Court of Appeal File No.: C56961
Court File No. CV-12-9667-00-CL

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF SINO-FOREST CORPORATION

Court of Appeal File No.: M42404
Court File No.: CV-11-431153-00CP

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO, SJUNDE AP-FONDEN, DAVID GRANT and ROBERT WONG

Plaintiffs

- and –

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (formerly known as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN, KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E. HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J. WEST, PÖYRY (BEIJING) CONSULTING COMPANY LIMITED, CREDIT SUISSE SECURITIES (CANADA), INC., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC., MERRILL LYNCH CANADA INC., CANACCORD FINANCIAL LTD., MAISON PLACEMENTS CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC and MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED (successor by merger to Banc of America Securities LLC)

Defendants

BOOK OF AUTHORITIES OF ERNST & YOUNG LLP

(Motion to Quash Appeal Returnable June 28, 2013)

May 10, 2013

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TO: **ATTACHED SERVICE LIST**

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TAB 1

Lesyork Holdings Ltd. et al. v. Munden Acres Ltd. et al.

[1976] O.J. No. 2225

13 O.R. (2d) 430

1 C.P.C. 261

Ontario
Court of Appeal

Brooke, Houlden and Blair JJ.A.

July 20, 1976

W.H.O. Mueller, for defendants, applicants.

B. Chernos, Q.C., for plaintiffs, respondents.

The judgment of the Court was delivered by

1 **BROOKE J.A.**:-- This is an application by the defendants for an order (a) quashing an appeal by the plaintiffs from an order of Donnelly, J., dated March 26, 1976, and (b) dismissing an application by the plaintiffs for an extension of time for cross-appealing from a judgment of the same Judge dated December 20, 1973.

2 By judgment of December 20, 1973, Donnelly, J., ordered specific performance of an agreement for the sale of land by the defendant Munden Acres Limited to the plaintiffs Lesyork Holdings Limited and Palmyra Holdings Limited. (Prior to the date for closing, the plaintiffs assigned an interest in the land to their co-plaintiffs, Gobeth Building Enterprises Limited and Chiffon Developments Limited, and the defendant conveyed the land to its co-defendant, Seven Acres Limited.) By the judgment, the closing of the transaction was referred to the Local Master at Brampton.

3 Before the reference could be commenced, the defendants appealed. With the consent of the plaintiffs, the perfection of the appeal was adjourned on several occasions in 1974 and 1975. Finally, on October 8, 1975, the defendants served on the plaintiffs a notice of abandonment of the appeal together with a notice of motion returnable before the Local Master at Brampton for directions for the closing of the sale. On the return of the motion, the plaintiffs alleged that they had suffered

considerable damage by reason of the delay resulting from the filing of the appeal. After hearing argument, the Master adjourned the reference so that the plaintiffs could apply to Donnelly, J., for an order authorizing the Master to expand the reference by examining into the damages claimed by the plaintiffs.

4 In March, 1976, the plaintiffs moved before Donnelly, J., for the trial of an issue to determine:

(a) Whether the plaintiffs are entitled, in addition to the decree of specific performance, to the supplementary relief of damages and compensation from the defendants for the loss suffered by the plaintiffs subsequent to the trial of this action by reason of the continued breach of the Agreement of Purchase and Sale subsequent to the said trial;

(b) If the plaintiffs be so entitled, the proper amount of such damages and compensation;

(c) Whether the plaintiffs are entitled to a fresh opportunity, after the determination of (a) and (b) by this Honourable Court, to elect as to the basic remedy of specific performance or damages;

(The third ground of relief was abandoned by the plaintiffs during the course of the hearing before Donnelly, J.)

