitted should be answered: Question No. 1, yes; Question No. 2, yes; Question No. 3, yes, except as to para. 19; Question No. 4, yes, except as to orders Nos. 2 and 6.

Appeal allowed.

Reporter's Note: Following the Reference by the Lieutenant-Governor-in-Council to the Supreme Court of Prince Edward Island in banco, by order of Campbell C.J. the appellant as a representative of the class interested in maintaining the affirmative of the questions put, and the respondent as representative of the class interested in maintaining the negative, were named nominal plaintiff and defendant respectively. On the filing of pleadings it appeared to the Court in banco that questions were raised as to the validity of Acts of the Parliament of Canada and the Legislature of Prince Edward Island, and the Attorney General thereof and the Attorney General of Canada having been granted leave to intervene at any stage of the proceedings and the Attorney General of Prince Edward Island having intervened, and it appearing to the Court in banco that a conclusive determination of the said questions by the Court of highest resort was desired by the parties and that such determination could be more expeditiously obtained by removing the case to the Supreme Court of Canada, it was ordered by the Court in banco that the Reference be so removed. Pursuant to this Court's direction argument as to its jurisdiction was heard on Oct. 25, 1951. H.F. McPhee K.C. appeared for the appellant and K.M. Martin K.C. for the respondent. Judgment was reserved and on Nov. 2, 1951, Cartwright J. delivered the unanimous judgment of the Court holding that under s. 37 of the Supreme Court Act an appeal lies only from the opinion of the highest court of final resort in the province in any matter referred to it by the Lieutenant-Governor-in-Council and no such opinion having been pronounced the appeal should be quashed but with no order as to costs.

TAB 16

Indexed as:

Lord's Day Alliance of Canada v. British Columbia

The Lord's Day Alliance of Canada on its own behalf and in its representative capacity, Appellant; and The Attorney General of British Columbia, City of Vancouver and Vancouver Mounties Holdings Ltd. on its own behalf and in its representative capacity, Respondent.

[1959] S.C.R. 497

Supreme Court of Canada

1959: February 23, 24 / 1959: April 28.

Present: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux, Abbott, Martland and Judson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law -- Validity of provincial enactment authorizing municipality to permit Sunday sport -- Permissive enactment -- Whether within exception of s. 6 of the Lord's Day Act, R.S.C. 1952, c. 171 -- Whether criminal legislation -- Whether delegation of authority -- The Criminal Code, 1953-54 (Can.), c. 51, ss. 7, 8, 11 -- The Constitutional Questions Determination Act, R.S.B.C. 1948, c. 66.

By s. 14 of Bill 55, the British Columbia Legislature proposed to amend the charter of the City of Vancouver by adding s. 206A thereto which authorized the city council to pass a by-law specifying public games and sports, other than horse-racing, that might be played in the city or parts thereof for gain, or prize, or reward, within certain hours on Sunday afternoons, and "which but for this section would be unlawful under...The Lord's Day Act (Canada)". The Lieutenant-Governor in Council of British Columbia referred to the Court of Appeal the question of the validity of the proposed legislation. By a majority it was held to be intra vires.

Held: The proposed legislation was intra vires in its entirety.

Per Kerwin C.J. and Taschereau, Fauteux and Abbott JJ.: (1) The Bill governed the conduct of people on Sunday and did not create an offence against the criminal law. This permissive legislation fell within heads 13 or 16 of s. 92 of the British North America Act and was, therefore, within the power of the provincial Legislature. This was not a case of delegation where Parliament attempted

to authorize a provincial legislature to do something beyond the latter's power but within the competence of Parliament. Section 6 of the Lord's Day Act does not apply to a province when it chooses to permit a certain occurrence. Looking at the pith and substance of the legislation, since in constitutional matters there is no general area of criminal law, the Legislature was not prohibiting something but merely stating in an affirmative manner that certain actions could be taken. The decision of the Privy Council in Lord's Day Alliance of Canada v. Attorney General for Manitoba, [1925] A.C. 384, completely covered the matter here in question and could not be distinguished by reference to English statutes, as now there are no criminal offences except those enacted by the Parliament of Canada.

(2) The point taken in the Court of Appeal, that the Legislature had attempted to delegate its powers to the council of the municipality was abandoned by the appellant, but, in any event, as was held by the majority in the Court of Appeal, the by-law would be a provincial law within s. 6 of the Lord's Day Act, R.S.C. 1952, c. 171.

Per Rand, Cartwright, Martland and Judson JJ.: Where a certain activity, when engaged in on Sunday, is not at the time forbidden as a criminal offence, the declaration by a provincial statute that it may be indulged in on that day is a valid enactment and is an Act "in force" within the meaning of those words in s. 6 of the Lord's Day Act: Lord's Day Alliance of Canada v. Attorney General for Manitoba, supra. There are no laws in force touching the observance of Sunday except the Lord's Day Act, since s. 8 of the new Criminal Code came into force. There is no such thing as a "domain" of criminal law. In a federal system, distinctions must be made arising from the true object, purpose, nature, or character, of each particular enactment. It is a misconception of the operation of s. 6 of the Lord's Day Act to say that its effect was to create a delegation of dominion power to the provinces. It cannot be open to serious debate that Parliament can limit the operation of its own legislation and may do so upon any event or condition.

Per Locke and Martland JJ.: The language of s. 6 as well as that of ss. 4 and 7 of the Lord's Day Act shows that the limitation of the prohibition applies not only to statutes passed prior to the coming into force of the Act but also to those which might thereafter be enacted. If therefore the province, in the exercise of its powers under heads 13 and 16 of s. 92 of the British North America Act, should permit the activities in question, the prohibition did not extend to them. By reason of s. 8 of the new Criminal Code, the Imperial statutes referred to in argument were no longer part of the law of British Columbia at the time the amendment was passed. There was no question of the delegation of the power of Parliament to the legislature, nor as to whether the provincial Act amended the Lord's Day Act, nor of any adoption by the Dominion of the provincial legislation by virtue of the language in s. 6. The amendment was a "provincial act or law" within the meaning of ss. 4 and 6 of the Lord's Day Act.

APPEAL from a judgment of the Court of Appeal for British Columbia [(1959), 15 D.L.R. (2d) 169, 121 C.C.C. 241], declaring, on a reference by the Lieutenant-Governor in Council of British Columbia, that a proposed amendment to the Charter of the City of Vancouver to permit Sunday sport was intra vires. Appeal dismissed.

F.A. Brewin, Q.C., and R.J. McMaster, for the appellant.
John J. Urie, for the Attorney General of British Columbia, Respondent.
J.W. de B. Farris, Q.C., and R.K. Baker, for the City of Vancouver, respondent.
W.R. Jackett, Q.C., and T.B. Smith, for the Attorney General of Canada, intervenant.

W.B. Common, Q.C., for the Attorney General of Ontario, intervenant.

Solicitors for the appellant: R.J. McMaster, Vancouver.
Solicitor for the Attorney General of British Columbia, respondent: G.D. Kennedy, Victoria.
Solicitor for the City of Vancouver, respondent: E.N.R. Elliott, Vancouver.

The judgment of Kerwin C.J. and Taschereau, Fauteux and Abbott JJ. was delivered by

THE CHIEF JUSTICE:-- This is an appeal by The Lord's Day Alliance of Canada on its own behalf and in its representative capacity against a decision of the Court of Appeal of British Columbia [(1959), 15 D.L.R. (2d) 169, 121 C.C.C. 241] on a reference directed to it by the Lieutenant-Governor in Council of the Province. The question submitted is:

> Is Section 14 of Bill 55, entitled "An Act to Amend the Vancouver Charter", or any of the provisions thereof, and in what particular or particulars, or to what extent, intra vires the Legislature of the Province?

Section 14 of the Bill referred to provides:

> 14. The said Act is further amended by inserting the following as Section 206A:
>
> 206A. (1) Notwithstanding anything contained in the "Sunday Observance Act" or in any other statute or law of the Province, where a by-law passed under subsection (2) hereof is in force and subject to its provisions, it shall be lawful for any person between half past one and six o'clock in the afternoon of the Lord's Day, commonly called Sunday, to provide for or engage in any public game or sport for gain, or for any prize or reward, or to be present at any performance of such public game or sport at which any fee is charged, directly or indirectly, either for admission to such performance or to any place within which the same is provided, or for any service or privilege thereat, that is specified in such by-law and which but for this Section, would be unlawful under Section 6 of "The Lord's Day Act (Canada)" or to do or engage any other person to do any work, business or labour in connection with any such public game or sport which but for this Section would be unlawful under Section 4 of "The Lord's Day Act (Canada)".
>
> (2) (a) The Council may pass a by-law declaring subsection (1) to be in force throughout the city or in such part or parts thereof as may be specified in the by-law and upon such by-law coming into force, subsection (1) shall apply throughout the city or in such specified part or parts as the case may be.

(b) the application of subsection (1) shall be limited to such public games or sports as are specified in the by-law.
(c) The by-law shall not specify horse-racing as a public game or sport.
(d) Where subsection (1) applies in specified parts of the city the limitation authorized by clause (b) hereof may differ in different parts.
(e) The by-law may reduce the period of time between half past one and six o'clock mentioned in subsection (1).
(f) The by-law shall provide for the regulation and control of the public games and sports specified in it and may provide for the regulation and control of any matter or thing in connection with such public games and sports.
(g) (i) No by-law passed under this section shall be repealed until the following question has been submitted to the electors, and a majority of affirmative votes obtained: Are you in favour of the repeal of the by-law passed under the authority of the Vancouver Charter that regulates public games and sports for gain on the Lord's Day?

(ii) The Council may submit the question set out above to the electors at any annual election.
(iii) Upon the presentation of a petition requesting that the by-law passed under this section be repealed, signed by at least ten percent of the electors of the municipality, the Council shall at the next annual election submit to the electors the question set out in subclause (i).

(h) Any petition mentioned in clause (g) (iii) above shall be deemed to be presented when it is lodged with the City Clerk and the sufficiency of the petition shall be determined by him, and his certificate as to its sufficiency shall be conclusive for all purposes. Provided, however, that a petition that is lodged with the City Clerk in the months of November or December shall be deemed to be presented in the month of February next following.

Three members of the Court were of opinion that the section was intra vires the provincial Legislature and two that it was ultra vires. The later also certified that, in any event, a by-law of the council of the City of Vancouver passed in pursuance of any power or authority the Legislature might have under the provisions of the Lord's Day Act, R.S.C. 1952, c. 171, would not be a provincial law within the meaning of the Lord's Day Act. This last point was abandoned before us but, in any event, as was held by the majority in the Court of Appeal, such a by-law would be a provincial law. The Legislature is merely providing that, if the city council passes a by-law under subs. (2), then subs. (1) takes effect.

The Legislature was purporting to proceed under the powers conferred by the exception contained in s. 6 of the Lord's Day Act:

6. (1) It is not lawful for any person, on the Lord's Day, except as provided in any provincial Act or law now or hereafter in force, to engage in any public

> game or contest for gain, or for any prize or reward, or to be present thereat, or to provide, engage in, or be present at any performance or public meeting, elsewhere than in a church, at which any fee is charged, directly or indirectly, either for admission to such performance or meeting, or to any place within which the same is provided, or for any service or privilege thereat.
>
> (2) When any performance at which an admission fee or any other fee is so charged is provided in any building or place to which persons are conveyed for hire by the proprietors or managers of such performance or by any one acting as their agent or under their control, the charge for such conveyance shall be deemed an indirect payment of such fee within the meaning of this section.

In my view the matter is covered completely by the judgment of the Judicial Committee in Lord's Day Alliance of Canada v. Attorney General for Manitoba [(1925] A.C. 384, 1 W.W.R. 296, 43 C.C.C. 185, 1 D.L.R. 561]. Their Lordships there considered their earlier judgment in Attorney General for Ontario v. Hamilton Street Railway Co. [[(1903] A.C. 524, 2 O.W.R. 672, 7 C.C.C. 326], where it was held that in circumstances arising before the enactment of the Lord's Day Act in 1906 (Statutes of Canada, c. 27), the prohibition with sanctions of certain activities on Sunday came within the heading of criminal law and therefore within the exclusive legislative authority of the Parliament of Canada. It was as a result of that decision that the Lord's Day Act was enacted. Its The circumstances calling for the Act supply clearly enough the explanation of its content. The Act is laying down for the whole of Canada regulations for the observance of Sunday. Some things on that day are everywhere prohibited; others are everywhere allowed. But there is an intermediate class of activities -- Sunday excursions are amongst them -- with reference to which the Act recognizes that differing views may prevail in the respective Provinces of the Dominion, so varying in these Provinces are the circumstances, usages and predominant religious beliefs of the people. The Act proceeds to provide accordingly, putting it generally, that with reference to these matters, Provincial views shall within a Province prevail. As Anglin J. observed in Ouimet v. Bazin, 46 Can. S.C.R. 502, 530, this course was no doubt adopted "to enable local bodies to deal with the peculiar requirements of localities with which they would presumably be more familiar and perhaps more in sympathy".

> There is therefore reserved to each Province power in these intermediate cases by (inter alia) "a Provincial Act ... hereafter in force" to exempt that Province from the operation of the general prohibition in whole or in part.
>
> Now, in their Lordships' judgment, a Provincial Act passed subsequently to the passing of this statute, if it is to be "in force" within the meaning of the reservation, must be one effectively enacted by the Provincial Legislature, and the solution of the problem whether the statute of Manitoba now under consideration, and in particular s. 1, is in that sense of these words "in force" in the Province, will be simplified if it be first asked whether or not it would have been within the competence of the Legislature of Manitoba effectively to enact it had there been on this subject of Sunday excursions no previous Dominion legislation at all.

To this question no other than an affirmative answer can, their Lordships think, be given. The argument to the contrary proceeds upon a view of Attorney-General for Ontario v. Hamilton Street Ry. Co. (1903) A.C. 524 decision, which they conceive is not admissible. The Board, dealing there with the Ontario Act as a whole -- as an Act which created offences and imposed penalties for their commission -- held that such a statute was part of the criminal law, and, as such, exclusively within the competence of the Parliament of Canada. But the Board was not considering the power of a Provincial Legislature to recognize what may be called the non-observance of Sunday as distinct from its assumption of power to enforce by penalties or punishment the observance of that day. And the two things are very different. Legislative permission to do on Sunday things or acts which persons of stricter sabbatarian views might regard as Sabbath-breaking is no part of the criminal law where the acts and things permitted had not previously been prohibited. Such permission might aptly enough be described as a matter affecting "civil rights in the Province" or as one of "a merely local nature in the Province". Nor would such permission necessarily be otiose. The borderline between the profanation of Sunday -- which might at common law be regarded as an offence and therefore within the criminal law -- and the not irrational observance of the day is very indistinct. It is a question with reference to which there may be infinite diversity of opinion. Legislative permission to do on Sunday a particular act or thing may, therefore, amount to a useful pronouncement that within the Province the acts permitted are on the one side of the line and not on the other. In the present case, as it happens, no objection could have been taken to the section under consideration on the ground that Sunday excursions were in Manitoba unlawful or criminal. They were not. They had never, according to the present assumption, been specifically prohibited by the Parliament of Canada. They were not unlawful by the laws of England existing on July 15, 1870, from which day the Dominion Parliament, by 51 Vict. c. 33, introduced into Manitoba such of these laws as related to matters within the jurisdiction of the Parliament of Canada. It follows that, prior to the Dominion Act of 1906, Sunday excursions were not in Manitoba the subject of prohibition. Enacted, therefore, by the Provincial Legislature before that statute, s. 1 of the Manitoba Act of 1923 would, in the opinion of their Lordships, have been intra vires and effective. The section would have been "in force" in the Province in the fullest meaning of these words, as found in the Act of 1906. And the section, if then in "force", would have so continued notwithstanding the passing of that Act. It would have been a "Provincial Act ... now in force".

As Duff J. says in Ouimet v. Bazin, 46 Can. S.C.R. 502, 526, when speaking of the Lord's Day Act, 1906: "This latter enactment appears to be framed upon the theory that the provinces may pass laws governing the conduct of people on Sunday; and by the express provisions of the Act such laws, if in force when the Act became law, are not to be affected by it. That is a very different thing from saying that in this Act the Dominion Parliament has manifested an intention to give the force of law to legislation passed by a provincial legislature professing to do what a province under its own powers of legislation cannot do,

> viz., to create an offence against the criminal law within the meaning of the enactments of the 'British North America Act' already referred to". With those observations the Board is in entire agreement.

To paraphrase the words of Duff J., approved in the Manitoba case, s. 14 of Bill 55 governs the conduct of people on Sunday and does not create an offence against the criminal law. It follows that the permissive legislation here in question falls within Heads 13 or 16 of s. 92 of the British North America Act and is, therefore, within the power of the provincial Legislature. It is not a case of delegation where the Dominion Parliament attempts to authorize a provincial legislature to do something beyond the latter's power, but within the competence of Parliament, such as occurred in Attorney General of Nova Scotia v. Attorney General of Canada [[1951] S.C.R. 31, [1950] 4 D.L.R. 369]. Section 6 of the Lord's Day Act merely provides that if a provincial legislature chooses to permit a certain occurrence, then that section does not apply to the particular province. In constitutional matters there is no general area of criminal law and in every case the pith and substance of the legislation in question must be looked at. This proposition is not inconsistent with anything that was said in the judgment of this Court in Henry Birks & Sons v. City of Montreal [(1955] S.C.R. 799, 5 D.L.R. 321]. Here the Legislature is not prohibiting something but merely stating in an affirmative manner that certain actions may be taken. This distinguishes the situation from that which confronted this Court in Ouimet v. Bazin [(1912), 46 S.C.R. 502, 20 C.C.C. 458, 3 D.L.R. 593].

It was sought to distinguish the Manitoba case on historical grounds and reference was made to certain English statutes:

> An Act for punishing Divers Abuses Committed on the Lord's Day, called Sunday (1625) 1 Car. I, C. 1;
>
> An Act for the further Reformation of Sunday Abuses Committed on the Lord's Day, commonly called Sunday (1627) 3 Car. II, C. 7;
>
> An Act for the better observation of the Lord's Day, commonly called Sunday (1626) 29 Car. II, C. 7;
>
> An Act for preventing certain Abuses and Profanation of the Lord's Day, called Sunday (1780) 21 Geo. III, C. 49;
>
> An Act to Amend the Laws in England relative to Games (1831) 1 and 2 Will. IV, C. 32;
>
> An Act to Repeal an Exception in an Act of the Twenty-seventh Year of King Henry the Sixth concerning the days whereon Fairs and Markets ought not to be kept (1850) 13 and 14 Vict., C. 23.

However, ss. 7 and 8 of the new Criminal Code provide:

7. (1) The criminal law of England that was in force in a province immediately before the coming into force of this Act continues in force in the province except as altered, varied, modified or affected by this Act or any other Act of the Parliament of Canada.

(2) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada, except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada.

8. Notwithstanding anything in this Act or any other Act no person shall be convicted

(a) of an offence at common law,
(b) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or
(c) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada,

but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or magistrate had, immediately before the coming into force of this Act, to impose punishment for contempt of court.

The criminal law of England is "altered", "varied", "modified" and "affected" by s. 8 by providing that, notwithstanding anything in the Code or any other Act, no person shall be convicted of an offence at common law, or of an offence under any Act of the Parliament of England, or of Great Britain or of the United Kingdom of Great Britain and Ireland. There are, therefore, no criminal offences, except those which are such by enactments of the Parliament of Canada.

The appeal should be dismissed without costs.

The judgment of Rand, Cartwright, Martland and Judson JJ. was delivered by

RAND J.:-- This is an appeal from the majority answer given by the Court of Appeal of British Columbia [(1959), 15 D.L.R. (2d) 169, 121 C.C.C. 241] to a question put to it by the Lieutenant-Governor in Council of that province relating to a Bill proposing an amendment to the Charter of Vancouver, introduced into the legislature and read a first time on February 26, 1958. The Bill in part was in these terms:

14. The said Act is further amended by inserting the following as section 206A:

(1) Notwithstanding anything contained in the "Sunday Observance Act" or in any other statute or law of the Province, where a by-law passed under sub-

> section (2) hereof is in force and subject to its provisions, it shall be lawful for any person between half past one and six o'clock in the afternoon of the Lord's Day, commonly called Sunday, to provide for or engage in any public game or sport for gain, or for any prize or reward, or to be present at any performance of such public game or sport at which any fee is charged, directly or indirectly, either for admission to such performance or to any place within which the same is provided, or for any serivce or privilege thereat, that is specified in such by-law and which but for this Section, would be unlawful under Section 6 of "The Lord's Day Act (Canada)" or to do or engage any other person to do any work, business or labour in connection with any such public game or sport which but for this Section would be unlawful under Section 4 of "The Lord's Day Act (Canada)".

The question put was:

> Is section 14 of Bill 55, entitled "An Act to Amend the 'Vancouver Charter'," or any of the provisions thereof, and in what particular or particulars, or to what extent, intra vires the Legislature of the Province?

To this O'Halloran, Bird and Davey JJ.A. answered that the Bill in its entirety was intra vires of the province; Sidney Smith and Sheppard JJ.A. that it was ultra vires.

In the view I take of it, the answer depends upon the nature or character of a provincial Act of a permissive as contradistinguished from a prohibitory effect where there is no existing prohibition of the activity which is the subject-matter of the Act and where any repealing effect of which would be confined to matters consequential or collateral to the prohibited matter or otherwise related to but not directly aimed against the activity by reason of public policy on the observance of Sunday in a religious aspect.

On that matter we have two authoritative pronouncements by the Judicial Committee: Attorney General for Ontario v. The Hamilton Street Railway Company [(1903] A.C. 524, 2 O.W.R. 672, 7 C.C.C. 326] and The Lord's Day Alliance v. Attorney General for Manitoba [(1925] A.C. 384, 1 W.W.R. 296, 43 C.C.C. 185, 1 D.L.R. 561]. The former held that prohibitory provisions of an Act to Prevent the Profanation of the Lord's Day enacted by the legislature of Ontario were ultra vires as being within the area of criminal law exclusively committed to the Dominion Parliament; in the latter a provision in a provincial Act passed in 1923 by the Manitoba legislature by which it was declared that it "shall be lawful", by any mode of conveyance, to run excursions to summer resorts, beaches or camping grounds on Sunday, was within provincial power and valid. This judgment, in my opinion, governs the present controversy and requires the same answer.

Section 6 of the Lord's Day Act, R.S.C. 1952, c. 171, deals with the subject-matter of the Bill here:

> 6. (1) It is not lawful for any person, on the Lord's Day, except as provided in any provincial Act or law now or hereafter in force, to engage in any public game or contest for gain, or for any prize or reward, or to be present thereat, or to provide, engage in, or be present at any performance or public meeting, elsewhere than in a church, at which any fee is charged, directly or indirectly, either

> for admission to such performance or meeting, or to any place within which the same is provided, or for any service or privilege thereat.

The reasons of the Judicial Committee in the Manitoba case were given by Lord Blanesburgh. Speaking of the scope of the Dominion Act, he distributed the matters dealt with as (a) certain acts absolutely forbidden, (b) certain left unaffected, and (c) others specified in ss. 4, 6 and 7 lying within a controversial range on which there are such differences of opinion that it would be legitimate to respect in any particular area those there predominating. It was to give effect to them that the language of exception contained in the sections mentioned was designed: local attitudes so expressed were to prevail. On p. 391 in his own words:

> The Act is laying down for the whole of Canada regulations for the observance of Sunday. Some things on that day are everywhere prohibited; others are everywhere allowed. But there is an intermediate class of activities -- Sunday excursions are amongst them -- with reference to which the Act recognizes that differing views may prevail in the respective Provinces of the Dominion, so varying in these Provinces are the circumstances, usages and predominant religious beliefs of the people. The Act proceeds to provide accordingly, putting it generally, that with reference to these matters, Provincial views shall within a Province prevail. As Anglin J. observed in Ouimet v. Bazin, 46 Can. S.C.R. 502, 530, this course was no doubt adopted "to enable local bodies to deal with the peculiar requirements of localities with which they would presumably be more familiar and perhaps more in sympathy."

And at p. 392:

> Legislative permission to do on Sunday things or acts which persons of stricter sabbatarian views might regard as Sabbath-breaking is no part of the criminal law where the acts and things permitted had not previously been prohibited. Such permission might aptly enough be described as a matter affecting "civil rights in the Province" or as one of "a merely local nature in the Province." Nor would such permission necessarily be otiose. The borderline between the profanation of Sunday -- which might at common law be regarded as an offence and therefore within the criminal law -- and the not irrational observance of the day is very indistinct. It is a question with reference to which there may be infinite diversity of opinion. Legislative permission to do on Sunday a particular act or thing may, therefore, amount to a useful pronouncement that within the Province the acts permitted are on the one side of the line and not on the other.... It follows that, prior to the Dominion Act of 1906, Sunday excursions were not in Manitoba the subject of prohibition. Enacted, therefore, by the Provincial Legislature before that statute, s. 1 of the Manitoba Act of 1923 would, in the opinion of their Lordships, have been intra vires and effective. The section would have been "in force" in the Province in the fullest meaning of these words, as found in the Act of 1906.

I take that language to mean that where a certain activity, when engaged in on Sunday, is not at the time, as a criminal offence, forbidden, the declaration by a provincial statute that it may be indulged

in on that day is a valid enactment and is an Act "in force" within the meaning of those words in s. 6 of the Lord's Day Act. In other words, a positive declaration of a liberty to act in a particular manner as the converse expression of the absence of any prohibition against it, exhibiting impliedly the view on the matter of the exception provided in the statute to be attributed to a province, as contemplated by s. 6, is a valid Act in force. The conversion of a negative state of absence of prohibition of an act into a positive assertion of permission to do that act is in substance a "useful pronounce sufficient subject-matter for the exercise of provincial legislative power. This was in principle the argument presented in the Manitoba appeal on behalf of the province when, as it appears at p. 386, it was urged by counsel that "the Act of 1923 merely declared the common law." The declaration was held also to be made as effectively by an Act passed subsequently to 1906 as one in force at the time of passing the enactment of that year.

It was argued by Mr. Brewin that a sufficiently distinguishing circumstance between the Manitoba case and that here lay in the fact that in that province prior to 1906 there was no law against running excursions by conveyances but that in British Columbia the law of England introduced in 1858 did forbid such games as those dealt with in the Bill now proposed. I see no basis for that distinction as applied in the case before us. The Criminal Code which came into force on April 1, 1955, by declaring in s. 8 that "no person shall be convicted" of any offences at common law or under an Act of the Parliament of England or of Great Britain or of the United Kingdom of Great Britain and Ireland or under an Act or ordinance in force in a province before it became a province of Canada has effectually abolished all offences created otherwise than by the Parliament of Canada. The provisions of the Act Respecting the Observance of Sunday, R.S.B.C. 1948, c. 318, enacted originally in 1858 and continued as law in the province by the Confederation Act of 1867 were thus repealed. At the time of the introduction of the Bill there was, and on its enactment at any subsequent time there will be, no law in force touching the observance of Sunday except that of the Dominion Act of 1906. The situation in this respect is then identical with that in Manitoba in 1923.

Into this branch of his argument Mr. Brewin injected the idea of a "domain" of criminal law which, as I understood it, was in some manner a defined area existing apart from the actual body of offences at a particular moment; and that it was characterized by certain distinguishing qualities. Undoubtedly criminal acts are those forbidden by law, ordinarily at least if not necessarily accompanied by penal sanctions, enacted to serve what is considered a public interest or to interdict what is deemed a public harm or evil. In a unitary state the expression would seem appropriate to most if not all such prohibitions; but in a federal system distinctions must be made arising from the true object, purpose, nature or character of each particular enactment. This is exemplified in Attorney General for Quebec v. Canadian Federation of Agriculture [(1951] A.C. 179, [1950] 4 D.L.R. 689], in which certain prohibitions with penalties enacted by Parliament against certain trade in margarine were held to be ultra vires as not being within criminal law.

Beyond or apart from such broad characteristics, of no practical significance here, which describe an area by specifying certain elements inhering in criminal law enactments, no such "domain" is recognized by our law. The language of Lord Blanesburgh in the Manitoba case refers to "domain" as the body of present prohibitions, the existing criminal law, and nothing else. The same view expressed in Proprietary Articles Trade Association v. Attorney General for Canada [(1931] A.C. 310 at 324, 55 C.C.C. 241, 2 D.L.R. 1, 1 W.W.R. 552] by Lord Atkin will bear repeating:

> The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?...It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

There is nothing here of a domain free from such mundane requirements.

It was argued finally that the effect of the exception in s. 6 was to create a delegation of dominion power to the province contrary to the holding of this Court in Attorney General for Nova Scotia v. Attorney General for Canada [(1951] S.C.R. 31, [1950] 4 D.L.R. 369]. The idea of delegation arises from a misconception of the operation of s. 6. The legislative efficacy in prohibiting the activity named is that solely of Parliament; the effect of the exception is to declare that in the presence of a provincial enactment of the appropriate character the scope of s. 6 automatically ceases to extend to the provincial area covered by that enactment. The latter is a condition of fact in relation to which Parliament itself has provided a limitation for its own legislative act. That Parliament can so limit the operation of its own legislation and that it may do so upon any such event or condition is not open to serious debate.

I would, therefore, dismiss the appeal. There will be no costs to any party.

The judgment of Locke and Martland JJ. was delivered by

LOCKE J.:-- The question referred to the Court of Appeal [(1959), 15 D.L.R. (2d) 169, 121 C.C.C. 241] under the provisions of the Constitutional Questions Determination Act, R.S.B.C. 1948, c. 66, reads:

> Is Section 14 of Bill 55 entitled "An Act to amend the 'Vancouver Charter'," or any of the provisions thereof, and in what particular or particulars, or to what extent, intra vires the Legislature of the Province?

The terms of the section mentioned are stated in other reasons to be given in this matter.

The answer to be made depends, in my opinion, entirely upon the interpretation that is to be given to s. 6 of the Lord's Day Act, R.S.C. 1952, c. 171.

Subsection (1) of s. 6, so far as it is necessary to consider its provisions, reads:

> It is not lawful for any person, on the Lord's Day, except as provided in any provincial Act or law now or hereafter in force, to engage in any public game or contest for gain, or for any prize or reward, or to be present thereat ...

The prohibition, on the face of it, does not purport to be absolute. Had the legislation in question been passed prior to the coming into force of the Lord's Day Act and, if at that time the Impe-

rial statutes to which we have been referred had not been in force in British Columbia, it would have been impossible to successfully contend that the legislation was not intra vires the Legislature since, by the very terms of s. 6, activities of the nature referred to in British Columbia were not affected. This aspect of the matter was referred to by Lord Blanesburgh in the judgment of the Judicial Committee in Lord's Day Alliance v. Attorney General of Manitoba [(1925), A.C. 384 at 393, 1 W.W.R. 296, 43 C.C.C. 185, 1 D.L.R. 561].

Subject to the powers given to the legislature by head 15 of s. 92, the exclusive authority to legislate in relation to the criminal law, except as to the constitution of courts of criminal jurisdiction, is vested in Parliament by head 27 of s. 91. Parliament cannot extend the jurisdiction of the legislature by delegation, A.G. N.S. v. A.G. Canada [[1951] S.C.R. 31, [1950] 4 D.L.R. 369], nor by abstaining from legislating to the full extent of its powers in a field in which its jurisdiction is exclusive, Union Colliery v. Bryden [[1899] A.C. 580 at 588].

The language of s. 6 as well as that of ss. 4 and 7 shows that the limitation of the application of these sections applied not only to statutes passed prior to the coming into force of the Act but also those which might thereafter be enacted. The words are "provincial Act or law now or hereafter in force", which makes it perfectly clear that if the province, in the exercise of its powers under heads 13 and 16 of s. 92 of the British North America Act should permit such activities, the prohibition did not extend to them.

The Imperial statutes referred to were no longer part of the law of British Columbia at the time the amendment was passed by reason of s. 8 of the new Criminal Code.

In my opinion, no question of the delegation of the power of Parliament to the Legislature, nor as to whether the provincial Act in some way amends the Lord's Day Act, nor of any adoption by the Dominion of the Provincial legislation by virtue of the language employed in s. 6, arises in the matter. The powers of the Legislature which have been invoked are derived solely from s. 92. Section 6 of the Lord's Day Act does not prohibit Sunday sports of the kind referred to in the impugned legislation if the statute of the province, whensoever enacted, permits them. The scope of the prohibition is limited by Parliament and no question of conflict between the Dominion and the provincial legislation arises.

Sidney Smith and Sheppard JJ.A., who dissented from the view of the majority of the court, considered that the amendment was not a "provincial Act or law" within the meaning of that expression in ss. 4 and 6 of the Lord's Day Act. Counsel appearing for the appellant before us said that he did not contend that the legislation was invalid on this ground. This, however, does not relieve this Court of its duty of considering the question. This is a reference -- not an action.

The learned judges who dissented considered that under the amendment it was the City by-law which was the operative provision which permitted Sunday games and sports, and the Vancouver City council, and not the Legislature, which was to decide whether or not these should be permitted. The view of the majority was, however, that a provincial Act -- such as the present amendment -- which becomes effective in a defined area upon the passing of a municipal by-law in accordance with its terms, is a provincial law within the meaning of s. 6. That was the view expressed by Dennistoun J.A. in Rex v. Thompson [[1931] 1 W.W.R. 26, 39 Man. R. 277, 55 C.C.C. 33, 2 D.L.R. 282].

I agree with the opinion of the majority of the Court of Appeal. It is the amending section that declares that it shall be lawful to engage in these activities when the conditions prescribed have been complied with, and the Act as thus amended the authority for what is done.

In my opinion, the legislation is intra vires in its entirety and the answer to the question submitted should be in the affirmative.

I would dismiss this appeal.

Appeal dismissed without costs.

TAB 17

Indexed as:

Coughlin v. Ontario (Highway Transport Board)

**John D. Coughlin, Appellant; and
The Ontario Highway Transport Board, Respondent; and
The Attorney General of Canada, The Attorney General for Ontario, The Attorney General of Manitoba, The Attorney General for Alberta, The Attorney General of Quebec, Intervenants.**

[1968] S.C.R. 569

[1968] R.C.S. 569

Supreme Court of Canada

1967: May 11, 12 / 1968: April 29.

Present: Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie and Spence JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law -- Validity of legislation -- Whether unconstitutional delegation by Parliament of power to legislate on interprovincial motor carriage -- Motor Vehicle Transport Act, 1953-54 (Can.), c. 59, s. 3(1), (2) -- Ontario Highway Transport Board Act, R.S.O. 1960, c. 273 -- B.N.A. Act, ss. 91, 92.

In 1954, a licence permitting the inter-provincial transport of goods was issued to the appellant in Ontario, under the Motor Vehicle Transport Act, 1953-54 (Can.), c. 59. When informed that the respondent Board intended to hold a hearing to review the terms of the certificate which led to the issue of the licence, the appellant applied for an order prohibiting the Board from proceeding on the ground that the Board was without jurisdiction because the Motor Vehicle Act, which confers upon it the jurisdiction it sought to exercise, was ultra vires. The trial judge dismissed the application, and this decision was affirmed by the Court of Appeal. The appellant was granted leave to appeal to this Court. In support of the appeal, it was argued that the terms of the Motor Vehicle Transport Act, and particularly s. 3 thereof, constituted an unlawful delegation by Parliament to the provincial legislatures of the power to legislate in relation to the subject matter of inter-provincial motor vehicle

carriage, a subject matter wholly within the legislative jurisdiction of Parliament. Counsel for each of the intervenants supported the constitutional validity of the Act.

Held (Martland and Ritchie JJ. dissenting): The appeal should be dismissed.

Per Cartwright, Fauteux, Abbott, Judson and Spence JJ.: By the terms of s. 3 of the Motor Vehicle Transport Act, the question whether a person may operate the undertaking of an inter-provincial carrier of goods by motor vehicle within the limits of the province of Ontario is to be decided by a Board constituted by the provincial legislature and which must be guided in the making of its decision by the terms of the statutes of that legislature and the regulations passed thereunder as they may exist from time to time. There is here no delegation of law-making power, but rather the adoption by Parliament, in the exercise of its exclusive power, of the legislation of another body as it may from time to time exist, a course which has been held constitutionally valid by this Court in A.G. for Ontario v. Scott, [1965] S.C.R. 137, and by the Court of Appeal for Ontario in R. v. Glibbery, [1963] 1 O.R. 232. The respondent Board derives no power from the legislature of Ontario to regulate or deal with the inter-provincial carriage of goods. Its wide powers in that regard are conferred upon it by Parliament, which can at any time terminate them.

Per Martland and Ritchie JJ., dissenting: Section 3(2) of the Motor Vehicle Transport Act (Can.) is not valid federal legislation. This legislation constitutes an unconstitutional delegation from the federal to the provincial authority of a subject matter reserved to Parliament alone under the B.N.A. Act. In enacting the Motor Vehicle Transport Act, and particularly ss. 3(2) and 5 thereof, the Parliament of Canada purported to relinquish all control over that subject matter.

Droit constitutionnel -- Validité d'un statut -- S'agit-il d'une délégation inconstitutionnelle par le Parlement du pouvoir de légiférer en matière de transport interprovincial par véhicule à moteur -- Loi sur le transport par véhicule à moteur, 1953-54 (Can.), c. 59, art. 3(1), (2) -- Ontario Highway Transport Board Act, R.S.O. 1960, c. 273 -- Acte de l'Amérique du Nord britannique, arts. 91,92.

En 1954, un permis pour le transport interprovincial de marchandises a été accordé à l'appelant en Ontario en vertu de la Loi sur le transport par véhicule a moteur, 1953-54 (Can.), c. 59. Ayant été informe que la régie intimée avait l'intention de réexaminer les termes du certificat en vertu duquel le permis avait été accordé, l'appelant a demandé qu'il soit ordonné à la régie de ne pas procéder pour le motif que la régie était sans juridiction vu que la Loi sur le transport par véhicule à moteur, qui lui confère la juridiction qu'elle tente d'exercer, est ultra vires. Le juge de première instance a rejeté la requête, et sa décision fut confirmée par la Cour d'appel. L'appelant a obtenu la permission d'en appeler à cette Cour, et soutient que les termes de la Loi sur le transport par véhicule à moteur, et particulièrement l'art. 3 d'icelle, constituent une délégation illégale par le Parlement aux législatures provinciales du pouvoir de légiférer en matière de transport interprovincial par véhicule à moteur, une matière relevant entièrement de la juridiction législative du Parlement. Les procureurs de chacun des intervenants ont affirmé la validité constitutionnelle de la loi.

Arrêt: L'appel doit être rejeté, les Juges Martland et Ritchie étant dissidents.

Les juges Cartwright, Fauteux, Abbott, Judson et Spence: De par les termes mêmes de l'art. 3 de la Loi sur le transport par véhicule à moteur, la question de savoir si une personne peut exploiter une entreprise interprovinciale pour le transport de marchandises par véhicule à moteur dans la province de l'Ontario doit être décidée par une régie créée par la législature provinciale et dont les décisions

doivent être basées sur les termes des lois de cette législature et des règlements établis en vertu d'icelles, en vigueur de temps à autre. Il n'y a ici aucune délégation du pouvoir de légiférer. Il s'agit plutôt de l'adoption par le Parlement, dans l'exercice de son pouvoir exclusif, de la législation d'un autre corps telle qu'elle peut exister de temps à autre, ce qui a été jugé constitionnellement valide par cette Cour dans A.G. for Ontario v. Scott, [1956] R.C.S. 137, et par la Cour d'appel de l'Ontario dans R. v. Glibbery, [1963] 1 O.R. 232. La régie intimée ne tire aucun pouvoir de la législature de l'Ontario pour réglementer le transport interprovincial de marchandises. Les pouvoirs étendus qu'elle détient à cette égard lui proviennent du Parlement qui peut en tout temps y mettre fin.

Les Juges Martland et Ritchie, dissidents: L'art. 3(2) de la Loi sur le transport par véhicule à moteur (Can.) n'est pas une législation fédérale valide. Cette législation constitue une délégation inconstitutionnelle de l'autorité fédérale à l'autorité provinciale d'une matière réservée exclusivement au Parlement par l'Acte de l'Amérique du Nord britannique. De par les termes mêmes de la loi, et particulièrement des arts. 3(2) et 5 d'icelle, le Parlement du Canada a abandonné tout contrôle sur cette matière.

APPEL d'un jugement de la Cour d'Appel de l'Ontario [[1966] 1 O.R. 183, 53 D.L.R. (2d) 30.], confirmant une décision rejetant une requête pour prohibition. Appel rejeté, les Juges Martland et Ritchie étant dissidents.

APPEAL from a judgment of the Court of Appeal for Ontario [1966] 1 O.R. 183, 53 D.L.R. (2d) 30, dismissing an application for prohibition. Appeal dismissed, Martland and Ritchie JJ. dissenting.

D.K. Laidlaw and J.H. Francis, for the appellant.
James J. Carthy, for the respondent.
D.S. Maxwell, Q.C., and D.H. Aylen, for the Attorney General of Canada.
F.W. Callaghan, Q.C., for the Attorney General for Ontario.
D.W. Moylan, for the Attorney General of Manitoba.
Gerald LeDain, Q.C., for the Attorney General of Quebec.
Samuel A. Friedman, Q.C., for the Attorney General for Alberta.

Solicitor for the appellant: J.J. Robinette, Toronto.
Solicitors for the respondent: Arnup, Foulds, Weir, Boeckh, Morris & Robinson, Toronto.
Solicitor for the Attorney General of Canada: D.S. Maxwell, Ottawa.
Solicitor for the Attorney General for Ontario: F.W. Callaghan, Toronto.
Solicitor for the Attorney General of Manitoba: G.E. Pilkey, Winnipeg.
Solicitor for the Attorney General of Quebec: Gerald Le Dain, Montreal.
Solicitor for the Attorney General for Alberta: S.A. Friedman, Edmonton.

The judgment of Cartwright, Fauteux, Abbott, Judson and Spence JJ. was delivered by

CARTWRIGHT J.:-- This is an appeal, brought pursuant to leave granted by this Court, from an order of the Court of Appeal for Ontario [1966] 1 O.R. 183, 53 D.L.R. (2d) 30 made on October 14, 1965, affirming an order of Gale C.J.H.C., made on July 15, 1965, dismissing an application of the appellant for an order prohibiting the respondent from proceeding with a hearing to re-

view the terms of the certificates which led to the issue of an extra-provincial operating licence to the appellant. The Court of Appeal gave no written reasons for its decision but we are informed by counsel that it stated its agreement with the reasons of Gale C.J.H.C.

There is no dispute as to any matter of fact. All of the business of the appellant consists of inter-provincial transport of goods and none of its operations involves transport entirely within one province so as to be of an intraprovincial nature. In 1954 a licence was issued to the appellant in Ontario under the Motor Vehicle Transport Act (Canada); this licence permits the inter-provincial movement of certain specific types of merchandise and is number X828. The respondent has informed the appellant of its intention to hold a hearing under The Motor Vehicle Transport Act (Canada) to review the terms of the certificate which led to the issue of the licence.

The application for prohibition was founded on the ground that the respondent was without jurisdiction because the Act which confers upon it the jurisdiction which it sought to exercise is ultra vires of Parliament. That Act is The Motor Vehicle Transport Act, Statutes of Canada, 2-3 Eliz. II, c. 59.

The relevant provisions of the Act are:

Section 2:

> In this Act,
>
> (a) "extra-provincial transport" means the transport of passengers or goods by means of an extra-provincial undertaking;
> (b) "extra-provincial undertaking" means a work or undertaking for the transport of passengers or goods by motor vehicle, connecting a province with any other or others of the provinces, or extending beyond the limits of a province;
>
> * * *
>
> (g) "local undertaking" means a work or undertaking for the transport of passengers or goods by motor vehicle, not being an extra-provincial undertaking; and
> (h) "provincial transport board" means a board, commission or other body or person having under the law of a province authority to control or regulate the operation of a local undertaking.