5 In his reasons for judgment dismissing the application, Donnelly, J., summarized the issues on the motion as follows:

> Prior to the trial the vendor had obtained from the municipality approval for a site plan permitting 17.5 units per acre. The applicants contend that the resolutions passed by the Council have voided this plan and limited the unit density to 14 building units per acre and that as a result they have sustained a substantial loss. The respondents argued that the resolutions related only to future applications for approval and did not affect any plan for which approval had been given; also that the zoning by-law could only be altered by by-law, not by resolution, that no amending by-law had been passed and none had been submitted to the municipal board for approval.
>
> The vendor had entered into an engineering and financial agreement with the municipality for the development of the lands which required the vendor to pay to the municipality 25% of the unit levy prior to the execution of the agreement and the remaining 75% within three years from its execution in September, 1972. The applicants urge that the vendor has failed to pay the remaining 75% of the levies and that a new financial agreement will be required which will involve increased levies and additional financial requirements. The respondents contend that default in payment did not terminate the agreement and that it is still binding. Alternatively the vendor admits that it is liable to pay all levies and in his written argument counsel stated that it will perform and fulfil this obligation.

> The applicants contend that the relief which they ask is supplemental to the action; that while the site plan approved by the municipality was at trial found to meet the requirements of the offer to purchase, its validity is now open to question because of the resolutions passed by Council and that the financial agreement no longer binds the municipality because of the default of the vendor. They seek an order under Rule 529 directing an issue to determine the validity at this time of the site plan which has been approved, the present effect of the financial agreement, and what damages flow if it is found that the site plan is no longer valid or the financing agreement no longer binding.
>
> Any question as to the validity of the site plan arises out of the resolutions which were passed after the trial. Any default under the financing agreement occurred in September, 1975.

6 Relying upon Carvell v. Carvell, [1969] 2 O.R. 513 at p. 520, 6 D.L.R. (3d) 26, Donnelly, J., held that Rule 529 did not confer jurisdiction on the Court to grant the relief requested, as the Rule is not intended to provide a means for giving relief in respect of a new cause of action arising after the date of judgment; accordingly, he dismissed the application. The plaintiffs have appealed from that order; in the alternative, they have asked in their notice of appeal for an order extending the time for cross-appealing from the judgment of December 20, 1973, in order that they may obtain the relief that they are claiming. In this application, the defendants seek dismissal of the appeal and of the application for an extension of time.

7 Turning first to Rule 529, it provides:

> 529. A party entitled to maintain an action for the reversal or variation of a judgment or order upon the ground of matter arising subsequent to the making thereof or subsequently discovered, or to impeach a judgment or order on the ground of fraud, or to suspend the operation of a judgment or order, or to carry a judgment or order into operation, or to any further or other relief than that originally awarded, may move in the action for the relief claimed.

We think that Donnelly, J., was right in holding that the Rule afforded no basis for the relief claimed by the plaintiffs. The Rule cannot be used to grant relief for a cause of action which has arisen subsequent to the issue of judgment: Hoffman v. McCloy (1917), 38 O.L.R. 446 at p. 451, 33 D.L.R. 526; nor can it be used where no attack is made on the validity of the judgment: Carvell v. Carvell, supra. Here the plaintiffs are relying upon an alleged cause of action which has arisen subsequent to the judgment, and no attack is made on the validity of the judgment. Donnelly, J., was right, therefore, in holding that Rule 529 could not be used by the plaintiffs to obtain the relief that they are seeking.

8 In this Court, the plaintiffs have, however, put their case on a wider basis. They submit that even if Rule 529 is not applicable, the remedy that they seek was properly the subject of a supplemental bill of relief in equity. And since the Supreme Court of Ontario has jurisdiction by s. 18, para. 8 of the Judicature Act, R.S.O. 1970, c. 228, as amended, to grant

> 8. ... all such remedies as any of the parties appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them in such cause or matter, so that, as far as possible, all matters so in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.

it has the power to grant the relief requested by the plaintiffs.

9 When ordering specific performance, the Court may award damages to the injured party in addition to specific performance: s. 21 of the Judicature Act. But the damages awarded at that stage of the proceedings are based on the circumstances that exist at the date of judgment and should be assessed once and for all at that time: McIntosh v. Parent (1924), 55 O.L.R. 552. In this case, no order for damages was made at the time that judgment was given for specific performance; indeed, it would seem that there was no basis for such an award.