Section 3(1):

> (1) Where in any province a licence is by the law of the province required for the operation of a local undertaking, no person shall operate an extra-provincial undertaking in that province unless he holds a licence issued under the authority of this Act.
>
> (2) The provincial transport board in each province may in its discretion issue a licence to a person to operate an extra-provincial undertaking into or

through the province upon the like terms and conditions and in the like manner as if the extra provincial undertaking operated in the province were a local undertaking.

Section 5:

> The Governor in Council may exempt any person or the whole or any part of an extra-provincial undertaking or any extra-provincial transport from all or any of the provisions of this Act.

While an additional submission was made to Gale C.J.H.C., the only ground in support of the appeal relied upon before us was that the terms of the Motor Vehicle Transport Act, and particularly s. 3 thereof, constitute an unlawful delegation by Parliament to the provincial legislatures of the power to legislate in relation to the subject matter of inter-provincial motor vehicle carriage which subject matter was rightly conceded to be wholly within the legislative jurisdiction of Parliament.

Counsel for each of the intervenants supported the constitutional validity of the Act.

The Motor Vehicle Transport Act was assented to on June 26, 1954; pursuant to a proclamation of the Governor in Council issued under s. 7 of the Act it came into force in Ontario on September 15, 1954. At that date the powers as to the regulation of intra-provincial carriage of goods by motor vehicle now exercised by the respondent Board were conferred upon the Ontario Municipal Board by The Public Commercial Vehicles Act, R.S.O. 1950, c. 304. The respondent Board was created by Statutes of Ontario, 1955, 4 Eliz. II, c. 54, by s. 25 of which the Public Commercial Vehicles Act, R.S.O. 1950, c. 304, was amended so that the powers as to the regulation of intra-provincial carriage of goods by motor vehicle theretofore exercised by the Ontario Municipal Board were transferred to the respondent Board.

The rules which guide the Board in the performance of its duties are now contained in the Public Commercial Vehicles Act, R.S.O. 1960, c. 139 and Regulations made by the Lieutenant-Governor in Council pursuant to s. 16 of that Act.

From the above brief review of the relevant legislation it will be seen that as matters stand at present the question whether a person may operate the undertaking of an interprovincial carrier of goods by motor vehicle within the limits of the Province of Ontario is to be decided by a Board constituted by the provincial legislature and which must be guided in the making of its decision by the terms of the statutes of that legislature and the regulations passed thereunder as they may exist from time to time.

Mr. Laidlaw argues that in bringing about this result by the enactment of s. 3 of the Motor Vehicle Transport Act Parliament has in substance and reality abdicated its power to make laws in relation to the subject of inter-provincial motor vehicle carriage and unlawfully delegated that power to the provincial legislature.

It is made clear by the judgment of this Court in Attorney General of Nova Scotia v. Attorney General of Canada [1951] S.C.R. 31, [1950] 4 D.L.R. 369, and by the earlier decisions of the Judicial Committee and of this Court collected and discussed in the reasons delivered in that case, that neither Parliament nor a Provincial Legislature is capable of delegating to the other or of receiving from the other any of the powers to make laws conferred upon it by the British North America Act.

Bill No. 136 of the Legislature of Nova Scotia which was under consideration in that case in terms provided that the Lieutenant-Governor of the Province might:

> by proclamation, from time to time delegate to and withdraw from the Parliament of Canada authority to make laws in relation to any matter relating to employment in any industry, work or undertaking in respect of which such matter is, by Section 92 of The British North America Act, 1867, exclusively within the legislative jurisdiction of this Legislature and any laws so made by the said Parliament shall, while such delegation is in force, have the same effect as if enacted by this Legislature.

The difference between such a bill and the Act which we are considering is too obvious to require emphasis.

It is well settled that Parliament may confer upon a provincially constituted board power to regulate a matter within the exclusive jurisdiction of Parliament. On this point it is sufficient to refer to the reasons delivered in the case of P.E.I. Potato Marketing Board v. H.B. Willis Inc. [1952] 2 S.C.R. 392, [1952] 4 D.L.R. 146.

In the case before us the respondent Board derives no power from the Legislature of Ontario to regulate or deal with the inter-provincial carriage of goods. Its wide powers in that regard are conferred upon it by Parliament. Parliament has seen fit to enact that in the exercise of those powers the Board shall proceed in the same manner as that prescribed from time to time by the Legislature for its dealings with intra-provincial carriage. Parliament can at any time terminate the powers of the Board in regard to inter-provincial carriage or alter the manner in which those powers are to be exercised. Should occasion for immediate action arise the Governor General in Council may act under s. 5 of the Motor Vehicle Transport Act.

In my opinion there is here no delegation of law-making power, but rather the adoption by Parliament, in the exercise of its exclusive power, of the legislation of another body as it may from time to time exist, a course which has been held constitutionally valid by this Court in Attorney General for Ontario v. Scott [1956] S.C.R. 137, 114 C.C.C. 224, 1 D.L.R. (2d) 433 and by the Court of Appeal for Ontario in Regina v. Glibbery [1963] 1 O.R. 232, [1963] 1 C.C.C. 101, 38 C.R. 5, 36 D.L.R. (2d) 548.

As has already been stated the point dealt with above was the only one argued before us. In regard to it I am in substantial agreement with the reasons of Gale C.J.H.C. It follows that I would dismiss the appeal.

Before parting with the matter I wish to call attention to the fact that in each of the proclamations whereby the Motor Vehicle Transport Act was brought into force in the various provinces it is recited that this action had been requested by the Government of the Province concerned. It seems plain that the Government of Canada in co-operation with the Governments of the Provinces concerned has sought to achieve a satisfactory manner of regulating the transport of goods by motor vehicle. Our duty is simply to determine whether as a matter of law the Act of Parliament impugned by the appellant is valid; but it is satisfactory to find that there is nothing which compels us to hold that the object sought by this co-operative effort is constitutionally unattainable.

I would dismiss the appeal with costs but would make no order as to costs in regard to any of the intervenants.

The judgment of Martland and Ritchie JJ. was delivered by

RITCHIE J. (dissenting):-- This is an appeal from a judgment of the Court of Appeal for Ontario [1966] 1 O.R. 183, 53 D.L.R. (2d) 30 dismissing without reasons an appeal from a judgment rendered by Gale C.J.H.C. (as he then was) whereby he dismissed the application of the present appellant for an order prohibiting the Ontario Highway Transport Board from proceeding with a hearing to review the certificates of public necessity and convenience which led to the issuance of his Extra-Provincial Operating Licence for the Province of Ontario. I have had the benefit of reading the reasons for judgment prepared by the present Chief Justice in which he sets out the relevant statutory provisions and reviews the circumstances giving rise to this appeal, but I do not find it possible to agree with the conclusion which he has reached in confirming the judgments of the Courts below.

The "Extra-Provincial Operating Licence" here in question, which is numbered X828, appears to be signed by the Registrar of Motor Vehicles for the Province of Ontario. It bears the heading: "The Motor Vehicle Transport Act (Canada 1954) -- Ontario Department of Transport -- Extra-Provincial Operating Licence" and it authorizes the appellant "to operate an extra-provincial undertaking for the transportation of goods...subject to the terms and conditions printed on the back hereof..." The terms and conditions referred to read, in part, as follows:

THE MOTOR VEHICLE TRANSPORT ACT

Statutes of Canada 1954

> 1. This Act authorizes the Minister of Transport to licence inter-provincial and international undertakings for the transport of passengers and goods by motor vehicle upon like terms and conditions and in the like manner as if the extra-provincial undertaking were a local undertaking.
>
> 2. Licences issued under this Act for the transportation of goods between two or more provinces of Canada or between the province of Ontario and a state of the United States are designated 'extra-provincial operating licences' and the serial number of each licence shall commence with the letter 'X'. The terms and conditions are that it shall be subject to the provisions of The Public Commercial Vehicles Act (Ontario) and the regulations made thereunder with the following exceptions:...

The italics are my own.

The exceptions are not strictly relevant for the purpose of this appeal.

The section of the Motor Vehicle Transport Act which is called in question in the present case is s. 3(2) which reads as follows:

> 3.(2) The provincial transport board in each province may in its discretion issue a licence to a person to operate an extra-provincial undertaking into or through the province under the like terms and conditions and in the like manner as if the extra-provincial undertaking operated in the province were a local undertaking.

The appellant contends that these provisions, when read in conjunction with the Public Commercial Vehicles Act, R.S.O. 1960, c. 319 and the regulations made thereunder, constitute a delegation by Parliament to the Provincial executive of the power to exercise control over a connecting undertaking by regulation, which power is expressly stated in the case of A.G. (Ontario) v. Winner [1954] A.C. 541, 13 W.W.R. (N.S.) 657, 71 C.R.T.C. 225, 4 D.L.R. 657, to be vested in the federal authority exclusively by reason of the provisions of s. 92(10)(a) of the British North America Act.

In the case of A.G. (Ontario) v. Winner, supra, the Privy Council had decided that it was beyond the legislative powers of a province (New Brunswick) to prohibit the operator of an interprovincial bus line from carrying passengers from points outside the province to points within the province and vice versa on the ground that no province had jurisdiction to legislate in relation to extra-provincial transport. The matter was succinctly stated by Lord Porter at page 580 where he said:

> . . .it is for the Dominion alone to exercise, either by Act or by regulation, control over connecting undertakings.

It appears to me to be of more than passing interest to note that the Motor Vehicle Transport Act (Canada) was assented to by Parliament almost exactly four months after the decision in the Winner case had been rendered by the Privy Council and that three months later, at the request of the Province of Ontario, a proclamation was issued "declaring the said act to be in force in the said province".

It seems to me that if it is to be held that s. 3(2) of the Motor Vehicle Transport Act is valid federal legislation, then the effect of the decision in the Winner case has been effectively nullified insofar as the Province of Ontario is concerned.

Before considering the question of whether or not this legislation constitutes a delegation from the federal to the provincial authority of subject matter reserved to Parliament alone under the British North America Act, it appears to me to be proper to re-state the proposition, that neither Parliament nor a provincial legislature is capable of delegating its powers to the other, in the language in which it was stated by Chief Justice Rinfret in A.G. of Nova Scotia v. A.G. of Canada [1951] S.C.R. 31, [1950] 4 D.L.R. 369. The Chief Justice there said at page 34:

> The constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled. It is part of the protection that Parliament can legislate only on the subject matters referred to it by section 91 and that each Province can legislate exclusively on the subject matters referred to it by section 92. The country is entitled to insist that legislation adopted under section 91 should be passed exclusively by the Parliament of Canada in the same way as the people of each Province are entitled to insist that legislation concerning the matters enumerated in section 92 should come exclusively from their respective Legislatures . . .
>
> No power of delegation is expressed either in section 91 or in section 92, nor, indeed, is there to be found the power of accepting delegation from one body

> to the other; and I have no doubt that if it had been the intention to give such powers it would have been expressed in clear and unequivocal language.

Notwithstanding these observations, it has nevertheless been settled, at least since the case of the P.E.I. Potato Marketing Board v. H.B. Willis Inc. [1952] 2 S.C.R. 392, [1952] 4 D.L.R. 146 (hereinafter referred to as the P.E.I. case), that Parliament may authorize the Governor-in-Council to empower a provincially-appointed board to regulate a matter which is within the exclusive jurisdiction of Parliament provided that ultimate control over the manner in which such power is to be exercised is retained by the federal authority. The impugned legislation considered in the P.E.I. case was section 2 of the Agricultural Products Marketing Act, 1949, which read as follows:

> 2(1) The Governor in Council may by order grant authority to any board or agency authorized under the law of any province to exercise powers of regulation in relation to the marketing of any agricultural product locally within the province, to regulate the marketing of such agricultural product outside the province in interprovincial and export trade and for such purposes to exercise all or any powers like the powers exercisable by such board or agency in relation to the marketing of such agricultural product locally within the province.
>
> (2) The Governor in Council may by order revoke any authority granted under subsection one.

The effect of this legislation was described by Chief Justice Rinfret at page 396 in the following terms:

> The effect of that enactment is for the Governor-in-Council to adopt as its own a board, or agency already authorized under the law of a province, to exercise powers of regulation outside the province in inter-provincial and export trade, and for such purposes to exercise all or any powers exercisable by such board, or agency, in relation to the marketing of such agricultural products locally within the province. I cannot see any objection to federal legislation of this nature. Ever since Valin v. Langlois, (1879) 5 A.C. 115, when the Privy Council refused leave to appeal from the decision of this Court, the principle has been consistently admitted that it was competent for Parliament to "employ its own executive officers for the purpose of carrying out legislation which is within its constitutional authority, as it does regularly in the case of revenue officials and other matters which need not be enumerated". The latter are the words of Lord Atkin, who delivered the judgment of the Judicial Committee in Proprietary Articles Trade Association et al v. A.G. for Canada et al, (1931 A.C. 310). The words just quoted are preceded in the judgment of Lord Atkin by these other words:--
>
> 'Nor is there any ground for suggesting that the Dominion may not...'
>
> It will be seen, therefore, that on that point the Judicial Committee did not entertain the slightest doubt.

> In The Agricultural Products Marketing Act of 1949 that is precisely what Parliament has done. Parliament has granted authority to the Governor-in-Council to employ as its own a board, or agency, for the purpose of carrying out its own legislation for the marketing of agricultural products outside the province in interprovincial and export trade, two subject-matters which are undoubtedly within its constitutional authority.

The italics are my own.

It will be seen also from a consideration of the Chief Justice's reasons for judgment, page 395, that he regarded the delegations of authority under the Agricultural Products Marketing Act as being "along the same lines" as those passed upon by this Court in the War Measures Act cases of In re Gray (1918), 57 S.C.R. 150, 3 W.W.R. 111, 42 D.L.R. 1 and The Chemical Reference [1943] S.C.R. 1, 79 C.C.C. 1, [1943] 1 D.L.R. 248.

In comparing the P.E.I. case with the case of Attorney General of Nova Scotia v. Attorney General of Canada, supra, Mr. Justice Taschereau said, at pages 410 and 411:

> Here the issue is entirely different. The Federal legislation does not confer any additional powers to the legislature but vests in a group of persons certain powers to be exercised in the interprovincial and export field. It is immaterial that the same persons be empowered by the legislature to control and regulate the marketing of Natural Products within the Province. It is true that the Board is a creature of the Lieutenant-General-in-Council, but this does not prevent it from exercising duties imposed by the Parliament of Canada. (Valin v. Langlois).

In the same case, Mr. Justice Rand expressed himself rather more fully in the following terms at pages 414 and 415:

> What the law in this case has done has been to give legal significance called incidents to certain group actions of five men. That to the same men, acting in the same formality, another co-ordinate jurisdiction in a federal constitution cannot give other legal incidents to other joint action is negated by the admission that the Dominion by appropriate words could create a similar board, composed of the same persons, bearing the same name, and with a similar formal organization, to execute the same Dominion functions. Twin phantoms of this nature must, for practical purposes, give way to realistic necessities. As related to courts, the matter was disposed of in Valin v. Langlois. No question of disruption of constitutive provincial features or frustration of provincial powers arises: both legislatures have recognized the value of a single body to carry out one joint, though limited, administration of trade. At any time the Province could withdraw the whole or any part of its authority. The delegation was, then, effective.

The italics are my own.

I am unable to conclude that the language of s. 3(2) of the Motor Vehicle Transport Act creates a situation in which the principle recognized in Valin v. Langlois (1879), 5 App. Cas. 115 has any application.

In the P.E.I. case, Parliament did nothing more than to authorize the Governor-in-Council to select as an arm of the federal authority any board or agency already established under provincial law for the regulation of Agricultural Marketing within the province and for the purpose of regulating such marketing extra provincially, to grant to it "any powers like the powers exercisable by such board or agency in relation to the marketing of such agricultural products locally within the province".

The Agricultural Products Marketing Act, and particularly s. 2 thereof and the order-in-council made by the Governor-in-Council thereunder, when read together with the provincial legislation, constitute an example of valid co-operation between federal and provincial authorities, and the whole question in the present case is whether the same thing has been achieved by the enactment of s. 3(2) and s. 5 of the Motor Vehicle Transport Act.

The difficulty which presents itself and to the Parliament to the legislatures in such cases is exemplified in the reasons for judgment of Lord Atkin in Attorney General for British Columbia v. Attorney General for Canada [1937] A.C. 377 at 389, 1 W.W.R. 328, 67 C.C.C. 337, 1 D.L.R. 691, where he said:

> Unless and until a change is made in the respective legislative functions of Dominion and Province it may well be that satisfactory results for both can only be obtained by co-operation. But the legislation will have to be carefully framed, and will not be achieved by either party leaving its own sphere and encroaching upon that of the other.

The italics are my own.

In light of these observations, it is to be noted that in the case of the Agricultural Products Marketing Act the extent to which the provincial powers to regulate were adopted, to be exercised in the extra-provincial field, remained within the control of the Governor-in-Council and in fact the order-in-council granting such authority to the P.E.I. Potato Board was restricted by reference to a selected number of provincially authorized regulations. In my view, the important aspect of this legislation from the point of view of the present case is that the controlling authority under that statute remained at all times in federal hands, with the result that the powers exercisable by the Board in the regulation of extra-provincial marketing are such as may from time to time be authorized by the Governor-in-Council.

In the case of the Motor Vehicle Transport Act, direct authority has been given to the local board in each province "in its discretion to issue a licence to a person to operate an extra-provincial undertaking into or through the province", and the manner in which that discretion is to be exercised is not limited to such provincial regulations as the Governor-in-Council may designate but is to be exactly the same as if the extra-provincial undertaking were a "local undertaking". In my view the effect of this legislation is that the control of the regulation of licensing of a "connecting undertaking", is turned over to the provincial authority, and in the Province of Ontario this means that the controlling legislation is the Ontario Highway Transport Act, R.S.O. 1960, c. 273, and the Public Commercial Vehicles Act, R.S.O. 1960, c. 319.

That this is in fact the effect of the legislation is made apparent from a consideration of the Notice of Review of the appellant's operating licence which is brought in question in the present case. It was published in the Ontario Gazette and read as follows:

> The Ontario Highway Transport Board Act, 1960
>
> The Ontario Highway Transport Board pursuant to Section 16 of The Ontario Highway Transport Board Act will review the terms of the certificates which led to the issuance of extra-provincial operating licence No. X-828, and has fixed Monday, the 14th day of September, 1964, at 10 a.m. (E.D.S.T.) at its Chambers, 67 College Street, Toronto, Ontario, for that purpose.
>
> At the hearing the applicant will be required to show cause why these certificates should not be amended or revoked by reason of operations contrary to the public interest; the operations are, more specifically -- continued disregard of The Motor Vehicle Transport Act (Canada) and The Highway Traffic Act and the regulations pursuant thereto.
>
> The Board may amend or revoke the terms of these certificates.

Although reference is made in the Notice to "continued disregard of The Motor Vehicle Transport Act (Canada) and The Highway Traffic Act" it is nevertheless clear that the Ontario Highway Transport Board Act was the statute pursuant to which the Notice was issued and the hearing was to be held.

There can, in my view, be no objection to Parliament enacting a statute in which existing provincial legislation is incorporated by reference so as to obviate the necessity of re-enacting it verbatim, but in providing for the granting of licences to extra-provincial undertakings in the like manner as if they were local undertakings, Parliament must, I think, be taken to have adopted the provisions of the provincial statutes in question as they may be amended from time to time. The result is that the granting of such licences is governed by the Public Commercial Vehicles Act, supra, pursuant to s. 16 of which the Lieutenant-Governor-in-Council may make regulations.

> ...(q) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act,...

I can only read this as meaning that the licensing regulations for extra-provincial transport may be governed by decisions made from time to time by the Lieutenant-Governor-in-Council without any control by, or reference to, the federal authority. This is very different from adopting by reference the language used in a provincial statute and, in my opinion, it means that the control over the regulation of licensing in this field has been left in provincial hands.

It is, of course, true that Parliament can at any time terminate the powers of the provincial boards to licence extra-provincial undertakings, but it seems to me that this would entail repealing s. 3(2) of the Motor Vehicle Transport Act and it is the constitutionality of that subsection which is here impugned.

It is also suggested that the Governor-in-Council might exercise control by acting under s. 5 of the Motor Vehicle Transport Act which reads as follows:

> The Governor-in-Council may exempt any person or the whole or any part of an extra-provincial undertaking or any extra-provincial transport from all or any of the provisions of this Act.

With the greatest respect for those who hold a different view, I do not think that this provision vests any control in the Governor-in-Council of the kind with which he was clothed by the Agricultural Products Marketing Act. Under the latter statute control of the regulation of extra-provincial marketing was vested in the Governor-in-Council; whereas under s. 5 of the Motor Vehicle Transport Act the powers of the Governor-in-Council are limited to exempting any extra-provincial transport from all or any of the provisions of the Act. I do not read this latter section as reserving any power to the Governor-in-Council to nullify the effect of s. 3(2) of the Act by exempting all extra-provincial transport from its provisions, and I am therefore of opinion that no control was retained by the federal authority over the unlimited legislative powers which it purported to transfer to the province by the language employed in s. 3(2) of the Act. Presumably, any person or undertaking exempted by the Governor-in-Council from the provisions of the Act, would be without authority to operate in the Province of Ontario, unless and until provision was made for the granting of a federal licence, but this would in no way effect the powers which s. 3(2) purported to confer on the Board to issue licences to persons or undertakings which had not been so exempted.

In my view, therefore, in enacting the Motor Vehicle Transport Act, and particularly s. 3(2) and 5 thereof, the Parliament of Canada purported to relinquish all control over a field in which Parliament has exclusive jurisdiction under the British North America Act, and left the power to exercise control of the licensing of extra-provincial undertakings to be regulated in such manner as the Province might from time to time determine.

The case of A.G. for Ontario v. Scott [1956] S.C.R. 137, 114 C.C.C. 224, 1 D.L.R. (2d) 433, has been cited in support of the validity of the legislation which is here in question, but in my view the question decided in that case was an entirely different one. The legislation there called in question was the Reciprocal Enforcement of Maintenance Orders Act, R.S.O. 1950, c. 334, which provided for registration in the Ontario court of a maintenance order made by a reciprocal state against a resident of Ontario. For the purpose of enforcement of the order, section 5(2) of the Act provided:

> At the hearing it shall be open to the person on whom the summons was served to raise any defence that he might have raised in the original proceedings had he been party thereto but no other defence;...

It was contended that this section amounted to a delegation by the legislature of its power to deal with the civil rights of its citizens, as the defences permitted under the law of England when the provincial act came into force might or might not have been extended or limited by subsequent English legislation. No question of delegation between federal and provincial authorities of powers conferred by the British North America Act was at issue in this case and the crux of the matter appears to me to have been stated by Rand J., speaking on behalf of himself, the Chief Justice, Kellock and Cartwright JJ. at page 141, where he said:

> That the legislation is within head 16, as a local or private matter, appears to me to be equally clear. No other part of the country nor any other of the several governments has the slightest interest in such a controversy and it concerns ultimately property, actual or potential, within Ontario in a local sense.
>
> Given, then, a right so created by the law of Ontario, the action taken in England is merely an initiating proceeding looking to effective juridical action in Ontario for the purposes of which it is a means of adducing a foundation in evidence. In the administration of justice the province is supreme in determining the procedure by which rights and duties shall be enforced and that it can act upon evidence taken abroad either before or after proceedings are begun locally I consider unquestionable.

To the same effect, Mr. Justice Abbott, speaking for himself, Taschereau and Fauteux JJ., said, at pages 147 and 148:

> As to s. 5, it is clearly competent to any province to determine for the purpose of a civil action brought in such province, what evidence is to be accepted and what defences may be set up to such an action. With the greatest respect for the learned judges in the Court below who have expressed the contrary view, the provision contained in s. 5(2) that 'it shall be open to the person on whom the summons was served to raise any defence that he might have raised in the original proceedings had he been a party thereto but no other defence' is not in my opinion a delegation of legislative power to another province or state. It is merely a recognition by the law of the province of the rights existing from time to time under the laws of another province or state, in accordance with the well recognized principles of private international law.

Notwithstanding certain obiter dicta in the reasons for judgment of Mr. Justice Rand and Mr. Justice Locke, I consider that the excerpts above quoted accurately reflect the ratio decidendi of the case of A.G. for Ontario v. Scott, supra, and with all respect for the opinion of others, I do not think that it constitutes an authority supporting the validity of the statute which is here called in question.

Reliance was placed also on the case of Regina v. Glibbery [1963] 1 O.R. 232, [1963] 1 C.C.C. 101, 38 C.R. 5, 36 D.L.R. (2d) 548. In that case it was contended that the provisions of the Government Property Traffic Regulations passed under the authority of the Government Property Traffic Act, R.S.C. 1952, c. 324, constituted an unconstitutional delegation of legislative authority by Parliament to the Province of Ontario.

The accused, Glibbery, was charged with careless driving, contrary to the provisions of s. 60 of the Highway Traffic Act, R.S.O. 1960, c. 172, whilst driving his vehicle in the defence establishment of Camp Borden which was government property, and contrary also to the provisions of s. 6(1) of the Government Property Traffic Regulations which read as follows:

> No person shall operate a vehicle on a highway otherwise than in accordance with the laws of the province and the municipality in which the highway is situated.

The constitutional argument is referred to in the judgment rendered by Mr. Justice McGillivray on behalf of the Court of Appeal of Ontario where he says at page 235:

> It is submitted however, that this Regulation can only apply to the laws of the Provinces and municipalities as they were in 1952 when the Government Property Traffic Act and the Regulations thereunder became law. If "laws of the province" as used in s. 6 is to mean more than that and to mean laws of the Province as they may be amended from time to time then, it is contended, there exists an unconstitutional and invalid delegation of legislative authority by Parliament to the Province.

After observing that he had no doubt that it was intended that the traffic regulations regarding highways upon Dominion property should conform at all times with those on highways in the areas surrounding such property and that such was the intention of the present regulation, Mr. Justice McGillivray went on to say at page 236:

> There is not here any delegation by Parliament to a Province of legislative power vested in the Dominion alone by the B.N.A. Act and of a kind not vested by the Act in a Province. Delegation by Parliament of any such power would be clearly unconstitutional: A.-G. N.S. et al v. A.-G. Can. 1950 4 D.L.R. 369, 1951 S.C.R. 31. The power here sought to be delegated was not of such a type but was in relation to a matter in which the Province was independently competent. Parliament could validly have spelled out in its own regulations the equivalent of relevant sections of the Highway Traffic Act as they existed from time to time but it was more convenient to include them, as has been done, by reference to contemporary legislation in the Province.

It appears to me that as the federal property at Camp Borden was within the Province of Ontario, the Highway Traffic Act of that Province would have applied to the highways inside the Camp boundaries had no regulations been enacted by the federal authority, but the federal government, of course, had authority to exercise control by way of regulation over the movement of traffic on its own property if it saw fit to do so and s. 6(2) of the Government Property Traffic Act Regulations makes it plain that the whole of the provincial law was not adopted and that the exercise of control by regulation over the movement of traffic within the Camp area was never relinquished by the federal authority. Section 6(2) reads as follows:

> In this section the expression 'laws of the province and the municipality' does not include laws that are inconsistent with or repugnant to any of the provisions of the Government Property Traffic Act or these regulations.

In my view, therefore, the case of Regina v. Glibbery is distinguishable from the present case on the ground that the federal legislation there placed in question related to property within the province in respect to which the province was independently competent to legislate, whereas the matter of extra-provincial transportation rests within the legislative competence of Parliament alone. Even if this were not so, and Parliament had exclusive power to regulate traffic within the boundaries of its own property, the regulations which were passed for that purpose do not constitute a dele-

gation of that power to the provinces because control is clearly retained in the federal authority as is indicated by the last-quoted section of the regulations, whereas under the Motor Vehicle Transport Act, Parliament has, in my opinion, relinquished to the province all control over the licensing of extra-provincial transport.

I have no doubt that the legislation here impugned was enacted by the Parliament of Canada with a view to cooperating with the provinces in the field of interprovincial transportation, but in framing the provisions of s. 3(2) and 5 of the Motor Vehicle Transport Act, Parliament has, in my opinion, failed to achieve the end which it sought and the authority of the case of the A.G. v. Winner, supra, remains as it was before the statute was enacted.

I do not think that anyone would question the desirability and in some cases the necessity of co-operation between the federal and provincial authorities in the carrying out of their respective functions, but if this is to be done, as Lord Atkin said in A.G. for B.C. v. A.G. for Canada, supra, "the legislation will have to be carefully framed", and if it results in the federal authority relinquishing to a province all control over a sphere allotted to "the exclusive legislative authority of the Parliament of Canada" under the British North America Act, then the legislation cannot stand.

The fact that Parliament can at any time repeal the offending sections of the Motor Vehicle Transport Act appears to me, with all respect, to be beside the point. The question here at issue is whether the language used by the framers of those sections, when read within the framework of the existing statute itself, has the effect of relinquishing all federal control over the licensing of "a connecting undertaking". I think that it does.

For all these reasons I would allow this appeal and direct that an order of prohibition be made prohibiting the Ontario Highway Transport Board from proceeding with any hearing with respect to the appeallant's extra-provincial operating licence. In my opinion, the appellant should have his costs in this Court and in the courts below.

Appeal dismissed with costs, MARTLAND and RITCHIE JJ. dissenting.

TAB 18

Indexed as:

Canadian Western Bank v. Alberta

Canadian Western Bank, Bank of Montreal, Canadian Imperial Bank of Commerce, HSBC Bank Canada, National Bank of Canada, Royal Bank of Canada, Bank of Nova Scotia and Toronto-Dominion Bank, Appellants;

v.

Her Majesty The Queen in Right of Alberta, Respondent,

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General for Saskatchewan, Alberta Insurance Council, Financial Advisors Association of Canada, AIG Life Insurance Company of Canada, Canada Life Assurance Company, La Capitale Civil Service Insurer Inc., La Capitale Insurance and Financial Services Inc., CUMIS Life Insurance Company, Desjardins Financial Security Life Assurance Company, Empire Life Insurance Company, Equitable Life Insurance Company of Canada, Great-West Life Assurance Company, Industrial Alliance Insurance and Financial Services Inc., Industrial-Alliance Pacific Life Insurance Company, London Life Insurance Company, Manufacturers Life Insurance Company, Standard Life Assurance Company of Canada, Sun Life Assurance Company of Canada and Transamerica Life Canada, Interveners.

[2007] 2 S.C.R. 3

[2007] S.C.J. No. 22

2007 SCC 22

File No.: 30823.

[page4]

Supreme Court of Canada

Heard: April 11, 2006;
Judgment: May 31, 2007.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ.

(129 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Catchwords:

Constitutional law -- Division of powers -- Banking -- Interjurisdictional immunity -- Federal Bank Act authorizing banks to engage in promotion of certain types of insurance -- Alberta's insurance legislation purporting to make federally chartered banks subject to provincial licensing scheme governing promotion of insurance products -- Whether provincial legislation constitutionally inapplicable to banks' promotion of insurance by virtue of doctrine of interjurisdictional immunity -- Constitution Act, 1867, ss. 91(15), 92(13).

Constitutional law -- Division of powers -- Banking -- Federal paramountcy -- Federal Bank Act authorizing banks to engage in promotion of certain types of insurance -- Alberta's insurance legislation purporting to make federally chartered banks subject to provincial licensing scheme governing promotion of insurance products -- Whether provincial legislation constitutionally inoperative in relation to banks' promotion of insurance by virtue of doctrine of federal paramountcy -- Constitution Act, 1867, ss. 91(15), 92(13).

Constitutional law -- Division of powers -- Doctrine of interjurisdictional immunity -- Scope.

Summary:

In 2000, Alberta enacted changes to its *Insurance Act* purporting to make federally chartered banks subject to the provincial licensing scheme governing the promotion of insurance products. Upon the coming into force of that Act, the appellant banks brought an application for a declaration that their promotion of certain insurance products authorized by the *Bank Act* was banking within the meaning of s. 91(15) of the *Constitution Act, 1867* and that the *Insurance Act* and its associated regulations were constitutionally inapplicable to the banks' promotion of insurance by virtue of the doctrine of interjurisdictional immunity or, alternatively, inoperative by virtue of the doctrine of federal paramountcy. The trial judge dismissed the application. He [page5] found that the challenged provisions of the *Insurance Act* were valid provincial legislation related to the province's property and civil rights power under s. 92(13) of the *Constitution Act, 1867*. He also found that the doctrine of interjurisdictional immunity was inapplicable because the promotion of authorized insurance was not at the core of banking, and that the doctrine of federal paramountcy was inapplicable because there was no operational conflict between the federal and provincial legislation. The Court of Appeal upheld the decision.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Binnie, LeBel, Fish, Abella and Charron JJ.: The *Insurance Act* and its associated regulations apply to the banks' promotion of insurance. The fact that Parliament allows a bank to enter into a provincially regulated line of business such as insurance cannot, by federal statute, unilaterally broaden the scope of an exclusive federal legislative power granted by the *Constitution Act, 1867*. When promoting insurance, the banks are participating in the business of insurance and only secondarily furthering the security of their loan portfolios. The banks' claim to interjurisdictional immunity must therefore be rejected, and they have to comply with both federal and provincial laws because the paramountcy doctrine is not engaged in this case. [para. 4]

The resolution of a case involving the constitutionality of legislation in relation to the division of powers must begin with an analysis of the pith and substance of the impugned legislation. This analysis consists of an inquiry into the true nature of the law in question for the purpose of identifying the matter to which it essentially relates. If the pith and substance of the impugned legislation can be related to a matter that falls within the jurisdiction of the legislature that enacted it, the courts will declare it *intra vires*. If, however, the legislation can more properly be said to relate to a matter that is outside the jurisdiction of that legislature, it will be held to be invalid owing to this violation of the division of powers. The corollary to this analysis is that legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, at least to a certain extent, affect matters beyond the legislature's jurisdiction without necessarily being unconstitutional. At this stage of the analysis, the dominant purpose of the legislation is still decisive. Merely incidental effects will not [page6] disturb the constitutionality of an otherwise *intra vires* law. The pith and substance doctrine is founded on the recognition that it is in practice impossible for a legislature to exercise its jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government. Also, some matters are by their very nature impossible to categorize under a single head of power: they may have both provincial and federal aspects. The double aspect doctrine, which applies in the course of a pith and substance analysis, ensures that the policies of the elected legislators of both levels of government are respected. The double aspect doctrine recognizes that both Parliament and the provincial legislatures can adopt valid legislation on a single subject depending on the perspective from which the legislation is considered, that is, depending on the various aspects of the matter in question. In certain circumstances, however, the powers of one level of government must be protected against intrusions, even incidental ones, by the other level. For this purpose, the courts have developed the doctrines of interjurisdictional immunity and federal paramountcy. [paras. 25-32]

The doctrine of interjurisdictional immunity recognizes that our Constitution is based on an allocation of exclusive powers to both levels of government, not concurrent powers, although these powers are bound to interact in the realities of the life of our Constitution. It is a doctrine of limited application which should be restricted to its proper limit. A broad use of the doctrine would be inconsistent with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote. It is these doctrines that have proved to be most consistent with contemporary views of Canadian federalism, which recognize that overlapping powers are unavoidable. Interjurisdictional immunity should in general be reserved for situations already covered by precedent. This means, in practice, that it will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred, as discerned from the constitutional division of powers as a whole, or what is absolutely indispensable

or necessary to enable an undertaking to carry out its mandate in what makes it specifically of federal (or provincial) jurisdiction. While in theory a consideration of interjurisdictional immunity is apt for consideration after the pith and substance analysis, in practice the absence [page7] of prior case law favouring its application to the subject matter at hand will generally justify a court proceeding directly to the consideration of federal paramountcy. [paras. 32-33] [para. 42] [paras. 77-78]

Even in situations where the doctrine of interjurisdictional immunity is properly available, the level of the intrusion on the core of the power of the other level of government must be considered. To trigger the application of the immunity, it is not enough for the provincial legislation simply to affect that which makes a federal subject or object of rights specifically of federal jurisdiction. The difference between "affects" and "impairs" is that the former does not imply any adverse consequence whereas the latter does. In the absence of impairment, interjurisdictional immunity does not apply. It is when the adverse impact of a law adopted by one level of government increases in severity from affecting to impairing that the core competence of the other level of government or the vital or essential part of an undertaking it duly constitutes is placed in jeopardy, and not before. [paras. 48-49]

According to the doctrine of federal paramountcy, when the operational effects of provincial legislation are incompatible with federal legislation, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the incompatibility. The doctrine applies not only to cases in which the provincial legislature has legislated pursuant to its ancillary power to trench on an area of federal jurisdiction, but also to situations in which the provincial legislature acts within its primary powers, and Parliament pursuant to its ancillary powers. In order to trigger the application of the doctrine, the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law. [paras. 69-70] [para. 75]

In the instant case, the pith and substance of the Alberta *Insurance Act* relates to property and civil rights in the province under s. 92(13) of the *Constitution Act, 1867*, and is a valid provincial law. The mere fact that the banks now participate in the promotion of insurance does not change the essential nature of the insurance activity, which remains a matter generally falling within provincial jurisdiction. [paras. 80-81]

The banks did not demonstrate that credit-related insurance is part of the basic, minimum and unassailable [page8] content of the banking power. While banking certainly includes the securing of loans by appropriate collateral, a bank in promoting optional insurance is not engaged in an activity vital or essential to banking. There is a difference between requiring collateral (a banking activity) and promoting the acquisition of a certain type of product that could then be used as collateral. The rigid demarcation sought by the banks between federal and provincial regulations would not only risk a legal vacuum, but also deny to lawmakers at both levels of government the flexibility to carry out their respective responsibilities. Furthermore, while s. 416(1) of the *Bank Act* allows bank corporations to engage in some insurance activities, it recognizes insurance as a business separate from banking. The banks themselves do not consider the insurance to be vital to their credit granting since apart from s. 418 mortgages, the loan agreement is not, in practice, made contingent on obtaining insurance. The bank cannot therefore be protected from operation of the *Insurance Act* by virtue of the doctrine of interjurisdictional immunity. [paras. 85-86] [paras. 89-92]

The doctrine of federal paramountcy is also inapplicable because neither operational incompatibility nor the frustration of a federal purpose have been made out. Since 2000, the banks have been promoting insurance in Alberta while complying with both the federal *Bank Act* and the provincial *Insurance Act*. This is not a case where the provincial law prohibits what the federal law permits. The federal legislation is permissive not exhaustive, and compliance by the banks with the provincial law complements, not frustrates, the federal purpose. [para. 4] [paras. 98-100] [para. 103]

Per Bastarache J.: All constitutional legal challenges to legislation should follow the same approach. First, the pith and substance of the provincial law and the federal law should be examined to ensure that they are both validly enacted laws and to determine the nature of the overlap, if any, between them. Second, the applicability of the provincial law to the federal undertaking or matter in question must be resolved with reference to the doctrine of interjurisdictional immunity. Third, only if both the provincial law and the federal law have been found to be valid pieces of legislation, and only if the provincial law is found to be applicable to the federal matter in question, then both statutes must be compared to determine whether the overlap between them constitutes a conflict sufficient to trigger [page9] the application of the doctrine of federal paramountcy. [para. 112]

The *Insurance Act* is clearly a law in pith and substance about the regulation of the insurance industry within the province, and the particular provisions at issue are concerned with the licensing and regulation of insurance providers, promoters and agents. The provincial law applies to all persons providing or promoting insurance services, including banks. It is therefore valid legislation of general application enacted under the provincial legislative authority over property and civil rights in the province under s. 92(13) of the *Constitution Act, 1867*. As for the validity of the 1991 amendments to the *Bank Act*, they were not challenged by the parties. [paras. 116-117]

The federal head of power in issue here is "banking" under s. 91(15) of the *Constitution Act, 1867*. While deposit taking, credit granting in the form of loans and the taking of security for those loans are core elements of banking, clearly, the promotion of authorized insurance does not fall within that core because it is not essential to the function of banking. Insurance can never be security; it is rather the collateral created in relation to the granting of a bank loan. The insurance promoted is optional and can be cancelled at any time. In enacting the amendments to the *Bank Act*, Parliament intended banks to promote insurance, not as an expansion of the core of the banking power, but rather as a limited exception to the general prohibition against the promotion of certain lines of insurance. Parliament thereby drew a clear distinction between the business of banking and the business of insurance. Since the promotion of insurance does not come within the core of banking, the *Insurance Act* is not affecting that core in any important way. Therefore, no immunity arises in the circumstances. [paras. 118-123]

The doctrine of paramountcy does not apply in this case as there is no conflict between the provincial law and the federal law. The interaction between the two statutory schemes is one of harmony and complementarity, rather than frustration of Parliament's legislative purpose. The aim of the amendments to the *Bank Act* and the associated regulations was to permit the banks to engage in the promotion of authorized insurance [page10] products and to spell out the types of products which could be validly promoted, not to set out the precise manner in which the promotion of insurance would be governed and regulated. Conversely, the aim of the provincial legislation was to provide a regulatory scheme for the promotion of insurance, but not to exercise any control over the kinds of insurance that banks may promote, or the extent to which they may do so, thereby maintaining the integrity of Parliament's legislative purpose. [para. 124] [para. 128]

Cases Cited

By Binnie and LeBel JJ.

Followed: *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86, 2007 SCC 23; **referred to:***Tennant v. Union Bank of Canada*, [1894] A.C. 31; *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96; *Canadian Indemnity Co. v. Attorney-General of British Columbia*, [1977] 2 S.C.R. 504; *Canadian Pioneer Management Ltd. v. Labour Relations Board of Saskatchewan*, [1980] 1 S.C.R. 433; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124; *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, [2005] 2 S.C.R. 669, 2005 SCC 56; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373; *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31; *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299; *Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328; *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117; *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21; *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575; *Hodge v. The Queen* (1883), 9 App. Cas. 117; *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749; *O'Grady v. Sparling*, [1960] S.C.R. 804; *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580; *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326; *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751; *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307; *Dominion Stores Ltd. v. The Queen*, [1980] 1 S.C.R. 844; *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2 [page11]; *John Deere Plow Co. v. Wharton*, [1915] A.C. 330; *Great West Saddlery Co. v. The King*, [1921] 2 A.C. 91; *Attorney-General for Ontario v. Winner*, [1954] 4 D.L.R. 657; *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285; *Commission de transport de la Communauté urbaine de Québec v. Canada (National Battlefields Commission)*, [1990] 2 S.C.R. 838; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *McKay v. The Queen*, [1965] S.C.R. 798; *Scowby v. Glendinning*, [1986] 2 S.C.R. 226; *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40; *Dick v. The Queen*, [1985] 2 S.C.R. 309; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529; *Commission du salaire minimum v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767; *Canadian National Railway Co. v. Courtois*, [1988] 1 S.C.R. 868; *Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board)*, [1988] 1 S.C.R. 897; *Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1028, aff'g (1993), 13 O.R. (3d) 389; *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641, leave to appeal refused, [2001] 1 S.C.R. ix; *Johannesson v. Rural Municipality of West St. Paul*, [1952] 1 S.C.R. 292; *Re Orangeville Airport Ltd. and Town of Caledon* (1976), 66 D.L.R. (3d) 610; *Venchiarutti v. Longhurst* (1992), 8 O.R. (3d) 422; *Registrar of Motor Vehicles v. Canadian American Transfer Ltd.*, [1972] S.C.R. 811; *R. v. Toronto Magistrates, Ex Parte Tank Truck Transport Ltd.*, [1960] O.R. 497; *R. v. Greening*

(1992), 43 M.V.R. (2d) 53; *R. v. TNT Canada Inc.* (1986), 37 D.L.R. (4th) 297; *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754; *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581; *Re Public Utilities Commission and Victoria Cablevision Ltd.* (1965), 51 D.L.R. (2d) 716; *Attorney-General of Quebec v. Kellogg's Co. of Canada*, [1978] 2 S.C.R. 211; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55; *Paul v. Paul*, [1986] 1 S.C.R. 306; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *Reference re Minimum Wage Act of Saskatchewan*, [1948] S.C.R. 248; *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers*, [1975] 1 S.C.R. 178; *Attorney General of Quebec v. Attorney General of Canada*, [1979] 1 S.C.R. 218; *Attorney General of Alberta v. Putnam*, [1981] 2 S.C.R. 267; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121; *Rothmans, Benson & Hedges [page12] Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13; *Gregory Co. v. Imperial Bank of Canada*, [1960] C.S. 204; *Commissioners of the State Savings Bank of Victoria v. Permewan, Wright & Co.* (1914), 19 C.L.R. 457; *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503; *Turgeon v. Dominion Bank*, [1930] S.C.R. 67; *Bank of Nova Scotia v. British Columbia (Superintendent of Financial Institutions)* (2003), 11 B.C.L.R. (4th) 206, leave to appeal refused, [2003] 3 S.C.R. viii; *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297.