10 However, in appropriate cases, the Court may vary a judgment for specific performance and award damages or compensation even though damages were not awarded in the original judgment: Fry on Specific Performance, 6th ed. (1921), pp. 592-4, ss. 1284-6. Thus, in Bishop v. Lewis, [1878] W.N. 5, the vendor, after granting of a decree of specific performance of a contract of a sale of land, cut down certain ornamental timber. The Court varied the decree by ordering an assessment of damages and directed that the amount of the damages and incidental costs should be set off against the purchase money. Again, in the recent case of Ford-Hunt et al. v. Raghbir Singh, [1973] 1 W.L.R. 738, Brightman, J., made a supplemental order directing an inquiry as to damages sustained by reason of the vendor's delay in complying with an order for specific performance.

11 Counsel for the defendants has called to our attention the decision of Corporation of Hythe v. East (1866), L.R. 1 Eq. 620, as authority for the proposition that the Court has no power to give damages for what has occurred after the granting of a judgment for specific performance. However, that case can be distinguished on two grounds: (a) the relief was sought by way of motion, not by a supplemental bill. The Judicature Act has abolished the necessity for a supplemental bill in this Province, but at the time of the Hythe case, it appears from the report of the argument of counsel that a supplemental bill was the proper procedure to obtain a variation in the decree, and (b) substantial delay had occurred at the time of the granting of the decree of specific performance, but no claim was made for such damage at the time of judgment. Since the cause of action was in existence at the date of judgment, damages should have been claimed and assessed at that time:

> McIntosh v. Parent, supra. In any event, if the Hythe case holds that there is no right to vary a judgment for specific performance so as to award damages or compensation for matters arising subsequent to the judgment, we decline to follow it. In our opinion, there are cases, such as Bishop v. Lewis and Ford- Hunt v. Raghbir Singh, supra, where justice requires the making of such an order.

12 Although the Court has power, therefore, in proper cases to make an order varying a judgment for specific performance to award damages or compensation, this is not such a case. The matters put forward by the plaintiffs do not in our opinion warrant a variation.

13 First, with reference to the plaintiffs' allegation that the zoning has changed, this matter is specifically dealt with in the offer to purchase. If the zoning is not as stipulated in the offer, the

plaintiffs have the option of declaring the agreement null and void. Hence, if the zoning has changed, the plaintiffs will have to elect either to rescind the agreement or to close the transaction and accept the applicable zoning in existence at that time.

14 Secondly, with reference to the levies of the Town (now the City) of Mississauga, the offer to purchase again specifically provides for this matter. On the hearing of this application, the defendants by their counsel acknowledged their liability for the levies and were prepared to post a cash bond or to pay the requisite amount into Court. We believe that the payment of the levies is something that the Master can inquire into, without difficulty, on the closing of the sale.

15 Thirdly, with reference to the validity of the site plan approval and the enforceability of the financial agreement with the municipality, these matters are also provided for in the offer to purchase. On the hearing of this application the defendants by their counsel similarly acknowledged their responsibility for these items and were willing to undertake at their expense to enforce the financial agreement against the municipality. We see no reason why these matters cannot be adequately dealt with by the Master on the closing of the sale.

16 If an appeal is manifestly devoid of merit, it may properly be quashed on a motion to quash: Oatway v. Canadian Wheat Board, [1945] S.C.R. 204 at p. 213, [1945] 2 D.L.R. 145. Since the grounds put forward by the plaintiffs afford no basis for varying the judgment of December 20, 1973, the application of the defendants should be granted, and the appeal quashed.

17 With regard to the plaintiffs' motion to extend the time for cross-appealing, when the motion was launched there was no appeal to support the cross-appeal, it having been abandoned. In any event, in the circumstances of this case, it would not be a proper exercise of discretion to make an order extending the time: Re Blackwell, [1962] O.R. 832, 34 D.L.R. (2d) 369.

18 The application will be granted, the appeal quashed, and the motion to extend the time for cross-appealing dismissed. The defendants will be entitled to the costs of this application forthwith after taxation thereof.

Application granted.

TAB 2

Case Name:

Bérubé v. Rational Entertainment Ltd.

Between
Clotilde Bérubé, Plaintiff/Appellant, and
Rational Entertainment Limited, Defendant/Respondent

[2009] O.J. No. 5619

Divisional Court File No. 09-1559

Ontario Superior Court of Justice
Divisional Court

D.J. Power J.

Heard: December 18, 2009.
Judgment: December 23, 2009.

(33 paras.)

Civil litigation -- Civil procedure -- Appeals -- Quashing or dismissal of -- Abuse of process -- No reasonable chance of success -- Motion by defendant to quash plaintiff's appeal allowed -- Plaintiff sued defendant, an operator of an online gambling website, claiming damages for unjust enrichment and fraud -- Action dismissed for lack of jurisdiction, as user agreement clearly stipulated that governing law was Isle of Man -- Court quashed plaintiff's appeal as frivolous, vexatious and manifestly devoid of merit -- Decision below was correct and law related to forum selection clauses was well-settled -- Plaintiff had history of unsuccessful litigation against gambling entities -- Courts of Justice Act, s. 134(3).

Conflict of laws -- Conflicts by legal area -- Contracts -- Choice of law -- Expressly chosen by terms of contract -- Motion by defendant to quash plaintiff's appeal allowed -- Plaintiff sued defendant, an operator of an online gambling website, claiming damages for unjust enrichment and fraud -- Action dismissed for lack of jurisdiction, as user agreement clearly stipulated that governing law was Isle of Man -- Court quashed plaintiff's appeal as frivolous, vexatious and manifestly devoid of merit -- Decision below was correct and law related to forum selection clauses was well-settled -- Plaintiff had history of unsuccessful litigation against gambling entities -- Courts of Justice Act, s. 134(3).

Motion by the defendant, Rational Entertainment, to dismiss or quash the appeal by the plaintiff, BÚrubÚ. The plaintiff commenced a small claims action that claimed that she invested money with an on-line casino, PokerStars, that she alleged was owned and operated by the defendant. The plaintiff alleged that the defendant operated from a British Isle. PokerStars was not fully licensed and regulated in Canada. The plaintiff claimed that the website was fraudulently programmed to cause people to lose and invest more money rapidly. She alleged that the website was rigged to provide users with no chance of winning. She sought the return of her investment based on unjust enrichment plus aggravated and punitive damages. The defendant denied any allegation of fraud. The defendant pleaded that users of the PokerStars website were required to register an account and agree to the terms of an end user licence agreement governed by the law of the Isle of Man. The defendant stated that any game play and competition occurred between users rather than against the website itself. The defendant obtained an order dismissing the proceeding for lack of jurisdiction. The plaintiff appealed. The defendant submitted that the appeal was frivolous, vexatious and lacked merit and substance.

HELD: Motion allowed. The plaintiff's appeal was frivolous and vexatious. The plaintiff had a history of launching unsuccessful court actions against gambling entities. The defendant was owned, operated and physically situated on the Isle of Man. The plaintiff's contention that the end user agreement did not govern her claim was untenable given the scope of the agreement. There was no reason to question the validity of the decision under appeal. The law on forum selection clauses was well-settled. The appeal was manifestly devoid of merit and was accordingly quashed. In the event that the appeal was reinstated, the plaintiff was required to post $6,000 as security for costs.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. 43, s. 21(2)(b), s. 23, s. 31, s. 106, s. 134(3)

Ontario Rules of Civil Procedure, Rule 1.03, Rule 2.01, Rule 2.02, Rule 3.02, Rule 56.01(e), Rule 61.06

Small Claims Court Rules, O. Reg. 258/98, Rule 6.01

Counsel:

Clotilde Bérubé, self-represented.

Stephanie V. Lewis, for the Defendant/Respondent.