By Bastarache J.

Referred to:*British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86, 2007 SCC 23; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121; *Tennant v. Union Bank of Canada*, [1894] A.C. 31; *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503; *Bank of Nova Scotia v. British Columbia (Superintendent of Financial Institutions)* (2003), 11 B.C.L.R. (4th) 206; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13; *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40.

Statutes and Regulations Cited

Bank Act, S.C. 1991, c. 46, ss. 409, 416, 418.

Constitution Act, 1867, ss. 91, 91(15), 92, 92(13), (16).

Insurance Act, R.S.A. 2000, c. I-3, ss. 1(n), (bb), 454, 468(1), 480, 482, 486, 500, 764.

Insurance Agents and Adjusters Regulation, A.R. 122/2001, ss. 12(1), 14, 15, 16, 17, 18.

Insurance Business (Banks and Bank Holding Companies) Regulations, SOR/92-330, ss. 2 "authorized type of insurance", "personal accident insurance", 7(2).

Personal Property Security Act, R.S.A. 2000, c. P-7.

Authors Cited

Brun, Henri, et Guy Tremblay. *Droit constitutionnel*, 4e éd. Cowansville, Qué.: Yvon Blais, 2002.

[page13]

Canada. Department of Finance. Report of the Task Force on the Future of the Canadian Financial Services Sector. *Change Challenge Opportunity*. Ottawa: Department of Finance, 1998.

Canada. Department of Finance. Task Force on the Future of the Canadian Financial Services Sector. *Change Challenge Opportunity*. Background Paper #2. *Organizational Flexibility for Financial Institutions: A Framework to Enhance Competition*. Ottawa: Department of Finance, 1998.

Canada. Department of Finance. *The Regulation of Canadian Financial Institutions: Proposals for Discussion*. Ottawa: Minister of Supply and Services Canada, 1985.

Canada. House of Commons. Standing Committee on Finance. *The Future Starts Now: A Study on the Financial Services Sector in Canada*. Ottawa: House of Commons, 1998.

Canada. Senate. Sixteenth Report of the Standing Senate Committee on Banking, Trade and Commerce. *Towards a More Competitive Financial Environment*. Ottawa: The Senate, 1986.

Canadian Bankers Association. *Your Guide to Financial Services: An overview of Canadian financial products and services*. Toronto: Canadian Bankers Association, 1999.

Gélinas, Fabien. "La doctrine des immunités interjuridictionnelles dans le partage des compétences: éléments de systématisation", dans *Mélanges Jean Beetz*. Montréal: Thémis, 1995, 471.

Hogg, Peter W. *Constitutional Law of Canada*, vol. 1, loose-leaf ed. Scarborough, Ont.: Carswell, 1997 (updated 2006, release 1).

Laskin, Bora. *Canadian Constitutional Law: Cases, Text and Notes on Distribution of Legislative Power*, 3rd ed. Toronto: Carswell, 1969.

Leclair, Jean. "The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity" (2003), 28 Queen's L.J. 411.

Magnet, Joseph Eliot. *Constitutional Law of Canada: Cases, Notes and Materials*, vol. 1, 8th ed. Edmonton: Juriliber, 2001.

McDonald, Patrick N. "The B.N.A. Act and the Near Banks: A Case Study in Federalism" (1972), 10 Alta. L. Rev. 155.

Shorter Oxford English Dictionary on Historical Principles, 5th ed. Oxford: Oxford University Press, 2002, "essential", "vital".

Weiler, Paul C. "The Supreme Court and the Law of Canadian Federalism" (1973), 23 U.T.L.J. 307.

History and Disposition:

APPEAL from a judgment of the Alberta Court of Appeal (McFadyen, Hunt and Berger JJ.A.) (2005), 39 Alta. L.R. (4th) 1, 361 A.R. 112, 249 D.L.R. (4th) 523 [page14], [2005] 6 W.W.R. 226, 18 C.C.L.I. (4th) 161, [2005] A.J. No. 21 (QL), 2005 ABCA 12, affirming a decision of Slatter J. (2003), 21 Alta. L.R. (4th) 22, 343 A.R. 89, [2004] 5 W.W.R. 108, 4 C.C.L.I. (4th) 59, [2003] A.J. No. 1166 (QL), 2003 ABQB 795. Appeal dismissed.

Counsel:

Neil Finkelstein, Jeffrey W. Galway and *Catherine Beagan Flood*, for the appellants.

Robert J. Normey, L. Christine Enns and *Nick Parker*, for the respondent.

Peter M. Southey, for the intervener the Attorney General of Canada.

Robin K. Basu and *Bay Ryley*, for the intervener the Attorney General of Ontario.

Alain Gingras, for the intervener the Attorney General of Quebec.

John G. Furey, for the intervener the Attorney General of New Brunswick.

Sarah Macdonald, for the intervener the Attorney General of British Columbia.

Thomson Irvine and *James Hall*, for the intervener the Attorney General for Saskatchewan.

Katharine L. Hurlburt and *Dale Gibson*, for the intervener the Alberta Insurance Council.

David Stratas and *Sara Gelgor*, for the intervener the Financial Advisors Association of Canada.

Terrence J. O'Sullivan and *M. Paul Michell*, for the interveners AIG Life Insurance Company of Canada et al.

The judgment of McLachlin C.J. and Binnie, LeBel, Fish, Abella and Charron JJ. was delivered by

BINNIE and LeBEL JJ.:--

I. Introduction

1 The framers of the *Constitution Act, 1867* must have thought that the content of the federal power [page15] over "Banking, Incorporation of Banks, and the Issue of Paper Money" (s. 91(15)) was tolerably clear. Banking, according to one early authority, is more or less what "com[es] within the legitimate business of a banker" (*Tennant v. Union Bank of Canada*, [1894] A.C. 31 (P.C.), at p. 46). Bankers today are not limited in their activities to the activities their predecessors pursued in the nineteenth century. In recent years, they have persuaded Parliament to open the door to lines of business formerly closed to them, such as the promotion (though not underwriting) of certain lines of insurance. Indeed, more generally, there has been a blurring of the traditional "four pillars" of the Canadian financial services industry, which formerly were neatly divided into banks, trust companies, insurance companies, and security dealers, the first under federal regulation and the last three regulated by the provinces.

2 The question that arises on this appeal is the extent to which banks, as federally regulated financial institutions, must comply with provincial laws regulating the promotion and sale of insurance. Specifically, we are required to consider whether and to what extent the market conduct rules enacted for consumer protection in Alberta's *Insurance Act*, R.S.A. 2000, c. I-3, govern the promotion of credit-related insurance by banks as now permitted under the *Bank Act*, S.C. 1991, c. 46, as amended.

3 The appellant banks say that the provincial insurance regulations strike at the core of what banking is all about, namely enhancing the security of loan portfolios. As the appellants' counsel puts it, "the primary character of this insurance, tied as it is to the provision of loans by banks of

their own loans, is security collateral for bank loans" (transcript, at p. 23) and such promotion therefore "lies at the core of what the bank does, lend money and take security" (transcript, at p. 11). Further, "the lending of money and the promotion of security are intimately [page16] tied together and together go to the core of banking" (transcript, at p. 13). The regulations cannot, the appellants say, be allowed to affect such a vital part of their banking undertaking. Alternatively, the appellants argue, the provincial regulations are in operational conflict with the *Bank Act* and its regulations, and the application of the provincial law would frustrate Parliament's purpose.

4 We agree with the conclusion of the courts in Alberta that the appellants' claim to interjurisdictional immunity should be rejected. The fact that Parliament allows a bank to enter into a provincially regulated line of business such as insurance cannot, by federal statute, unilaterally broaden the scope of the exclusive legislative power granted by the *Constitution Act, 1867*. When promoting insurance, the banks are participating in the business of insurance and only secondarily furthering the security of their loan portfolios, as the evidentiary record clearly established. This means, it is true, that banks will have to comply with both federal and provincial laws, but when federally regulated entities take part in provincially regulated activities there will inevitably result a measure of jurisdictional overlap. Nevertheless, the paramountcy doctrine is not engaged. Absent conflict with a valid federal law, valid provincial legislation will apply. Here there is no operational conflict. Compliance by the banks with provincial insurance laws will complement, not frustrate, the federal purpose. On both branches of the appellants' argument, the appeal should be dismissed.

II. Facts

5 Revisions to the *Bank Act* in 1991 permitted banks to engage in the promotion of certain types [page17] of insurance, an activity from which, historically, they had been excluded. The Canadian Bankers Association chronicled this evolution in a consumer information booklet entitled *Your Guide to Financial Services: An overview of Canadian financial products and services* (1999), as follows:

> Up until the mid-20th century, the bank's main function was to act as society's "financial intermediary," pooling the funds of savers through deposit-taking and making them available to borrowers. While their core services are still deposits and loans, banks have expanded to offer hundreds of different products and services to a diverse clientele. Offerings include basic savings and chequing accounts, RRSPs, money orders, foreign exchange, letters of credit, mortgages, financial planning, insurance products such as creditor life insurance and investment products. [Emphasis added; p. 5.]

6 Specifically, the *Bank Act* and its *Insurance Business (Banks and Bank Holding Companies) Regulations*, SOR/92-330 ("*IBR*s"), now authorize banks to promote at their branches eight kinds of insurance ("authorized insurance") as follows:

> (a) *credit or charge card-related insurance*: this insurance covers damage to goods acquired with a credit card, including rented vehicles;
>
> (b) *creditors' disability insurance*: the insurer will pay all or part of a bank loan if a borrower becomes disabled. The beneficiary of the policy is the bank.

The amount of the insurance usually corresponds to the amount of the payments that fall due during the period of disability;

(c) *creditors' life insurance*: this is a group insurance policy which pays off the loan when the borrower dies. The beneficiary is the bank, and the amount of the insurance is the amount of the loan outstanding from time to time, subject to any limits in the policy;

(d) *creditors' loss of employment insurance*: the insurer pays all or part of the debt owed to the bank [page18] if the borrower becomes unemployed. The beneficiary is the bank, and the amount of the insurance would generally be the amount of payments falling due while the borrower is unemployed;

(e) *creditors' vehicle inventory insurance*: the insurer covers damage to vehicles held as inventory by customers of the bank (usually dealerships) where the vehicles have been financed by the bank and pledged as collateral for repayment of the bank loan;

(f) *export credit insurance*: the insurer protects an exporter against non-payment by the purchaser of the goods. Where the bank has provided financing to the exporter's business, the insurance will generally be assigned to the bank as collateral for the loan;

(g) *mortgage insurance*: this insures the bank against default by one of its mortgagors. The beneficiary of the policy is the bank, the amount payable under the policy is the balance outstanding on the mortgage (usually the net after proceeds of foreclosure), and the insured risk is default by the mortgagor;

(h) *travel insurance*: the insurer will pay losses arising from the cancellation of trips, the loss of personal property while on a trip, the loss of baggage, as well as medical expenses incurred on a trip;

7 The evidence showed that a large percentage of the banks' customers purchase credit-related insurance. Therefore, even though the purchase is optional, the fact is that promotion of insurance as collateral may to some extent increase the security of the banks' overall loan portfolio. The trial judge considered this effect to be small. He found that banks generally insist on adequate collateral *before* the loan is made, and the decision to grant credit is not afterwards reconsidered if the borrower declines the offer of optional insurance. From the bank's perspective, its position is already fully protected. The availability of yet more collateral in [page19] the form of after-acquired insurance may therefore simply pile Mount Pelion on Olympus.

8 The trial judge noted that of these eight types of insurance "products" only mortgage insurance and export credit insurance actually insure against the risk of default in the payment of a loan. In contrast, credit-card related insurance and travel insurance, including personal accident insurance,

have no significant connection to the amount of a loan owed to a bank and are payable irrespective of any default. While he recognized that insurance against the risk of a customer's disability or of loss of life or of employment enhances the safety of the bank's loan portfolio, the risk insured against is not default on the payment of the loan but the insured's disability or loss of life or of employment. The insurance, which is entirely optional for the borrower, is promoted on the basis of providing the borrower (not the bank) with peace of mind. The insurer will generally be required to pay the proceeds of the insurance directly to the bank in the event the risk materializes, even if the loan remains in good standing and there is no question about the insured's ability to pay. As the trial judge noted, "[r]emoving the necessity for the bank to pursue widows and orphans can undoubtedly improve the bank-customer relationship, although it is difficult to determine how big a factor this would be" ((2003), 343 A.R. 89, 2003 ABQB 795, at para. 41).

9 The trial judge added that the way in which banks promote insurance varies somewhat from product to product. Credit card and travel insurance coverage are generally sold as a feature of credit cards. Mortgage insurance is promoted in concert with the granting of mortgages (although it is mandatory under s. 418 of the *Bank Act* in the case of a high-ratio mortgage worth more than 75 percent of the value of the mortgaged residence). The insurance relating to a calamity in the life of a debtor (disability, unemployment and death) is sometimes [page20] promoted at the time the loan is taken out but is also promoted quite independently by direct mail or through telemarketers. If the borrower answers certain health questions in the negative, the insurance is automatically approved through a group policy.

10 In 2000, Alberta enacted changes to its *Insurance Act* purporting to make federally chartered banks subject to the provincial licensing scheme governing the promotion of insurance products. Under s. 454, a bank wanting to promote insurance must obtain a "restricted insurance agent's certificate of authority". The banks thereby became subject to market standards regulation including, for example, s. 486 that requires training procedures to be in place, s. 500 that targets misrepresentations about the levels of premiums, and ss. 480 and 764 that provide sanctions for non-compliance and improper market conduct. In addition, the statute empowers the provincial Minister of Finance to make regulations respecting the ethical, operational and trade practices of agents. It is consumer protection legislation.

11 Upon the coming into force of the *Insurance Act*, the appellant banks sought a declaration that their promotion of insurance is "banking" under s. 91(15) of the *Constitution Act, 1867* and that the *Insurance Act* and its associated regulations are constitutionally inapplicable and/or inoperative to the banks' promotion of insurance.

III. Judicial History

A. *Court of Queen's Bench of Alberta* (2003), 343 A.R. 89, 2003 ABQB 795

12 Slatter J. noted that, except for mortgages for an amount in excess of 75 percent of the home value, [page21] the purchase of insurance by a bank customer is optional. Being optional, it is obviously not considered by the bank as vital and essential to its undertaking. The trial judge concluded, on the evidence, that in the majority of cases where the loan is paid by insurance, the borrower would in any event have been able to retire the loan without the insurance. The trial judge found as fact that "[t]he overall effect on portfolio strength is small, and is not the main reason why the banks promote insurance" (para. 48). Instead, he concluded:

> On this record it is clear that the primary reason the banks want to promote authorized types of insurance is because they make a profit from it. The sale of insurance is simply another product line, no more and no less. [para. 53]

13 Slatter J. held that the *Insurance Act* was not rendered inapplicable to the banks under the doctrine of interjurisdictional immunity. He reviewed the evidence in detail. The insurance is not part of the credit-making decision and, on the evidence, has almost nothing at all to do with the granting of loans. He ruled:

> On this record it is not possible to say that the promotion of insurance is an "unassailable part" of the credit [granting] process or banking. It is collateral or "subsidiary" to both; a new product and profit centre unrelated to core banking. The promotion of insurance is analogous to mortgage lending and the sale of registered retirement savings plans which, while carried on by banks, are not a part of "banking" for constitutional purposes. This conclusion is particularly compelling for those types of insurance that have no relation to loan balances, but it applies to all insurance. [para. 173]

14 As to the doctrine of federal paramountcy, Slatter J. held that "the provincial regulatory scheme does not frustrate Parliament's intentions in empowering the banks to promote insurance; the provincial regulations complement the new powers [page22] of the banks. There is no operational conflict. The doctrine of paramountcy is not engaged on this record" (para. 204).

B. *Court of Appeal of Alberta (McFadyen, Hunt and Berger JJ.A.)* (2005), 39 Alta. L.R. (4th) 1, 2005 ABCA 12

15 Hunt J.A., writing for herself and McFadyen J.A., agreed with the trial judge's conclusion that the impugned provisions of the *Insurance Act* apply to banks. Only the "basic, minimum and unassailable core" of a matter under federal jurisdiction is immune from provincial regulations. The banks' insurance products are (except in the case of certain mortgage loans) not mandatory, can be cancelled independently by the consumer, are often not promoted until after the loan arrangement has been finalized, are not triggered by default on the loan and are often terminated by default on loan payments. They agreed with the trial judge that "the insurance is mostly optional and outside the Banks' control. Borrowers' insurance-related decisions do not affect the Banks' credit-granting decisions" (para. 81).

16 Hunt and McFadyen JJ.A. also rejected the application of federal paramountcy. There was no conflict between the provincial and federal laws. The insurance provisions contained in the *Bank Act* and *IBR*s are permissive rather than exhaustive. Nothing in the federal enactments or the legislative history suggests a parliamentary intent to authorize banks to promote insurance without complying with otherwise valid provincial laws. There is no operational incompatibility.

17 In concurring reasons, Berger J.A. emphasized that overlap of federal and provincial legislation is to be expected and accommodated, and [page23] that courts should exercise restraint in applying interjurisdictional immunity and paramountcy. The provincial *Insurance Act* does not restrict the banks' lending operations, nor does it restrict the ability of the banks to take any type of security at any time they choose. The banks remain free to promote insurance, and compliance with the impugned provincial legislation does not result in a sterilization or frustration of the parliamentary purpose.

IV. Relevant Statutes and Regulations

18 See Appendix.

V. Constitutional Questions

19 On September 19, 2005, the Chief Justice stated the following constitutional questions:

1. Are Alberta's *Insurance Act*, R.S.A. 2000, c. I-3, and the regulations made thereunder, in whole or in part, constitutionally inapplicable to the promotion by banks of an "authorized type of insurance" or "personal accident insurance" as defined in the *Insurance Business (Banks and Bank Holding Companies) Regulations*, SOR/92-330, by reason of the doctrine of interjurisdictional immunity?
2. Are Alberta's *Insurance Act*, R.S.A. 2000, c. I-3, and the regulations made thereunder, in whole or in part, constitutionally inoperative in relation to the promotion by banks of an "authorized type of insurance" or "personal accident insurance" as defined in the *Insurance Business (Banks and Bank Holding Companies) Regulations*, SOR/92-330, by reason of the doctrine of federal legislative paramountcy?

VI. Analysis

A. *The Issues*

20 In the present appeal, we are not confronted with a dispute between the federal government and Alberta. Rather, the appellant banks are independently making the claim to carry on their insurance activities in Alberta free of the insurance [page24] regulations imposed on all other promoters and vendors of insurance products in the province. The banks assert that as federal undertakings they are "immune" from provincial insurance regulation aimed generally at fair market practices and consumer protection in the province. At the same time, the appellants acknowledge that for 125 years the regulation of insurance has been held generally to be a matter of "Property and Civil Rights in the Province" within provincial jurisdiction under s. 92(13) of the *Constitution Act, 1867*; see *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96 (P.C.); *Canadian Indemnity Co. v. Attorney-General of British Columbia*, [1977] 2 S.C.R. 504; and *Canadian Pioneer Management Ltd. v. Labour Relations Board of Saskatchewan*, [1980] 1 S.C.R. 433. The appellants' argument is that when banks promote credit-related insurance, they are carrying on the business of banking, not the business of insurance. As the Attorney General of Canada put it in oral argument, the issue is "whether the authorized creditor insurance products are themselves so vital and essential to lending that they join lending at the core of banking" (transcript, at p. 34). On that issue, as stated, the Alberta courts flatly rejected the banks' position. We agree.

B. *Principle of Federalism*

21 The disposition of this case requires the consideration and application of important constitutional doctrines governing the operation of Canadian federalism. Despite the doubts sometimes expressed about the nature of Canadian federalism, it is beyond question that federalism has been a

"fundamental guiding principle" of our constitutional order since the time of Confederation, as our Court emphasized in the *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 55.

[page25]

22 As the Court noted in that decision, federalism was the legal response of the framers of the Constitution to the political and cultural realities that existed at Confederation. It thus represented a legal recognition of the diversity of the original members. The division of powers, one of the basic components of federalism, was designed to uphold this diversity within a single nation. Broad powers were conferred on provincial legislatures, while at the same time Canada's unity was ensured by reserving to Parliament powers better exercised in relation to the country as a whole. Each head of power was assigned to the level of government best placed to exercise the power. The fundamental objectives of federalism were, and still are, to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good.

23 To attain these objectives, a certain degree of predictability with regard to the division of powers between Parliament and the provincial legislatures is essential. For this reason, the powers of each of these levels of government were enumerated in ss. 91 and 92 of the *Constitution Act, 1867* or provided for elsewhere in that Act. As is true of any other part of our Constitution -- this "living tree" as it is described in the famous image from *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136 -- the interpretation of these powers and of how they interrelate must evolve and must be tailored to the changing political and cultural realities of Canadian society. It is also important to note that the fundamental principles of our constitutional order, which include federalism, continue to guide the definition and application of the powers as well as their interplay. Thus, the very functioning of Canada's federal system must continually be reassessed in light of the fundamental values it was designed to serve.

[page26]

24 As the final arbiters of the division of powers, the courts have developed certain constitutional doctrines, which, like the interpretations of the powers to which they apply, are based on the guiding principles of our constitutional order. The constitutional doctrines permit an appropriate balance to be struck in the recognition and management of the inevitable overlaps in rules made at the two levels of legislative power, while recognizing the need to preserve sufficient predictability in the operation of the division of powers. The doctrines must also be designed to reconcile the legitimate diversity of regional experimentation with the need for national unity. Finally, they must include a recognition that the task of maintaining the balance of powers in practice falls primarily to governments, and constitutional doctrine must facilitate, not undermine what this Court has called "co-operative federalism" (*Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 162; *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, [2005] 2 S.C.R. 669, 2005 SCC 56, at para. 10). We will now turn to the issue of how, in our view, the main consti-

tutional doctrines and the interplay between them should be construed so as to facilitate the achievement of the objectives of Canada's federal structure.

C. *Constitutional Doctrines and How They Interrelate*

(1) "Pith and Substance" Doctrine

25 It is now well established that the resolution of a case involving the constitutionality of legislation in relation to the division of powers must always begin with an analysis of the "pith and substance" of the impugned legislation (*Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, at p. 450; *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31, at para. 16; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31, at para. 52). The analysis may concern the legislation as a whole or only certain of its provisions.

[page27]

26 This initial analysis consists of an inquiry into the true nature of the law in question for the purpose of identifying the "matter" to which it essentially relates. As Rand J. put it in *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, at p. 333:

> ... the courts must be able from its language and its relevant circumstances, to attribute an enactment to a matter *in relation to which* the legislature acting has been empowered to make laws. That principle inheres in the nature of federalism ... . [Emphasis in original.]

If the pith and substance of the impugned legislation can be related to a matter that falls within the jurisdiction of the legislature that enacted it, the courts will declare it *intra vires*. If, however, the legislation can more properly be said to relate to a matter that is outside the jurisdiction of that legislature, it will be held to be invalid owing to this violation of the division of powers.

27 To determine the pith and substance, two aspects of the law must be examined: the purpose of the enacting body and the legal effect of the law (*Reference re Firearms Act*, at para. 16). To assess the purpose, the courts may consider both intrinsic evidence, such as the legislation's preamble or purpose clauses, and extrinsic evidence, such as Hansard or minutes of parliamentary debates. In so doing, they must nevertheless seek to ascertain the *true* purpose of the legislation, as opposed to its mere stated or apparent purpose (*Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328 (P.C.), at p. 337). Equally, the courts may take into account the effects of the legislation. For example, in *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 ("*Alberta Banks*"), the Privy Council held a provincial statute levying a tax on banks to be invalid on the basis that its effects on banks were so great that its true purpose could not be (as the province argued) the raising of money by levying a tax (in which case it would have been *intra vires*), but was rather the regulation of banking (which rendered it *ultra vires*, and thus invalid).

[page28]

28 The fundamental corollary to this approach to constitutional analysis is that legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, at least to a certain extent, affect matters beyond the legislature's jurisdiction without necessarily being unconstitutional. At this stage of the analysis of constitutionality, the "dominant purpose" of the legislation is still decisive. Its secondary objectives and effects have no impact on its constitutionality: "merely incidental effects will not disturb the constitutionality of an otherwise *intra vires* law" (*Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21, at para. 23). By "incidental" is meant effects that may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature: see *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49, at para. 28. Such incidental intrusions into matters subject to the other level of government's authority are proper and to be expected: *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 670. In *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575, by way of further example, and in contrast to the *Alberta Banks* case already mentioned, the Privy Council upheld the validity of legislation levying a tax on banks, holding that the pith and substance of the legislation was indeed to generate revenue for the province, and its essential purpose was therefore in relation to direct taxation, not banks or banking. See P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at para. 15.5(a).

29 The "pith and substance" doctrine is founded on the recognition that it is in practice impossible for a legislature to exercise its jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government. For example, as Brun and Tremblay point out, it would be impossible for Parliament to make effective laws in relation [page29] to copyright without affecting property and civil rights, or for provincial legislatures to make effective laws in relation to civil law matters without incidentally affecting the status of foreign nationals (H. Brun and G. Tremblay, *Droit constitutionnel* (4th ed. 2002), at p. 451).

30 Also, some matters are by their very nature impossible to categorize under a single head of power: they may have both provincial and federal aspects. Thus the fact that a matter may for one purpose and in one aspect fall within federal jurisdiction does not mean that it cannot, for another purpose and in another aspect, fall within provincial competence: *Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.), at p. 130; *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749 ("*Bell Canada (1988)*"), at p. 765. The double aspect doctrine, as it is known, which applies in the course of a pith and substance analysis, ensures that the policies of the elected legislators of both levels of government are respected. A classic example is that of dangerous driving: Parliament may make laws in relation to the "public order" aspect, and provincial legislatures in relation to its "Property and Civil Rights in the Province" aspect (*O'Grady v. Sparling*, [1960] S.C.R. 804). The double aspect doctrine recognizes that both Parliament and the provincial legislatures can adopt valid legislation on a single subject depending on the perspective from which the legislation is considered, that is, depending on the various "aspects" of the "matter" in question.

31 When problems resulting from incidental effects arise, it may often be possible to resolve them by a firm application of the pith and substance analysis. The scale of the alleged incidental effects may indeed put a law in a different light so as to place it in another constitutional head of power. The usual interpretation techniques of constitutional interpretation, such as reading down, may then play a useful role in determining on a case-by-case basis what falls exclusively to a given

level of government. In this manner, the courts incrementally define the scope of the relevant heads of power. The flexible nature of the pith and substance analysis makes it [page30] perfectly suited to the modern views of federalism in our constitutional jurisprudence.

32 That being said, it must also be acknowledged that, in certain circumstances, the powers of one level of government must be protected against intrusions, even incidental ones, by the other level. For this purpose, the courts have developed two doctrines. The first, the doctrine of interjurisdictional immunity, recognizes that our Constitution is based on an allocation of exclusive powers to both levels of government, not concurrent powers, although these powers are bound to interact in the realities of the life of our Constitution. The second, the doctrine of federal paramountcy, recognizes that where laws of the federal and provincial levels come into conflict, there must be a rule to resolve the impasse. Under our system, the federal law prevails. We will now discuss these doctrines, beginning with interjurisdictional immunity.

(2) The Doctrine of Interjurisdictional Immunity and its Sources

33 Interjurisdictional immunity is a doctrine of limited application, but its existence is supported both textually and by the principles of federalism. The leading modern formulation of the doctrine of interjurisdictional immunity is found in the judgment of this Court in *Bell Canada (1988)* where Beetz J. wrote that "classes of subject" in ss. 91 and 92 must be assured a "basic, minimum and unassailable content" (p. 839) immune from the application of legislation enacted by the other level of government. Immunity from such intrusion, Beetz J. observed in the context of a federal undertaking, is

> an integral and vital part of [Parliament's] primary legislative authority over federal undertakings. If this power is exclusive, it is because the Constitution, which could have been different but is not, expressly specifies this to be the case; and it is because this power is [page31] exclusive that it pre-empts that of the legislatures both as to their legislation of general and specific application, in so far as such laws affect a vital part of a federal undertaking. [p. 840]

34 The doctrine is rooted in references to "exclusivity" throughout ss. 91 and 92 of the *Constitution Act, 1867*. The opening paragraph of s. 91 refers to the "exclusive [l]egislative [a]uthority of the Parliament of Canada" in relation to matters coming within the listed "[c]lasses of [s]ubjects" including "Banking, Incorporation of Banks, and the Issue of Paper Money" (s. 91(15)). If that authority is truly exclusive, the reasoning goes, it cannot be invaded by provincial legislation even if the federal power remains unexercised. "The abstinence of the Dominion Parliament from legislating to the full limit of its powers, could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the [*Constitution Act, 1867*]": *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580 (P.C.), at p. 588. Equally, s. 92 (headed "Exclusive Powers of Provincial Legislatures") is introduced by the words "In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated", including "Property and Civil Rights in the Province" (s. 92(13)) and "Generally all Matters of a merely local or private Nature in the Province" (s. 92(16)). The notion of exclusivity and the reciprocal notion of non-encroachment by one level of legislature on the field of exclusive competence of the other gave rise to Lord Atkin's famous "watertight compartments" metaphor, where he wrote of Canadian federalism that "[w]hile the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compart-

ments which are an essential part of her original structure" (*Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.), at p. 354). Its modern application expresses a continuing concern about risk of erosion of provincial as well as federal competences (*Bell Canada (1988)*, at p. 766). At the same time, the doctrine of interjurisdictional immunity [page32] seeks to avoid, when possible, situations of concurrency of powers (Laskin C.J., in *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751, at p. 764).

(3) The Dominant Tide of Constitutional Interpretation Does Not Favour Interjurisdictional Immunity

35 Despite the efforts to find a proper role for the doctrine, the application of interjurisdictional immunity has given rise to concerns by reason of its potential impact on Canadian constitutional arrangements. In theory, the doctrine is reciprocal: it applies both to protect provincial heads of power and provincially regulated undertakings from federal encroachment, and to protect federal heads of power and federally regulated undertakings from provincial encroachment. However, it would appear that the jurisprudential application of the doctrine has produced somewhat "asymmetrical" results. Its application to federal laws in order to avoid encroachment on provincial legislative authority has often consisted of "reading down" the federal enactment or federal power without too much doctrinal discussion, e.g., *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, *Dominion Stores Ltd. v. The Queen*, [1980] 1 S.C.R. 844, and *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914. In general, though, the doctrine has been invoked in favour of federal immunity at the expense of provincial legislation: Hogg, at p. 15-34.

36 A view of federalism that puts greater emphasis on the legitimate interplay between federal and provincial powers was championed by the late [page33] Chief Justice Dickson, who described the doctrine of interjurisdictional immunity as "not ... particularly compelling" (*OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 17):

> The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that doctrines like interjurisdictional and Crown immunity and concepts like "watertight compartments" qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines; rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues. [p. 18]

This statement was reproduced in Dickson C.J.'s judgment (for a unanimous bench that included Beetz J.) in *General Motors*, at p. 669.

37 The "dominant tide" finds its principled underpinning in the concern that a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government. In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest. Professor Paul Weiler wrote over 30 years ago that

> the court should refuse to try to protect alleged, but as yet unoccupied, enclaves of governmental power against the intrusions of another representative legislature which has ventured into the area. Instead, the court should try to restrict itself to the lesser but still important role of interpreting statutes of different jurisdictions in the same area, in order to avoid conflict, and applying a doctrine of paramountcy in the few situations which are left.
>
> ("The Supreme Court and the Law of Canadian Federalism" (1973), 23 U.T.L.J. 307, at p. 308)

[page34]

38 In our view, the sweeping immunity argued for by the banks in this appeal is not acceptable in the Canadian federal structure. The argument exposes the dangers of allowing the doctrine of interjurisdictional immunity to exceed its proper (and very restricted) limit and to frustrate the application of the pith and substance analysis and of the double aspect doctrine. The latter have the ability to resolve most problems relating to the validity of the exercise of legislative powers under the heads of power applicable to the activities in question.

39 It is not without interest that the present doctrine of interjurisdictional immunity, which is the result of a long process of constitutional evolution, was originally developed in a very special context, namely to protect federally incorporated companies from provincial legislation affecting the essence of the powers conferred on them as a result of their incorporation (*John Deere Plow Co. v. Wharton*, [1915] A.C. 330 (P.C.); *Great West Saddlery Co. v. The King*, [1921] 2 A.C. 91 (P.C.)). Since the creation of corporations by letters patent issued by the Crown constituted an exercise of the Crown's prerogative to create corporations, it would have seemed natural to the Privy Council to extend the Crown's immunity to the entities it incorporated. Thus, to apply a province's general statutes to these corporations could be conceived as interfering with the exercise of the prerogative of incorporation.

40 The doctrine of interjurisdictional immunity was subsequently applied to protect "essential" parts of federal "undertakings" (*Attorney-General for Ontario v. Winner*, [1954] 4 D.L.R. 657 (P.C.); see also *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52 (P.C.) ("*Toronto Corporation*")). Still later, the courts resorted to interjurisdictional immunity to shield Aboriginal peoples and their lands from provincial legislation of general application affecting certain aspects of their special status (*Natural Parents*; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285).

[page35]

41 Thus, broadly speaking, the doctrine of interjurisdictional immunity was used to protect that which makes certain works or undertakings, things (e.g., Aboriginal lands) or persons (e.g., Aboriginal peoples and corporations created by the federal Crown) specifically of federal jurisdiction.

As Gonthier J. observed in *Commission de transport de la Communauté urbaine de Québec v. Canada (National Battlefields Commission)*, [1990] 2 S.C.R. 838:

> The immunity pertaining to federal status applies to things or persons falling within federal jurisdiction, some specifically federal aspects of which would be affected by provincial legislation. This is so because these specifically federal aspects are an integral part of federal jurisdiction over such things or persons and this jurisdiction is meant to be exclusive. [Emphasis added; p. 853.]

Of course, what is of specific federal interest may well be the federally regulated activity itself rather than the identity of the participants. In *Natural Parents*, at p. 760, Laskin C.J. observed:

> It cannot be said therefore that because a provincial statute is general in its operation, in the sense that its terms are not expressly restricted to matters within provincial competence, it may embrace matters within exclusive federal competence... . This is because to construe the provincial legislation to embrace such activities would have it encroaching on an exclusive federal legislative area. [Emphasis added.]
>
> (Cited with approval by Beetz J. in *Bell Canada (1988)*, at p. 834.)

In *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, in the course of considering federal jurisdiction over maritime law, the Court acknowledged that the doctrine could potentially apply to all "activities" within Parliament's jurisdiction. See also *McKay v. The Queen*, [1965] S.C.R. 798, where the issue was the applicability of a municipal sign law to a federal activity, namely a federal election; *OPSEU, per* Beetz J., at p. 30; and *Scowby v. [page36] Glendinning*, [1986] 2 S.C.R. 226, *per* La Forest J., at p. 257.

42 While the text and logic of our federal structure justifies the application of interjurisdictional immunity to certain federal "activities", nevertheless, a broad application of the doctrine to "activities" creates practical problems of application much greater than in the case of works or undertakings, things or persons, whose limits are more readily defined. A broad application also appears inconsistent, as stated, with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote. See F. Gélinas, "La doctrine des immunités interjuridictionnelles dans le partage des compétences: éléments de systématisation", in *Mélanges Jean Beetz* (1995), at p. 471, and Hogg, at para. 15.8(c). It is these doctrines that have proved to be most consistent with contemporary views of Canadian federalism, which recognize that overlapping powers are unavoidable. Canadian federalism is not simply a matter of legalisms. The Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of cooperation among government actors to ensure that federalism operates flexibly.

43 Excessive reliance on the doctrine of interjurisdictional immunity would create serious uncertainty. It is based on the attribution to every legislative head of power of a "core" of indeterminate scope -- difficult to define, except over time by means of judicial interpretations triggered serendipitously on a case-by-case basis. The requirement to develop an abstract definition of a "core" is not compatible, generally speaking, with the tradition of Canadian constitutional interpretation, which favours an incremental approach. While it is true that the enumerations of ss. 91 and 92 contain a

number of powers that are precise and [page37] not really open to discussion, other powers are far less precise, such as those relating to the criminal law, trade and commerce and matters of a local or private nature in a province. Since the time of Confederation, courts have refrained from trying to define the possible scope of such powers in advance and for all time: *Citizens Insurance*, at p. 109; *John Deere Plow*, at p. 339. For example, while the courts have not eviscerated the federal trade and commerce power, they have, in interpreting it, sought to avoid draining of their content the provincial powers over civil law and matters of a local or private nature. A generalized application of interjurisdictional immunity related to "trade and commerce" would have led to an altogether different and more rigid and centralized form of federalism. It was by proceeding with caution on a case-by-case basis that the courts were gradually able to define the content of the heads of power of Parliament and the legislatures, without denying the unavoidable interplay between them, always having regard to the evolution of the problems for which the division of legislative powers must now provide solutions.

44 Moreover, as stated, interjurisdictional immunity means that despite the absence of law enacted at one level of government, the laws enacted by the other level cannot have even incidental effects on the so-called "core" of jurisdiction. This increases the risk of creating "legal vacuums", as this Court recognized in *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67, at para. 52. Generally speaking, such "vacuums" are not desirable.

45 Further, a broad use of the doctrine of interjurisdictional immunity runs the risk of creating an unintentional centralizing tendency in constitutional interpretation. As stated, this doctrine has in the past most often protected federal heads of power from incidental intrusion by provincial legislatures. The "asymmetrical" application of interjurisdictional immunity is incompatible with the [page38] flexibility and co-ordination required by contemporary Canadian federalism. Commentators have noted that an extensive application of this doctrine to protect federal heads of power and undertakings is both unnecessary and "undesirable in a federation where so many laws for the protection of workers, consumers and the environment (for example) are enacted and enforced at the provincial level" (Hogg, at p. 15-30; see also Weiler, at p. 312; J. Leclair, "The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity" (2003), 28 Queen's L.J. 411). The asymmetrical effect of interjurisdictional immunity can also be seen as undermining the principles of subsidiarity, i.e. that decisions "are often best [made] at a level of government that is not only effective, but also closest to the citizens affected" (*114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40, at para. 3).

46 Finally, the doctrine would seem as a general rule to be superfluous in that Parliament can always, if it sees fit to do so, make its legislation sufficiently precise to leave those subject to it with no doubt as to the residual or incidental application of provincial legislation. As we shall see, sufficient confirmation of this can be found in the history and operation of the doctrine of federal paramountcy.

47 For all these reasons, although the doctrine of interjurisdictional immunity has a proper part to play in appropriate circumstances, we intend now to make it clear that the Court does not favour an intensive reliance on the doctrine, nor should we accept the invitation of the appellants to turn it into a doctrine of first recourse in a division of powers dispute.

[page39]

D. *A More Restricted Approach to Interjurisdictional Immunity*

(1) Impairment Versus Affects

48 Even in situations where the doctrine of interjurisdictional immunity is properly available, we must consider the level of the intrusion on the "core" of the power of the other level of government which would trigger its application. In *Bell Canada (1988)*, Beetz J. wrote, at pp. 859-60:

> In order for the inapplicability of provincial legislation rule to be given effect, it is sufficient that the provincial statute which purports to apply to the federal undertaking affects a vital or essential part of that undertaking, without necessarily going as far as impairing or paralyzing it. [Emphasis added.]

Our colleague Bastarache J. agrees with the substitution in *Bell Canada (1988)* of "affects" for "impairs". He writes:

> ... the meaning of the word "affects" should be interpreted as a kind of middle ground between the perhaps overly vague or broad standard of "touches on" and the older and overly restrictive standard of "sterilizes" or "impairs". Without requiring complete paralysis of the core of the federal power or the operations of the undertaking, the impact of the application of the by-law must be sufficiently severe and serious to trigger immunity.
>
> (*British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86, 2007 SCC 23, at para. 139)

With great respect, we cannot agree. We believe that the law as it stood prior to *Bell Canada (1988)* better reflected our federal scheme. In our opinion, it is not enough for the provincial legislation simply to "affect" that which makes a federal subject or object of rights specifically of federal jurisdiction. The difference between "affects" and "impairs" is that the former does not imply any adverse consequence whereas the latter does. The shift in *Bell Canada (1988)* from "impairs" to "affects" is not [page40] consistent with the view subsequently adopted in *Mangat* that "[t]he existence of a double aspect to the subject matter ... favours the application of the paramountcy doctrine rather than the doctrine of interjurisdictional immunity" (para. 52). Nor is the shift consistent with the earlier application by Beetz J. himself of the "impairment" test in *Dick v. The Queen*, [1985] 2 S.C.R. 309, at pp. 323-24. It is when the adverse impact of a law adopted by one level of government increases in severity from "affecting" to "impairing" (without necessarily "sterilizing" or "paralyzing") that the "core" competence of the other level of government (or the vital or essential part of an undertaking it duly constitutes) is placed in jeopardy, and not before.

49 In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, Dickson C.J. and Lamer and Wilson JJ. observed in passing that a distinction could be drawn between the *direct* application of provincial law (where the operative verb is "affects") and the *indirect* application (where the operative verb may still be "impairs") (p. 957). This further exercise in line drawing signalled a measure of dissatisfaction with the "affects" test without doing anything about it. At this point, we should

complete the reassessment begun in *Irwin Toy* and hold that, in the absence of impairment, interjurisdictional immunity does not apply.

(2) Identification of the "Basic, Minimum and Unassailable" Content of a Legislative Power

50 One of the important contributions of *Bell Canada (1988)* was to limit the scope of the doctrine to the "basic, minimum and unassailable content" (p. 839) sometimes referred to as the "core" of the legislative power in question. (By "minimum", we understand that Beetz J. meant the minimum content necessary to make the power effective for the purpose for which it was conferred.) This is [page41] necessary, according to Beetz J., to give effect to what he called "the principle of federalism underlying the Canadian Constitution" (p. 766). Thus, the success of the appellants' argument in this appeal depended in part on locating the promotion of "peace of mind" insurance at the core of banking. For the reasons already discussed, and particularized below, we do not believe that this aspect of the appellants' argument can be sustained.

(3) The Vital or Essential Part of an Undertaking

51 In the exercise of their legislative powers, federal and provincial legislators bring into existence "undertakings". The appellant banks are "federal undertakings" constituted pursuant to the s. 91(15) banking power. In *Bell Canada (1988)*, Beetz J. spoke of interjurisdictional immunity in relation to "essential and vital elements" of such undertakings (pp. 839 and 859-60). In our view, some text writers and certainly the appellants have been inclined to give too wide a scope to what should be considered "vital or essential" to a federal undertaking. We believe that Beetz J. chose his words carefully and intended to use "vital" in its ordinary grammatical sense of "[e]ssential to the existence of something; absolutely indispensable or necessary; extremely important, crucial" (*Shorter Oxford English Dictionary* (5th ed. 2002), vol. 2, at p. 3548). The word "essential" has a similar meaning, e.g. "[a]bsolutely indispensable or necessary" (vol. 1, at p. 860). The words "vital" and "essential" were not randomly chosen. The expression "vital part" was used as a limitation on the scope of interjurisdictional immunity by Abbott J. in *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529, at p. 592, and by Martland J. in *Commission du salaire minimum v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767 ("*Bell Canada (1966)*"), at p. 774. Martland J. also referred to an "essential part of the operation of such an undertaking", at p. 777. What is "vital" or "essential" is, by definition, not co-extensive [page42] with every element of an undertaking incorporated federally or subject to federal regulation. In the case of federal undertakings, Beetz J. referred to a "general rule" that there is *no* interjurisdictional immunity, provided that "the application of [the] provincial laws does not bear upon those [federal] subjects in what makes them specifically of federal jurisdiction" (*Bell Canada (1988)*, at p. 762 (emphasis added)). In the present appeal, for example, the appellants' argument inflates out of all proportion what could reasonably be considered "vital or essential" to their banking undertaking. The promotion of "peace of mind" insurance can hardly be considered "absolutely indispensable or necessary" to banking activities unless such words are to be emptied of their ordinary meaning.

52 In this respect, following the sage common law adage that it is wise to look at what the courts do as distinguished from what they say, a useful approach to understanding the limited scope of the doctrine of interjurisdictional immunity in respect of undertakings is to see how it has been applied to the facts. A comparison between *Bell Canada (1988)* and the present case is instructive. In *Bell Canada (1988)*, the Court concluded that the application of a provincial *Act respecting occupational*

health and safety could not apply to a federal telephone undertaking because such application would "enter directly and massively into the field of working conditions and labour relations ... and ... management and operation" of the federal utility (p. 798). Amongst other things, the provincial Act would impose "a system of partial co-management of the undertaking by the workers and the employer" (p. 810), thereby regulating the federal undertaking in a manner not sanctioned by Parliament. To the same effect is *Canadian National Railway Co. v. Courtois*, [1988] 1 S.C.R. 868, released concurrently with *Bell Canada (1988)*, where the same provincial [page43] Act was declared inapplicable to a federally regulated railway (p. 890). In the third case of the 1988 trilogy, *Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board)*, [1988] 1 S.C.R. 897, the Court held that the preventative (as distinguished from compensatory) aspects of the B.C. provincial *Workers Compensation Act* could not apply to an interprovincial and international trucking undertaking because to do so would intrude on the management of the federally regulated undertaking, including the "B.C. Board's power to order an employer to close down all or part of the place of employment to prevent injuries" (p. 911). These cases may usefully be contrasted with *Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367 (P.C.), where it was held *not* to be vital or essential for the federal government to regulate the clearance of trash and debris from the ditch on the south side of the railway undertaking's roadbed. (See also *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1028.) Yet it seems that clearing debris from the roadbed is at least as essential to the operations of a rail service as is selling optional "peace of mind" insurance to bank borrowers.

53 Nor do the other authorities relied on by the appellants, in our view, justify their expansive view of the elements that are vital and essential to their banking operations. It is simply not credible, in our view, to suggest that the promotion of "peace of mind" insurance is "absolutely indispensable or necessary" to enable the banks to carry out their undertakings in what makes them specifically of federal jurisdiction.

E. *The Interjurisdictional Immunity Case Law Relied on by the Appellants*

(1) The Federal Transportation Cases

54 The appellants rely on *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641 (C.A.), leave to appeal to S.C.C. [page44] refused, [2001] 1 S.C.R. ix, in which it was held that a neighbouring municipality could not impose its land-use development controls (and charges) on the planned expansion of terminal facilities at Toronto's Pearson Airport. Of course interprovincial and international carriers have a vital and essential interest in being able to land at an airport or having access to a safe harbour. Aircraft cannot remain aloft indefinitely awaiting planning permission from other levels of government. This activity does not lend itself to overlapping regulation. See *Johannesson v. Rural Municipality of West St. Paul*, [1952] S.C.R. 292; *Re Orangeville Airport Ltd. and Town of Caledon* (1976), 66 D.L.R. (3d) 610 (Ont. C.A.), and *Venchiarutti v. Longhurst* (1992), 8 O.R. (3d) 422 (C.A.). Equally, a provincial law that purported to regulate the access of its residents to banks would likely meet the same constitutional objections as provincial laws that purported to regulate the collection and discharge of international or interprovincial cargo and passengers. In *Winner*, the Judicial Committee held that a provincial law which required a particular licence to be obtained before a bus company operating an interprovincial and international bus service could "embu[s] or debu[s]" passengers would "destroy the efficacy" of the federal undertaking (pp. 668 and 675). For a province to regulate that part of the undertaking would be to

usurp the regulatory function of the federal government. Access to passengers and cargo, in other words, was absolutely indispensable and necessary to the carriers' viability: see to the same effect *Registrar of Motor Vehicles v. Canadian American Transfer Ltd.*, [1972] S.C.R. 811, and *R. v. Toronto Magistrates, Ex Parte Tank Truck Transport Ltd.*, [1960] O.R. 497 (H.C.J.).

55 On the other hand, courts have consistently held that there is no vital or essential federal interest that would justify holding transportation undertakings immune from the rules of the road or legislation dealing with safety in the transportation industry. See, e.g., *R. v. Greening* (1992), 43 M.V.R. (2d) 53 (Ont. Ct. (Prov. Div.)) [page45]; *National Battlefields Commission*, at p. 860; *R. v. TNT Canada Inc.* (1986), 37 D.L.R. (4th) 297 (Ont. C.A.), at p. 303. These cases, in our view, are more closely analogous to the facts here.

56 In *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754, the Court held that it was not vital or essential to the federal interest to regulate the wages and working conditions of employees of an independent contractor (not itself a federal undertaking) constructing an airport building. In *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581, provincial liquor laws were held applicable to airlines because the sale of liquor was a benefit but not essential to the airline undertaking. The same could be said of the relationship between the promotion of insurance and the banking business.

(2) The Federal Communication Undertakings

57 Reference has already been made to the appellants' reliance on *Bell Canada (1966)* and *Bell Canada (1988)*. One of the first cases to find a valid provincial law inapplicable to a federal undertaking was *Toronto Corporation*. The province purported to authorize the municipality to regulate the construction of Bell's conduits, poles and cables, but the court held that "no provincial legislature ... is competent to interfere with [Bell's] operations, as authorized by ... Parliament" (p. 57). Reference should be made to *Re Public Utilities Commission and Victoria Cablevision Ltd.* (1965), 51 D.L.R. (2d) 716 (B.C.C.A.), to the same effect. The federal interest extends not only to the management of the undertaking but also to ensuring that the undertaking can fulfill its fundamental mandate "in what makes them specifically of federal jurisdiction" (*Bell Canada (1988)*, at p. 762). Unimpeded access to conduits and poles was, in other words, absolutely indispensable and necessary to allow Bell to fulfill its federal mandate.

[page46]

58 These cases do not assist the appellants. Alberta's insurance law does not deny banks access to insurance as collateral. Just because banks require collateral does not mean they must have an essential role as an insurance agent or promoter. Banks can simply indicate their requirements to the prospective borrower, and let the borrower find its own insurance. Of course, profits from the promotion of insurance support the bottom line of banks just as advertising dollars support broadcasters, yet the Court found a provincial law regulating advertising applicable to a company seeking to advertise on a federal broadcast undertaking in *Attorney-General of Quebec v. Kellogg's Co. of Canada*, [1978] 2 S.C.R. 211.

(3) The Maritime Law Cases

59 The appellants rely on *Ordon Estate*, citing the proposition that maritime negligence law is considered part of the unassailable core of Parliament's exclusive jurisdiction over navigation and shipping and this was in part

> because of the intrinsically multi-jurisdictional nature of maritime matters, particularly claims against vessels or those responsible for their operation. This concern for uniformity is one reason, among others, why the application of provincial statutes of general application to a maritime negligence claim cannot be permitted. [para. 93]

We would have thought that in the case of insurance, the concern for uniformity favours the provincial law so that all promoters of insurance within the province are subject to uniform standards of marketing behaviour and fair practices.

(4) The Indian Cases

60 The appellants relied on certain observations about interjurisdictional immunity in *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55, but of [page47] course the actual holding in that case was that notwithstanding exclusive federal jurisdiction over "Indians, and Lands reserved for the Indians", a provincial Forest Appeals Commission could properly consider questions relating to aboriginal rights arising in the execution of its valid provincial mandate respecting forestry resources. In *Kitkatla Band*, our Court held that a provincial law relating to the preservation of heritage objects applied because its application did not affect aboriginal rights or title. These cases further demonstrate that the Court has taken a strict view of the "basic, minimum and unassailable content" of the federal power in relation to "Indians" who are, in limited respects, federal "persons", and to that extent these cases undermine rather than advance the banks' argument.

61 In some cases, it is true, the Court has found a vital or essential federal interest to justify federal exclusivity because of the special position of aboriginal peoples in Canadian society or, as Gonthier J. put it in the *National Battlefields Commission* case mentioned earlier, "the fundamental federal responsibility for a thing or person" (p. 853). Thus, in *Natural Parents*, Laskin C.J. held the provincial *Adoption Act* to be inapplicable to Indian children on a reserve because to compel the surrender of Indian children to non-Indian parents "would be to touch 'Indianness', to strike at a relationship integral to a matter outside of provincial competence" (pp. 760-61). Similarly, in *Derrickson*, the Court held that the provisions of the British Columbia *Family Relations Act* dealing with the division of family property were not applicable to lands reserved for Indians because "[t]he right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative power under s. 91(24) of the *Constitution Act, 1867*" (p. 296). In *Paul v. Paul*, [1986] 1 S.C.R. 306, our Court held that provincial family law could not govern disposition of the matrimonial home on a reserve. In these cases, what was at issue was relationships within Indian families and reserve communities, matters that [page48] could be considered absolutely indispensable and essential to their cultural survival. On the other hand, in *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031, this Court held that a non-Indian business on a reserve that was partly owned and operated by Indians (but not the band) was subject to provincial labour regulation. The Court could not discern a need for federal exclusivity in a matter so remote from its special responsibilities for aboriginal peoples. In other words, in their federal aspect ("Indianness"), Indian people are governed by federal law exclusively, but in their activities as

citizens of a province, they remain subject to provincial laws of general application. As it is with Indians, so it must be with chartered banks.

(5) The Management of Federal Institutions

62 The cases relied upon by the appellants dealing with the management of federal undertakings, including the 1988 trilogy, belong in fact to a broader line of cases dealing with federal institutions, where management has been considered an absolutely indispensable and necessary element of federal jurisdiction. These include the post office: *Reference re Minimum Wage Act of Saskatchewan*, [1948] S.C.R. 248 (province cannot fix wages of postal employees); *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers*, [1975] 1 S.C.R. 178 (province cannot regulate labour relations in the post office); and the RCMP: *Attorney General of Quebec v. Attorney General of Canada*, [1979] 1 S.C.R. 218 (circumscribing a provincial public enquiry because "no provincial authority may intrude into its management" (p. 242)), and *Attorney General of Alberta v. Putnam*, [1981] 2 S.C.R. 267 (holding inapplicable a provincial police complaints procedure). Yet RCMP officers are obliged to observe, for example, provincial [page49] highway traffic laws. Such laws do not affect the core of "what they do and what they are" that is specifically of federal interest.

63 Viewed in this larger context, it seems evident that the 1988 trilogy, focussed as it is on management, cannot be read as broadly as the appellant banks urge. The optional sale of borrowers' "peace of mind" insurance is not connected to a "basic, minimum and unassailable element" of the federal banking power or a "vital" part of the *banking* undertaking of the appellant banks.

(6) The Regulation of Federal Companies and Undertakings

64 The respondent, for its part, relied on *Canadian Indemnity*. In that case, British Columbia had introduced a universal compulsory automobile insurance plan to be administered by the Insurance Corporation of British Columbia to the exclusion of the appellants who were insurance companies incorporated federally or abroad. The Court held that "[t]he fact that a federally-incorporated company has, by federal legislation, derived existence as a legal person, with designated powers, does not mean that it is thereby exempted from the operation of such provincial regulation" (p. 519). In the present case, of course, the exclusive federal power is in relation to "banking" as well as "the incorporation of banks".

65 As to what constitutes "banking", however, the Court has taken the view that it does *not* include "every transaction coming within the legitimate business of a banker" because taken literally such a definition

> would then mean for instance that the borrowing of money or the lending of money, with or without [page50] security, which come[s] within the legitimate business of a great many other types of institutions as well as of individuals, would, in every respect, fall under the exclusive legislative competence of Parliament. Such a result was never intended.
>
> (*Canadian Pioneer Management*, at p. 468, *per* Beetz J.)

This observation takes on particular relevance here. Section 409(2) of the *Bank Act* provides that "[f]or greater certainty, the business of banking includes (*a*) providing any financial service". The appellants cannot plausibly argue that banks are immune from provincial laws of general applica-

tion in relation to "any" financial service, as this would not only render inapplicable elements of the *Insurance Act* but potentially render inapplicable provincial laws relating to mortgages, securities and many other "services" as well.

66 Of greater relevance to the present appeal is the line of cases that have applied provincial environmental law to federal entities engaged in activities regulated federally. In *Ontario v. Canadian Pacific*, the federally regulated railway was held to be subject to the Ontario *Environmental Protection Act* with respect to smoke it caused by burning dead grass along its right-of-way, despite the fact that the fires were set by the railway company to comply with the federal *Railway Act*. The Ontario Court of Appeal held that the principle of interjurisdictional immunity did not apply (see (1993), 13 O.R. (3d) 389), and an appeal to this Court was unanimously dismissed with brief reasons. In *TNT Canada*, an interprovincial trucking company was held bound by provincial regulations governing the carriage of PCB waste. As MacKinnon A.C.J.O. observed, at p. 303:

> In the same way that the province can regulate speed limits and the mechanical conditions of vehicles on the roads of the province for the protection and safety of other highway users, it can set conditions for the carriage of particular toxic substances within the province, [page51] provided that the conditions do not interfere in any substantial way with the carrier's general or particular carriage of goods, and are not in conflict either directly or indirectly with federal legislation in the field.

(7) Conclusion

67 In our view, the above review of the case law cited by the appellants, the respondent and interveners shows that not only *should* the doctrine of interjurisdictional immunity be applied with restraint, but with rare exceptions it *has* been so applied. Although the doctrine is in principle applicable to all federal and provincial heads of legislative authority, the case law demonstrates that its natural area of operation is in relation to those heads of legislative authority that confer on Parliament power over enumerated federal things, people, works or undertakings. In most cases, a pith and substance analysis and the application of the doctrine of paramountcy have resolved difficulties in a satisfactory manner.

68 We turn, then, to the second branch of the appellants' argument, namely that they are relieved of compliance with provincial insurance regulations by the doctrine of federal paramountcy.

F. *Doctrine of Federal Paramountcy*

69 According to the doctrine of federal paramountcy, when the operational effects of provincial legislation are incompatible with federal legislation, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the incompatibility. The doctrine applies not only to cases in which the provincial legislature has legislated pursuant to its ancillary power to trench on an area of federal jurisdiction, but also to situations in which the provincial legislature acts within its primary powers, and Parliament pursuant to its ancillary powers. This doctrine is much better suited to contemporary Canadian federalism than is the doctrine of interjurisdictional immunity, as this Court has expressly [page52] acknowledged in the "double aspect" cases (*Mangat*, at para. 52).

70 Of course, the main difficulty consists in determining the degree of incompatibility needed to trigger the application of the doctrine of federal paramountcy. The answer the courts give to this question has become one of capital importance for the development of Canadian federalism. To interpret incompatibility broadly has the effect of expanding the powers of the central government, whereas a narrower interpretation tends to give provincial governments more latitude.

71 In developing its approach, this Court, despite the problems occasionally caused by certain relevant aspects of its case law, has shown a prudent measure of restraint in proposing strict tests: *General Motors*, at p. 669. In *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, the Court defined the fundamental test for determining whether there is sufficient incompatibility to trigger the application of the doctrine of federal paramountcy. Dickson J. stated:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. [p. 191]

72 Thus, according to this test, the mere existence of a duplication of norms at the federal and provincial levels does not in itself constitute a degree of incompatibility capable of triggering the application of the doctrine. Moreover, a provincial law may in principle add requirements that supplement the requirements of federal legislation (*Spraytech*). In both cases, the laws can apply concurrently, and citizens can comply with either of them without violating the other.

73 Nevertheless, there will be cases in which imposing an obligation to comply with provincial [page53] legislation would in effect frustrate the purpose of a federal law even though it did not entail a direct violation of the federal law's provisions. The Court recognized this in *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, in noting that Parliament's "intent" must also be taken into account in the analysis of incompatibility. The Court thus acknowledged that the impossibility of complying with two enactments is not the sole sign of incompatibility. The fact that a provincial law is incompatible with the purpose of a federal law will also be sufficient to trigger the application of the doctrine of federal paramountcy. This point was recently reaffirmed in *Mangat* and in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13.

74 That being said, care must be taken not to give too broad a scope to *Hall, Mangat* and *Rothmans*. The Court has never given any indication that it intended, in those cases, to reverse its previous decisions and adopt the "occupied field" test it had clearly rejected in *O'Grady* in 1960. The fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject. As this Court recently stated, "to impute to Parliament such an intention to 'occup[y] the field' in the absence of very clear statutory language to that effect would be to stray from the path of judicial restraint in questions of paramountcy that this Court has taken since at least *O'Grady*" (*Rothmans*, at para. 21).

75 An incompatible federal legislative intent must be established by the party relying on it, and the courts must never lose sight of the fundamental rule of constitutional interpretation that, "[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes" (*Attorney General of Canada v. Law Society of British Columbia*, at p. 356). To sum up, the onus is on the party relying on the doctrine of federal paramountcy to [page54] demonstrate that the federal and provincial laws are in fact incompatible by

establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law.

G. *Order of Application of the Constitutional Doctrines*

76 The above review of constitutional doctrines inevitably raises questions about the logical order in which they should be applied. It would be difficult to avoid beginning with the "pith and substance" analysis, which serves to determine whether the legislation in question is in fact *valid*. The other two doctrines serve merely to determine whether a valid law is *applicable* or *operative* in specific circumstances.

77 Although our colleague Bastarache J. takes a different view on this point, we do not think it appropriate to *always* begin by considering the doctrine of interjurisdictional immunity. To do so could mire the Court in a rather abstract discussion of "cores" and "vital and essential" parts to little practical effect. As we have already noted, interjurisdictional immunity is of limited application and should in general be reserved for situations already covered by precedent. This means, in practice, that it will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred, as discerned from the constitutional division of powers as a whole, or what is absolutely indispensable or necessary to enable an undertaking to carry out its mandate in what makes it specifically of federal (or provincial) jurisdiction. If a case can be resolved by the application of a pith and substance analysis, and federal paramountcy where necessary, it would be preferable to take that approach, as this Court did in *Mangat*.

[page55]

78 In the result, while in theory a consideration of interjurisdictional immunity is apt for consideration after the pith and substance analysis, in practice the absence of prior case law favouring its application to the subject matter at hand will generally justify a court proceeding directly to the consideration of federal paramountcy.

H. *Application to the Facts of this Case*

79 While the particular factual elements of this case have already been canvassed for the purpose of the legal analysis, we will address them in greater depth out of respect for the detailed arguments of the parties.

(1) The Pith and Substance of the Alberta *Insurance Act* Relates to Property and Civil Rights in the Province

80 The Alberta *Insurance Act* is a valid law. As the banks acknowledge, the business of insurance in general falls within the authority of the provinces as a matter of property and civil rights. See, e.g., *Parsons* and *Canadian Pioneer Management*. As noted earlier, a federally incorporated company remains subject to provincial regulation in respect of its insurance business: *Canadian Indemnity*. The banks say however that the promotion of their eight lines of "authorized" insurance products is integral to their lending practices, and thus to banking, which is a federally regulated activity.

81 Nevertheless, banks, as such, are not exempt from provincial law. In *Bank of Toronto v. Lambe*, as mentioned earlier, it was held that the bank was subject to a provincial tax aimed at banks. In *Gregory Co. v. Imperial Bank of Canada*, [1960] C.S. 204, it was held by the Quebec Superior Court that a bank is subject to provincial securities laws. Accordingly, the mere fact that the banks now participate in the promotion of insurance does not change the essential nature of the insurance [page56] activity, which remains a matter generally falling within provincial jurisdiction.

82 In this respect, the banks' argument is also that while insurance is generally a provincial matter, when used as collateral for bank loans, credit-related insurance is "integrated" into banking in the same way that negligence law was held to be "integral" to shipping and navigation in *Ordon Estate*. This integration contention fails on the facts, as discussed here.

(2) The Onus Lies on the Proponent of Interjurisdictional Immunity on the Facts of a Particular Case to Demonstrate that Credit-Related Insurance Is Part of the Basic, Minimum and Unassailable Content of the Banking Power

83 The purpose of allocating "Banking, Incorporation of Banks, and the Issue of Paper Money" to Parliament under s. 91(15) of the *Constitution Act, 1867* was to create an orderly and uniform financial system, subject to exclusive federal jurisdiction and control in contrast to a regionalized banking system which in "[t]he years preceding the Canadian Confederation [was] characterized in the United States by 'a chaotic era of wild-cat state banking'" (P. N. McDonald, "The B.N.A. Act and the Near Banks: A Case Study in Federalism" (1972), 10 Alta. L. Rev. 155, at p. 156; B. Laskin, *Canadian Constitutional Law: Cases, Text and Notes on Distribution of Legislative Power* (3rd ed. 1969), at p. 603).

84 At least in part, the importance of national control was because of "the peculiar status of bankers [as financial intermediaries], their importance at the centre of the financial community [and] the expectation of the public that it can grant them implicit and utmost confidence" (*Canadian Pioneer [page57] Management*, at p. 461). In 1914, the High Court of Australia said:

> The essential characteristics of the business of banking ... may be described as the collection of money by receiving deposits upon loan, repayable when and as expressly or impliedly agreed upon, and the utilization of the money so collected by lending it again in such sums as are required... .
>
> (*Commissioners of the State Savings Bank of Victoria v. Permewan, Wright & Co.* (1914), 19 C.L.R. 457, at pp. 470-71)

85 It is unnecessary, for present purposes, to delve deeply into the notoriously difficult task of defining banking. It includes the incorporation of banks. It certainly includes, as the banks argue, the securing of loans by appropriate collateral. At issue is the difference between *requiring* collateral (a banking activity) and promoting the acquisition of a certain type of product (e.g. insurance) that could then be *used* as collateral. The respondent, for its part, complains that the appellants' argument would render the "basic, minimum and unassailable" content of the banking power more or less co-extensive with what bankers are authorized to do. There is no doubt that banking is crucial to the economy and that even the basic, minimum and unassailable content of the exclusive power conferred on Parliament in this regard must not be given a cramped interpretation. Banks are institu-

tions of great importance. The federal authorities monitor all aspects of their activities to ensure that they remain safely solvent and that they do not abuse their privileged position as takers of deposits and granters of credit. Courts have recognized that in its regulation of banks, Parliament may well trench on matters that would otherwise lie within provincial jurisdiction such as property and civil rights in the province, including insurance. As early as 1894, it was held that the federal banking power allowed Parliament to confer upon a bank privileges which had "the effect of modifying civil rights in the province" (*Tennant*, at p. 47). (See also *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503 (P.C.), and *Bank of Montreal v. Hall*, at pp. 132-33.) Such considerations, however, should not lead to [page58] confusion between the scope of the federal power and its basic, minimum and unassailable content.

(3) Credit-Related Insurance Is Not a Vital or Essential Element of the Banking Undertaking

86 The appellants rely on *Turgeon v. Dominion Bank*, [1930] S.C.R. 67, for the proposition that when a bank takes insurance as security for a loan, it is engaged in the business of banking. But that too is not the issue. The question is whether the bank in *promoting* optional insurance is engaged in an activity vital or essential to banking. The answer, as found by the courts in Alberta, is no. We agree with that conclusion.

87 The appellants rely on the decision in their favour by the British Columbia Court of Appeal in *Bank of Nova Scotia v. British Columbia (Superintendent of Financial Institutions)* (2003), 11 B.C.L.R. (4th) 206 ("*Optima*" case), leave to appeal to S.C.C. refused, [2003] 3 S.C.R. viii. That case dealt with the sale by a telemarketer of Scotia Visa Balance Insurance. The question was whether the telemarketers could be required by provincial law to obtain a provincial licence. The B.C. Court of Appeal held:

> A provincial licensing regime, which allows the province to say who gets a licence and under what conditions, and which could prevent the bank from obtaining security in a certain way, would affect a vital part of a federal enterprise... .
>
> ... it is sufficient to say that the taking of security generally is a core aspect of the banking power. [Emphasis added; paras. 90-91.]

[page59]

88 In this appeal, as well, the appellants centred their argument on the provincial licensing requirement. However if, as we conclude, the promotion of insurance is not vital or essential to the banking activity, there is no reason why the banks *should* be shielded from the consequences of non-compliance with the provincial *Insurance Act*. If a bank were to misrepresent the amount of a policy premium, or wrongfully disclose confidential information to third parties, or engage in other market practices considered by the Alberta Legislature to be unfair, there is no reason why it should escape the regulatory discipline to which all other promoters of insurance in the province are subject. Of course, if the Minister should single out banks for discriminatory treatment, the banks would have recourse to judicial review in the ordinary way. (We note parenthetically, as much

stress was laid by the appellants on the refusal by this Court of leave to appeal the *Optima* case, that refusal of leave should not be taken to indicate agreement with the judgment sought to be appealed, from any more than the grant of leave can be taken to indicate disagreement. In the leave process, the Court does not hear or adjudicate a case on the merits. The notation "leave to appeal to S.C.C. refused" is inserted in law reports for editorial convenience.)

89 The appellants also then rely on this Court's holding in *Bank of Montreal v. Hall* in which it was held

> ... beyond dispute that the federal banking power empowers Parliament to create an innovative form of financing and to define, in a comprehensive and exclusive manner, the rights and obligations of borrower and lender pursuant to that interest. [p. 150]

However, it must be repeated that just because Parliament *can* create innovative forms for financing does not mean that s. 91(15) grants Parliament *exclusive* authority to regulate their promotion. If provincial legislation were held to be inapplicable [page60] to all forms of security held as collateral by banks, then the application of provincial legislation such as the *Personal Property Security Act*, R.S.A. 2000, c. P-7 ("*PPSA*"), would also be in jeopardy. The appellants claim that the *Insurance Act* differs from the *PPSA* because the *Insurance Act* may lead to a prohibition of the activity (promoting insurance), whereas the *PPSA* deals only with *how* the creditor realizes on a security. However, the *Insurance Act* does not prohibit the promotion of insurance any more than the *PPSA* prohibits realization on a security provision. In both cases, compliance with provincial rules is a precondition to obtaining the benefit of the statute. The rigid demarcation sought by the banks between federal and provincial regulations would not only risk a legal vacuum, but deny to lawmakers at both levels of government the flexibility to carry out their respective responsibilities.

90 Other circumstances of this case, some of them previously noted, also support the rejection of the appellants' position by the courts in Alberta.

91 First, while s. 416(1) of the *Bank Act* allows bank corporations to engage in some insurance activities, it recognizes insurance as a business separate from banking. Section 416(1) reads: "A bank shall not undertake the business of insurance except to the extent permitted by this Act or the regulations." Parliament itself appears not to consider the promotion of insurance to be "the business of banking". While Parliament cannot unilaterally define the scope of its powers, the fact is that Parliament has always treated insurance and banking as distinct and continues to do so.

92 Second, on the facts, the insurance promoted by the banks is not mandatory, can be cancelled at any time by the customer and is often not promoted until after the loan agreement has been finalized. The banks themselves therefore do not consider the [page61] insurance to be vital to their credit granting since apart from high-ratio s. 418 mortgages, the loan agreement is not, in practice, made contingent on obtaining insurance, as found by the trial judge. This is to be contrasted with *mandatory* mortgage insurance. As Slatter J. observed:

> Mandatory loan insurance is not promoted by the bank, is not optional, generates no fee for the bank, is a part of the credit granting decision, and cannot be cancelled without defaulting on the loan. The authorized types of insurance are to the opposite effect on all these points. [para. 165]

93 Third, the insurance at issue is only loosely connected to the eventual payment of the debt. The triggering event for the "personal calamity" insurance is not default on the loan but rather an event in the life of the insurer. As the trial judge rightly noted, no prudent banker would extend credit if repayment was only guaranteed by a catastrophic event in the debtor's life. Further, some of the life insurance coverage is terminated by default on the loan payments, which makes the insurance worthless to the banks when it is most needed to ensure repayment of the loan.

94 Fourth, the banks operate their insurance business as a separate profit centre completely distinct from their banking operations. Promotion of insurance may be a significant source of profit for banks and may enhance their competitive edge, but commercial convenience does not transform the promotion of insurance into a core banking activity.

95 Fifth, the appellants contend that the promotion of insurance helps reduce their overall portfolio risk. However, the evidence shows that loans are secured in other ways and then insurance is offered [page62] so that the bank need not resort to that security. The banks' evidence of the number of customers who carry insurance (or the value of the loans insured) is not helpful because most of those loans are secured by other means. Section 416 of the *Bank Act* does not lay out a manner in which the banks may realize on collateral (as in *Hall*) but merely allows the banks to promote an insurance product which they do for profit.

96 The banks' final argument is that the promotion of insurance is vital to banking because it provides a means of realizing on a debt without having to enforce security in times of customer distress. However, as pointed out by the trial judge, this is a matter of customer relations and retention, which is no more or less important to the business of banking than it is to any other.

97 As the constitutional questions stated in this case are expressly limited to "authorized type of insurance" and "personal accident insurance", this opinion is not to be taken to deal with constitutional issues that may arise in relation to mandatory mortgage insurance.

(4) Federal Paramountcy Does Not Apply on the Facts of this Case

98 The banks' alternative argument is that if the provincial law is applicable to the promotion of insurance by banks, it is nevertheless rendered inoperative by virtue of the doctrine of paramountcy. They argue that the federal *Bank Act* authorizes the banks to promote insurance, subject to enumerated restrictions, and that these enactments are comprehensive and paramount over those of the province. In our view, neither operational incompatibility nor the frustration of a federal purpose have been made out.

[page63]

(a) *No Operational Incompatibility*

99 Since 2000, the banks have been promoting insurance in Alberta while complying with both the federal *Bank Act* and the provincial *Insurance Act*. All of the appellants presently hold the provincial restricted certificates of authority and are actively promoting insurance in Alberta. It cannot be said, in the words of Dickson J., that one enactment says "yes" and the other says "no"; or that "compliance with one is defiance of the other": *Multiple Access*, at p. 191.

100 The appellants say there is conflict between s. 416(2) of the *Bank Act*, which *prohibits* banks from acting as "agents", and the provincial *Insurance Act* which *requires* the banks to hold a "restricted insurance agent's certificate" (s. 454(1)). However, it is apparent that the term "agent" is not used in the same sense in the two enactments. The term "agent" in the *Bank Act* is undefined and bears the common law meaning of a person who can legally bind his or her principal. This the banks cannot do. They cannot bind an insurance underwriter. They merely "promote" insurance. By contrast, the term "insurance agent" is a defined term in the provincial *Insurance Act* and includes a person "who, for compensation, ... solicits insurance on behalf of an insurer, insured or potential insured" (s. 1). Accordingly, the banks may properly act as an insurance agent within the meaning of the provincial *Insurance Act* by promoting (soliciting) insurance and transmitting applications without binding the insurer or potential insured within the prohibition of the *Bank Act*. This is not a case where the provincial law prohibits what the federal law permits.

(b) *No Frustration of Federal Purpose*

101 A classic example of a provincial law that frustrates a federal purpose is *Mangat*. In that case, the provincial prohibition against non-lawyers appearing before a tribunal for a fee would, if applied, [page64] frustrate Parliament's intention to enable non-lawyers to appear before immigration proceedings so as to promote hearings that are informal, accessible and expeditious.

102 The banks argue that the *Bank Act* and its *IBR*s are similar to the legislation in *Mangat* and should be taken to express Parliament's intent that its regulations are exhaustive. However, this is not borne out by the record.

103 Here, as in *Rothmans*, the federal legislation is permissive. Section 416(1) provides that "[a] bank shall not undertake the business of insurance except to the extent permitted by this Act or the regulations". This formulation bears some similarity to the law under consideration in *Spraytech* which held the federal law controlling pesticides to be "permissive, rather than exhaustive" (para. 35). Parliament did not intend to fully regulate pesticide use, nor was its purpose to authorize their use. The federal pesticide legislation itself envisioned the existence of complementary municipal by-laws; see paras. 40 and 42. Similarly, the federal legislation at issue in this case, while permitting the banks to promote authorized insurance, contains references that assume the relevant provincial law to be applicable. Section 7(2) of the *IBR*s reads:

7... .

> (2) Notwithstanding subsection (1) and section 6, a bank may exclude from a promotion referred to in paragraph (1)(*e*) or 6(*b*) persons
>
> (*a*) in respect of whom the promotion would contravene an Act of Parliament or of the legislature of a province ... .

104 The relevant legislative history may be used to shed light on Parliament's object and purpose in passing the 1991 amendment. As stated [page65] by McIntyre J. in *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, in constitutional cases, "extrinsic evidence may

be considered to ascertain not only the operation and effect of the impugned legislation but its true object and purpose as well" (p. 318).

105 Here the relevant legislative record begins with the 1985 Department of Finance Green Paper, *The Regulation of Canadian Financial Institutions: Proposals for Discussion* (pp. 84-85). While the sale of insurance by banks was not discussed in detail, the Green Paper did endorse the concept of a level playing field for all participants selling a particular product. The Senate Standing Committee responding to the Green Paper agreed, and also recommended a level playing field such that no institution would obtain a competitive advantage as a result of being subject to a different regulatory regime than its competitors (*Towards a More Competitive Financial Environment* (1986), Sixteenth Report of the Standing Committee on Banking, Trade and Commerce, at p. 64).

106 Because of the extent of the reforms eventually enacted in 1991, it was agreed that a review of the changes would occur in five years. The review of the Task Force on the Future of the Canadian Financial Services Sector, *Change Challenge Opportunity* (1998) ("MacKay Task Force"), postdates the enactment of the 1991 amendments. For that reason, it is not entitled to much weight, but it does represent a considered after-the-fact statement by some Parliamentarians of their legislative purpose. To that extent, it provides some after-the-fact confirmation of the respondent's position. The MacKay Task Force discussed the role of provincial regulation and stated

> that employees of deposit-taking institutions engaged in the sale of insurance should comply with applicable provincial requirements with respect to the education and licensing of insurance salespersons, [page66] so long as such requirements are non-discriminatory. [Emphasis added.]
>
> (MacKay Task Force, Background Paper #2, *Organizational Flexibility for Financial Institutions: A Framework to Enhance Competition* (1998), at p. 93)

A statement in the final report of the MacKay Task Force specifically addressed licences such as the Alberta's restricted insurance agent's certificate of authority:

> 19) Employees of deposit-taking institutions who are engaged in the sale of insurance should comply with applicable provincial requirements with respect to the education and licensing of insurance salespersons, so long as such requirements are non-discriminatory.

(MacKay Task Force, Report, Recommendation 19, at p. 197)

107 The House of Commons Standing Committee on Finance considered the MacKay Task Force Report and agreed with this proposition: "Those selling insurance products must be licensed and meet all of the qualifications that are required of others selling similar products" (*The Future Starts Now: A Study on the Financial Services Sector in Canada* (1998), at p. 130).

108 We do not place much weight on the post-enactment activities in Parliament. The intention of the 1991 amendments is clear on their face. The appellants argue that Parliament intended to create a unified national "banking" scheme for the promotion of insurance, but there is nothing in the record to support such a conclusion. Parliamentarians were concerned as early as 1985 to maintain a level playing field among all financial service providers participating in the same business. To hold

the banks immune from provincial market conduct regulation would give them a privileged position in the marketplace. Every indication is that Parliament wished to avoid this result.

[page67]

109 These reasons focus, as did those of Hunt J.A., on the banks' arguments on paramountcy related to the provincial requirement of licences and the alleged conflict in the definition of agent. Other more specific conflicts were argued before the trial judge, and rejected by him. Those objections were not carried forward in the Court of Appeal or this Court. Should an issue arise in future with respect to a conflict not dealt with here or in the reasons of the courts below, it would, of course, be open to the banks to pursue a paramountcy argument on the basis of the facts as they may then appear.

VII. Conclusion

110 For these reasons, we would dismiss the appeal with costs and answer the constitutional questions as follows:

1. Are Alberta's *Insurance Act*, R.S.A. 2000, c. I-3, and the regulations made thereunder, in whole or in part, constitutionally inapplicable to the promotion by banks of an "authorized type of insurance" or "personal accident insurance" as defined in the *Insurance Business (Banks and Bank Holding Companies) Regulations*, SOR/92-330, by reason of the doctrine of interjurisdictional immunity?

   Answer: No.

2. Are Alberta's *Insurance Act*, R.S.A. 2000, c. I-3, and the regulations made thereunder, in whole or in part, constitutionally inoperative in relation to the promotion by banks of an "authorized type of insurance" or "personal accident insurance" as defined in the *Insurance Business (Banks and Bank Holding Companies) Regulations*, SOR/92-330, by reason of the doctrine of federal legislative paramountcy?

Answer: No.

The following are the reasons delivered by

111 BASTARACHE J.:-- I have read the reasons of Justices Binnie and LeBel and concur in the result. [page68] I disagree, however, with their approach to the doctrine of interjurisdictional immunity and with their appreciation of the doctrine within the general methodological approach to division of powers questions. In my view, their approach severely restricts the doctrine and that is unwarranted. As discussed in my reasons in *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86, 2007 SCC 23, there is both a doctrinal and a practical need to conserve the doctrine of interjurisdictional immunity (see paras. 102-108). Though I will not revisit in detail my defence of the doctrine, I note that in *Lafarge* I did address the serious concern that the

doctrine unnecessarily and unfairly creates a much wider scope for centralization of federal power at the expense of the principles of federalism and regionalism. I concluded that the best way to address this concern was to clarify the meaning of "affects" in the "affects a vital part" test to require a sufficiently severe impact by the impugned provincial law on the core of a federal head of legislative power in order to justify a finding of immunity (para. 109). In my view, this approach promotes an incremental development of the doctrine, avoids a significant departure from this Court's recent jurisprudence in this area and is better adapted to the practical needs that must always concern us in constitutional matters. Thus, I propose to resolve this case according to the principles and approach I set down in *Lafarge*. For this purpose, I do, however, accept the facts as stated by Binnie and LeBel JJ. in paras. 5-11 of their reasons.

1. The Correct Methodological Approach

112 The starting point of my analysis in *Lafarge* was to set out the proper methodological approach to division of powers questions. As I noted at para. [page69] 102, all constitutional legal challenges to legislation should follow the same pattern. First, the pith and substance of the provincial statutory provisions and the federal statutory provisions should be examined to ensure that they are both validly enacted laws and to determine the nature of the overlap, if any, between them. Second, the applicability of the provincial law to the federal undertaking or matter in question must be resolved with reference to the doctrine of interjurisdictional immunity. Third, only if both the provincial law and the federal law have been found to be valid pieces of legislation, and only if the provincial law is found to be applicable to the federal matter in question, then both statutes must be compared to determine whether the overlap between them constitutes a "conflict" sufficient to trigger the application of the doctrine of federal paramountcy.

113 These steps should take place in the sequence listed, such that if the impugned law is found to be invalid on the pith and substance test, there is no need to move on to consider applicability. Similarly, as demonstrated in my reasons in *Lafarge*, where an impugned law is found inapplicable to a federal matter or undertaking on account of interjurisdictional immunity, there is no need to go on to consider operability. I cannot agree with Justices Binnie and LeBel's suggestion at paras. 76-78 that considerations of operability should generally precede considerations of applicability in the division of powers analytical framework absent "situations already covered by precedent" and that the interjurisdictional immunity analysis should be exceptional to the general methodological approach. In my view, it is impossible to find a federal law paramount over a provincial law, or to conclude that the provincial law is inoperable, if the provincial law is not even applicable to the federal matter at issue. This is a matter of practicality as much as it is one of logic.

[page70]

114 Regarding the option of considering paramountcy first, J. E. Magnet, in "Research Note: The Difference Between Paramountcy and Interjurisdictional Immunity" in *Constitutional Law of Canada: Cases, Notes and Materials* (8th ed. 2001), vol. 1, at p. 338, convincingly notes the differences between the doctrines of immunity and paramountcy. He writes that immunity "is different from the paramountcy doctrine in that even where there is no contradiction or meeting of legislation, the provincial legislation offers significant obstruction to the federal thing, person or undertaking, affects

its status, or drains off essential federal attributes which make them within federal jurisdiction" (p. 339). I agree that there is clearly a need for different types of constitutional legal inquiries. I will now proceed to apply the steps of the correct methodological approach to the case at bar.

2. Application to the Facts

2.1 *The Validity of the Provincial and Federal Laws*

115 We must first consider whether the impugned law in question, the *Insurance Act*, R.S.A. 2000, c. I-3, is in pith and substance related to a provincial matter. As I suggested in *Lafarge*, it is also useful at this stage to determine the validity of the federal legislation in question -- in this case the *Bank Act*, S.C. 1991, c. 46 -- in order to properly consider the application of the doctrine of federal paramountcy, should the analysis proceed that far (see *Lafarge*, at para. 117).

116 The *Insurance Act* is clearly a law "in pith and substance" about the regulation of the insurance industry within the province, and the particular provisions at issue are concerned with the licensing and regulation of insurance providers, promoters and agents. The provincial law applies to all persons providing or promoting insurance services, including banks. It is therefore valid legislation of general application enacted under the provincial legislative authority over "property and [page71] civil rights" in the province under s. 92(13) of the *Constitutional Act, 1867*. Nevertheless, the effects of the provincial law do create some overlap with federal areas of jurisdiction, given that it is potentially applicable to banks as one class of persons or institutions involved in the business of insurance. Thus, the provincial law has some "incidental effects" on banks and, by implication, on the federal banking power; such overlap is generally permissible and should not disturb the constitutionality of an otherwise *intra vires* statute: see *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31, at para. 54. The extent of these incidental effects, however, and whether they affect the "core" of the banking power and whether they frustrate Parliament's purpose in amending the *Bank Act* to permit banks to promote certain types of authorized insurance, will be discussed under the application of the doctrine of interjurisdictional immunity and the doctrine of federal paramountcy.