D.J. POWER J.:--

Introduction

1 The defendant/respondent moves for the following relief:

(a) an order that this appeal be dismissed as a result of the Notice of Appeal being served more than thirty days after the date the order appealed from was made; or

(b) in the alternative, an order that the appeal be quashed pursuant to s. 134(3) of the Courts of Justice Act, R.S.O. 1990, c. 43; or

(c) in the further alternative, an order that the appellant pay $6,000, or such other reasonable amount, in security for the respondent's costs on this appeal prior to the appeal being allowed to proceed; and

(d) should the Court decline to dismiss or quash the appeal, an order granting the respondent an extension of time of sixty (60) days, from the date of the Court's order on this motion, within which to serve its responding materials in this appeal.

Relevant Facts

2 Ms. Bérubé commenced this action in the Ottawa-Carleton Small Claims Court on August 27, 2009 against Rational Entertainment Limited (sic Rational Entertainment Enterprises Limited) (hereinafter "REEL"), the Gambling Supervision Commission, and the Department of Trade and Industry. In the appeal to this Court no relief is sought by or against the Gambling Supervision Commission or the Department of Trade and Industry. In her Statement of Claim Ms. Bérubé pleaded that she "invested" $983,45 USD with an on-line casino called PokerStars between July 29th and August 2nd, 2009. She alleged that PokerStars, despite its website advertising to the contrary, is not fully licenced and regulated in Canada. She alleged that PokerStars was owned and operated by REEL. She further alleged that REEL "operates from British Isle called the Isle of Man well known for people who do not want to pay taxes on their investment." Rather, she alleged that PokerStars "is licenced under the Isle of Man Gambling Supervision Commission" and that the said Commission "does not have the power and the authority to promote gambling worldwide ... " She also alleged that casinos such as PokerStars "are rigged as they are programmed in such way that people loose [sic] often, so they invest more money and more rapidly."

3 In para. 11 of her Statement of Claim she claimed the return of her "investment based or the legal principle of unjust and illegal enrichment." The fact is that she lost this money while gambling.

4 In paras. 15 and 16 of her Statement of Claim she made the following allegations:

> 15. The Plaintiff is claiming punitive and aggravated damages from the Defendants for the following reasons:
>
> - they are lying to gamblers in order to incite them to deposit money with them;
> - all games are phoney, [sic] pre-arranged and rigged so that it becomes impossible to win and therefore a waste of time;
> - they convince the Plaintiff to send them by e-mail copies of her passport and driver's licence under false pretenses;
> - they know that anyone's chances of winning are practically nil if not impossible.
>
> 16. The Plaintiff therefore claims the following:
>
> - $1,200.00 CAD as money invested in Pokerstars [sic, PokerStars];

- $1,000.00 for the time passed discussing with the Defendants and trying to find out their legal mailing address and sending them documentation;
- $5,000.00 as punitive and aggravated damages

5 The defendants pleaded that, to their knowledge, there was no such company as Rational Entertainment Limited. However, they did plead that Rational Entertainment Enterprises Limited (REEL) "is a duly incorporated corporation pursuant to the laws of the Isle of Man with its head office in Douglas, Isle of Man and is licenced by the Gambling Supervision Commission (under the authority from the Isle of Man Government) to provide online poker gaming services."

6 REEL also pleaded that users of PokerStars "must first register with an account on the website, read through and agree to the terms of the end user licence agreement (the "EULA") which governs the use of the Poker Gaming Software ... and then download the software which allows them to participate in real money poker games against other Users." All allegations of fraud were and are denied. REEL alleges that a software user "does not make any wagers against Poker-Stars; rather, all game play and competition occurs between a user and other users." The evidence establishes that, during the account creation process, the appellant, like all other users, was required to provide personal information as well as acknowledge that she read and understood the terms of the end user licence agreement. Specifically, the appellant was required to toggle a checkbox beside text stating "I have read and understood the End Users License Agreement published on the PokerStars website." It is REEL's position that if the checkbox was not toggled the appellant would have been unable to proceed with the account creation process and would not have been able to use any of the PokerStars' services.