117 The validity of the *Bank Act* was not challenged by the parties and the trial judge was prepared to assume its constitutionality under s. 91(15) for the purposes of this challenge ((2003), 343 A.R. 89, at para. 86). I am equally prepared to do so. However, I agree with Hunt J.A., who differed from the trial judge in finding that it was the federal power of "banking" itself, and not the power to legislate in respect of the "incorporation of banks" in s. 91(15), which empowered Parliament to amend the *Bank Act* to permit banks to engage in the promotion of authorized insurance products ((2005), 39 Alta. L.R. (4th) 1, at para. 35). The federal incorporation power for certain companies or undertakings involves bringing a company into existence, conferring a legal personality on it, the creation of its corporate structure and the authority over its legal capacity and status. However, this federal [page72] incorporation power, according to Hogg, "does not authorize regulation of the activities of federally-incorporated companies, and therefore there can be no immunity from provincial laws regulating the activities of such companies" (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), at para. 15.8(c), footnote 116 (emphasis added)). Thus, for Parliament to have amended the federal statutory scheme to permit an enlargement of the activities and operations banks are allowed to undertake, it must have done so pursuant to its "banking" power, rather than its "incorporation" power. If there is any federal immunity to be enjoyed by banks as federal undertakings and federally incorporated companies, it will derive from an impermissible impact of the pro-

vincial law on the federal power to regulate the activities of banks as part of the banking power, not from any impact on the incorporation power.

2.2 *The Applicability of the Provincial Law*

118 The proper analytical approach to the applicability analysis was set out at para. 118 of my reasons in *Lafarge*:

> The first step is to identify the "core" of the federal head of power; that is, to determine what the federal power encompasses within its primary scope, and then to determine whether the impugned federal undertaking or matter at issue falls within that core. The second step is to determine whether the impugned provincial law ... impermissibly affects a vital aspect of the federal core of [the] head of power, so as to render it inapplicable to the federal undertaking or matter (see *Bell Canada (1988)*; see also Hogg (loose-leaf ed.), at pp. 15-25 to 15-28, and Monahan, at pp. 123-26).

Thus, the first step is to identify the "core" of the federal head of power in issue, which here is "banking" under s. 91(15). I do not support a concept of the "core" that is overly restrictive; nor do I support [page73] a concept of the "core" that is defined too widely (para. 127 of my reasons in *Lafarge*). Ultimately, my view is that the extent of the "core" is very context specific; it depends on the federal head of power in question. For example, in *Lafarge*, I concluded that the federal power over navigation and shipping (s. 91(10)) is broad and comprehensive and as a result its core must be defined in a more global and comprehensive fashion (para. 131). While the federal power over "banking" in s. 91(15) has similarly been found to be quite extensive (see Hogg, at para. 24.2(a)), I do not think its core is so imprecise. Certainly, just because something is permitted by the *Bank Act* does not make it essential to the core of banking. What will be protected under the core from impermissible intrusions by the provinces are only those elements of federal jurisdiction which are "essential and vital" to the proper functioning of the federal undertaking or matter: see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 955. After a thorough examination of the jurisprudence, the trial judge found that the lending of money, the taking of deposits, the extension of credit in the form of granting loans, as well as the taking of security for those loans were core elements of banking (paras. 129-30). I agree. When one considers these "essential" elements of the federal banking power, one is naturally drawn towards a consideration of the activities and operations performed by banks which are central to the reasons why they fall under federal jurisdiction. Thus, deposit taking and credit granting easily fall at the heart of this core set of operations and activities, since these activities constitute in many ways the *raison d'être* of banks. It is also possible to see these activities as part of the core of banking because this is so clearly and palpably the "domain" of banks as federal undertakings. The question thus becomes whether the particular matter in issue falls within this core.

[page74]

119 Here I endorse the characterization of the particular matter in issue as the promotion of authorized insurance. It may appear that I am focussing on a specific activity as opposed to a subject matter or jurisdiction -- a position I criticized in *Lafarge* (para. 110). However, the problem with

Justices Binnie and LeBel's analysis in *Lafarge* was that they focused on the Vancouver Port Authority's regulatory power over land-use planning *as exercised in a particular case by deciding to approve the Lafarge proposal*. The corresponding "prohibited" line of inquiry here would thus be a focus on the power of banks to promote the sale of authorized insurance products *as exercised in a particular factual context* (such as a specific manner in which the insurance is promoted, or a specific insurance product or type of insurance). Just as the particular activity of the Vancouver Port Authority approving the development was technically not relevant to the immunity analysis in *Lafarge*, the particular way in which the banks promote the authorized insurance products or the particular type of authorized insurance would not be relevant to the immunity analysis here. Thus, the particular subject matter or power at the heart of this interjurisdictional immunity analysis is the ability of the banks to promote the purchase of authorized insurance products, regardless of whether or how they actually exercise that power.

120 In my view, the courts below were correct to conclude that the promotion of authorized insurance does not come within the "core" of banking. This is so for many reasons. First, the nature of the promotion of authorized insurance products renders it "one step removed" from generally-accepted "core" areas of banking identified above, to use the language of the trial judge (para. 164). While the granting of credit in exchange for collateral and the taking of "security" can be seen as being clearly at the core of the banking power (see *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121; *Tennant v. Union Bank of Canada*, [1894] A.C. 31 (P.C.); and *Attorney-General for Alberta v. Attorney-General [page75] for Canada*, [1947] A.C. 503 (P.C.)), the promotion, sale or creation of insurance as collateral for the exercise of such security is not part of the core of the banking power. As recognized by the trial judge, at para. 118, insurance can never be "security". The insurance is rather the collateral created in relation to the granting of a bank loan. Thus, the provincial law in question cannot be interpreted as affecting the promotion of security, but rather the promotion of collateral (see the trial judge's reasons, at para. 121). The trial judge was therefore correct to disagree with the British Columbia Court of Appeal's position on this point in *Bank of Nova Scotia v. British Columbia (Superintendent of Financial Institutions)* (2003), 11 B.C.L.R. (4th) 206.

121 Second, although not a determinative factor (because Parliament cannot, for constitutional purposes, determine the content of the core of a federal head of power), the structure and language of the federal statutory provisions which permit banks to engage in the promotion of insurance suggests that Parliament clearly intended to allow only a limited participation in the insurance industry, recognizing that such participation would in fact constitute an encroachment of banks into an area not traditionally associated with the core of "banking". In addition, the trial judge's review of extrinsic secondary source materials concerning Parliament's legislative intent in enacting the 1991 amendments to the *Bank Act* supports the notion that Parliament intended banks to promote insurance, not as an expansion of the core of the banking power, but rather as a limited exception to the general prohibition (paras. 75-84). Thus, Parliament appears to have drawn a clear distinction between the business of banking and the business of insurance.

[page76]

122 Third, the aim of promoting insurance yields another clue as to its exclusion from the core of the banking power. Matters that fall within the core of a federal head of power would normally be

expected to have a purpose or goal which is consistent with the exercise of that head of power and consistent with its maintenance and use. Here, the promotion of insurance by the banks does not seek to permit the continued use and maintenance of the federal banking power; rather, the sole purpose of engaging in the promotion of insurance appears to be to generate additional revenue as a separate product line and profit centre, thereby maintaining and enhancing a bank's competitive edge in an economic world of "universal banking". I would also raise the fact that the insurance promoted is optional and can be cancelled at any time, as well as the fact that the overall impact of the promotion of insurance on the banks' portfolio risk is quite minimal, as further evidence that the matter does not come within the core of banking. Clearly, the promotion of authorized insurance is not part of the core of banking because it is not essential to the function of banking.

123 The analysis should not stop here, however, because the second step set out in *Lafarge* is to determine whether the impugned provincial law impermissibly affects a vital aspect of the federal core of the head of power, so as to render it inapplicable to the federal undertaking or matter. The benefit of such a two-step inquiry, rather than focussing almost exclusively on the question of whether a federal matter comes within the "core" to determine immunity, is that it promotes greater flexibility in assessing whether immunity should arise. Even if a matter is found to be essential to a federal undertaking, immunity from a provincial law will not arise unless its "affect" on the federal power is "sufficiently severe": the federal legislative authority needs to be "attacked", "hindered" or "restrained" (paras. 108 and 139 of my reasons in *Lafarge*). Because the promotion of insurance does not go to the core of banking, it is obvious that in the present case, Alberta's *Insurance Act* is not [page77] affecting in any important way the core of banking. If the promotion of insurance did go to the core of banking, a more in-depth analysis would have to be undertaken, as was done in *Lafarge* (see paras. 139-41), to determine the severity of the impact. Therefore, no immunity arises in the circumstances, and we can move on to the final consideration of operability.

2.3 *The Operability of the Provincial Law*

124 As noted above, the doctrine of paramountcy is triggered when there is "conflict" between a provincial law and a federal law, and this only *after* they have both been found valid and the provincial law found to be applicable. The meaning of "conflict" was disputed between the parties, but it is fairly clear in the jurisprudence. Conflict should be considered equivalent to "inconsistency" between the statutes, and inconsistency is generally present when Parliament's legislative purpose has been frustrated or displaced, either by making it impossible to comply with both statutes or through some other means notwithstanding the theoretical possibility of complying with both statutes: see *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13, at paras. 11-14; *Bank of Montreal v. Hall*, at pp. 151-55; *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67, at para. 52, where Gonthier J. first excluded the application of the immunity doctrine in the context of that case because it "might lead to a bifurcation of the regulation and control of the legal profession in Canada". If there is conflict or inconsistency, the provincial law will be inoperable to the extent of the conflict or inconsistency, and the federal law will be paramount.

125 In this case, it is clear that there is no express conflict between the provincial and federal schemes concerning the promotion of insurance by banks and that on the face of the relevant statutory provisions involved, dual compliance with both schemes is possible and in fact is to be encouraged. This is [page78] in large part due to the fact that the federal scheme is in fact permissive and empowering, rather than a complete regulatory code concerning the banks' ability to promote au-

thorized forms of insurance. There is in fact virtually nothing in the *Bank Act* or in the regulations about the conduct of such promotion of insurance and how it is to be regulated and governed. The appellants were therefore in error to allege that this case is markedly different from the situation in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40, where no conflict was found in light of the fact that the federal scheme in question was merely permissive and not exhaustive.

126 Nor is there any express or "operational" conflict between the federal prohibition on banks acting as an "agent" at s. 416(2) of the *Bank Act* and the requirement in the provincial legislation that banks promoting insurance must hold a "restricted insurance agent's certificate" at s. 454 of the *Insurance Act*. As noted by the trial judge at para. 202, there is no definition of "agent" in the federal legislation. This implies that the narrow common-law meaning of "agent" as a person acting with the authority to bind his or her principal must have been intended. In contrast, the term "agent" in s. 1(bb) of the provincial law has a much wider and expansive meaning and includes a person who merely "solicits" or promotes insurance on behalf of an insurer, an insured or a potential insured. Thus, it is technically possible to be an "agent" for the purposes of compliance with the provincial *Insurance Act*, while not being an "agent" for the purposes of compliance with the federal *Bank Act*.

127 Finally, there is no evidence here that the application of the provincial law to the banks' promotion of authorized insurance products would frustrate Parliament's legislative intent in allowing banks to engage in this activity. There is nothing to indicate that Parliament enacted the legislative amendments to the *Bank Act* with the intent that the promotion of [page79] authorized insurance products should be immune from provincial regulation. In fact, what little evidence there is concerning Parliament's intent with respect to the applicability of provincial law tends to support the opposite conclusion. The evidence discloses specific instances of Parliamentary committees and reports explicitly recommending that the banks' promotion of authorized insurance products continues to be subject to valid provincial regulatory regimes (see paras. 80-82 of trial reasons).

128 Overall, the application of the provincial law in this case would not frustrate Parliament's legislative intent in enacting the amendments to the *Bank Act* and the associated regulations, because the aim of those amendments was to permit the banks to engage in the promotion of authorized insurance products and to spell out the types of products which could be validly promoted, not to set out the precise manner in which the promotion of insurance would be governed and regulated. Conversely, the aim of the provincial legislation is to provide a regulatory scheme for the promotion of insurance, but not to exercise any control over the kinds of insurance that banks may promote, or the extent to which they may do so, thereby maintaining the integrity of Parliament's legislative purpose. The interaction between the two statutory schemes is therefore one of harmony and complementarity, rather than frustration or displacement of legislative purpose.

3. Conclusion

129 For all of the foregoing reasons, I would dismiss the appeal and answer the constitutional questions in the negative.

* * * * *

APPENDIX

Bank Act, S.C. 1991, c. 46

409. (1) Subject to this Act, a bank shall not engage in or carry on any business other than the business of banking and such business generally as appertains thereto.

[page80]

(2) For greater certainty, the business of banking includes

(*a*) providing any financial service;

...

416. (1) A bank shall not undertake the business of insurance except to the extent permitted by this Act or the regulations.

(2) A bank shall not act in Canada as agent for any person in the placing of insurance and shall not lease or provide space in any branch in Canada of the bank to any person engaged in the placing of insurance.

...

(4) Nothing in this section precludes a bank from

(*a*) requiring insurance to be placed by a borrower for the security of the bank; or

(*b*) obtaining group insurance for its employees or the employees of any bodies corporate in which it has a substantial investment pursuant to section 468.

Insurance Business (Banks and Bank Holding Companies) Regulations SOR/92-330

2. In these Regulations,

...

"authorized type of insurance" means:

(*a*) credit or charge card-related insurance,

(*b*) creditors' disability insurance,

(*c*) creditors' life insurance,

(*d*) creditors' loss of employment insurance,

(*e*) creditors' vehicle inventory insurance,

(*f*) export credit insurance,

(*g*) mortgage insurance, or

(*h*) travel insurance;

Insurance Act, R.S.A. 2000, c. I-3

1 In this Act,

...

[page81]

(n) "deposit-taking institution" means

(i) Alberta Treasury Branches or a bank, credit union, loan corporation or trust corporation ...

...

(bb) "insurance agent" means a person who, for compensation,

(i) solicits insurance on behalf of an insurer, insured or potential insured,

...

454(1) The Minister may issue a restricted insurance agent's certificate of authority to a business

(a) that is a deposit-taking institution ...

...

(2) A restricted insurance agent's certificate of authority authorizes the holder and the holder's employees to act or offer to act, subject to prescribed conditions and restrictions, as an insurance agent in respect of classes or types of insurance specified by the Minister.

468(1) The Minister may refuse to issue an applicant's new certificate of authority if the requirements of this Act and the regulations relating to the certificate have not been met.

...

482 A decision of the Minister under this Part to refuse to issue, renew or reinstate a certificate of authority, to impose terms and conditions on a certificate of authority, to revoke or suspend a certificate of authority or to impose a penalty on the holder or former holder of a certificate of authority may be appealed in accordance with the regulations.

Insurance Agents and Adjusters Regulation, A.R. 122/2001

[Information provided by consumer]

12(1) The holder of a restricted certificate

[page82]

(a) may not use personal information given by a person buying insurance unless it is used for the purpose for which it is given and the person signs a consent that meets the requirements of subsection (2), and

(b) may not release the information described in clause (a) to someone who is not an employee of the holder unless the person signs a consent that meets the requirements of subsection (3).

...

[Insurance application]

14(1) When a holder of a restricted certificate negotiates or enters into a transaction with a person for credit-related insurance at the same time as a credit arrangement is being negotiated or entered into with the person, the holder must provide the person with a separate application for the insurance coverage.

(2) A holder of a restricted certificate must, on request, provide a person making an application for insurance with a copy of the completed insurance application.

[Disclosure]

15(1) A holder of a restricted certificate, at the time the person applies for insurance coverage, must

(a) provide to a person buying insurance

(i) a summary of the terms, including limitations and restrictions, of the insurance offered, and

(ii) a summary of the circumstances under which the insurance commences or terminates and the procedures to follow in making a claim,

and

(b) notify a person buying insurance that the policy will be sent to the person, or in the case of a contract of group insurance, a certificate will be sent to the person.

(2) A holder of a restricted certificate who is marketing credit-related insurance, at the time of application for insurance coverage

(a) must provide to a person buying insurance

[page83]

(i) a statement that sets out the right to rescind the insurance contract and obtain a full refund of the premium pursuant to section 18, and

(ii) a statement that the duration of the insurance is less than the term of the amortization period of any related loan, or that the amount of the insurance is less than the indebtedness, if that is the case,

and

(b) must inform a person buying insurance that the person may contact the insurer for further information or clarification, the name of the insurer that is providing the insurance and how that insurer may be contacted.

(3) The insurer on behalf of which the holder of the restricted certificate is marketing insurance must ensure that procedures are in place to effect the requirements of this section.

(4) Where a holder of a restricted certificate receives any compensation, inducement or benefit from an insurer, directly or indirectly, for selling insurance, the

holder of a restricted certificate must disclose that fact to any person who is considering buying insurance from that holder.

[Loan offers]

16(1) A holder of a restricted certificate may not, when offering to make a loan to, or arrange a loan for, a person, inform the person that the person must, or require the person to, purchase insurance before the loan can be made.

(2) Despite subsection (1), a holder of a restricted certificate may, when offering to make a loan to, or arrange a loan for, a person, inform the person that the person must, or require the person to, purchase insurance if the insurance is to protect the lender against default of the borrower and the insurance is from an insurer licensed to do business in Alberta.

(3) For the purpose of subsection (2), a holder of a restricted certificate may not inform the person that the person must, or require the person to, purchase insurance from the holder or an insurer or insurance agent, specified by the holder.

[Information certificate]

17 A holder of a restricted certificate must

[page84]

(a) ensure that purchasers or potential purchasers of insurance are informed that they are contracting or considering contracting with an insurer and not with the holder, and

(b) ensure that written documentation is provided to the purchaser of insurance evidencing the insurance and setting out the information required to be disclosed by clause (a) and section 15(1)(b) within 30 days of the insurance coming into force.

[Right of rescission]

18(1) A person who buys life insurance through the holder of a restricted certificate has 10 days, or any longer period specified in the policy or certificate, after receiving the written documentation referred to in section 17 to rescind the insurance.

(2) A person who rescinds insurance in accordance with subsection (1) is entitled to receive from the insurer a refund of the whole premium that has been paid.

Solicitors:

Solicitors for the appellants: Blake, Cassels & Graydon, Toronto.

Solicitor for the respondent: Attorney General of Alberta, Edmonton.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Sainte-Foy.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

[page85]

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitors for the intervener the Alberta Insurance Council: Emery Jamieson, Edmonton.

Solicitors for the intervener the Financial Advisors Association of Canada: Heenan Blaikie, Toronto.

Solicitors for the interveners AIG Life Insurance Company of Canada et al.: Lax O'Sullivan Scott, Toronto.

cp/e/qllls

TAB 19

Case Name:

Ramdath v. George Brown College of Applied Arts and Technology

Between
Katrina Ramdath and Zsolt Kovessy, Plaintiffs, and
The George Brown College of Applied Arts and Technology,
Defendant
PROCEEDING UNDER the Class Proceedings Act, 1992

[2010] O.J. No. 1411

2010 ONSC 2019

93 C.P.C. (6th) 106

2010 CarswellOnt 2038

Court File No. CV-O8-363847 CP

Ontario Superior Court of Justice

G.R. Strathy J.

Heard: February 9-10, 2010.
Judgment: April 8, 2010.

(168 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Certification -- Common interests and issues -- Members of class or sub-class -- Representative plaintiff -- Motion by proposed plaintiffs for certification of class action and common issues allowed in part -- Plaintiffs were former International Business Management students at defendant college who alleged defendant's course calendar misrepresented program as enabling them to obtain industry designations -- While most plaintiffs were international students not still in Ontario, Ontario had real and substantial connection and little likelihood action would be commenced elsewhere -- Common issues of negligent misrepresentation, unfair practice and breach of contract certified but entitlement to damages to be individually proven -- Class action judicially efficient -- Representative plaintiffs and litigation plan suitable.

Contracts -- Misrepresentation -- What constitutes -- Negligent misrepresentation -- Motion by proposed plaintiffs for certification of class action and common issues allowed in part -- Plaintiffs were former International Business Management students at defendant college who alleged defendant's course calendar misrepresented program as enabling them to obtain industry designations -- While most plaintiffs were international students not still in Ontario, Ontario had real and substantial connection and little likelihood action would be commenced elsewhere -- Common issues of negligent misrepresentation, unfair practice and breach of contract certified but entitlement to damages to be individually proven -- Class action judicially efficient -- Representative plaintiffs and litigation plan suitable.

Motion by the proposed plaintiffs for certification of the class action and common issues. The plaintiffs were former International Business Management students at the defendant college. The plaintiffs claimed that the online and printed course calendars misrepresented the benefits of the program by falsely stating completion of the program would entitle the students to three industry designations. The proposed class consisted of students enrolled in three classes. The plaintiffs asserted that the industry designations were highly sought after and the opportunity to obtain them was their main reason for enrolling in the program. However, the defendant had not made the appropriate arrangements and was not accredited by the industry associations. After students complained in 2008, the defendant removed the representations from the online calendar and by the time the third class graduated, the defendant had arrangements in place to confer some designations. The representative plaintiffs were from the first and second class. The plaintiffs sought to certify common issues of breach of contract, negligent misrepresentation, unfair practice, entitlement to damages and costs of recovery. The defendant argued that the matter was unsuitable for a class action because most students were no longer in Ontario, some members did not complete the program and some obtained certain designations. The defendant suggested joinder or bifurcation as an alternative.

HELD: Motion allowed in part. The university calendars were contractual documents and the agreement between parties was a consumer transaction. The names of all class members were identified and the class was real and existing. There was a real and substantial connection to Ontario and no real likelihood a student would bring an action in another jurisdiction. The hypothetical risk of another state not accepting the judgment did not preclude Ontario from taking jurisdiction and certifying the class. The students from three classes constituted an appropriate class and the fact that some had withdrawn or received certain designations was an issue for damages assessment, not certification. The class was certified. The common issues of breach of contract, negligent misrepresentation and unfair practice were supported by the evidence and certified. Entitlement to damages was not certified because each plaintiff had to prove entitlement. The costs of recovery were also a matter to be determined later. The defendant's alternative of joinder was based on removing international students from the class, so was not relevant since the entire class had been certified. The defendant's argument that the matter should be bifurcated with individual issues heard first was an attempt to make this an opt-in class. The proposed representative plaintiffs were appropriate and committed and had developed a suitable notice and litigation plan.

Statutes, Regulations and Rules Cited:

Business Practices Act, R.S.O. 1990, c. B.18,

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5(1), s. 5(1) (a), s. 5(1)(b), s. 5(1)(d), s. 5(1)(e), s. 6.1, s. 8, s. 12, s. 25(2)

Competition Act, R.S.C. 1985, c. C-34,

Consumer Protection Act, S.O. 2002, c. 30, s. 2, s. 14(1), s. 14(2), s. 15, s. 18(1), s. 18(2), s. 18(3), s. 18(11), s. 18(15), s. 24(1)

Ontario Colleges of Applied Arts and Technology Act, 2002, S.O. 2002, c. 8, s. 2(1), s. 2(2)

Rules of Civil Procedure, Rule 5.02, Rule 17.02, Rule 76

Counsel:

Victoria Paris and Erica Buschmann, for the Plaintiff/Moving Party.

Robert B. Bell, Michael C. Smith and Allessandra V. Nosko, for the Defendant/Respondent.

REASONS FOR DECISION ON CERTIFICATION

1 G.R. STRATHY J.:-- This is a motion for certification of a proposed class action, pursuant to s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*C.P.A.*") The plaintiffs are former students in the International Business Management Program (the "Program") at The George Brown College of Applied Arts and Technology ("George Brown"). They claim that the course calendar misrepresented the benefits of the Program and falsely stated that it would enable them to obtain three industry designations in addition to a college certificate.

2 The Program was eight months long and was first offered at George Brown in September, 2007. This action is brought on behalf of all students who registered in the Program beginning in September, 2007 (the "First Class"), January, 2008 (the "Second Class") and September, 2008 (the "Third Class") (collectively the "Class" or "Class Members").

I. Background

3 The Plaintiff Zsolt Kovessy lives in Toronto, Ontario. He enrolled in the Program in September 2007 and successfully completed it in April 2008, having previously obtained a post-graduate Business Management Certificate from George Brown.

4 The Plaintiff Katrina Ramdath lives in Mississauga, Ontario. She enrolled in the Program in January 2008, and successfully completed it in August, 2008. Before registering in the Program, Ms. Ramdath had completed the International Trade Certificate and the Advanced International Trade Certificate at George Brown.

5 George Brown was established under s. 2(1) of the *Ontario Colleges of Applied Arts and Technology Act*, 2002, S.O. 2002, c. 8, Sch. F. Subsection 2(2) of that statute states that the objects of each college include offering a comprehensive program of career-oriented, post-secondary education and training to assist individuals in finding and keeping employment. In carrying out these objects, colleges may enter into partnerships with business, industry and other educational institutions.

6 George Brown's relationships with industry organizations, and the ability of its students to obtain desirable employment qualifications, clearly make it an attractive and cost-effective educational choice for job-focused students. For those wishing to pursue a career in international business management, the Program offered access to some important industry qualifications.

7 There are a number of associations in the international business management industry in Canada including: the Forum for International Trade Training ("FITT"); the Canadian Society of Customs Brokers ("CSCB"); and the Canadian International Freight Forwarders Association ("CIFFA") (collectively, the "Industry Associations"). Each Industry Association awards designations to those who complete certain courses of study, which the individual association either offers itself or approves from outside providers. The designations are: the Certified International Trade Professional (CITP), awarded by FITT; the Certified Customs Specialist (CCS), awarded by the CSCB; and, the Certificate in International Freight Forwarding (CIFF), awarded by CIFFA (collectively, the "Industry Designations").

8 The plaintiffs say that the Industry Designations are highly sought-after qualifications that provide an entry into careers in the field of international business management in Canada and internationally and that they enrolled in the Program because they understood it would provide them with an opportunity to obtain those designations.

9 George Brown described the Program in the print and on-line versions of its course calendar as follows:

> **OUR PROGRAM**
>
> The field of international trade can seem as large and complex as the world itself. Encompassing disciplines such as strategic planning, law, finance, logistics and marketing, attaining a mastery of global trade can seem a daunting challenge. This International Business Management post-graduate program simplifies the complex field of international business with dynamic and interactive teaching methods, including case analysis and guest speakers. The International Business Management post-graduate program provides students with the opportunity to complete three industry designations/certifications in addition to the George Brown College Graduate Certificate. (emphasis added)
>
> The three industry designations/certifications include:
>
> Certified International Trade Professional (C.I.T.P. designation)
>
> Certified Customs Specialist (CCS)
>
> Certificate in International Freight Forwarding
> (CIFFA, recognized and approved by Federation of
> International Freight Forwarding Associations)

10 Under the heading "Required Courses", the calendar described the George Brown courses that were apparently necessary in order to obtain the Industry Designations:

> **REQUIRED COURSES**

C.I.T.P. DESIGNATION

BUS4030 International Trade Law

BUS4031 Global Entrepreneurship

BUS4032 International Trade Logistics

BUS4033 International Trade Logistics II

BUS4034 International Trade Finance

BUS4035 International Marketing

BUS4036 International Market Entry and Distribution

BUS4037 International Trade Management

CUSTOMS COURSES

BUS4040 Customs Procedures I

BUS4041 Customs Procedures II

CIFFA COURSES

BUS4038 Introduction to Freight Forwarding I

BUS4039 Introduction to Freight Forwarding II

11 The courses offered by George Brown were described in a fashion that was similar to the courses offered or required by the Industry Associations.

12 The calendar also contained a statement in the "Admission Requirements" section to the effect that the tuition fees did not cover the costs of "textbooks, association memberships or association examinations."

13 The plaintiffs say that they relied on the statements in the printed and on-line calendars and understood them to mean that at the end of their course of studies they would obtain the three Industry Designations as well as a George Brown certificate. They allege that at the time they enrolled in the Program, George Brown had made no arrangements with the Industry Associations and that no arrangements were in place by the time the First Class and the Second Class graduated. They claim that they would not have enrolled in the Program if they had known that it was not accredited by the Industry Associations and that they could not obtain the Industry Designations simply by completing the Program.

14 The plaintiffs state that at some point in 2008 students learned that they would not automatically receive the Industry Designations on completing the Program and that they would have to pay additional fees, complete additional courses or examinations and/or submit proof of work experience in order to obtain them. They claim that after students complained, and a meeting was held with students in the Second Class in July of 2008, George Brown amended its on-line calendar to substantially correct the alleged misrepresentations. The amendment read as follows, with deletions being struck out and additions denoted by underlining:

> The field of international trade can seem as large and complex as the world itself. Encompassing disciplines such as strategic planning, law, finance, logistics and marketing, attaining a mastery of global trade can seem a daunting challenge. This International Business Management post-graduate program at George Brown College simplifies the complex field of international business with dynamic and interactive teaching methods, including case analysis and guest speakers. [The International Business Management post-graduate program provides students with the opportunity to complete three industry designations/certifications in addition to the George Brown College Graduate Certificate.] [Editor's note: Text in brackets is struck out in the original.]
>
> The International Business Management post-graduate program can also prepare students to pursue three industry designations / certifications in addition to the George Brown College Graduate Certificate if they choose to do so. All of these industry designations / certifications require additional exams and / or related work experience to qualify. Please check out their official websites listed below to find out the detailed requirements set by the granting bodies of these designations / certifications.
>
> The three industry designations/certifications include:
>
> Certified International Trade Professional (C.I.T.P. designation offered by FITT (www.fitt.ca)

> Designations offered by Canadian Society of Custom Brokers (www.cscb.ca) [Certified Customs Specialist (CCS)] [Editor's note: Text in brackets is struck out in the original.]
>
> Certificate in International Freight Forwarding (CIFFA, recognized and approved by Federation of International Freight Forwarding Associations (www.ciffa.com)
>
> **Note:** The qualification requirements for each designation / certificate are set by the granting body, not George Brown College. In order to qualify [sic] any of those designations / certifications, you need to follow the process listed on their website and meet all the requirements applicable to you.

15 By the time the Third Class graduated, George Brown had arrangements in place with some of the Industry Associations, but not with all of them.

16 The plaintiffs claim that they relied to their detriment on the description of the Program in the calendar and they assert a cause of action for negligent misrepresentation. They also claim that George Brown breached its contract to provide the Industry Designations as part of the educational services it agreed to supply to students in the Program. Finally, the plaintiffs claim that George Brown engaged in unfair practices prohibited by s. 14 and 15 of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A ("the *Consumer Protection Act 2002*").

The Case on behalf of George Brown

17 I will discuss later in these reasons some of the evidence tendered on behalf of George Brown. To give context to that evidence, I will explain the primary grounds on which George Brown opposes certification.

18 First, it says that the plaintiffs' claim is essentially for negligent misrepresentation, which makes it unsuitable for certification because the individual issues, including Class Members' knowledge and understanding of the alleged misrepresentations, will make a class action unmanageable. I will discuss this under the "preferable procedure" analysis under s. 5(1)(d) of the *C.P.A.*

19 Second, George Brown says that 78 of the 119 members of the Class are international students who are not resident in Canada. It has adduced evidence, discussed below, with a view to showing that a judgment of this court in a class action would not be recognized in India and China, the homelands of many Class Members. It says that non residents should not be included in the Class because the court cannot be satisfied that its judgment would foreclose litigation in those jurisdictions. I will discuss this issue when I discuss the "identifiable class" requirement under s. 5(1)(b) of the *C.P.A.*

20 Third, it says that the Class is overly broad because it includes (a) those beyond the jurisdiction of the court; (b) those who enrolled after the course calendar was amended in response to student complaints; (c) those who failed or withdrew from the Program; (d) those who subsequently obtained some or all of the Industry Designations from the Industry Associations; and (e) those who had actual knowledge of the work experience, course work and examinations which the three different Industry Associations required before the Industry Designations could be granted, but who enrolled in the Program because they sought the George Brown College Graduate Certificate offered in the calendar. I will discuss this complaint under the "identifiable class" requirement as well.

II. The Test for Certification

21 The test for certification is set out at section 5(1) of the *C.P.A.*:

> The Court shall certify a class proceeding if:
>
> (a) the pleading or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and,
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
> (ii) has produced a plan for the proceeding that set out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

22 The provisions of s. 5(1) should be generously construed so as to promote access to justice, judicial efficiency and behaviour modification, as envisioned by the *C.P.A.*: *Cloud* v. *Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) ("*Cloud*") at paras. 37-39, leave to appeal denied, [2005] S.C.C.A. No. 50; *Hollick* v. *Toronto (City)*, [2001] 3 S.C.R. 158 ("*Hollick*") at paras. 14-16; *Pearson* v. *Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.) ("*Pearson*") at paras. 3, 44, leave to appeal denied [2006] S.C.C.A. No. 1.

23 The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiffs' claim. The evidentiary requirement for certification is low - the plaintiffs need only show "some basis in fact" for each of the certification requirements in s. 5(1), other than the requirement in s. 5(1)(a) that the pleading discloses a cause of action: *Hollick,* at paras. 16, 25; *Boulanger* v. *Johnson & Johnson Corp.*, [2007] O.J. No. 179 (S.C.J.) at para. 20, leave to appeal denied, [2007] O.J. No. 1991 (Div. Ct.)., supplemental reasons, [2007] O.J. No. 2043 and [2007] O.J. No. 2766 (S.C.J.).

24 While a decision on certification is very much dependent on the circumstances of the particular case, there is precedent for certification of class actions for breach of contract, negligent misrepresentation, and breach of the *Consumer Protection Act 2002* in the context of educational institutions. It will be of assistance to examine these decisions as they involve many of the issues that arise in this case.

25 The first case in Ontario is *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63, [1998] O.J. No. 2786 (Gen. Div.) ("*Mouhteros v. DeVry*"), a decision of Winkler J., as he then was. The plaintiff was a former student of a private, for-profit post-secondary educational institution that operated four Canadian campuses, one in Alberta and three in Ontario. The plaintiff alleged that the school misrepresented the quality of its programs and the marketability of its graduates. The proposed class would have included all persons who attended the institution between 1990 and 1996, some 17,000 people. The plaintiff alleged multiple misrepresentations, made by some 76 field representatives, 46 admissions officers, and in numerous television, print and direct mailing advertise-

ments. The plaintiff pleaded negligent misrepresentation and breach of contract, among other causes of action.

26 Winkler J. did not certify the action as a class action. He found, first, that the class definition was over-inclusive because it included students who successfully completed their programs, were satisfied with their education, and went on to find appropriate employment. It also included persons who enrolled regardless of whether they relied on the alleged misrepresentations and who would have no claim for relief.

27 Winkler J. also found that, while misrepresentation might constitute a common issue in a class proceeding, the misrepresentations in that case were numerous, were made in various forms over an extended period of time and their impact and consequences would depend on circumstances peculiar to each student. He stated, at para. 23:

> .. in the present case, the various representations were published by the defendant in 67 different television commercials and 30 different newspaper advertisements, or were made verbally by some 122 admissions officers over a six-year period. The nature of the representations made in DeVry's advertising and promotions, the question of whether the representations were false and misleading, and whether they were made negligently or fraudulently will vary according to the content of the advertisement or the statements made by the admissions officer, the time at which it was published or communicated, the program of study undertaken by each individual student, and the conditions then extant at each of the DeVry campuses.

28 On the "preferable procedure" aspect of the certification test, Winkler J. concluded that while a class proceeding might promote access to justice, it would not foster judicial economy. He concluded, at paras. 30 and 31, that the common issues in the case before him would be "subsumed by the plethora of individual issues" and that all of the criteria in s. 6 of the *C.P.A.* came into play:

> Assuming that the misrepresentation issues identified above were capable of a common resolution, such resolution would be but the beginning, and not the end of the litigation. With respect to the claim for misrepresentation in tort, the plaintiff must prove reasonable reliance on a misrepresentation negligently made. Reliance is an essential element of the tort. The question of reliance must be determined based on the experience of each individual student, and will involve such evidentiary issues as how the student heard about DeVry, whether the student saw any of the advertisements and if so, which ones, what written representations were made to the student prior to enrollment, whether the student met with an admissions officer, and whether the student relied on some or all of these in deciding to enroll in DeVry. The inquiry will not end there, however. If the class members are able to demonstrate reliance, they must show that they relied to their detriment. Damages will require individual assessment. In that regard, the court must consider the program of study entered into, the student's performance in the program, the field in which employment was sought, the length of the job search, any assistance in the search provided by DeVry, the class members prior education and employment history, and the nature of the employment, if any, obtained by the class member. These issues are in addition to the numerous ques-

> tions surrounding the nature of the representations and whether they were negligently and fraudulently made, as enunciated above.
>
> The presence of individual issues will not be fatal to certification. Indeed, virtually every class action contains individual issues to some extent. In the instant case, however, what common issues there may be are completely subsumed by the plethora of individual issues, which would necessitate individual trials for virtually each class member. Each student's experience is idiosyncratic, and liability would be subject to numerous variables for each class member. Such an class action would be completely unmanageable.

29 Winkler J. concluded that certification would ultimately result in a multitude of individual trials, which would completely overwhelm any advantages to be obtained from the trial of the few common issues. Proceedings in the Small Claims Court or under the simplified procedure rules would promote greater judicial economy.

30 *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2006), 211 O.A.C. 301, [2006] O.J. No. 2393 (C.A.) ("*Hickey-Button*") is a decision of the Court of Appeal, reversing a decision of the Divisional Court (unreported, November 2, 2004) and of the certification motion judge ((2003), 31 C.P.C. (5th) 171, [2003] O.J. No. 811) and certifying a class action brought on behalf of nursing students at Loyalist. The action claimed that students in the nursing program in 1997 and 1998 were offered what was called the "Queen's option," which would allow students entering the program to obtain a nursing degree from Queen's University in four years. The "Queen's option" was referred to in material provided to the students prior to their enrolment. The plaintiff alleged that no such option was available and claimed damages for breach of contract and negligent misrepresentation. Loyalist acknowledged that the material it provided to students could be considered to contain representations, but said that negligent misrepresentation could only be determined on a student-by-student basis, based on what each student was told and what reliance, if any, the student placed on that information. As in the case before me, the college claimed that additional information or representations were made to students, in other documentation and communications and in information sessions, that would have qualified the representation about the "Queen's option."

31 Doherty J.A., who gave the judgment of the Court of Appeal, found that there were properly pleaded causes of action for breach of contract and negligent misrepresentation. The proposed classes consisted of students who had entered into a nursing program in each of two years. Doherty J.A. found that the class description was appropriate - at paras. 48-51:

> The class contemplated by Ms. Hickey-Button consists of her and the other twenty-two persons who entered the nursing diploma course at Loyalist in the fall of 1997. The class contemplated by Ms. Potter consists of her and fifty-six students who entered the nursing diploma course in the fall of 1998.
>
> A class of persons is identifiable for the purposes of s. 5(1)(b) if that class is described by objective criteria that can identify its members without reference to the ultimate merits of the action. There must also be some rational relationship between the described class and common issues: *Hollick v. Toronto (City), supra*, at para. 19; *Cloud v. Attorney General of Canada, supra*, at para. 45: *Pearson v. Inco Ltd.* (2005), 261 D.L.R. (4th) 629 at para. 57 (Ont. C.A.).

> The appellants have used readily discernible objective criteria to describe the classes of persons that each proposes to represent. The classes are described by reference to enrolment in a specific course at a specific time at a specific educational institution. There cannot be any difficulty in identifying the persons who qualify for membership. The classes described by the appellants are the antithesis of an open-ended or undefined class.
>
> There is also a close link between the described classes and the common issues. The appellants contend that all members of the class entered into a contract with Loyalist that included the "Queen's" option and that Loyalist breached that contract in respect of each of the students. Further, it is alleged that Loyalist owed a duty of care to all members of the class and breached that duty in negligently making false statements as to the availability of the "Queen's" option.

32 Doherty J.A. found that common issues arose out of both the breach of contract and the negligent misrepresentation claims. Those common issues were similar to the issues the plaintiffs propose in this action. In answer to the complaint, which had been accepted by the Divisional Court, that reliance would have to be established on a student-by-student basis, Doherty J. observed that reliance was not a necessary requirement of the breach of contract claims. He also said that the existence of individual issues was not a barrier to certification, referring to *Cloud,* at paras. 73-75.

33 In the preferable procedure analysis, Doherty J.A. found that a class action would satisfy the objectives of the *C.P.A.*, as summarized in *Cloud* at paras. 73-75, and *Pearson* at para. 67. He noted that it is important to examine what the common issues are and to consider their significance in the resolution of the overall action: "The more numerous the common issues in the litigation, and the more central those issues are to the outcome of the litigation, the stronger will be the argument for a class proceeding." He said, at para. 55:

> An examination of the common issues and, in particular, the significance of those issues to the overall action will play a key role in deciding whether a class proceeding is a preferable procedure. The more numerous the common issues in the litigation, and the more central those issues are to the outcome of the litigation, the stronger will be the argument for a class proceeding: *Inco, supra*, paras. 69-74. I have already outlined the numerous common issues raised in these proceedings. I have also indicated that in my view those common issues are central to the outcome of this litigation. If the appellants cannot succeed on those common issues, the action will fail. It is only if the appellants are successful on those issues that various individual issues specific to each student, such as damage-related issues, will have to be determined.
>
> The number of common issues raised by the appellants and their significance to the litigation makes this a case where it can be said that a class proceeding is a "preferable" procedure. The interests of judicial economy would be well served by addressing the common issues in a single class proceeding rather than in a number of individual actions.

34 I will return to this observation shortly, because one of the fundamental submissions of counsel on behalf of George Brown in this case is that the common issues are only peripheral to the resolution of the claims of the Class and the real guts of the case are in the individual issues. Similar objections were voiced, and rejected, in *Hickey-Button.*

35 *Olar v. Laurentian University* (2003), 37 C.P.C. (5th) 129, [2003] O.J. No. 2756, (S.C.J.), aff'd (2004), 6 C.P.C. (6th) 276, [2004] O.J. No. 3716 (Div. Ct.) was a similar sort of case. The plaintiff complained that a statement in the university's calendar misrepresented the ability of an engineering student to transfer to a third year engineering program at another Ontario university after having completed two years of university at Laurentian. In denying certification, Patterson J. relied on the decision at first instance in *Hickey-Button*, which he described, at para. 30, as factually similar. He found that there would be significant individual issues remaining after the determination of the common issues.

36 In *Matoni v. C.B.S. Interactive Multimedia Inc. (c.o.b.) Canadian Business College* [2008] O.J. No. 197, 2008 CanLII 1539 (S.C.J.), supplemental reasons [2008] O.J. No. 3340 and [2008] O.J. No. 3341 ("*Matoni v. C.B.S.*"), the plaintiffs in a proposed class action asserted that the college had failed to inform them that the program for dental hygienists had not been certified by the appropriate professional body. Graduates of the program were allegedly not automatically qualified to write the eligibility examination or might find their ability to practice delayed. Claims were made in breach of contract, negligent misrepresentation and breach of the *Consumer Protection Act, 2002*, among others. Hoy J. found that these claims were properly pleaded and that it was not plain and obvious that they could not succeed. The proposed class, which was composed of all persons who had enrolled in the program after a specific date, was found to be acceptable, notwithstanding that some members of the class might ultimately be unable to prove damages. Hoy J. noted that class members might in any event be entitled to nominal damages for breach of contract and that proof of actual damages was not required under the *Consumer Protection Act, 2002.*

37 Hoy J. was not prepared to certify the action on the basis of the causes of action in contract, negligent misrepresentation, breach of collateral warranty, breach of the *Competition Act,* R.S. 1985, c. C-34 and breach of the *Business Practices Act*, R.S.O. 1990, c. B.18. She found that the individual issues would overwhelm the common issues and that the action would be unmanageable and would not result in judicial economy. The "plethora" of individual issues that would have to be proven after the common issues trial would mean that access to justice would not be promoted in any meaningful way. She found, however, that the claim under the *Consumer Protection Act, 2002* disclosed a cause of action that did not require proof of misrepresentation and permitted damages to be recovered on an objective basis, which would likely be formulaic and simple. If the claimants were successful, there would be no need to proceed with the claims in negligence or breach of contract.

38 I will return to these decisions in my discussion of the common issues and also in considering whether a class action is the preferable procedure for the resolution of the common issues.

III. Application of the Test for Certification

(a) Cause of Action

39 The principles applicable to the cause of action requirement, which are well-known and not in dispute, were recently summarized by Lax J. in *Fresco* v. *Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531, 71 C.P.C. (6th) 97 (S.C.J.):

(a) no evidence is admissible for the purposes of determining the section 5(1)(a) criterion;
(b) all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proved and thus assumed to be true;
(c) the pleading will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect;
(d) matters of law which are not fully settled by the jurisprudence must be permitted to proceed; and,
(e) the pleading must be read generously to allow for inadequacies due to drafting frailties and the plaintiff's lack of access to key documents and discovery information.

40 Certification is decidedly *not* a test of the merits of the action. The question for a judge on a certification motion is not "will it succeed as a class action?", but rather "can it *work* as a class action?"

41 George Brown acknowledges the pleadings disclose causes of action in breach of contract, negligent misrepresentation and breach of the *Consumer Protection Act, 2002*. I agree and my reasons will be brief.

42 The plaintiffs say that the description of the Program in the calendar was part of the offer of educational services made by George Brown to students, which was accepted by the Class Members and that it was a contractual term that they would obtain the Industry Designations if they completed the Program. The plaintiffs say that George Brown breached the contract by not providing the Industry Designations.

43 A number of cases have found that university calendars can be regarded as contractual documents: *Hickey-Button,* at para. 47; *Acadia University* v. *Sutcliffe,* [1978] N.S.J. No. 680, 30 N.S.R. (2d) 423 (C.A.) at para. 13; *Memorial University of Newfoundland* v. *Matthews,* [1994] N.J. No. 446 (S.C.T.D.) at para. 14; *Bell* v. *St. Thomas University,* [1992] N.B.J. No. 608, 97 D.L.R. (4th) 370 (Q.B.T.D.) at. p. 7. Claims for breach of contract were considered to have been properly pleaded in *Hickey-Button* and *Matoni v. C.B.S.* The pleading in this case discloses a cause of action for breach of contract.

44 The requirements for a claim of negligent misrepresentation were set out by the Supreme Court of Canada in *Queen* v. *Cognos Inc.*, [1993] 1 S.C.R. 87 at para. 33:

(a) there must be a duty of care based on a "special relationship" between the representor and the representee;
(b) the representation in question must be untrue, inaccurate or misleading;
(c) the representor must have acted negligently in making the representation;
(d) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and,

(e) the reliance must have been detrimental to the representee in the sense that damages resulted.

45 Similar pleadings were considered to disclose a cause of action in *Matoni v. C.B.S.* The pleadings here disclose a cause of action based on negligent misrepresentation in the calendar.

46 The plaintiffs assert that the agreement between George Brown and the Class was a "consumer transaction" within the *Consumer Protection Act, 2002* and that the statements in the brochure were false, misleading or deceptive representations, which amounted to unfair practices under that statute giving rise to a right of rescission or damages. In *Matoni v. C.B.S*, Hoy J. concluded that the plaintiffs had properly pleaded a cause of action under the *Consumer Protection Act, 2002.* The same holds true here.

(b) Identifiable Class

47 Section 5(1)(b) of the *C.P.A.* requires that there be "an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant." The purpose of the class definition is to: (a) identify those persons with a potential claim for relief against the defendant; (b) define the parameters of the lawsuit so as to identify who will be bound by its result; and (c) describe who is entitled to notice of the lawsuit: *Bywater* v. *Toronto Transit Commission*, [1998] O.J. No. 4913, 27 C.P.C. (4th) 172 (Gen. Div.) at para. 10; *Hollick,* at para. 20. Plaintiff's counsel submits that the following are the characteristics of an identifiable class:

(a) membership in the class should be determinable by objective criteria that do not depend on the outcome of the litigation: *Western Canadian Shopping Centres Inc.* v. *Bennett Jones Verchere et al.*, [2001] 2 S.C.R. 534 ("*Western Canadian*") at para. 38;
(b) the class criteria should bear a rational relationship to the common issues asserted by all class members: *Western Canadian*;
(c) the class must be bounded and not of unlimited membership: *Hollick,* at para. 17;
(d) there is a further obligation, although not onerous, to show that the class is not unnecessarily broad and could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues: *Hollick,* at paras. 20, 21;
(e) membership in a class may be defined by those who make claims in respect of a particular event or alleged wrong, without offending the rule against the class description being dependent on the outcome of the litigation: *Attis* v. *Canada (Health)*, [2007] O.J. No. 1744, 46 C.P.C. (6th) 129 (S.C.J.) at para. 56, aff'd 2008 ONCA 660, [2008] O.J. No. 3766; and
(f) a proper class definition does not need to include only those persons whose claims will be successful: *Frohlinger* v. *Nortel Networks Corporation*, [2007] O.J. No. 148, 40 C.P.C. (6th) 62 (S.C.J.) at paras. 23-28.

48 In this case, the Class is comprised of 119 students in the three classes. The names of all Class Members have been identified. The majority of the Class Members were international students and many were from China and India.

49 There is no doubt that the Class is real and existing. A group of concerned students existed prior to the commencement of this action. While George Brown has produced evidence that some

members of the proposed Class were satisfied with the education they received and have no present intention of making a claim, they will be entitled to opt out if the action is certified.

50 The proposed Class is similar to that certified in *Hickey-Button*, which Doherty J.A. described in the extract I referred to earlier as "the antithesis of an open-ended or undefined class."

51 George Brown submits that the class definition proposed by the plaintiffs is overly broad, for three reasons, which I shall deal with in the following order:

(a) the Court lacks jurisdiction over a significant number of putative Class Members and the Class includes persons who will not be bound by any result in the proceeding;
(b) the Class includes persons who failed to complete the Program, and accordingly have no claim for relief against George Brown as well as persons who do not share a connection to the common issues;
(c) the Class includes persons who may not have relied on the representations in the course calendars, and who have obtained the Industry Designations, and accordingly have no connection to the proposed common issues.

(a) The jurisdiction issue

52 George Brown submits that this action should not be certified, at least with respect to 65% of the Class who are international students, because "[The] evidence shows the proposed class action will not have preclusive effect in the countries where former international students reside." It says that this would result in procedural unfairness because international students who are not happy with the outcome in this action would have the ability to take a "second bite" at George Brown in their home countries.

53 The evidence of Mr. Kohli, George Brown's Program Advisor, is that 78 of the 119 students enrolled in the Program were international students who came from India, China, Japan, Turkey, Brazil, Russia, South Korea, Syria, Thailand, and Mexico. The largest numbers were from India (22) and China (11). George Brown has recruiting agents in many of these countries.

54 Mr. Kohli's evidence is also to the effect that many of the students in the Program chose to pursue one of the three Industry Designations and would have benefited from the Program as a result.

55 Mr. Kohli deposes that in order to assess each student's claim it will be necessary to conduct an inquiry into the student's actual knowledge about the content of the Program. The international students may have obtained information about the Program from a variety of sources, including George Brown's website, the calendar or conversations with George Brown or a recruitment agent. He says that it would also be necessary to determine each student's knowledge of the requirements of the Industry Organizations, whether the student relied on the calendar description, whether the student took steps to mitigate damages and what damages he or she actually incurred. He says that the website calendar was changed for the 2008/2009 year (i.e., before the Third Class) and that four students applied to the Program after the change in wording. Some 15 students withdrew from the Program before completing it and an additional 8 students did not graduate. He says that there were ample opportunities for the students to obtain additional information about the Program and the In-

dustry Designations, including information sessions for applicants as well as during orientation sessions at the commencement of classes and throughout the school year.

56 George Brown tenders the evidence of Shabbir Wakhariya, a lawyer practicing in India, who expresses the opinion that a judgment in a class action is not likely to preclude litigation in India if the plaintiff establishes that he or she did not receive notice of the class action and could not exercise his or her right to opt out. He expresses the opinion that, because India's rule for representative actions require a plaintiff to "opt in" an Indian court would likely conclude that it would offend natural justice to deem Indian residents to be Class Members regardless of whether they receive actual notice and would refuse to recognize a class action judgment in the absence of such notice. Mr. Wakhariya acknowledges that there is no precedent for this issue in India, one way or another.

57 In addition, Mr. Wakhariya opines that because Class Members may have received many representations, in addition to the representations in the calendar, there is a risk of multiple actions and inconsistent results. He says that the Indian judicial process is notoriously slow and lawsuits may not reach trial for 15 to 20 years. It could take many years for the Indian courts to deal with the preclusive effect of a Canadian judgment and "decades" before decisions on the merits were reached by these courts.

58 Finally, Mr. Wakhariya expresses the opinion that with a population of over a billion and no central registry of residents, it would be almost impossible to locate individual members of the Class living in India without a residence address.

59 Evidence is also given by Mr. Steve Liyun Kou, a lawyer practicing in the People's Republic of China (the "PRC"). Mr. Kou expresses the opinion that an order or judgment of a Canadian court in this proceeding would not be recognized or enforced in the PRC and would not be given preclusive effect. He states that he is not aware of any precedent in China for the enforcement of a judgment in a class proceeding.

60 George Brown does not dispute that there is a real and substantial connection between Ontario and the claims of the international students. It could hardly do so. George Brown has a real presence here, it is based here and it carries on business here. It engaged agents in the foreign jurisdictions to solicit international students to come to Ontario to go to school at George Brown. The students came to Ontario to study, resided here during their eight month course and their contracts with George Brown were performed in Ontario. There is no question that an Ontario court would have jurisdiction over a claim by an international student if brought against George Brown as an ordinary civil action. George Brown says this is not enough. It says that it is not even enough if the international students were given adequate notice of these proceedings, perhaps even individual personal notice. Mr. Kou, the expert on the law of China, expresses the opinion that the P.R.C. simply would not recognize the Court's judgment. Mr. Wakhariya, the expert in the law of India, suggests that an Indian court would only recognize this Court's judgment if the Indian Class Member received actual notice of the proceedings and an opportunity to opt out.

61 There is no evidence that any Class Member has brought an action in any jurisdiction other than Ontario. Given the evidence about the glacial pace of civil justice in India, the likelihood of an action being prosecuted in that jurisdiction seems somewhat remote. The same probably holds true in China. These comments do not dispose of the issue, of course.

62 In a typical civil action, where the defendant is a non-resident, the court is required to consider whether there is a "real and substantial connection" between the defendant and the jurisdiction. The

test has recently been re-formulated by the Court of Appeal in *Van Breda v. Village Resorts Ltd.*, 2010 ONCA 84, [2010] O.J. No. 402 ("*Van Breda*"). In that case, the Court of Appeal simplified the test that it had previously articulated in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.). The focus remains on the connections of the defendant to the forum and the connection of the plaintiff's claim to the forum. If the case falls within one of the sub-rules in 17.02 of the *Rules of Civil Procedure* (other than sub-rule (h), "damage sustained in Ontario" and sub-rule (o), "necessary and proper party"), jurisdiction will be presumed to exist.

63 In a class action that involves non-residents, a further question arises, namely whether the court has jurisdiction over the claims of class members who are outside the jurisdiction. This is important, because in Ontario's opt-out regime, a judgment in a class action will bind all members of the class and will prevent them from suing for the same relief in Ontario or any other jurisdiction, assuming that a foreign court will respect and enforce the judgment of the Ontario court. It thus becomes necessary to determine the conditions under which an Ontario court can assume jurisdiction over non-resident class members. While national or international classes have been approved in several decisions of this court (see, for example: *Robertson v. The Thompson Corporation* (1999), 43 O.R. (3d) 161, [1999] O.J. No. 280 (S.C.J.); *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173, [1999] O.J. No. 1662 (S.C.J.); *Wilson v. Servier* (2000), 50 O.R. (3d) 219, [2000] O.J. No. 3392 (S.C.J.); *Silver v. Imax Corp.*, [2009] O.J. No. 5585), this appears to be the first case in which evidence has actually been submitted asserting that the court's judgment would lack preclusive effect in a foreign jurisdiction. Fortunately, there is considerable guidance to be found in the decision of the Court of Appeal in *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321, [2005] O.J. No. 506 (C.A.) ("*Currie*"), to which I shall refer in a moment.

64 Counsel for George Brown relies on the decision of the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye,* [1990] 3 S.C.R. 1077, [1990] S.C.J. No. 135 ("*Morguard*"), stating in his factum that " ... jurisdiction follows recognition. Recognition and enforcement of an Ontario judgment in foreign jurisdictions is not solely an issue for foreign courts, as has previously been held, but it is an important consideration for Ontario Courts at the outset of the proceeding." (relying also on *Robertson v. Thompson Corp.*, above, at para. 48 and *Nantias v. Teletronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331, [1995] O.J. No. 2592 (Gen. Div.)).

65 In *Morguard,* the Supreme Court noted the private international law rule that there be a "substantial connection" with the forum before a court exercises jurisdiction over the case and that where such connection exists the courts of other jurisdictions will recognize the judgment of the forum. The Supreme Court held that the same general principle applies to the recognition by the courts of one province of the judgment of a court of a sister province. While the Supreme Court said that the exercise of jurisdiction and recognition can be regarded as "correlative" (paras. 26 and 42), it did so in the context of emphasizing that the court exercising jurisdiction must have regard to the principles of "order and fairness," including "acting through fair process and with properly restrained jurisdiction." (at para. 42). I do not read *Morguard* as stating that "jurisdiction follows recognition." If it were true that "jurisdiction follows recognition," Ontario courts would be deprived of jurisdiction in cases where there is an obvious real and substantial connection to Ontario. The defendant could simply point to another country that would not recognize a potential judgment in order to oust the court's jurisdiction, regardless of the unreasonableness of that refusal. This is clearly not what the Supreme Court intended. I regard the quoted passage as affirming that if a court exercises jurisdiction over non-residents based on a real and substantial connection, and does so having regard to order and fairness, its decision ought to be respected and enforced in other jurisdictions,

both as a matter of private international law and, in the case of the decisions of courts of other provinces, Canadian constitutional law.

66 The issue of the enforcement of a foreign class action judgment in Ontario was addressed by the Court of Appeal in *Currie.* In that case, the court refused to give preclusive effect to a judgment implementing a settlement of a class action suit in Illinois, which purported to bind Canadian and other international class members who had not opted out. The court held that before enforcing a foreign class action judgment, it is necessary to consider whether the foreign court had an appropriate basis for assuming jurisdiction and whether the rights of Ontario residents were adequately protected.

67 Sharpe J.A., who gave the judgment of the Court, noted at para.15. that there are strong policy reasons favouring the fair and efficient resolution of interprovincial and international class action litigation and this requires courts to recognize class action judgments that are based on the proper exercise of jurisdiction. He observed, however, that class actions have unique features, one of which is the involvement of the "unnamed, non-resident class plaintiff" who, unlike the plaintiff in a typical lawsuit, does not come to Ontario asking for access to our courts and thereby attorning to our courts' jurisdiction. Sharpe J.A. suggested that a court considering the enforcement of a foreign class action judgment must look to the real and substantial connection test and the principles of order and fairness from the perspective of the party against whom enforcement is sought - i.e., the absentee plaintiff. One aspect of this analysis would be to examine whether it would be reasonable for that person to expect that his or her rights would be determined by the foreign court. He gave the example of an Ontario resident who engages in a cross-border transaction, such as buying goods from a foreign mail order merchant or purchasing securities over a foreign stock exchange - that person might reasonably expect that claims in relation to those transactions could be litigated in the foreign jurisdiction. Where there is no such contact between the plaintiff and the foreign jurisdiction, the court must nonetheless look to whether there is a real and substantial connection between the subject matter of the class action litigation and the foreign jurisdiction. In the case before the Court of Appeal, McDonald's had its head office in Illinois and the allegedly wrongful activity occurred in the United States. Sharpe J.A. referred to the observations of Cumming J. in *Wilson v. Servier*, above, that Ontario courts have certified national class actions "if there is a real and substantial connection between the subject-matter of the action and Ontario" in the expectation that "other jurisdictions on the basis of comity should recognize the Ontario judgment" (at para. 22).

68 Another aspect of the analysis is to examine whether the procedures adopted in the "foreign" jurisdiction were:

> ... sufficiently attentive to the rights and interests of the unnamed non-resident class members. Respect for procedural rights, including the adequacy of representation, the adequacy of notice and the right to opt out, could fortify the connection with [the foreign] jurisdiction and alleviate concerns regarding unfairness. [at para. 25]

69 In the context of the case before him, Sharpe J.A. stated, at para. 25:

> Given the substantial connection between the alleged wrong and Illinois, and given the small stake of each individual class member, it seems to me that the principles of order and fairness could be satisfied if the interests of the non-

> resident class members were adequately represented and if it were clearly brought home to them that their rights could be affected in the foreign proceedings if they failed to take appropriate steps to be removed from those proceedings. (at para. 25)

70 He concluded, at para. 30, that a three part test should apply to the recognition of a foreign class action judgment:

> In my view, provided (a) there is a real and substantial connection linking the cause of action to the foreign jurisdiction, (b) the rights of non-resident class members are adequately represented, and (c) non-resident class members are accorded procedural fairness including adequate notice, it may be appropriate to attach jurisdictional consequences to an unnamed plaintiff's failure to opt out. In those circumstances, failure to opt out may be regarded as a form of passive attornment sufficient to support the jurisdiction of the foreign court. I would add two qualifications: First, as stated by LaForest J. in *Hunt v. T & N plc.*, [1993] 4 S.C.R. 289, above at p. 325, "the exact limits of what constitutes a reasonable assumption of jurisdiction" cannot be rigidly defined and "no test can perhaps ever be rigidly applied" as "no court has ever been able to anticipate" all possibilities. Second, it may be easier to justify the assumption of jurisdiction in interprovincial cases than in international cases: see *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 at paras. 95-100 (C.A.).

71 In this case, looked at from the perspective of both the international students and George Brown, there would be every reason for both to expect that claims arising from their relationship would be litigated in Ontario. Given that George Brown is based in Ontario, the students came to college in Ontario and lived in Ontario, and the contract was performed in Ontario, it is hard to imagine that either party would have contemplated that George Brown would be sued in China, India or any one of the other foreign jurisdictions if the relationship broke down. There is, in any event, a real and substantial connection with Ontario and there is no such connection with any other single jurisdiction. The second factor, respect for procedural rights, including adequate representation of non-resident Class Members, is an issue that must be addressed and I will deal with it under the question of the representative plaintiffs and the litigation plan. The notice aspect of procedural fairness can also be addressed in dealing with the litigation plan.

72 I do not accept the proposition that procedural fairness in this case requires satisfying myself beyond any doubt that each member of the Class will receive actual notice of the action and of his or her right to opt out. This is not a requisite of a purely provincial or interprovincial class action and it could make effective international class actions a practical impossibility. Nor do I accept the proposition that the court should not exercise jurisdiction over non-resident class members where there is evidence that a particular foreign jurisdiction might not recognize a class action judgment either altogether (as is said to be the case in China) or in the absence of actual notice (as is said to be the case in India). The hypothetical failure of another state to observe the generally accepted principles of private international law in connection with the assumption of jurisdiction and the recognition of foreign judgments should not preclude an Ontario court from taking jurisdiction in a class action involving its residents, provided the conditions set out in *Currie* are met: see the observations of Cumming J. in *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219, [2000] O.J. No. 3392 at para. 28, leave to appeal refused (2000), 52 O.R. (3d) 20 (Div. Ct.), app. for leave to appeal

dismissed, [2001] S.C.C.A. No. 88; see also *Wilson v. Servier Canada Inc.* (2003), 119 A.C.W.S. (3d) 915, [2003] O.J. No. 157 (S.C.J.) at para. 22. Nor should another state's views of the requirements of natural justice (particularly in the context of what appears to be a "representative action" regime as opposed to a true class action regime) be allowed to dictate what is required for procedural fairness in an Ontario class action.

73 I should add that, based on Mr. Wakhariya's evidence concerning the Indian system of civil justice, where it is said that proceedings can take 15 to 20 years if not "decades", it seems highly unlikely that a disgruntled class member would sue George Brown in India in any event. Nor should we assume that an Indian court will not ultimately recognize a decision in a foreign opt-out class action, made on appropriate jurisdictional grounds, and giving due regard to considerations of order, fairness and comity. An unanswered question, and one that would be particularly relevant to many inter-jurisdictional class actions, is whether an Indian (or Chinese) court would even take jurisdiction over the plaintiff's claim, given the factual nexus between that claim and Ontario. If an Indian court would not accept jurisdiction, then it matters not whether India would recognize the binding effect of an Ontario judgment on an Indian class member as the effect would be the same in either case.

74 I was referred to an interesting article by John P. Brown, "Seeking Recognition of Canadian Class Action Judgments in Foreign Jurisdictions: Perils and Pitfalls" (Mar. 2008), 4 Can. Class Action Rev. 220-257, which addresses a serious concern that some countries, particularly some European countries, may not recognize and enforce Canadian class action judgments. The author notes that this may be a particular concern for defendants who settle such actions, only to find that they can be successfully sued in foreign jurisdictions because those courts will not recognize the decision. He notes that some European countries take the view that opt-out class actions violate fundamental principles of consent and "violate the principle that one should only become a claimant by asking to bring a claim and not by remaining silent" (p. 221).

75 Mr. Brown's article contains the following suggestion, at p. 235:

> Canadian courts should be slow to certify worldwide classes. Jurisdiction should take into account recognition. Purporting to assume jurisdiction over proposed foreign class members, without considering whether the resulting judgment will be recognized for the benefit of, or against, a foreign class member outside of Canada, will lead to uncertainty and conflicting decisions. By any measure this is not in the best interests of the class. Nor, ultimately, is it in the interests of any of the other parties to the action.

76 The article commends the draft *Guidelines for Recognizing and Enforcing Foreign Judgments for Collective Redress* (the "Guidelines"), developed by a task force of the Consumer Litigation Committee of the International Bar Association, and released in October, 2007. Mr. Brown was the chair of that task force. Chief Justice Winkler and two Ontario lawyers were members of the eight person working group.

77 Counsel for George Brown submits that certification of a class that includes non-residents in this case would not meet the requirements of the Guidelines. While the Guidelines are in draft form for discussion purposes only, they are clearly the product of careful thought. They have, perhaps not surprisingly considering the composition of the task force, a strong Ontario flavour. I have attached

the articles of the Guidelines, without the commentary, as an appendix to these reasons. They are obviously a very useful contribution to the debate of these issues.

78 The Guidelines stress, as does *Currie*, the importance of procedural fairness to absent claimants in opt-out jurisdictions. Article 4.04 points to the need to give individual notice by direct mail or similar means "wherever practical."

79 George Brown relies on Article I of the Guidelines, the full text of which is as follows:

> Article 1 Jurisdiction
>
> 1.01 It is appropriate for a court issuing a judgment for collective redress to have assumed jurisdiction to do so provided that, in addition to existing rules for recognition and enforcement, it was reasonable for the court to expect that its judgment would be granted preclusive effect by the jurisdictions in which claimants not specifically named in the proceedings would ordinarily seek redress.
>
> 1.02 It is reasonable for a court issuing a collective redress judgment to expect its judgment to be given preclusive effect in respect of Absent Claimants by the jurisdictions in which the Absent Claimants reside if:
>
> (i) the results obtained for Absent Claimants are not patently inadequate in the circumstances
> (ii) the interests of Absent Claimants have been adequately represented;
>
> and
>
> (iii) absent Claimants have been given adequate notice of the proceedings and an opportunity to opt out.
>
> 1.03 When there are multiple fora which are otherwise appropriate jurisdictions for a collective redress action, the forum or fora in the best position to process claims from an administrative standpoint, to have access to evidence and witnesses, and to facilitate adequate representation of the claimants and other parties should assume jurisdiction. Multi-jurisdictional court to court communication and cooperation should be implemented as needed for this purpose.

80 Relying on Article 1.01, George Brown says that the court should not assume jurisdiction over international students, at least those in India and the PRC, because the evidence "establishes that it is not reasonable for the court to expect that its judgment would be granted preclusive effect by Courts in India and the PRC." Moreover, it says that the plaintiffs have failed to demonstrate that the rights of non-resident Class Members will be adequately represented and that they will be accorded procedural fairness.

81 The Guidelines were adopted by the International Bar Association in October 2008, more than three years after the Court of Appeal's decision in *Currie*. There is nothing in them, in my respectful view, at odds with *Currie*, which is, of course, binding on me.

82 Article 1.01 asks the court to consider whether it is reasonable to expect that its judgment would be given preclusive effect by jurisdictions in which foreign class members "would ordinarily seek redress." It is interesting to note that the article uses the words "would ordinary seek redress" as opposed to the words "jurisdictions in which the absent claimants reside," which is used in Article 1.02. It seems to me that this requires that one ask, not "where do the absent class members reside?", but rather "where would the absent class members ordinarily seek redress?" It is far more likely that foreign Class Members would ordinarily seek redress against George Brown in Canada (where George Brown is located, where they attended school and where the contract was performed), rather than in their homelands.

83 The Guidelines suggest, in Article 1.02, that the test is an objective one of the certifying court's reasonable expectations of preclusivity, provided the results are not "patently inadequate" and proper representation and procedural fairness have been observed. If these have been provided, and the court has properly assumed jurisdiction under articles 1.01 and 1.03, then the certifying court can reasonably expect that other courts, including the court in the jurisdiction where absent class members reside, will recognize and give preclusive effect to its judgment. This, moreover, is in-keeping with my interpretation of the ratio in *Morguard* on this issue, namely that the court can reasonably expect other countries to give effect to its judgments where it has a real and substantial connection to the subject matter of the litigation and gives regard to concerns of order and fairness.

84 It is clear from the evidence of George Brown's experts in foreign law that there is no legal precedent, in either India or the PRC, for the recognition, or non-recognition of the class action decisions of the courts of other jurisdictions. If the Guidelines are intended, as they say they are, to state "minimum internationally accepted standards" to be followed by courts issuing judgments in class proceedings, and to be considered by courts of other jurisdictions in determining whether such judgments will be recognized, why should I assume that the courts of India, of the PRC, or of any other jurisdiction will refuse to observe those minimum standards? To echo the observations of Cumming J. in *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219, [2000] O.J. No. 3392, referred to above, at para. 28, if this court properly has jurisdiction over absent plaintiffs and the defendants, why should it decline to hear the case because another jurisdiction refuses to accede to the accepted norms of international law and, in particular, the principle of comity?

85 George Brown refers to the decision of the United States District Court in *In re: Alstom S.A. Securities Litigation*, 253 F.R.D. 266 (S.D.N.Y. 2008) in which the plaintiff sought to certify the claims of a class of persons who purchased the shares in the United States as well as all U.S., Canadian, French, English or Dutch persons or entities who purchased or otherwise acquired Alstom securities in foreign markets. The Court declined to certify a class including French persons because it found that the plaintiff had failed to demonstrate that French courts would more likely than not recognize and give preclusive effect to the court's judgment. That decision was distinguished and not followed in a subsequent decision of the same court: *In re: Vivendi Universal, S.A. Securities Litigation*, 2009 W.L. 855799 (S.D.N.Y.), a securities fraud class action. In so doing, the court noted the difficulty in determining, before the fact, the preclusive effect of its judgment in another jurisdiction and declined to speculate on how French law might develop or might regard the notice given to class members. It concluded, at p. 16:

> As a result, Rule 23 [of the *Federal Rules of Civil Procedure*] requires only that the Court make a reasoned prediction as to the likely preclusive effect of its judgment on absent class members and evaluate the risk of non-recognition to-

gether with all factors relevant to determining whether a class action is superior to other available methods for adjudicating the controversy.

86 In evaluating the risk of non-recognition in India and China, I observe that George Brown essentially says that I should not certify a class that includes members from China and India because of the cumulative effect of the following risks:

* a particular Class Member does not opt-out;
* the claim is ultimately decided in favour of George Brown or in some other manner adverse to that Class Member;
* the Class Member commences legal action in his or her homeland;
* the court in the homeland takes jurisdiction;
* the court of the homeland declines to give preclusive effect to a judgment of this court, granted on the basis of internationally-accepted jurisdictional foundations, with appropriate protection of the rights of non-residents; and
* the claim is decided against George Brown by the court of the homeland.

87 Applying the approach of *Vivendi*, it seems to me that the cumulative effect of these risks, while not zero, is insufficient to outweigh the many good reasons why the court can and should take jurisdiction, including the evidence that it is the only realistic way to provide access to justice for many international Class Members. Applying the approach of *Morguard, Wilson v. Servier,* and the International Bar Association *Guidelines*, as long as this Court follows international norms for taking jurisdiction, and is concerned for order and fairness, it is entitled to expect that other countries will recognize its orders. In this case, the jurisdictional factors almost exclusively point to Ontario, and it is unlikely that any Class Member would commence a proceeding in any other jurisdiction. It is appropriate for this Court to take jurisdiction over non-resident Class Members in these circumstances, particularly where the Class Members are as easily identifiable as in this case. It is a separate concern, however, whether the Class is defined too broadly for the common issues.

(b) Overbroad class

88 George Brown's second objection to the class definition centres around the complaint that the Class is too broad because it includes members who do not share the common issues.

89 First, George Brown says that 23 of the putative Class Members either withdrew from the Program or failed to graduate from the Program and they therefore have no cause of action, presumably because they suffered no damages: *Mouhteros v. DeVry,* above, at para. 18, *Dumoulin v. Ontario*, [2005] O.J. No. 3961, 19 C.P.C. (6th) 234 (S.C.J.) at paras. 13-14. George Brown submits that there is no evidence that any of these students withdrew from the Program or failed to graduate for any reason relating to the Industry Designations.

90 The fact that a Class Member may ultimately not succeed in establishing damages is not a ground for refusing to include him or her in the Class. Class Members may have withdrawn from the Program for a variety of reasons, including the realization that they would not receive an Industry Designation on graduation. This appears to have been the case with a number of members who were included in the class in *Matoni v. C.B.S.*, above, at para. 90. Class Members in this case should be given an opportunity to prove the reasons for their failure to complete the Program.

91 George Brown also says that some of the putative Class Members have no connection to at least some of the common issues because:

* 42 obtained the CIFF designation;
* 25 obtained a FITT equivalency transcript;
* 3 have obtained the FITT Diploma; and
* 1 has obtained the CITP designation.

92 The fact that some Class Members ultimately attained one of the Industry Designations, by whatever means and at whatever cost, goes only to the damages that he or she sustained.

93 George Brown says that the four students who enrolled in the Program after the website was corrected in 2008 should be excluded from the Class. The Plaintiffs' answer is that (a) there is no evidence that those students saw the web-site or that this corrected the previous misrepresentation, which had remained in the printed copy of the calendar in any event; and (b) the fact that some members of the Class may not have a claim is not fatal to the Class definition. I agree.

94 Finally, George Brown says that the Class includes people who did not rely on the representation in the calendar, either because they were not aware of the representation or because they obtained the correct information through other sources. It says the proposed Class definition is not rationally connected to the proposed common issues.

95 As Cullity J. noted in *Taylor v. Canada (Minister of Health)*, [2007] O.J. No. 3312, 285 D.L.R. (4th) 296 (S.C.J.) at para. 62, the possibility that some class members will be unable to prove damages is a necessary result of the requirement that the class definition cannot be merits-based.

96 In summary, then, I find the Class definition acceptable.

(c) Common Issues

97 The common issues are at the core of a class action. It is through the resolution of the common issues that a class action achieves the goals of access to justice, judicial efficiency and behavior modification. The principles applicable to the common issues analysis are well-established and not in dispute. The plaintiff puts forward the following general principles:

(a) the *CPA*'s common issues requirement is a "low bar": *2038724 Ontario Ltd* v. *Quizno's Canada Restaurant Corp.* (2009), 96 O.R. (3d) 252, [2009] O.J. No. 1874 (Div. Ct.) at para. 31;
(b) common issues need not determine liability and need only be issues of fact or law which will move the litigation forward and avoid duplication: *Quiznos*;
(c) it is not essential that the class members' claims be identical or even that the common issues predominate over non-common issues, but only that the claims share a "substantial common ingredient": *Western Canadian,* at para. 39;
(d) the fact that there may remain substantial individual issues after the resolution of the common issues does not preclude certification: *Cloud,* at para. 53;
(e) a purposive approach is to be taken when analyzing common issues. The underlying question is whether allowing the action to proceed as a class action will avoid duplication of fact-finding or legal analysis;

(f) an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim;
(g) it is not essential that the class members be identically situated with respect to the opposing party;
(h) it is not necessary that the resolution of the common issues would be determinative of each class member's claim. *Western Canadian,* at para. 39.

98 In *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, [2010] O.J. No. 113, I set out the following propositions about the common issues analysis:

> A: The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 39.
>
> B: The common issue criterion is not a high legal hurdle, and an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud v. Canada (Attorney General)*, above, at para. 53.
>
> C: There must be a basis in the evidence before the court to establish the existence of common issues: *Dumoulin v. Ontario*, above, at para. 25; *Fresco v. Canadian Imperial Bank of Commerce,* above, at para. 21. As Cullity J. stated in *Dumoulin v. Ontario*, at para. 27, the plaintiff is required to establish "a sufficient evidential basis for the existence of the common issues" in the sense that there is some factual basis for the claims made by the plaintiff and to which the common issues relate.
>
> D: In considering whether there are common issues, the court must have in mind the proposed identifiable class. There must be a rational relationship between the class identified by the Plaintiff and the proposed common issues: *Cloud v. Canada (Attorney General)*, above at para. 48.
>
> E: The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim: *Hollick v. Toronto (City),* above, at para. 18.
>
> F: A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: *Harrington v. Dow Corning Corp.*, [1996] B.C.J. No. 734, 48 C.P.C. (3d) 28 (S.C.), aff'd 2000 BCCA 605, [2000] B.C.J. No. 2237, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.
>
> G: With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: *Western Cana-*

dian Shopping Centres Inc. v. Dutton, above, at para. 40, *Ernewein v. General Motors of Canada Ltd.*, [2005] B.C.J. No. 2370, above, at para. 32; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43, [2009] S.J. No. 179 (C.A.), at paras. 145-146 and 160.

H: A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant: *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54, [2000] O.J. No. 3821 (S.C.J.) at para. 39, aff'd [2001] O.J. No. 4952, 17 C.P.C. (5th) 103 (Div. Ct.), aff'd [2003] O.J. No. 1160 and 1161 (C.A.); *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110, 27 C.P.C. (5th) 155, (S.C.J.), aff'd [2003] O.J. No. 3918, 39 C.P.C. (5th) 151 (Div. Ct.).

I: Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis: *Chadha v. Bayer Inc.*, [2003] O.J. No. 27, 2003 CanLII 35843 (C.A.) at para. 52, leave to appeal dismissed [2003] S.C.C.A. No. 106, and *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575, [2008] B.C.J. No. 831 (S.C.) at para. 139.

J: Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient": *Rumley v. British Columbia,* [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39 at para. 29.

99 The plaintiff has set out fifteen common issues, which are grouped in relation to the three causes of action asserted, damages and administration of the claim. I will discuss these in turn.

Negligent Misrepresentation

100 The proposed common issues are:

1. Was George Brown in a special relationship with the Class Members?
2. Did George Brown make representations to the Class Members that it would provide the Class Members with the opportunity to complete the three Industry Designations in addition to the George Brown College Graduate Certificate?
3. If such representations were made, were they untrue, inaccurate or misleading? If so, was George Brown negligent in making the representations?

101 The plaintiff in this case relies on a single representation that is in written form (in the calendar and on the web). It is reasonable to conclude that, being contained in the course calendar, it was likely communicated to every member of the Class. Most students would read the calendar description. The prominence given to the Industry Designations in the calendar would suggest that it was a significant representation. The evidence before me supports this conclusion.

102 The representation common issues have been carefully tailored and are very similar to those identified by Doherty J.A. in *Hickey-Button,* at para. 44. These issues are substantial ingredients of each Class Member's claim and their resolution would advance the claims of all members of the Class.

103 While I expect that each Class Member would have to establish that he or she was aware of the alleged misrepresentation and relied on it in enrolling in the Program, as a condition of recovery under this cause of action, the importance of the calendar as a contractual document, and of the Industry Designations to most students enrolling in the Program, could give rise to a presumption of reasonable reliance. For this reason, and because the same representation was made to all Class Members, this case is at the positive end of the spectrum of misrepresentation cases that are appropriate for certification. As Cullity J. noted in *Murphy v. BDO Dunwoody LLP* (2006), 32 C.P.C. (6th) 358, [2006] O.J. No. 2729, single misrepresentations will be more amendable to certification than those in which there are multiple statements made in different forms over a lengthy time period. This case is not dissimilar to *Lewis v. Cantertrot Investments Ltd.* (2005), 24 C.P.C. (6th) 40, [2005] O.J. No. 3535 (S.C.J.) in which Cullity J. certified a class action brought on behalf of some 120 condominium unit owners, alleging that the condominium declaration, the budget and a sales flyer provided to buyers prior to purchase contained misrepresentations about monthly assessment and maintenance fees. It was acknowledged that the questions of reasonable reliance would have to be dealt with on an individual basis, but that did not detract from the fact that the resolution of the common issues would advance the claim of every class member. Here, as in that case, the representations were made in documentary form, were uniform in their nature, were likely provided to all Class Members, and were of a kind that were likely to have had some impact on the decision-making of the Class Members. These circumstances make this case particularly appropriate for certification.

104 In reaching this conclusion, I have taken into account the submission of counsel for George Brown that some students may have obtained information about the Industry Designations from other sources, including the Industry Associations, discussions with George Brown and information sessions that were held with students at the beginning of each session. This could be said in almost every case involving misrepresentation. It is not necessary that a common issue resolves the class members' claims, provided it advances the resolution. That is the case here. In this regard, the observations of the Divisional Court in *Canadian Imperial Bank of Commerce v. Deloitte & Touche* (2003), 172 O.A.C. 59, [2003] O.J. No. 2069, at para. 35 are particularly apt:

> ... even though reliance and causation are significant individual issues, that does not preclude the certification of a class proceeding, as determined in cases such as *Western Canadian Shopping Centres*, supra, and *Carom v. Bre-X Minerals Ltd.* (C.A.), supra at 252, 255, [2000] O.J. No. 4014. Unlike *Bre-X*, this is not a case where there were many representations to many parties over a long period of time. Even though reliance was a significant individual issue there, a class proceeding was still certified. Here, there are two sets of representations found in the two financial statements. While the reliance of each Original Lender on those representations will have to be determined at some point, it will only be after a determination of significant common issues with respect to liability - particularly the existence of a duty of care to the Original Lenders, the standard of care for

auditors, the determination whether there were material misstatements in the financial statements, and whether the misstatements were made negligently or recklessly. All of these are significant common issues, requiring extensive documentary and oral evidence and, with respect to the standard of care issues, expert evidence. There are other common issues as well, including elements of damages and champerty and maintenance. Resolution of these issues is very important to the course of the litigation, as success in respect of the common issues will significantly advance the litigation for the proposed class members, while if those issues are decided in favour of the defendants, the litigation will come to an end.

Consumer Protection Act, 2002

105 The proposed common issues are:

4. Did George Brown breach Part III of the *Consumer Protection Act?*
5. If so, what remedy, if any, are the Class Members entitled to under the *Act*?
6. Does the Class, or any portion thereof, require, and is it entitled to, a declaration waiving the notice provisions of section 18 of the *Consumer Protection Act*?

106 Part III of the *Consumer Protection Act, 2002* prohibits "unfair practices", which include false, misleading or deceptive representations (s. 14(1), (2)). The statute provides that any agreement entered into by a consumer after a person has engaged in an unfair practice may be rescinded and the consumer is entitled to damages (s. 18(1)). Where rescission is not possible, the consumer is entitled to recover the amount by which the consumer's costs of the goods or services exceeds the value of the goods or services to the consumer as well as damages (s. 18(2)). The Court may award exemplary or punitive damages in addition to any other remedy (s. 18(11)).

107 The consumer is required to give notice within one year of entering into agreement, prior to the commencement of the action, if he or she is seeking the remedy of rescission or damages *in lieu* (s. 18(3)). The court may disregard this requirement "if it is in the interest of justice to do so" (s. 18(15)).

108 As Hoy J. noted in *Matoni v. C.B.S.*, at para. 149, the determination of whether a representation is false, misleading or deceptive can be made on an objective basis. Moreover, a consumer invoking s. 18 of the *Consumer Protection Act, 2002* does not have to establish that he or she relied on the representation or was induced to enter the contract based on the representation (see *Matoni v. C.B.S.*, at para. 155).

109 The common issues proposed by the plaintiff under the *Consumer Protection Act, 2002* in this case are, for all practical purposes, identical to those certified by Hoy J. in *Matoni v. C.B.S.* As in that case, the determination of common issue 4, asking whether George Brown breached the statute by engaging in unfair practices, raises common issues of fact and law. So too does common issue 5 dealing with remedies. While rescission might not be available to students who completed the course, it could be available to those who withdrew. Common issue 6 raises the issue of whether notice can be waived in the circumstances and whether the notice given by the plaintiff can be given on behalf of the Class.

110 The common issues under this heading are ideally suited for resolution on a class-wide basis. While the damages suffered by each student pursuant to s. 18(2) *may* have to be determined on an individual basis, this is not a bar to certification: see *C.P.A.* s. 6(1).

111 George Brown suggests that the *Consumer Protection Act, 2002* is not applicable to non-resident plaintiffs, but s. 2 provides that the act applies to a consumer transaction if the consumer "or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place." It is obvious that George Brown is located in Ontario and that the contract was performed in Ontario.

Breach of Contract

112 These common issues ask:

7. Was the relationship between George Brown and the Class Members a contractual relationship?
8. If the answer to question #7 is yes, did the contract include a term by which George Brown agreed to provide the Class Members with the opportunity to complete the three Industry Designations in addition to the George Brown College Graduate Certificate?
9. If the answer to question #8 is yes, did George Brown breach that contract?

113 The contractual common issues are very similar to those identified by Doherty J.A. in *Hickey-Button,* at para. 41. As in that case, their resolution is central to the claim of the Class. As Doherty J.A. noted in that case at para. 42, proof of reliance is not required in the contract claim. These common issues are appropriate for certification.

Damages

114 The proposed common issues are:

10. Are the Class Members entitled to damages?
11. If so, do such damages include:

    (a) the cost of tuition, English as a second language ("ESL") course and exam fees, books, travel, accommodation, living expenses, visa fees and immigration consultant fees;
    (b) loss of income;
    (c) delayed entry to the workplace;
    (d) loss of competitive advantage;
    (e) the cost of additional Industry Association fees for courses and examinations; and/or
    (f) costs incurred to adjust, extend or renew visas for residency, study and work in Canada?

12. If so, can damages be determined on an aggregate basis on behalf of the Class? If so, what is the quantum of those damages?
13. Is George Brown's conduct deserving of punitive or exemplary damages?

115 In my view, these common issues are not appropriate for certification primarily because they are not capable of resolution on a common basis. There is no value in the certification of common issue 10, which simply asks whether the plaintiffs are entitled to damages. This issue offends the rule against stating issues in the most general terms: *Rumley v. British Columbia,* above, at para. 29. If George Brown is liable for breach of contract or breach of the *Consumer Protection Act*, then it is *prima facie* liable for damages, although the damages may be purely nominal in some cases. Answering the question does nothing to advance the resolution of the claims of the Class as it will be necessary to examine the circumstances of each Class Member to determine whether he or she sustained damages.

116 With respect to common issue 11, the plaintiffs say that damages incurred by Class Members could include such things as tuition fees, loss of income, the costs of memberships in the Industry Associations and the other items identified under this heading. In the case of international students, additional costs such as visas, travel costs and increased tuition costs could have been incurred. All this may be true, but I do not see how the entitlement to particular heads of damage can be determined in common for all Class Members. The circumstances of each individual will have to be examined to determine the damages that are reasonably recoverable as a result of the breach of contract, misrepresentation or statutory breach.

117 Section 18(2) of the *Consumer Protection Act, 2002* provides that where an agreement has been entered into after a person has engaged in an unfair practice, it may be rescinded but where rescission is not possible the consumer "is entitled to recover the amount by which the consumer's payment under the agreement exceeds the value that the goods or services have to the consumer, or to recover damages, or both ... [emphasis added]." I do not see how the value of the services to the consumer can be determined except by individual inquiry. The inability to acquire the Industry Designations will have different values for different students, depending on their particular career goals, experience and objectives.

118 Although aggregate damages have been stated as a common issue in some cases, it is not necessary to do so because the trial judge has jurisdiction to do so where it is found that the conditions in s. 24(1) have been satisfied: *Healey v. Lakeridge Health Corp.* (2006), 38 C.P.C. (6th) 145, [2006] O.J. No. 4277 (S.C.J.) at para. 102; *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para. 59. That section provides:

> The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

119 In *Markson v. MBNA Canada Bank* the Court of Appeal found that an aggregate assessment of damages would overcome the difficulty of identifying which members of the class had suffered damages as a result of the defendant's conduct. It determined that, due to the importance of the issue, it should be stated as a common issue (at para. 59).

120 I am not at all satisfied that it is appropriate to state a common issue of aggregate assessment in this case and as it is not necessary, I do not propose to do so. It can properly be left to the trial judge.

121 The plaintiff also puts forward the entitlement to punitive damages as a common issue. It may be appropriate to award punitive damages where the conduct of defendant is aimed at the class as a whole: *Robinson v. Medtronic Inc.*, [2009] O.J. No. 4366 (S.C.J.) In this case, however, it will only be possible to assess the defendant's liability for punitive damages after individual assessments of damages have been made. The punitive damages claim is not appropriate as a common issue.

Administration/Interest

122 These questions are:

> 14. Should George Brown pay the costs of administering and distributing any recovery? If so, in what amount?
> 15. Should George Brown be ordered to pay prejudgment interest? If so, how is prejudgment interest to be calculated and what interest rate will apply?

123 It is not necessary to have a common issue such as question 14, dealing with the administration of recovery. There is authority under s. 12 and s. 25(2) of the *C.P.A.* to give directions concerning the resolution of the issues remaining after the determination of common issues in favour of the class.

124 A common issue as to prejudgment interest was certified in *Bondy v. Toshiba of Canada Ltd.* (2007), 39 C.P.C. (6th) 339, [2007] O.J. No. 784 at paras. 54-56. Other cases have also done so: *Barbour v. University of British Columbia*, 2007 BCSC 800, [2007] B.C.J. No. 1216; *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (S.C.J.); *Robinson v. Medtronic Inc.*, above; *Smith v. National Money Mart Co.*, [2007] O.J. No. 46, 37 C.P.C. (6th) 171 (S.C.J.). As individual trials will likely be required to assess damages in this case, prejudgment interest is not an appropriate common issue: see *Fischer v. IC Investment*, 2010 ONSC 296, [2010] O.J. No. 112 at para. 193.

(d) Preferable Procedure

125 Section 5(1)(d) of the *C.P.A.* requires the court to consider whether a class proceeding would be the preferable procedure for the resolution of the common issues. In *Markson v. MBNA Canada Bank,* above, Rosenberg J.A. summarized the approach to this question, at paras. 69 -70:

> (1) The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;
> (2) "Preferable" is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and,
> (3) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.

> As I read the cases from the Supreme Court of Canada and appellate and trial courts, these principles do not result in separate inquiries. Rather, the inquiry into the questions of judicial economy, access to justice and behaviour modification can only be answered by considering the context, the other available procedures and, in short, whether a class proceeding is a fair, efficient and manageable method of advancing the claim.

126 As was stated in *Pearson,* at para. 67: "[T]he preferability requirement can be met even where there are substantial individual issues; the common issues need not predominate over the individual issues."

127 George Brown raises three principal arguments under the preferable procedure heading. First, it says that when international students are excluded, the class is small enough that joinder under Rule 5.02 of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194, would be more practical and manageable than a class action. Second, it says that there are numerous individual issues that will "overwhelm" the common issues. Third, and as an alternative, it suggests that if the action is certified, the proceedings should be "bifurcated" and the individual issues should be considered ahead of the common issues. I will examine each of these arguments in turn.

(a) Joinder

128 George Brown's proposal for joinder is based on the proposition that, after the international students are excluded from the Class, its size would be small enough to warrant joinder of plaintiffs under Rule 5.02 of the *Rules of Civil Procedure*: *Western Canadian Shopping Centres Inc. v. Dutton*, at paras. 42, 59; *Nieberg (Litigation Guardian of) v. Simcoe County District School Board* (2004), 48 C.P.C. (5th) 164, [2004] O.J. No. 2524 (S.C.J.) at paras. 49-53; *Polizer v. 170498 Canada Inc.*, [2005] O.J. No. 5224, 20 C.P.C. (6th) 288 (S.C.J.) at para. 41. It says that when these students are excluded, and the students who did not graduate are winnowed out, the Class could be as small as 10 students and these could easily sue individually in the Small Claims Court or under the simplified procedure of Rule 76, or could be joined in a single action.

129 As I have explained, a class proceeding is capable of accommodating both the Ontario resident Class Members and the 78 international students in a way that protects the interests of all Class Members as well as George Brown. Since the Class will include international students, it is my view that its size makes joinder impractical. Joinder would most definitely not be a preferable procedure for the non-resident Class Members, many of whom have returned to their homes abroad. The inability to resolve the common issues in an effective way in either the Small Claims Court or Rule 76 proceedings makes a class action preferable to either of these alternatives.

(b) Overwhelming individual issues

130 George Brown says that the common issues only bite around the edges of the real issues and that each Class Member will still be required to give evidence as to his or her actual knowledge of the alleged misrepresentation, will have to prove that they relied on the misrepresentation and will have to prove damages. Individual trials will still be required and the individual issues will overwhelm any efficiency obtained by resolution of the common issues. George Brown says that the individual issues, for each Class Member, will include whether the person:

* read the course calendar;
* read the George Brown College web site;
* spoke to a representative of George Brown College prior to applying or registering for the Program;
* attended any of the orientation sessions offered by George Brown College to students of the Program;
* had knowledge of the requirements to obtain the Industry Designations at any material time;
* contacted the Industry Associations at any material time;
* intended to pursue the Industry Designations, or any one of them;
* had the work experience required to obtain the Industry Designations, or any one of them;
* reasonably relied on any representation made by George Brown College;
* understood any representation made by George Brown College to be false, misleading or untrue;
* had actual knowledge, at the time the representation was made, that affected his or her understanding of such representation;
* had actual knowledge, at the time the representation was made, that rendered the representation plain and unambiguous;
* has a potential misrepresentation claim with respect to individual statements or representations, which will not be resolved by the class proceeding;
* completed the Program;
* suffered damages or detrimental reliance;
* paid fees to George Brown College in an amount that exceeded the fair value of the services received; and
* mitigated their damages, if any.

131 George Brown says that all these issues must be determined in order to resolve the plaintiffs' claims and that the negligent misrepresentation claim will "inevitably break down into individual proceedings." The breach of contract claim, so it says, requires a causal nexus between the breach of the contractual term and the behaviour of the individual class member - that is, it must be shown that the breach of contract was causative of damages.

132 As Lax J. noted in *Griffin v. Dell Canada Inc.,* above, at para. 90, the complaint that the individual issues will "overwhelm" the common issues and will make the proceedings "unmanageable" is a familiar refrain from defendants on contested certification motions and it is certainly one that has been echoed by the court in many cases. In *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, [2010] O.J. No. 113, I declined to certify claims for misrepresentation and false advertising in relation to a class of several million consumers who purchased over 100 different sunscreen products over an eight year class period as a result of alleged misrepresentations made in various formats on product labels, advertisements and websites. That was a case, like other misrepresentation claims that have been denied certification, where the individual issues truly overwhelmed the common issues.

133 As I noted earlier, the claim in *Mouhteros v. DeVry* was denied certification for this very reason. There were scores, if not hundreds, of statements made to thousands of students over a six year period. Winkler J. found that the individual issues would be overwhelming.

134 *Matoni v. C.B.S.* was a similar sort of case. While the class was considerably smaller, approximately 200 students over a two year period, different representations were made to members of the class and some of the statements were oral and some were written. There were material differences in the contract documentation given to students over the class period and the plaintiffs relied upon both express and implied contract terms. Hoy J. distinguished *Hickey-Button*, at paras. 109 - 111, on the basis that in that case, unlike the case before her, the plaintiff relied on common written material provided to all class members. Hoy J. found that the individual issues (apart from those arising from the *Consumer Protection Act, 2002* claim) would overwhelm the common issues. The case before me is much closer to *Hickey-Button* than it is to *Matoni v. C.B.S.* or *Mouhteros v. DeVry.*

135 In *Hickey-Button*, the alleged misrepresentation about the "Queen's option" had been made in written material provided to students, including the course calendar, as well as in oral form at various information sessions. It was argued that individual inquiries would have to be made to determine the content of the representations made to each student and the reliance, if any, placed on the representations. As noted earlier, in answer to the assertion that reliance might have to be determined on an individual basis, Doherty J.A. stated, at para. 43:

> It is, however, no answer to a contention that common issues exist to demonstrate that there are some issues that are not common to all parties of the class. In most actions where certification is sought, there will be both common and individual issues: *Cloud, supra*, at paras. 73-75.

136 In this case, the plaintiff relies on a single representation, made in the course calendar in printed form and on the George Brown website. The language used in both media was the same. The web version of the calendar was amended in July, 2008 but the printed calendar was not. The representation was clearly important to students wishing to enroll in the Program and the calendar is an important contractual document. George Brown has produced no other contractual document that might contradict the representation. It is a reasonable conclusion that the calendar would be read by every student before enrolling in the Program.

137 In considering the preferable procedure issue I must ask myself: "What are the common issues and how significant are they in the resolution of the action? How important are they in relation to the claims as a whole?": see *Hickey-Button* at para. 55; *Matoni v. C.B.S.* at para. 171. I must also ask whether a class action would be a fair, efficient and manageable way of advancing the claim, having regard to the goals of the *C.P.A.*

138 In this case, the proposed common issues as to misrepresentation and breach of contract are very similar to the issues in *Hickey-Button* and many of the complaints made by the defendant in this case are the same as those made in *Hickey-Button*. The claims of negligent misrepresentation, breach of contract and breach of the *Consumer Protection Act, 2002* all hinge on the legal effect of the statements made in the calendar and whether those statements were inaccurate or misleading. As in *Hickey-Button,* the resolution of those issues in favour of George Brown would likely put an end to the action. The resolution of one or more of those issues in favour of the plaintiffs will not put an end to the action, but it would substantially advance the claim of every Class Member.

139 Many of the individual issues posited by George Brown are premised on the assumption that Class Members may have received contradictory information about the Industry Designations from other sources, presumably prior to entering into a contract with George Brown. This is, of course,

possible, but the obvious purpose of the calendar was to provide information to prospective students about how George Brown's courses would equip them to find employment in the international business management industry. Students could reasonably expect such information to be accurate and would have little need to confirm it from other sources. The onus will be on George Brown to show, in any particular case, that the student knew or ought to have known of information that would contradict or qualify the representation made by George Brown.

140 Some of the individual issues raised by George Brown go to damages. The need for individual assessments of damages is specifically not a barrier to certification: see *C.P.A.* s. 6.1. The fact that some students may have ultimately obtained an Industry Designation may go to damages or mitigation, but it does not make it inappropriate to include them in the Class.

141 Looking at the preferability analysis having regard to the goals of the *C.P.A.*, a class action will provide access to justice to a vulnerable group of students, many of whom are from different lands and cultures. Class Members may lack the individual resources, initiative and sophistication to pursue legal action on their own and may be intimidated by the legal process. Their claims are relatively modest, and while they might be individually pursued in the Small Claims Court or under the Simplified Procedure, they can be more efficiently managed in a single action case managed by a single judge. The prospect that the international students might pursue George Brown in their homelands, seems very remote and, from the evidence, such litigation would likely be unproductive and expensive.

142 A class proceeding would also fulfill the goal of judicial economy by addressing important aspects of George Brown's liability at the outset. A multiplicity of legal proceedings would be a drain on court resources.

143 George Brown says that there is no need for concern about behaviour modification in this case, because it responded appropriately to student complaints and it made necessary changes to the course calendar. As Doherty J.A. said in *Hickey-Button*, however, at para. 58, accountability is the first step towards behavior modification and a class action requires wrongdoers to account for their behavior, not simply to correct it. As he also pointed out, the goal of behaviour modification is particularly important in the case of public institutions.

George Brown's Proposal for Bifurcation

144 George Brown proposes that if this action is certified, the proceedings should be bifurcated and there should be discovery and trial of individual liability issues before trial of the common issues. It says that that the claims advanced in this action cannot be resolved without the determination of numerous individual issues including those identified earlier in this section. It advances the following reasons:

(a) while not converting the proceeding to an opt-in class action, this approach will require somewhat more than passive attornment to the jurisdiction, providing greater certainty and procedural fairness to both non-resident Class Members and George Brown College alike;
(b) a number of the outstanding individual issues are threshold issues, the determination of which will serve to further refine the overly broad class definition;
(c) resolution of the individual issues prior to the proposed common issues is in the interests of efficient case management; and

(d) resolution of the individual issues will afford the proposed common issues a greater degree of commonality, such that they may become substantial elements of each class member's claim.

145 George Brown argues that this approach will allow the court to determine the appropriate class definition, the scope of the plaintiff's claims, the appropriate factual issues and, in some cases, entitlement to damages "on a full factual record."

146 It says that the following factors support this position:

* the issues of liability and the threshold individual issues are clearly separate from the issues of remedies and the proposed common issues;
* separation will result in the saving of time and expense by all parties;
* the overall timeframe of the proceeding will not be unduly lengthened by this approach;
* causation issues are confined to issues of liability. The quantum of each class member's damages, if any, can be determined through the use of claim forms or other procedures, to be ordered by the trial judge;
* credibility issues, if any, will arise predominantly in determining issues of liability;
* the proposed approach will afford the parties and the Court a better appreciation of the nature and extent of each class member's claim, including the extent of any alleged damages;
* facilities are available to permit the expeditious resolution of individual and common issues, and issues of liability and damages, and the Court may make any orders necessary to expedite the proceeding; and
* there is a good chance that the determination of threshold individual issues and the issue of liability will put an end to the action.

147 George Brown submits that the Court has jurisdiction to bifurcate the process in this fashion, pursuant to s. 12 of the *C.P.A.,* and refers to the observations of Perell J. in *Peter v. Medtronic Inc.,* [2009] O.J. No. 4364 (S.C.J.) at paras. 16-18; see also, *Air Canada v. WestJet Airlines Ltd.,* [2005] O.J. No. 5512, 20 C.P.C. (6th) 141 (S.C.J.) and *Bourne v. Saunby* (1993), 23 C.P.C. (3d) 333, [1993] O.J. No. 2606 (Gen. Div.), referred to therein. These latter cases were ordinary civil actions and there is no doubt that in such proceedings the court has jurisdiction to separate the determination of issues such as liability and damages. The *C.P.A.* contemplates that there will be a bifurcation of the resolution of the common issues and the individual issues, but the clear expectation, expressed in s. 25, is that the resolution of the common issues will precede the resolution of the individual issues. It may be appropriate in some cases to bifurcate the common issues, as Perell J. did in *Peter v. Metronic*, where doing so would promote efficiency and economy. George Brown's proposal in this case is vastly different from what was done in *Peter v. Metronic*. It wants to put the individual issues cart before the common issues horse.

148 Part of the logic of George Brown's unusual proposal is that it would permit non-resident class members to be heard at an early stage, thereby increasing the likelihood that the court's judgment will be recognized in the country where each member ordinarily resides. As I have concluded the court can properly assume jurisdiction over the claims of absent class members, and that its

judgment should be given preclusive effect elsewhere, this argument in favour of bifurcation is not persuasive.

149 George Brown refers to so-called "Lone Pine Orders" in the United States (*Lore v. Lone Pine Corporation,* 1986 WL 637507 (N.J. Super Ct. Law Div. 1986)) in which case management orders have been made in mass tort litigation requiring some individual evidence as to causation and the fact of loss prior to discovery and the common issues trial; see also *Acuna v. Brown & Root Inc.,* 200 F. 3d 335 (5th Cir. 2000). To the best of my knowledge, these cases have never been considered in Canada and no Canadian court has ever made such an order in a class proceeding.

150 George Brown is really trying to turn this action into an opt-in class action by requiring each Class Member to come forward and establish his or her entitlement to claim prior to the resolution of the common issues. This proposal stands class proceedings on their head and would result in a waste of judicial and private resources if the common issues were ultimately decided against the Class. It may be the case that, in an exceptional circumstance, the court's jurisdiction under s. 12 of the C.P.A. would permit the determination of some or all individual issues before the common issues, but I have some difficulty in contemplating what those circumstances might be. I see no reason to do so in this case.

151 In summary, therefore, it is my conclusion that a class proceeding would be the preferable procedure for the resolution of the common issues, would promote the goals of the *C.P.A.* and would provide a process for the resolution of the remaining individual issues, notably damages, in an efficient and cost-effective manner.

(e) Representative Plaintiff

152 Section 5(1)(e) of the *C.P.A.* requires that I be satisfied that there is a representative plaintiff or defendant who:

(i) would fairly and adequately represent the interests of the class,
(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying Class Members of the proceeding, and
(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other Class Members.

153 I must be satisfied that the proposed plaintiff will vigorously and capably prosecute the claim on behalf of the Class: see *Campbell v. Flexwatt Corp.* (1997), 15 C.P.C. (4th) 1, [1997] B.C.J. No. 2477 (C.A.), application for leave to appeal dismissed, [1998] S.C.C.A. No. 13; *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 41. I must also be satisfied that plaintiff's counsel is qualified to advance the proceeding on behalf of the Class. This is part of the court's supervisory jurisdiction in class actions: see *Poulin v. Ford Motor Co. of Canada*, [2006] O.J. No. 4625, 35 C.P.C. (6th) 264 (S.C.J.) at para. 88.

154 Ms. Ramdath was a student in the Second Class and Mr. Kovesst was a student in the First Class. They have been actively involved in the issues that are the subject of this action, serving as advocates on behalf of their class-mates before the commencement of this action. They fall within the class definition and they understand their duties as representative plaintiffs. I am satisfied that

they would fairly and adequately represent the Class. There is no suggestion that they have any conflict with other members of the Class.

155 While George Brown complains that there is no proposed plaintiff who was a student in the Third Class, I am not satisfied that members of this group require separate representation. Should it prove necessary or desirable to add a representative plaintiff on behalf of this group, the plaintiffs may bring a motion to do so.

156 I do consider that, for the reasons expressed in *Currie* and discussed above, there should be a separate representative on behalf of non-resident Class Members. These persons have unique interests concerning several matters, including purely administrative issues such as notice and communication, as well as substantive matters such as damages. They may have incurred substantially greater costs to attend George Brown, including higher tuition, visas, transportation and residence costs. Their voice should be separately heard in the action itself and in any discussions of settlement.

157 George Brown says that the plaintiffs' litigation plan is deficient because (a) the notification program is inadequate; (b) there is an erroneous assumption that damages can be assessed following a common issues trial; and (c) it envisages that the proposed class will cease to be represented following the common issues trial, leaving them without counsel. I will deal with each of these issues.

158 Since a class action in Ontario will bind all Class Members who do not opt out, notice of certification requires careful consideration. It is particularly important where, as here, the proposed class includes non-residents. The plaintiffs' litigation plan proposes a multi-faceted notice plan with notice of certification being disseminated:

> (b) by mail and e-mail to the last known address of Class Members as shown on George Brown's records;
> (c) by e-mail to the addresses of Class Members known to the plaintiffs;
> (d) by posting on the website of plaintiffs' counsel;
> (e) by posting on George Brown's website;
> (f) by posting on the "Facebook" website;
> (g) by publishing in the George Brown Student newspaper;
> (h) by posting in common areas of George Brown, including the student lounge and lunch room; and
> (i) by delivery by plaintiffs' counsel to any person who requests it.

159 The plaintiffs also propose that if a number of notices are returned as undeliverable a consultant will be retained to locate the addressees.

160 George Brown says that the proposed notification program is inadequate for three reasons. First, it erroneously assumes that George Brown has current contact information for each Class Member. Second, it assumes that a consultant will be able to locate Class Members for whom the parties lack current contact information. The evidence before the Court indicates that a significant number of Class Members may be very difficult, if not impossible, to locate in countries such as India and China. Third, it says that the notification program cannot guarantee that the requirements of natural justice and due process will be met with respect to absent claimants and, as a result, there remains an issue of whether this Court can properly take jurisdiction over the proposed Class.

161 George Brown says that it does not have home country address information for 16 of the 78 Class Members who were international students, and none of those 16 updated their addresses with a Canadian address after graduation. It says that it has incomplete home country information for 13 international students, but those students have updated their address information with Canadian addresses after graduation. The plaintiffs' counsel says that her firm has been in contact with 56 out of 78 students in the First Class and the Second Class.

162 George Brown says that the proposed notification program is also unnecessarily broad and its cost is out of proportion to the claims. There is no evidence before the Court to suggest that the proposed Class Members are still students of George Brown. Posting the notice of certification on the George Brown website and in the common areas of George Brown, and publishing the notice of certification in the George Brown student newspaper, will not result in Class Members receiving notice of the proceeding, but rather risks harm to George Brown's reputation for no reason.

163 For the reasons set out in *Currie*, the notice plan is critical. There must be a fair and robust notice plan which should include actual notice, whether by mail or e-mail or other form of publication, to the extent reasonably possible and practical. The experience of most graduates of universities and colleges is that these institutions can be remarkably adept and persistent in tracking their alumni when they wish to raise funds. I expect that, with the substantial amount of information already collected, in the hands of the plaintiffs and George Brown and its recruiters, it will be possible to develop a notice program that accomplishes these goals. I also expect that, working together with the common objective of ensuring that, to the extent practical, every Class Member receives actual notice of the proceedings, the court and the parties will be able to devise a satisfactory notice program. I note that both the plaintiffs and the defendant have an interest in ensuring that all class members receive actual notice of this proceeding. The framework proposed by the plaintiffs is, broadly speaking, acceptable. Some of its components can safely be deleted, I expect, if other aspects are enhanced. It will be refined and approved on the motion to approve the Notice of Certification.

164 George Brown says that the litigation plan is flawed because it assumes that the court will award damages if the common issues are determined in the plaintiffs' favour. It says that individual issues will have to be determined before George Brown's liability is resolved. This may be a valid criticism of the plan, but it does not mean that the plan fails this certification requirement. As has been said many times, the litigation plan is a work in progress that will be refined as the action progresses.

165 George Brown says that the litigation plan is deficient because it purports to terminate the representation of Class Members by class counsel after the common issues trial. As Lax J. recently pointed out in *Glover v. Toronto (City)* (2009), 70 C.P.C. (6th) 303, [2009] O.J. No. 1523 (S.C.J.) at para. 94, this is problematic:

> In a class proceeding, a client does not have a right to choose his or her lawyer or have a right to terminate the retainer. If a class member is dissatisfied with counsel of record, he or she may opt out of the class, but by the time [the] proceeding reaches the stage of individual assessments, that time will have long passed. In my opinion, *class counsel cannot unilaterally choose to terminate representation, but is bound to represent those class members who wish to pursue individual claims on the same basis as the retainer agreement provides until the class*

> *member or the court directs otherwise. It seems to me that the proposed abandonment of class members following the determination of common issues is completely at odds with the fiduciary duty that a lawyer has to a client, which includes the duty of loyalty. It is also completely at odds with the goals of class proceedings.* [citations omitted, emphasis added]

166 Counsel for the plaintiffs has confirmed that her firm's retainer will continue after the resolution of the common issues on its current terms.

167 Subject to the foregoing observations, the plaintiffs are suitable representatives of the Class and the litigation plan is approved.

V. Conclusion

168 For these reasons, and subject to the modifications I have made, this action will be certified as a class proceeding. Counsel shall prepare an order, in the form contemplated by s. 8 of the *C.P.A.* If they are unable to agree on the form of order a case conference may be arranged. If the parties are unable to agree on the costs of the motion, written submissions may be delivered to me care of Judges' Administration. Counsel shall agree on a timetable for the filing of costs submissions.

G.R. STRATHY J.

* * * * *

Proposed Common Issues

Negligent Misrepresentation

1. Was George Brown in a special relationship with the Class Members?
2. Did George Brown make representations to the Class Members that it would provide the Class Members with the opportunity to complete the three Industry Designations in addition to the George Brown College Graduate Certificate?
3. If such representations were made, were they untrue, inaccurate or misleading? If so, was George Brown negligent in making the representations?

Consumer Protection Act 2002

4. Did George Brown breach Part III of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A (the "*Act*")?
5. If so, what remedy, if any, are the Class Members entitled to under the *Act*?
6. Does the Class, or any portion thereof, require, and is it entitled to, a declaration waiving the notice provisions of section 18 of the *Act*?

Breach of Contract

7. Was the relationship between George Brown and the Class Members a contractual relationship?
8. If the answer to question #6 is yes, did the contract include a term by which George Brown agreed to provide the Class Members with the opportunity to complete the three Industry Designations in addition to the George Brown College Graduate Certificate?
9. If the answer to question #7 is yes, did George Brown breach that contract?

Damages

10. Are the Class Members entitled to damages?
11. If so, do such damages include:

    a) the cost of tuition, English as a second language ("ESL") course and exam fees, books, travel, accommodation, living expenses, visa fees and immigration consultant fees;
    b) loss of income;
    c) delayed entry to the workplace;
    d) loss of competitive advantage;
    e) the cost of additional Industry Association fees for courses and examinations; and/or f) costs incurred to adjust, extend or renew visas for residency, study and work in Canada?

12. If so, can damages be determined on an aggregate basis on behalf of the Class? If so, what is the quantum of those damages?
13. Is George Brown's conduct deserving of punitive or exemplary damages?

Administration/Interest

14. Should George Brown pay the costs of administering and distributing any recovery? If so, in what amount?
15. Should George Brown be ordered to pay prejudgment interest? If so, how is prejudgment interest to be calculated and what interest rate will apply?

* * * * *

Guidelines for Recognizing and Enforcing Foreign Judgments for Collective Redress

[Note: Commentary not included]

ARTICLE 1 - JURISDICTION

1.01 It is appropriate for a court issuing a judgment for collective redress to have assumed jurisdiction to do so provided that, in addition to existing rules for rec-

ognition and enforcement, it was reasonable for the court to expect that its judgment would be granted preclusive effect by the jurisdictions in which claimants not specifically named in the proceedings would ordinarily seek redress.

1.02 It is reasonable for a court issuing a collective redress judgment to expect its judgment to be given preclusive effect in respect of Absent Claimants by the jurisdictions in which the Absent Claimants reside if:

(i) the results obtained for Absent Claimants are not patently inadequate in the circumstances
(ii) the interests of Absent Claimants have been adequately represented; and
(iii) Absent Claimants have been given adequate notice of the proceedings and an opportunity to opt out.

1.03 When there are multiple fora which are otherwise appropriate jurisdictions for a collective redress action, the forum or fora in the best position to process claims from an administrative standpoint, to have access to evidence and witnesses, and to facilitate adequate representation of the claimants and other parties should assume jurisdiction. Multi-jurisdictional court to court communication and cooperation should be implemented as needed for this purpose.

ARTICLE 2 - PERMISSIBLE CAUSES OF ACTION

2.01 A judgment for collective redress based on the causes of action listed below should be enforced, if the judgment otherwise satisfies these Guidelines.

(i) Tort, delicts or wrongful acts
(ii) Contract
(iii) Securities
(iv) Product liability
(v) Violation of Human rights

Other causes of action, including statutory, constitutional and anti-trust causes of action, should be considered on an individual basis and enforcement should not be refused simply on the grounds that the claim is novel or unique.

ARTICLE 3 - PERMISSIBLE TYPES OF DAMAGES AND/OR RELIEF

3.01 A judgment for collective redress awarding the types of damages listed below should be enforced if the amounts awarded are not patently unreasonable.

(i) Pecuniary Damages

    (A) Out of pocket expenses
    (B) Wage losses
    (C) Costs of medical and related care

(ii) Non-Pecuniary Damages

(A) Compensatory damages for pain and suffering
(B) Anticipated future wage losses
(C) Anticipated costs of future medical and related care

(iii) Economic damages
(iv) Punitive/Exemplary Damages

3.02 A judgment for collective redress granting declaratory relief may be recognized provided it does not adversely interfere with the sovereignty of the jurisdiction in which it is to be enforced.

ARTICLE 4 - REQUIRED PROCEDURAL RIGHTS AND PROTECTIONS

4.01 A court should be satisfied before enforcing a judgment for collective redress from another jurisdiction that the principles of natural justice and due process were adequately addressed by the court issuing the judgment.

4.02 "Representative" claimants eligible to commence an action for collective redress may include individuals, corporations, partnerships and government appointed agents or ombudsmen and may be brought for the benefit of or on behalf of other individuals, corporations or partnerships.

4.03 A judgment for collective redress should reflect that the following criteria have been satisfied:

(i) the pleadings disclosed a permissible cause of action (see Article II above);
(ii) there is an identifiable group of claimants that are represented by the representative claimant;
(iii) the claims of the claimants raised common or collective issues;
(iv) an action for collective redress was the preferable procedure for the resolution of the common issues; and
(v) there is a representative who fairly and adequately represented the interests of the group of claimants.

4.04 A judgment for collective redress should include provisions that address and protect the procedural rights of all claimants including (i) the representative claimant(s) named in the action, (ii) claimants who were permitted to opt into an action, and (iii) Absent Claimants, i.e. those claimants who were included in the action as a result of the governing legislation and who did not take active steps to opt-out of the action. Without limiting the generality of the foregoing, these should include the provisions set out below.

(i) Claimants should be provided with due and adequate notice of the significant stages of the proceedings which resulted in the judgment. Wherever practical individual notice by direct mail or similar means should be considered.
(ii) Claimants should be given a reasonable opportunity to be heard at each such stage either in writing and/or orally and either in person or through a representative.
(iii) Claimants should be given the right to opt out of the proceeding and an adequate period of time to do so.

ARTICLE 5 - PERMISSIBLE COSTS AWARDS

5.01 An award of costs or counsel fees on any of the bases listed below in a judgment for collective redress should be enforced unless the amount awarded is patently unreasonable.

(i) Costs awarded on a time and materials basis

(ii) Conditional costs
(iii) Contingency fees
(iv) Disbursements

TAB 20

Case Name:

Sauer v. Canada (Attorney General)

Between
Bill Sauer, Plaintiff, and
The Attorney General of Canada on behalf of Her Majesty the Queen in Right of Canada as represented by the Minister of Agriculture, John Doe, Jane Roe and Ridley Inc., Defendants
PROCEEDING UNDER the Class Proceedings Act, 1992

[2008] O.J. No. 3419

2008 CarswellOnt 5081

169 A.C.W.S. (3d) 27

Toronto Court File No. 05-CV-287428CP

Ontario Superior Court of Justice
Toronto, Ontario

J.L. Lax J.

Heard: June 5-6 and 9, 2008.
Judgment: September 3, 2008.

(95 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Certifications -- Members of class or sub-class -- Procedure -- Settlements -- Approval -- Mary Carter agreements -- Application by the plaintiff to have the action certified as a class proceeding on behalf of all Canadian cattle farmers (except in the province of Quebec) against the Government of Canada and also Ridley Inc. for the purposes of settlement -- Claims asserted arose from the closure of international borders to Canadian cattle and beef products following diagnosis of a single case of BCE or "mad-cow disease" in an Alberta cow -- Applications allowed -- Applicant satisfied minimal evidential burden to show there was an identifiable class and rational connection between the class definition and the common issues.

Application by the plaintiff, Sauer, to have the action certified as a class proceeding on behalf of all Canadian cattle farmers (except in the province of Quebec) against the Government of Canada and Ridley Inc. The plaintiff also moved to certify the action against Ridley for the purposes of settlement. The claims asserted in the action arose from the closure of international borders to Canadian cattle and beef products following the May 20, 2003, diagnosis of a single case of bovine spongiform encephalopathy ("BSE") or "madcow disease" in an Alberta cow. Ridley was alleged to have manufactured the BSE-contaminated feed that was consumed by the Alberta cow and to have been negligent in using ruminant meat and bone meal as an ingredient in its feed products. The Crown was alleged to have been negligent as regulator of the Cattle industry in Canada, such that BSE entered the feed system and infected the Alberta Cow, which led to the border closures and disrupted the whole of the cattle industry in Canada.

HELD: Applications allowed. The applicant satisfied the minimal evidential burden to show that there was an identifiable class and a rational connection between the class definition and the common issues to be decided in the action. Further, there was a reasonable likelihood that the preconditions for an aggregate assessment of potential damages could be satisfied and, while not strictly necessary, could be included among the issues to be tried. The court was not persuaded that the individual issues involved in the case would overwhelm the proceeding to make it unsuitable for certification. The applicant was an appropriate representative plaintiff and had no interest in conflict with class members. With respect to the Ridley certification and settlement motion, the plaintiff had sufficient information to negotiate a settlement and put sufficient evidence before the court to assess it. The proposed settlement provided no direct benefits to the class. Class members would receive indirect benefits so as to make the settlement one that was fair.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5(1), s. 24, s. 25

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 9

Feeds Regulations, 1983 amendment SOR/90-73,

Ontario Rules of Civil Procedure, Rule 21.01(1)(b)

Counsel:

Cameron Pallett, Reynold Robertson, Q.C. and Clint Docken, Q.C. for the Plaintiff.

Dale Yurka and Roslyn Mounsey for the Defendant, The Attorney General of Canada.

Tim Buckley, Robert B. Bell, Barry Glaspell and Mélanie de Wit for the Defendant, Ridley Inc.

---

1 **J.L. LAX J.**:-- This is an intended class proceeding brought on behalf of all Canadian cattle farmers (except in the province of Quebec) against the government of Canada and Ridley Inc. The claims asserted in this action arise from the closure of international borders to Canadian cattle and beef products following the May 20, 2003 diagnosis of a single case of bovine spongiform encephalopathy ("BSE") or 'madcow disease' in an Alberta cow. BSE is a fatal neurological disease of cattle

that is transmitted when healthy cattle, particularly calves, eat food rations containing the rendered remains of infected cattle, referred to as ruminant meat and bone meal or RMBM. This was routinely added to calf starter feed rations in order to boost the protein content of the feed and enhance growth until the Canadian government prohibited this practice in October 1997.

2 Ridley is alleged to have manufactured the BSE-contaminated feed that was consumed by the Alberta cow and to have been negligent in using ruminant meat and bone meal as an ingredient in its feed products. Her Majesty the Queen ("HMQ") is alleged to have been negligent as regulator of the cattle industry in Canada, such that BSE entered the feed system and infected the Alberta cow, which led to the border closures and disrupted the whole of the cattle industry in Canada.

3 There are two motions before the court. In the first motion, the plaintiff moves to certify this action against Her Majesty the Queen in Right of Canada ("HMQ") under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"). This motion raises the difficult issue of the relationship between class proceedings and losses that rise to the level of industrial sector economics. The Crown vigorously contested this motion on a number of grounds, including that there is no commonality among class members, that loss and causation are individual issues that would overwhelm the litigation of any common issues, and that industry concerns are more appropriately addressed, and have already been addressed, through government BSE-specific compensation programs and other aid programs such as the Canadian Agricultural Income Stabilization Program ("CAIS").

4 In the second motion, which proceeded on consent and in respect of which HMQ took no position, the plaintiff moves to certify this action against Ridley for the purposes of settlement. The plaintiff also seeks the court's approval of a Settlement Agreement of February 5, 2008, between Ridley and the class representatives in this action and in related actions in Quebec, Alberta and Saskatchewan. These reasons will address both motions which I will refer to as the "HMQ Certification Motion" and the "Ridley Certification and Settlement Motion." I will first address the HMQ Certification Motion, but the background is common to both motions.

Background

5 The story of BSE in Canada, as alleged in the Fresh as Amended Statement of Claim, begins with the serious outbreak of 'mad cow disease' that occurred in the United Kingdom in the 1980s. This caused the Canadian government in 1987 to require that all cattle imported from the UK be from herds certified to be free of BSE. In 1988, as part of a concerted effort to halt the spread of BSE, the UK banned the feeding of the rendered remains of cattle and other ruminant to cattle. In 1990, the Canadian government re-enacted a regulation to the *Feeds Act*, but it specifically permitted the continued incorporation of RMBM into cattle feed.

6 In 1990, Canada banned the importation of live cattle from the UK and Ireland and placed 198 cattle that had been imported between 1982 and 1990 into a monitoring program. At least ten of these animals were from farms in the UK where cattle had been diagnosed with BSE. In December 1993, one of the monitored cattle tested positive for BSE. HMQ instituted a trace at that time of the remaining 197 British imported cattle. The remains of at least eighty of these cattle had been rendered and could have entered the Canadian animal food chain by December 1993, although the monitoring program was supposed to prevent this.

7 In April 1996, the World Health Organization called for a world-wide ban on the use of ruminant tissues in ruminant feed. In May 1996, the animal feed industry in Australia, including Ridley Australia, a corporation related to Ridley, participated in a voluntary ban in Australia. Despite the

voluntary ban there, Ridley did not cease their incorporation of RMBM into their calf starter rations in Canada until the Canadian government banned this by a regulation enacted in August 1997 that became effective in October 1997.

8 There were no further cases of BSE in Canada until 2003 when the first case of BSE in a Canadian-born cow was diagnosed. This cow was born on the McCrea farm near Baldwinton, Saskatchewan in March 1997 and was fed calf starter containing meat and bone meal from rendered cattle that had been manufactured at Ridley's Feed-Rite mill in St. Paul, Alberta. Initially, the Canadian Food Inspection Agency ("CFIA") identified this product as the likely source of BSE for the infected cow. Later, it withdrew this comment and said that it could not definitively identify which source of exposure infected the McCrea cow. This is discussed further in the Ridley Certification and Settlement Motion.

9 In January 2003, this calf, now a heifer with a new owner in northern Alberta, was identified at slaughter as a 'downer' or diseased cow. The head was removed and sent to the Alberta provincial laboratory for testing. On May 20, 2003, the Central Veterinary Laboratory ("CVL") in Weymouth, England (the international gold standard for BSE testing) confirmed that this heifer had BSE. The closure of international borders to Canadian cattle and beef products immediately followed the CVL announcement.

10 Bill Sauer is an Ontario cattle farmer. He seeks to represent a class of approximately 115,000 cattle farmers and claims damages on their behalf in excess of ten billion dollars. The class members' alleged damages include past, present and future losses of income, loss of business opportunities, diminution in value of livestock and cattle business, and diminution in value of real property.

11 A companion action in Quebec was authorized as a class action on June 15, 2007. On May 28, 2008, Wagner J. of the Quebec Superior Court approved the Settlement Agreement between the Quebec representative plaintiff and Ridley on behalf of the Quebec class. Actions that were commenced in Alberta and Saskatchewan have been postponed. The Statement of Claim has been amended to include class members in these provinces. If this action is certified, class representatives in Alberta and Saskatchewan will seek a stay of those actions so that the four actions become two: the Quebec action and an Ontario action in which Sauer will represent all cattle farmers in Canada, except Quebec.

Certification Requirements

12 On a certification motion, the question that underlies each of the statutory requirements is whether the claims in the action can be appropriately prosecuted as a class proceeding: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 16. Under s. 5(1) of the *CPA*, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would adequately represent the class without conflict of interest and who has produced a workable litigation plan. The plaintiff must show some basis in fact for each of the certification requirements, other than the requirement that the pleading discloses a cause of action. However, the purpose of a certification motion is not to determine whether the litigation can succeed, but how the litigation is to proceed: *Hollick*, at paras. 25, 28-29.

13 The *CPA* is a procedural statute that provides a mechanism for the resolution of mass claims. Although each of the five requirements for certification is commonly addressed separately by coun-

sel and by the court, Winkler J. (as he then was) captured the first three criteria for certification in a single sentence: "There must be a cause of action, shared by an identifiable class, from which common issues arise": *Frohlinger v. Nortel Networks Group*, [2007] O.J. No. 148 at para. 25. As he helpfully observed, at the core of a class proceeding is the element of commonality and implicit in that concept is that the cause of action, the scope of the class and the common issues are inextricably linked.

14 The remaining two requirements for certification are linked to the first three and the single sentence proposed by Chief Justice Winkler can be expanded to incorporate them in this way: "There must be a cause of action, shared by an identifiable class, from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification of behaviour of wrongdoers." I find it helpful to keep this linkage in mind in considering the individual criteria for certification. In view of this linkage, it is not always easy to separate the certification analysis into distinct components and overlap is unavoidable.

HMQ Certification Motion

Section 5(1)(a) -- a cause of action

15 The four main allegations of negligence against HMQ are:

(a) negligently designing, crafting and promulgating *Feeds Regulations, 1983* amendment SOR/90-73;
(b) negligently allowing 80 of 198 cattle imported from the United Kingdom between 1982 and 1990 into the animal food chain while they were being 'monitored' by HMQ to prevent the spread of BSE into Canada;
(c) negligently failing to warn the plaintiff and the class members of the risk of BSE entering the Canadian herd as a result of these same 80 animals entering the animal food chain; and
(d) negligently failing to take adequate action, if any, following the discovery that the remains of these 80 cattle had entered the animal food chain in Canada including, *inter alia*, requiring that calf starter rations be labelled to indicate whether they contained RMBM and promulgating an effective RMBM feed ban in a timely manner.

16 Issues (a) and (d) (as well as allegations against Ridley) were the subject of motions by the defendants under Rule 21.01(1)(b) of the *Rules of Civil Procedure*. Both the Superior Court and the Court of Appeal for Ontario declined to strike these claims. The Supreme Court of Canada has dismissed applications by HMQ and Ridley for leave to appeal: *Sauer v Canada (Attorney General)* (2006), 79 O.R. (3d) 19 (S.C.J.), [2006] O.J. No. 26; aff'd (2007), 225 O.A.C. 143 (C.A.), [2007] O.J. No. 2443 (C.A.), leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 454.

17 The "plain and obvious" test that is used on a Rule 21 motion as enunciated in *Hunt v. Carey*, [1990] 2 S.C.R. 959, is also used to determine whether the proposed class proceeding discloses a cause of action: *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.) at 679. As it has been conclusively and finally determined that the allegations in negligence against the federal government disclose a cause of action, this satisfies the first requirement for certification.

Section 5(1)(b) -- an identifiable class

18 The amended class definition proposed by the plaintiff is:

> All persons who as at May 20, 2003 were resident in Canada (except the province of Quebec) and farmed cattle including, but not limited to, cow-calf, backgrounder, purebred, veal, feedlot and dairy producers.
>
> In this class definition 'person' means any individual, partnership, corporation, cooperative, communal organization, trust, band farm or other association who as at May 20, 2003 was farming cattle within the meaning of the *Income Tax Act*.

19 In *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.) at para. 10, the three purposes of a class definition were described as: (a) to identify the persons who have a potential claim for relief against the defendants; (b) to define the parameters of the lawsuit so as to identify those persons who are bound by its result; and (c) to describe who is entitled to notice pursuant to the Act. It is well-established that a claimant's probability of success cannot be a factor in determining whether a class has been adequately defined. This would offend the rule against merit-based criteria and require the court to determine the outcome of the litigation on the merits prior to class membership being ascertained. *Hollick* requires only that class members have a common interest in the resolution of the common issues.

20 In determining whether a putative class action meets the statutory definition of an identifiable class consisting of two or more persons who would be represented by the representative plaintiff in the action, Ontario courts have been guided by two principles: (1) the need to identify the class by objective criteria, and (2) a rational connection between the class definition and the common issues to be decided in the action.

Objective Criteria

21 HMQ submits that the class definition provides no guidance as to what criteria must be met to satisfy the class definition of "cattle farmer" and that it is subjective and unworkable. It submits that the class definition leaves "a whole host of questions unanswered" and provides examples to illustrate this. The plaintiff's submission is that the proposed class definition constitutes a properly and easily identifiable class, and that while the individual specifics of the farming operations among the intended class members may vary, cattle farmers and HMQ know who they are and can self-identify.

22 The affidavit of John Ross, filed by HMQ in response to the motion, describes the distinct sectors within the Canadian beef and cattle industry as (a) the beef sector (b) the dairy sector (c) the veal sector and (d) the breeding sector.

23 According to Mr. Ross, the beef sector is involved in raising cattle which become Canadian beef and beef products consumed domestically and internationally. He describes the four main stages of beef production as (i) cow-calf operations; (ii) backgrounding operations; (iii) feedlot operations; and (iv) packers. Cow-calf operations breed and raise beef cattle until they attain an appropriate weight. They are then sold to backgrounders and/or feedlot operators where they are "finished" or fed to their slaughter weight. Fed cattle that have reached slaughter weight and cull animals (older, non-productive breeding cattle) are sold to abattoirs and the resulting beef and beef products are sold by packers into domestic and international markets.

24 Within the dairy and veal sectors, cows may be culled for slaughter or sold for beef production to backgrounders or feedlot operators. Within the breeding sector, seedstock suppliers sell animals with elite genetics to farmers and these animals may be part of the dairy or beef sectors. Seedstock beef producers also commonly sell a portion of their calf crop to backgrounders and/or feedlot operators. As well, many livestock operations (beef/veal/dairy/breeding) grow crops for sale. One or more of the businesses (cow-calf/backgrounder/feedlot) may be integrated into one farming operation. Mr. Sauer is an example. In May 2003, he owned dairy, cow-calf and backgrounder cattle.

25 What emerges from this evidence is that cattle farming can take different forms, that cattle farmers may be involved in one or more sectors of the cattle industry that may overlap, that their operations may be large or small, and that some may also be involved in other farming activities. However, the common defining characteristic of intended class members is that they all have a relationship to the farming of cattle from which they earn their livelihood in whole or in part. This is the fundamental defining characteristic and represents the commonality of interest among the class members in this action. If it weren't already self-evident, Mr. Ross' evidence confirms that cattle are not bred and raised as pets, but for sale.

26 The self-evident nature of the phrase "farming cattle" or "farmed cattle" is highlighted by HMQ's factum at para. 12, which identifies with clarity persons intended to be captured by the class definition:

> 12. Cow-calf, backgrounding, and feedlot operations are highly varied. Cow-calf operations may range from a small hobby farmer who raises one or two calves a year to much larger operations that produce up to a thousand head of cattle per year. Some operators are large, full-time producers, while others are smaller, part-time producers with more diversified farming or other income sources. Backgrounding operations may stand alone as a business or be combined with cow-calf, feedlot, or other farming operations. Feedlots can range from a few hundred head up to tens of thousands of cattle. Some feedlot operators are also involved in custom-feeding arrangements on a fee for service basis.

27 Cattle farming is a centuries old activity, which is distinct in the public eye. Cattle farmers as a group share a commonality of political and economic interest and have had no difficulty self-identifying through membership in organizations such as the Canadian Cattlemen's Association, a national federation representing the interests of more than 90,000 beef producers encompassing eight provincial organizations. The federal government has had no difficulty identifying cattle farms or cattle farmers. The individual farms of intended class members and the number and kind of cattle on these farms have been identified with precision by Statistics Canada. This is clear from the 2001 Census of Agriculture, filed as an exhibit to Sauer's affidavit.

28 At the margins, there may be some questions about class membership, but the *CPA* permits the Court to enter upon a "relatively elaborate factual investigation in order to determine class membership": *Serhan v. Johnson and Johnson*, [2004] O.J. No. 2904 (S.C.J.) at para. 52. As Cullity J. said, "The fact that particular persons may have difficulty in proving that they satisfy the conditions for membership is often the case in class proceedings and is not, by itself, a reason for finding that the class is not identifiable": *Risorto v. Farm Mutual Automobile Insurance Co.*, [2007] O.J. No. 676 (S.C.J.) at para. 31. I think it very unlikely that a process to determine class membership

will be required for the overwhelming majority of class members as most, if not all, will know whether they farmed cattle as at May 20, 2003. The definition of "person" will assist those in doubt. It clarifies that employees and family members of cattle members and cattle agents, brokers or shippers are not included as they do not farm cattle within the meaning of the *Income Tax Act*. The "host of unanswered questions" is addressed by the amendment.

29 With one exception, the non-exhaustive categories of cattle farmers listed in the class definition is on all fours with the evidence of Mr. Ross and provide a useful context for self-identification of class members. That exception is packers. It is the plaintiff's position that the operators of meat packing plants, abattoirs or slaughterhouses are not class members as they do not farm cattle, but purchase cattle from cattle farmers for sale as beef. To the extent that packers also farmed cattle as at May 20, 2003, they are caught by the class definition. I do not regard this or the fact that packer operations may be vertically integrated into cattle farming operations as a reason to reject the class definition.

30 The *CPA* is a procedural statute and a rigid approach would defeat its purpose: *Hollick* at para. 21. The class here is defined with reference to a particular activity (cattle farming) at a particular place (Canada, but not Quebec) at a particular time (May 20, 2003). I have explained that cattle farming may have diverse characteristics, but the diversity of cattle farming operations does not negate the commonality shared by proposed class members as they are all cattle farmers. I am satisfied that the class cannot be defined more narrowly without arbitrarily excluding some members. In *Hollick*, the court accepted a class definition of 'persons who owned or occupied property,' although occupation can be a difficult concept legally and factually. In *Bywater*, the court accepted a class definition of 'persons exposed to smoke.' The proposed class definition here is at least as objective, and arguably more so, than in those cases.

Rational Connection

31 The core common issue to be decided in this action is whether the defendants were negligent. The plaintiff claims that the closing of the borders damaged all cattle farmers and has produced evidence to support this. As part of its materials, the Crown filed evidence from Professor Kurt Klein of the University of Lethbridge to demonstrate that the cattle industry has been fully compensated for its losses through various federal and provincial programs that were implemented soon after the borders closed. Essentially, HMQ submits that the plaintiff has not shown that harm has been suffered on a class-wide basis, and as a result, the class definition bears no rational connection to the class claim in negligence, a component of which is proof that the defendant's conduct caused damage.

32 Class membership identification is not commensurate with the elements of the cause of action. There simply must be a rational connection between the class member and the common issue. In the very recent case of *Tiboni v. Merck Frosst Canada Ltd.*, [2008] O.J. No. 2996 (S.C.J.), Cullity J. accepted a class definition of all persons in Canada (except certain provinces) who were prescribed and ingested Vioxx in the face of defendants' evidence that of the estimated 350,000 class members, those who suffered problems from taking the drug would be about 2000 people. He pointed out that in any class action involving claims in tort for personal injury or economic loss, it is possible that the claims of some class members will be unsuccessful. As he said at para. 78, "This is virtually ordained by the authorities that preclude merits-based class definitions". He reminded us that in *Hollick*, the plaintiff satisfied the commonality requirement by providing evidence that complaints of harm had been received from 950 of the approximately 30,000 putative class members.

33 The class representative has done this. He produced evidence attesting to his personal losses as a result of the BSE crisis and the experience of others in his community. He has produced evidence from Allan Bonnett, a very large and profitable Alberta cattle producer whose business was bankrupted by BSE. The impact of BSE has been the subject of numerous studies and reports that are public or government documents and form part of the plaintiff's Request to Admit. Their admissibility is not in issue. HMQ has known for some time that the plaintiff would be relying on them and is not prejudiced. They speak to the enormity of the economic consequences to cattle farmers from the discovery of BSE. Whether or not all class members were harmed by this, all class members share a common interest in ascertaining whether HMQ caused or contributed to this. This is sufficient to show a rational connection between the class definition and the proposed common issues.

34 On the Rule 21 motions, the court accepted the plaintiff's submission for the purposes of the motions that the defendants were in a relationship of proximity to the plaintiff so as to give rise to a duty of care. The Court of Appeal described it in this way at para. 39 of the Reasons:

> ... Sauer says that he and Ridley are part of one integrated industry, from the supply of feed through to the sale of cattle. Beyond this economic link, Sauer points out that there is a regulatory link: the feed component of the industry is regulated nationally in the interests of the participants in it and the public. *Most importantly, the catastrophic consequences of BSE contamination due to a single infected cow are shared by all commercial cattle farmers. Foreign sales are eliminated for all.* This economic catastrophe dwarfs the impact of the loss of one cow on the cattle farmer who purchased the Ridley feed. *In this critical way, all commercial cattle farmers are linked to Ridley as the victims of feed contaminated by BSE.* (Emphasis added)

35 In this same 'critical way,' all cattle farmers are linked to HMQ as the victims of the Crown's alleged negligence in the regulation of the cattle industry and the monitoring of cattle from an infected herd. It seems to me that the question of whether there is a rational connection between the class and the common issues has, by and large, been determined by the outcome of the Rule 21 motions. It would be an extraordinary paradox for the defendants to be in a relationship of proximity to Canadian cattle farmers to potentially owe them a duty of care, but for the plaintiff to have failed to show a rational connection between the class and the common issues.

36 I conclude that the plaintiff has satisfied the minimum evidential burden to show that there is an identifiable class and a rational connection between the class definition and the common issues to be decided in the action. In discussing rational connection, I have forecast the evidence on the most contentious issue on this motion, being the formulation of the negligence question, which is linked to the preferability determination.

Section 5(1)(c) -- common issues

37 The underlying question of a common issue is whether the resolution of the common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 39. The common issue criterion is not a high legal hurdle. An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 53, leave to appeal to the S.C.C. refused,

[2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.). It must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim, although not necessarily to the same extent: *Hollick* at para. 18; *Western Canadian Shopping Centres* at para. 40.

38 The plaintiff proposes the following common issues:

1. Does section 9 of the *Crown Liability and Proceedings Act* bar the Class Members' claims against the federal government of Canada?
2. Were the defendants negligent and if so when and how?
3. What is the appropriate apportionment of fault, if any, between the defendants?
4. Can the amount of compensatory damages, if any, be reasonably determined on an individual basis? If so, how should individual damages be determined?
5. If the answer to question 4 is no, can the amount of compensatory damages, if any, be determined on an aggregate basis? If so, what is the amount of damages and how should they be distributed?

Common Issue 1

39 Section 9 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 ("CLPA") provides that:

> No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.

40 It is common ground that the federal government provided financial assistance to cattle farmers thorough various programs soon after May 20, 2003. The record does not fully disclose what these programs were, how the payments were made and who received them. There is evidence that some class members received payments from the CAIS Program. It is a matter of dispute whether CAIS payments are caught by this section or whether they would be taken into account in assessing damages.

41 The Crown submits that this issue will not be common to each member of the class as it is relevant only to putative class members who received compensation for losses suffered as a result of BSE. Those who did not suffer a loss or those who did not apply for or receive compensation would not have this issue in common. This is only partially correct. The statutory bar applies in respect of compensation that has been paid out of the funds defined in the section, but it also applies in respect of compensation that *is payable* from these funds. Every class member is at least potentially impacted by the statutory bar.

42 The issue of whether s. 9 of the *CLPA* bars the claims of intended class members can only be properly determined with the benefit of a complete evidentiary record. HMQ acknowledges that this common issue anticipates the Crown's defence. The plaintiff offered to withdraw this as a common issue if the Crown consented to an order that s. 9 only applies, if at all, to class members who received compensation for losses suffered as a result of BSE. Until HMQ makes its position known, this should remain as a common issue.

Common Issue 2

43 The second proposed common issue is the composite question of whether the defendant was negligent. This is a composite question because it presupposes that all of the elements of negligence, including damages and causation, can be formulated into a common issue. This is contentious and underlies many of the defendant's arguments in opposition to certification.

44 In most cases certified under the *CPA*, a determination of whether each class member has suffered damages and the quantum of damages will not be made at a trial of common issues. The plaintiff agrees that unless the requirements for aggregate assessment are met, the quantum of damages cannot be determined at a trial of common issues. In most negligence cases, causation is an individual issue, but where there is evidence of causation of harm to the class, a generic negligence question such as the one proposed is appropriate. A similar question was accepted in *Taylor v. Canada (Minister of Health)* (2007), 285 D.L.R. (4th) 296 on the basis of evidence that TMJ implants were harmful to all recipients who comprised the class.

45 HMQ submits that this is a case where each class member will have to prove the nature and extent of the losses caused by the border closures and therefore, causation is an individual rather than a common issue. The Crown also argues that it is not possible to resolve this common issue without first examining the individual circumstances of each class member and that the macro-level data with respect to the overall economic effect of BSE on the beef and cattle industry in Canada cannot be used to determine damage on a class-wide basis. I do not agree. For certification purposes, the fact of universal damage has been shown.

46 The April 2004 Report of the Parliamentary Standing Committee on Agriculture and Agri-Food states that BSE "devastated Canadian cattlemen and other livestock producers, ... sent cattle prices spiralling downward, led to the building of record levels of cattle inventories, dramatically raised feed costs, drained cattlemen's cash positions and completely eliminated any chance for profitability in 2003, with little prospects for recovery in the immediate and foreseeable future". A June 2004 research paper prepared by two researchers within the Agricultural Division of Statistics Canada states that the economic impact on the Canadian livestock industry was in the billions of dollars. Between July and December 2003, farm cash receipts for cattle and calves fell 48 per cent compared with the same period in 2002. This was the largest percentage decline in a decade. While government program payments partially offset the economic impact from the BSE-related ban, these authors found that there was still a 25 per cent decline in cattle and calf revenues in 2003 compared to 2002. In a 2006 paper prepared by Professor Klein and others commissioned by the Canadian Agricultural Trade Policy Research Network, the authors say that "the consequences of the BSE discovery in Canada hurt all aspects of the domestic beef sector."

47 In his 2008 report on which HMQ relies, Professor Klein expresses the opinion that based on more current information, the damages suffered by the beef industry as a whole is at least equivalent to the value of the compensation received from federal and provincial governments. He says that the Canadian cattle industry was fully compensated for the losses incurred, that a large proportion of Canadian beef producers received compensation from government programs that mitigated any losses and that while some Canadian cattle producers may have suffered losses even accounting for compensation, others "possibly gained as a result of the closure". I can find no evidence to support this last statement.

48 Throughout the submissions of HMQ, I was urged to give minimal weight to the plaintiff's evidence or asked to conclude that the evidence was not credible. In effect, I was asked to assess the relative merits of the evidence proffered by the plaintiff and HMQ. A certification motion is not an inquiry into the merits and the *CPA* does not require a preliminary merits showing. The plaintiff is not required to put forward the evidence of an expert, although this is commonly done. Neither is he required to cross-examine the expert put forward by the defendant, although this is commonly done. The adequacy of the record will vary, but perhaps the time has come to be reminded that the Report of the Attorney General's Committee on Class Action Reform contemplated that "evidence on the motion for certification should be confined to the [certification] criteria". (at 31, referred to in *Hollick* at para. 25).

49 In *Tiboni*, Cullity J. discusses the distinction between the evidence required for a certification motion and that on a motion for summary judgment. After stating that only a minimum evidential basis needs to be established by evidence for the existence of common issues (*Hollick)*, he said at para. 52:

> Once provided, the question whether the defendants could obtain summary judgment by providing additional conflicting evidence that demonstrates that there are no genuine issues for trial will not arise and evidence directed at the question is irrelevant and inadmissible. If this were not correct, every opposed certification motion would be likely to involve, in effect, the same test of the merits as on a motion for summary judgment, and the evidential burden on plaintiffs would be increased enormously.

50 Professor Klein does not dispute that harm was widespread and significant and that all farms suffered reduced returns as a result of BSE. He estimated losses to the beef industry from BSE to be up to four billion dollars. Professor Klein did not investigate individual losses to beef or dairy farmers, but in explaining the difficulty of accurately calculating individual losses, he provided this example in his 2008 report:

> ... While many cattle producers delayed marketing of their animals following the confirmation of BSE on May 20, 2003, others took advantage of what they thought were excellent buying opportunities and purchased additional animals at the depressed prices. When the border did not open promptly (as many had hoped and expected), some of these decisions resulted in greater losses for these cattle businesses. Some cattle businesses bought high priced feed (the result of a serious drought in some parts of the country) to sustain their herd until the prices improved. Many of those who made this decision also increased the losses to their cattle businesses when the border did not re-open promptly.

51 HMQ agrees that in some cases, the fact that each and every class member suffered at least some loss or injury may be determined on a class-wide basis and suggests that an obvious example would be a common disaster such as a plane crash. BSE was a common disaster for cattle farmers. Immediately following May 20, 2003, the livestock of all cattle farmers was worth significantly less. Cattle and calf receipts were cut in half. Foreign sales were eliminated for all. The plaintiff produced evidence to show that when the borders closed, all farmers were forced to sell their cattle at depressed prices and all suffered damage from BSE. Professor Klein's example illustrates this. Individual circumstances will determine how extensive the losses were, but I believe that the ques-

tion of causation could be dealt with in respect of the class as a whole. Although it is not necessary for certification to show that all class members suffered harm, it is my view that the plaintiff satisfied any evidentiary burden to show that there is some basis in fact to believe that all cattle farmers suffered harm from BSE, making the proposed question a common issue.

52 In *Chadha v. Bayer Inc.*, [2003] O.J. No. 27 (C.A.), on which HMQ relies, certification was denied because the plaintiff had adduced *no* evidence that the result of the defendant's allegedly illegal acts were passed through to the consumers who made up the class. In *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.), leave to appeal to the S.C.C. dismissed, [2007] S.C.C.A. No. 346, a class proceeding was found appropriate where a finding on the common issue would establish some liability to all class members. In that case, all were at risk of being harmed and thus beneficiaries of declarative and injunctive relief, but only some class members had entitlement to a monetary remedy. Here, there is potential liability to all class members for damage if the plaintiff can establish the elements of duty and breach. On the authority of *Markson*, this is sufficient to trigger the application of s. 24 of the *CPA*. The plaintiff takes issue with Professor Klein's central thesis that the losses suffered were mitigated by the compensation payments received and points to flaws in his analysis, but I agree with the plaintiff that his analysis shows that damage can potentially be assessed on an aggregate basis.

53 If the common issue relating to negligence were to be determined in the plaintiff's favour, the trial court will have found that the defendant caused or contributed to the finding of BSE in the index cow. If my analysis is correct, liability will be established for the class. This presents no unfairness to the defendant who may dispute liability when it delivers a Statement of Defence. The Crown may of course rely on Professor Klein's opinion as to mitigation of losses, but this raises an issue to be tried and not one to be resolved on this motion. The resolution of either common issue 1 or 2 in the defendant's favour will terminate the proceeding for all class members. Their resolution in the plaintiff's favour will advance the litigation for all class members to a damages assessment as proposed in common issues 4 and 5.

Common Issues 3, 4 and 5

54 Common issue 3 was not commented on by the defendant and is acceptable for now. The Crown indicated on the hearing of the Ridley Settlement Motion that it does not intend to cross-claim against Ridley in which case, this issue may disappear. Issues 4 and 5 raise common issues as to the method of assessing damages. Aggregate damages have been included as a common issue in economic loss claims: *Markson*; *Cassano v. Toronto Dominion. Bank*, [2007] O.J. No. 4406 (C.A.), leave to appeal to the S.C.C. dismissed, [2008] S.C.C.A. No. 15, as well as in cases involving personal injury claims in negligence such as *Cloud* and *Tiboni*. In *Tiboni*, Cullity J. expressed the view at para. 94 that while "it may seem unlikely that general compensatory damages for physical injury could be assessed on an aggregate basis, the position might be different in respect of claims for disgorgement and pecuniary losses". This is a claim for pecuniary losses. I am satisfied that this is a case where there is a reasonable likelihood that the pre-conditions for an aggregate assessment could be satisfied and, while not strictly necessary, should be included among the issues to be tried. It is for the common issues trial judge to assess whether and in what manner an aggregate damages award is to be made or whether an individual damages assessment protocol is fairer and preferable.

Section 5(1)(d) -- preferable procedure

55 In *Hollick*, Chief Justice McLachlin, said that the *CPA* is to be construed generously and directed lower courts to avoid taking an overly restrictive approach to its interpretation at the certification stage. The court found that the preferability requirement can be met even where there are substantial individual issues. At least since the 2004 decision of the Ontario Court of Appeal in *Cloud*, it has been recognized that this is a qualitative and not quantitative inquiry and that it is essential to assess the importance of the common issues in relation to the claim as a whole. The *Hollick* principles were summarized by Rosenberg J.A. in *Markson* in this way at para. 69:

a) The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;
b) "Preferable" is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and,
c) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.

56 HMQ argues that there is too much variation in the individual circumstances of putative class members to meaningfully or fairly assess damages on a class wide-basis and that the individual issues of loss and causation that will remain after resolution of the common issues will dwarf the common issues. I do not agree. The common issues are fundamental to this action. A decision on common issue 1 would potentially terminate the litigation in favour of the defendant. As counsel for the plaintiff said, it is the 'sword of Damocles' hanging over the head of class members. A decision on common issue 2 is the heart of this litigation.

57 Even on the Crown's view of this case, the nature of the legal duties owed to class members, and whether those duties were breached, are of primary importance in the action as framed. For any class member to recover, they must first succeed on this issue. A single trial on this issue would make it unnecessary to adduce evidence more than once of the Crown's conduct in relation to the finding of BSE in Mr. McCrea's cow. As in *Cloud*, the resolution of the debate about the essential legal duties on which the claim is founded (a debate that made its way to the Supreme Court of Canada) and whether these duties were breached, would significantly advance the action to the point where, on my view of the case, only an assessment of damages would remain.

58 I am not persuaded that the individual issues will overwhelm this proceeding to make it unsuitable for certification. That the assessment of individual damage from BSE may be more difficult because losses are variable and other factors may have contributed to the losses of class members is not a compelling reason. Idiosyncratic causation and damages issues did not prevent certification in *Bywater, Cloud, Tiboni*, or in other negligence cases, where disparate harm to class members required individual assessments of both causation and damage. Moreover, I believe that there is the prospect in this case for aggregate assessment. If damages can be determined in whole, or part, on an aggregate basis, the Crown would only need to adduce evidence once that the losses to the class were mitigated by the compensation payments received. There may never need to be individual damage assessments if the defendant succeeds on this issue.

59 While pursuant to s. 25 of the *CPA* it is for the trial judge to determine the procedures that are to be followed, I must be satisfied that there is a realistic possibility that acceptable procedures can be found. The plaintiff produced evidence from Kerry Eaton, the Vice-President of Crawford Class Action Services, which has successfully administered some of the largest and most complex class action settlements in Canada. He proposes that damages can be assessed in the aggregate by a pay-out that is calculated based upon a dollar value per head of cattle owned by each individual class member as at May 20, 2003 or by a more complex system akin to the CAIS Program to assess individual damages. The federal government has used both methods to make payments to cattle farmers. Mr. Eaton prepared an Assessment of Damages Plan and provided evidence that the CAIS Program claim form and assessment protocol could be adapted to a fair, workable and cost-effective loss of individual income assessment. Alternatively, an aggregate assessment calculation could be done utilizing the farm cash receipts reports for cattle from Statistics Canada and applying an algorithm developed by an agricultural economist.

60 Mr. Eaton's proposed individual damages assessment is necessarily broad and preliminary, but I am satisfied that it is a starting point that will permit the trial judge to fashion manageable procedures for resolving the individual issues, given the extensive powers and discretion conferred by s. 25 of the *CPA*. At this stage, I am not prepared to conclude that individual damage assessment cannot be achieved as the plaintiff has shown that there is some basis in fact to believe that it can. If the trial judge concludes that compensatory damages can be reasonably determined on an individual basis, the defendant will have ample opportunity to participate in the formulation of a fair procedure for the determination of individual claims.

61 If the trial judge is satisfied that the requirements of s. 24 are met, there is the potential for an aggregate assessment of damages using the method proposed by Mr. Eaton in its present or an amended form. Professor Klein's analysis also shows that aggregate assessment is possible. It is true, as the Crown points out, that Mr. Eaton's proposed aggregate assessment approach would take no account of individual circumstances and "there will be some winners and some losers," but this is contemplated by s. 24(2) and (3) of the *CPA* and was approved in *Markson*. It is also no objection that the plaintiff has not yet produced evidence from an expert that an algorithm can be developed: *Lee Valley Tools Limited v. Canada Post Corporation*, [2007] O.J. No. 4942 (S.C.J.) at paras. 32-35.

62 The *CPA* provides a procedural mechanism in s. 26 to require the defendant to distribute amounts awarded under either s. 24 or s. 25 directly to class members and in making an order under this section can take into account the fact that the amount of monetary relief to which a class member is entitled can be determined from the records of the defendant: *Cassano* at para. 67. The government of Canada has such records.

63 The only alternative to a class action proposed by the defendant is that class members avail themselves of the provincial and federal compensation programs that are already in place. This will not provide class members with the remedies they seek. Those class members who did not apply to CAIS have no means of doing so retroactively. Reimbursement through CAIS is not full compensation. Mr. Bonnett's circumstances illustrate this. He (or more accurately, the Receiver) received payments through CAIS and other subsidy programs in 2003 of 2.8 million dollars on losses of 12.8 million dollars as calculated under the CAIS Program. The CAIS Program and other government programs compensate past losses and class members would receive no compensation for future losses attributable to BSE, although there is evidence that before the BSE event, farm cash receipts

from the sale of cattle were increasing annually. Importantly, the plaintiff asserts that the CAIS Program is an insurance program and not a compensation program and contests Professor Klein's inclusion of these payments in his analysis.

64 In my view, the direction from the Ontario Court of Appeal since *Cloud*, and in particular in the recent cases of *Markson* and *Cassano*, is that the court should strive to find ways to use the powerful tools of the *CPA* to meet the preferability requirement. Even on the Crown's view of this case, which I do not share, the determination of negligent conduct in this action at a trial estimated to be between eight and twelve weeks will achieve considerable judicial economy. The Crown does not allege that cattle farmers will bring individual actions and no class member has the resources to prosecute this action individually against the federal government. The access to justice objective is clearly met.

65 With respect to the third objective of class proceedings -- behaviour modification -- the defendant submits that the Crown is not subject to deterrence. The plaintiff has pleaded that the federal government knew that there were cattle in the monitoring program from herds infected with BSE, but failed to warn cattle farmers of this or take reasonable steps to avoid disease in the Canadian herd. On this point, I adopt the following comments of Cullity J. in *Taylor* at para. 83:

> ... To the extent that it is suggested ... that behavioural modification will not be served by successful class proceedings against government regulators, such as Health Canada, no authority was cited for that submission. I see no reason why it should be assumed that governmental bodies, their officials and employees are impervious to judicial findings, and damages awards, for negligent conduct relating to the manner in which they perform their public responsibilities and, in that respect, are to be distinguished from profit-making entities.

66 BSE was a catastrophic event for Canadian cattle farmers. The defendant has remedies if its dire forecast of unmanageability is borne out, but refusing certification denies class members any opportunity to pursue claims for their losses. The assessment of individual damages is not an easy issue and the aggregate assessment plan needs work, but at this point, I consider that the ghostly spectre of unmanageability underlying the arguments presented against certification is unconvincing. As with most ghosts, it will either vanish in the daylight of case management, the direction of the trial judge, or agreement of the parties or it will return in the night to haunt this proceeding, in which case the defendant may move under section 10 of the *CPA* for decertification: *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (C.A.) at para. 70.

Section 5(1)(e) -- a representative plaintiff with a workable litigation plan

67 The defendant's criticisms of the plaintiff's litigation plan essentially repeat the same arguments relating to the individual nature of causation. The litigation plan may need work, but it is workable. It is to be reviewed again at a case conference once pleadings are complete. Mr. Sauer is an appropriate representative plaintiff and has no interest in conflict with class members.

68 The defendant argues that certifying this proceeding will conflict with and harm the long-term economic interest of the beef and cattle industry because it will lend unwarranted credence to the arguments of individuals and groups such as R-CALF (a lobby group representing the interests of the U.S. cattle industry) who have lobbied and commenced legal action aimed at preventing the

U.S. border being re-opened to Canadian cattle and beef products. This may be a difficult political issue, but it is not a reason to deny certification.

69 I find that the plaintiff has satisfied the requirements for certification against HMQ and there will be an order certifying the proceeding with Bill Sauer as representative plaintiff. I will review the draft order at a case conference and submissions as to the disposition of costs can be made at that time.

Ridley Certification and Settlement Motion

Certification Requirements for Settlement

70 Where certification is sought for the purposes of settlement, all the criteria for certification must be met, but may be applied less stringently: *Bona Foods Ltd. v. Ajinomoto U.S.A. Inc.* [2004] O.J. No. 908 (S.C.J.) at paras. 14-20; *Bellaire v. Daya*, [2007] O.J. No. 4819 (S.C.J.) at para. 16. The manageability aspect of whether class proceedings is the preferred procedure moves from whether the litigation would be manageable to whether the implementation of the settlement is manageable: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at paras. 24-26. Having found that the certification requirements as against HMQ have been met, it is only necessary to briefly address these requirements as they apply to Ridley.

5(1)(a) -- cause of action

71 There is one primary allegation of negligence against Ridley in this action, namely that Ridley continued to incorporate RMBM into their calf starter rations when they knew of the risk of transmission of BSE. Both the Superior Court and the Court of Appeal for Ontario declined to strike the claim against Ridley when framed as raising a duty of care, but struck the claim when framed as raising a duty to warn. Ridley's application for leave to appeal to the Supreme Court of Canada in respect of the permitted negligence claim has been dismissed. The Statement of Claim discloses a cause of action in negligence and satisfies the first requirement.

5(1)(b) -- an identifiable class

72 Ridley accepts the amended class definition as:

> All persons who as at May 20, 2003 were resident in Canada (except the province of Quebec) and farmed cattle including, but not limited to, cow-calf, backgrounder, purebred, veal, feedlot and dairy producers.
>
> In this class definition 'person' means any individual, partnership, corporation, cooperative, communal organization, trust, band farm or other association who as at May 20, 2003 was farming cattle within the meaning of the *Income Tax Act*.

73 Class members share a common interest in ascertaining whether Ridley was negligent and this provides a rational connection between the class definition and the common issue. The second criterion for certification is met.

5(1)(c) -- common issue

74 The plaintiff proposes with respect to Ridley, the following common issue for determination: "Whether Ridley was negligent and if so, when and how." Ridley concedes that for settlement purposes, the determination of this issue is a substantial ingredient of each class member's claim

against Ridley, and is necessary to the resolution of each class member's claim. For reasons already given, this is an acceptable formulation of the common issue.

5(1)(d) -- preferable procedure

75 So long as Ridley remains a defendant, the Court must determine whether the plaintiff has the requisite proximity to Ridley to substantiate a duty of care and whether such duty is overwhelmed by policy considerations. This issue can be approached collectively and its resolution will significantly advance the action and promote the three objectives of the *CPA*.

5(1)(e) -- a representative plaintiff with a workable litigation plan

76 For settlement purposes, Mr. Sauer is a suitable representative plaintiff who has no conflict with other class members and who can fairly and adequately represent the class for settlement purposes. The Notice Plan is acceptable. In my consideration of the settlement agreement, I will address the proposed distribution plan which may require modification. Subject to this, I am satisfied that the requirements of certification for settlement purposes are met.

Settlement Approval

77 The test for settlement approval in class proceedings is whether the settlement is "fair, reasonable and in the best interests of the class as a whole": *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Gen. Div.) at para. 9, aff'd [1998] O.J. No. 3622 (C.A.), leave to appeal dismissed, [1998] S.C.C.A. No. 372; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at para. 69. These cases have developed a list of factors which are to be used as a guide in deciding this, although some will have greater significance than others. They are:

1. Likelihood of recovery, or likelihood of success.
2. Amount and nature of discovery, evidence or investigation.
3. Settlement terms and conditions.
4. Recommendation and experience of counsel.
5. Future expense and likely duration of litigation and risk.
6. Recommendation of neutral parties, if any.
7. Number of objectors and nature of objections.
8. The presence of good faith, arms' length bargaining and the absence of collusion.
9. The degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.
10. Information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiation.

Terms of the Settlement

78 The proposed settlement is in the form of an agreement between the representative plaintiffs in the actions and Ridley and is a modified form of 'Mary Carter' agreement. In consideration of the payment of six million dollars and release of claims against it, Ridley will remain in the actions to defend claims against it for contribution and indemnity, or any claim to apportion liability against Ridley on the grounds that HMQ was wholly responsible for the BSE crisis. Under the proposed Settlement Agreement, the plaintiffs will not seek to apportion liability against Ridley and Ridley will not contest the class members' damages claims against HMQ. Whether or not Ridley remains in the action, the settlement funds will be paid and will be used to fund the litigation against HMQ.

79 Ridley will remain in the action if HMQ, or any party added to the action, advances a claim for contribution or indemnity with respect to class members' losses or damages, or seeks to apportion any negligence, fault, liability, responsibility or wrongdoing against Ridley with respect to those losses or damages to defend these claims. If such claims are not advanced, Ridley will leave the action. Whether or not Ridley remains in the action, Ridley will provide documentary production. The plaintiffs will have access to Ridley's North American employees and Ridley will produce them at its own expense, as required as witnesses at the common issues trial of any of the actions.

80 Ridley will cap its exposure by paying the settlement amount into a trust fund that will be used to fund disbursements and counsel fees at significantly reduced rates in order to prosecute the actions against HMQ. The fund will be administered through a trust. The Settlor of the trust is the BSE Class Action Association, whose current members are the representative plaintiffs in the actions. The Administrator is Crawford Class Action Services and the Trustee is Royal Trust. After final judgment or settlement, the balance of the remaining capital and income in the trust will be distributed equally to the five Canadian veterinary Colleges. I have been provided with the RBC Dominion Securities Investment Policy Statement and am satisfied that investment returns are likely to offset fees of the Trustee so that the corpus of the trust will remain intact for its intended use.

81 Settlements of this kind are not *per se* objectionable: *Pettey v. Avis Car Inc.*, [1993] O.J. No. 1454 (Gen. Div.); *M. (J.) v. B. (W.)* (2004), 71 O.R. (3d) 171 (C.A.) and there is some precedent for the payment of settlement funds to class counsel and for the payment of class counsel fees where indirect benefits are conferred upon class members: *Currie v. McDonald's Restaurants of Canada Ltd.*, [2006] O.J. No. 813 (S.C.J.), [2007] O.J. No. 3622 (S.C.J.); *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (S.C.J.); *K. Field Resources Ltd. v. Bell Canada International Inc.*, [2005] O.J. No. 3935 (S.C.J.).

82 I propose to first review the usual factors that are considered in determining the fairness of a settlement and then turn to some concerns I have about the administration of the trust. Justice Wagner considered these same factors and found the proposed agreement met the test for approval. He briefly considered the concerns I will raise, but did not find them to be an obstacle to approval.

Likelihood of Success

83 The claim against Ridley raises a novel question of law: does Canadian negligence law contemplate a claim against a product manufacturer in respect of pure economic losses suffered by persons who neither purchased nor used the product? On Ridley's Rule 21 motion, the plaintiff conceded that Canadian courts had not yet recognized the duty of care alleged. Winkler J. (as he then was) acknowledged that the claim raised policy considerations that had 'manifest' implications for the law of tort.

84 The plaintiff's claim against Ridley is based on a single source of infection that links Ridley, the manufacturer of the feed, to the cow born on the McCrea farm. The reports of the CFIA initially supported this theory when it identified Ridley feed as the source of contamination to the McCrea calf. In early 2006, Mr. McCrea disclosed for the first time that in addition to the Calf-Glow product he says he fed to the index cow, he had also purchased another feed product in the spring of 1997 and fed it to cattle on his property. This raised an issue of cross-contamination. Also, it appears that Calf-Glow is manufactured by a different feed company not named as a defendant and Ridley never manufactured this product. There have been eleven other cows diagnosed in Canada with BSE since May 2003 and according to CFIA investigators, many of these were born after the feed ban. CFIA

now says that it can no longer definitively identify which source of exposure infected the index cow. CFIA's change in position presents a real and serious risk that the plaintiff will be unable to establish at trial that the source of contamination originated with a product manufactured by Ridley.

85 Ridley will plead that the border did not shut in May 2003 because of a concern that the McCrea cow, or its remains, would be imported into the United States, but that the international border closure actions were caused by the infection of the Canadian herd and that the U.S. border would have reopened in whole or in part later in 2003, but for the diagnosis of BSE in a Canadian bred cow diagnosed with BSE in Washington State in December 2003. Ridley intends to vigorously defend the action in light of significant duty, foreseeability, identification, causation, and remoteness issues. The claim against Ridley has been placed in jeopardy by the withdrawal of the CFIA report, the misidentification of Ridley as the manufacturer of Calf-Glow and the identification of Ridley as the sole manufacturer of feed containing RMBM.

Amount and Nature of Discovery, Evidence or Investigation

86 This agreement was reached before the actions had progressed to the certification stage. Ridley has not delivered a defence and documentary production and examinations for discovery have not been held. This is not a bar to settlement approval so long as a serious and diligent effort has been made to determine the facts and the court has been provided with sufficient evidence to allow it to exercise an independent and objective assessment of the fairness of the proposed settlement: *Dabbs* at para. 15; *Ford v. F. Hoffmann-LaRoche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 126.

87 In this case, lengthy investigations were undertaken by plaintiff class counsel as appears from the roughly two hundred documents comprising the two Requests to Admit served on HMQ in January and June 2006. These documents were gathered through extensive research over time including several Access to Information and Privacy ("ATIP") requests to the federal government. It was through the ATIP process that the plaintiff learned that CFIA investigation in 2003 disclosed that the most likely source of BSE for the infected cow was pre-feed ban calf starter manufactured by Ridley.

88 As a condition to mediation, Ridley required that it be allowed to explore Mr. McCrea's assertions regarding his feeding practices in 1997. It was through this process that the plaintiff became aware of the difficulties to be confronted in the claim against Ridley. Ridley provided the transcript of Mr. McCrea's cross-examination to the relevant authorities and soon after, CFIA changed its position. I am satisfied that the plaintiff had sufficient information to negotiate a settlement with Ridley and has put sufficient evidence before the court to assess it.

Recommendation of Neutral Parties and Arm's Length Negotiations

89 There is a strong initial presumption of fairness when the settlement is negotiated at arm's length. Mediation between counsel for Ridley and the plaintiffs in each of the BSE actions took place on December 20 and 21, 2006 before Martin Teplitsky, Q.C., a highly experienced mediator in class actions and other complex disputes. Mr. Teplitsky strongly recommended that the plaintiffs accept Ridley's final offer of six million dollars and it was accepted in principle soon after. However, it took more than a year of ongoing negotiations to finalize the other terms of the agreement. Ridley wanted to be let out of the action completely through a 'Peirringer' style settlement, but the plaintiffs were unwilling to settle in a structure that permitted HMQ to attempt to reduce its liability share by arguing that Ridley caused or contributed to the damage. Ridley ultimately agreed to con-

fer additional benefits upon class members through its potential ongoing participation in the litigation and by providing a causation concession. Ridley has agreed that it will not contest that pre-ban feed was the source of the McCrea cow BSE infection.

Recommendation and Experience of Class Counsel

90 There are five co-counsel involved in these actions: Cameron Pallett in Toronto, Clint Docken, Q.C. in Calgary, Reynold Robertson, Q.C. of Robertson Stromerg Pedersen LLP in Saskatoon and Regina, Gilles Gareau of Adams Gareau in Montreal and James Woods of Woods LLP in Montreal. Collectively, they have considerable class action experience and unanimously recommend the proposed settlement. There are no objectors.

The Future Expense an Likely Duration of Litigation

91 The proposed settlement converts Ridley from an opponent into an ally. If Ridley were to be held in the actions without settlement, the litigation will be difficult, expensive and protracted with an uncertain outcome that is fraught with risk. The 2006 CFIA report found a common link to an Edmonton renderer among the first three cases of BSE in Canada, including the index cow. It is expected that Ridley will issue third party claims against it and against the manufacturer of Calf-Glow. The settlement significantly streamlines the litigation into an action that will save years in time and expense in legal fees, expert fees and other disbursements, and will achieve a more timely result for the class members. It minimizes delay and avoids exposure to costs. The plaintiffs accept that Ridley's defences are not trivial.

92 There is evidence that recovery for class members in the event of a judgment against Ridley would not approach their losses. Mr. Docken's affidavit attaches Ridley's 2007 Annual Report which shows that the shareholders' equity is in an amount that would see cattle farmers receive only a small amount before Ridley would be forced into bankruptcy protection. Mr. Docken deposes that "Ridley has publicly stated and, upon investigation, plaintiffs' counsel are satisfied that, there is little prospect of any of Ridley's insurers responding favourably." I am uncertain why this would be the case, but I accept Mr. Docken's evidence. The settlement focuses the litigation on the party that is capable of providing meaningful compensation to class members and on the narrower issue of the Crown's liability. In my view, this is the most important factor in this case and achieves the most significant benefit for the class.

93 I turn then to my concerns. The trust document and the administration of the trust did not receive a great deal of attention in counsel's submissions, but the document is annexed as a schedule to the Settlement Agreement and I have reviewed it. The Trustee and Administrator will report regularly and the court will maintain supervision of the administration and operation of the distribution of trust property. Class counsel assured me that the court will maintain its usual role in approving class counsel fees and disbursements paid from the trust, but I have a concern that this is not made clear in the trust document and, as a practical matter, I am uncertain how this is intended to work. If paragraph 2.3 of the Settlement Agreement were to be amended by adding the words, "subject to the direction and approval of the court," this concern could be alleviated. However, doing so raises another concern that this may place an intolerable burden on the court to review and approve counsel fees and disbursements as the litigation proceeds without the benefit of a complete picture as to the risks undertaken and the success achieved. I appreciate that counsel fees are being paid from the trust at significantly reduced rates, but it appears that disbursements can be paid from the trust in any amount with the agreement of counsel and approval of the Administrator.

94 I need to be satisfied that the court is not relinquishing its approval role to the Trustee and Administrator and that the contemplated distribution from the trust fund is both manageable and consistent with the court's oversight role. A related issue is the language in the proposed form of notice to class members as to the calculation and fixing of class counsel fees and administration expenses to the date of approval of the Settlement Agreement. I appreciate that I approved similar language in the notice given to class members of this hearing to the effect that the court would be asked to fix these fees and expenses in an amount not to exceed 1.5 million dollars as of the date of approval. It may be that counsel intended to defer this request pending a decision on approval of the Settlement Agreement, but as the notice is annexed as a schedule to the Settlement Agreement, I cannot approve this language until I have been provided with the material that will allow me to determine this.

95 Although the settlement provides no direct benefits to the class, in light of the factors I have reviewed, I am satisfied that class members will receive indirect benefits so as to make this settlement one that is fair, reasonable and in the best interest of the class as a whole. Subject to the concerns I have raised, which I invite counsel to address at a case conference, I am prepared to provisionally certify this action for the purposes of settlement and provisionally approve the settlement.

J.L. LAX J.

cp/e/ln/qlkxl/qllkb/qlrxg/qlaxr/qlced