7 The preamble and paras. 1.2. and 13 of the EULA explicitly state as follows:

PokerStars Online Poker Software Terms of Service

END USER LICENSE AGREEMENT

> This end user license agreement (the "Agreement") should be read by you (the "User" or "you") in its entirety prior to your use of PokerStars' service or products. Please note that the Agreement constitutes a legally binding agreement between you and Rational Entertainment Enterprises Limited (referred to herein as "PokerStars", "us" or "we") which owns and operates the Internet site found at www.pokerstars.com (the "Site"). In addition to the terms and conditions of this Agreement, please review our Privacy Policy, the Poker Rules, and the VIP Club terms and conditions as well as the other rules, policies and terms and conditions relating to the games and promotions available on the Site as posted on the Site from time to time, which are incorporated herein by reference, together with such other policies of which you may be notified of by us from time to time.
>
> By clicking the "I Agree" button below as part of the software installation process and using the Software (as defined below), you consent to the terms and conditions set forth in this Agreement, the Privacy Policy and the Poker Rules as each may be updated or modified from time to time in accordance with the provisions below and therein.

...

1. GRANT OF LICENSE/INTELLECTUAL PROPERTY

1.1. ...

1.2. The Software is licensed to you by PokerStars for your private personal use. Please note that the Software is not for use by (i) individuals under 18 years of age, (ii) individuals under the legal age of majority in their jurisdiction and (iii) individuals connecting to the Site from jurisdictions from which it is illegal to do so. PokerStars is not able to verify the legality of the Service in each jurisdiction and it is the User's responsibility to verify such matter.

13. GOVERNING LAW

The Agreement and any matters relating hereto shall be governed by, and construed in accordance with the laws of the Isle of Man. Each party irrevocably agrees that the relevant courts of the Isle of Man shall have exclusive jurisdiction in relation to any claim, dispute or difference concerning the Agreement and any matter arising therefrom and irrevocably waives any right that it may have to object to an action being brought in those courts, or to claim that the action has been brought in an inconvenient forum, or that those courts do not have jurisdiction.

8 REEL pleaded that Ms. Bérubé made a pre-litigation complaint against REEL which was investigated and determined to be based on false allegations of fact

9 After delivering its Statement of Defence, REEL moved before Justice Tierney of the Small Claims Court for the following relief:

(a) An order staying or dismissing this proceeding pursuant to s. 106 of the Courts of Justice Act on the basis that the Courts of Ontario do not have jurisdiction over this action;
(b) In the alternative, an order striking the Plaintiff's Statement of Claim, without leave to amend, for being inflammatory, a nuisance, a waste of time, and an abuse of process, and for failing to disclose a reasonable cause of action;
(c) In the further alternative, an order granting summary judgment in favour of the Defendant and dismissing the Plaintiff's claim.

10 Ms. Bérubé, who, incidentally, is or was a Quebec lawyer, replied to REEL's motion arguing that the Small Claims Court did, indeed, possess jurisdiction to entertain her claim on the basis that the cause of action arose in Ontario. She denied that REEL was physically situated in the Isle of Man. I pause here to observe that, clearly, REEL is owned, operated, and physically situated in the Isle of Man. With respect to para. 13 of the aforementioned agreement, she argued that para. 13 was not applicable because it applied only in relation to any claim, dispute or difference concerning the agreement. She submitted that her claim had nothing to do with the agreement and that it dealt with "operating an on-line casino illegally, fraudulently and unjust enrichment." In a document entitled "Reply to Defendant's Motion" she included the following paragraph:

9. The Defendant is a crook and a thief. Its on-line casino is rigged and all hands are pre-arranged. The Plaintiff was dealt the same hand three times.

11 Under the heading "God does not like legal disputes !!!" she said:

11. After having used every argumentation it could find, the Plaintiff forgot to refer to God and religion.
12. The Defendant's Motion is a nuisance and an abuse of the Court's process.

12 Justice Tierney made the following written endorsement with respect to REEL's motion:

> Motion on behalf of the defendant Rational Entertainment Enterprises Limited for an order staying or dismissing the claim on the basis that Ontario is not the proper forum for the trial of this action, and alternatively, for an order striking the claim on that basis that it fails to disclose a reasonable cause of action and is an abuse of the court process.
>
> This defendant is based in the Isle of Man and licensed pursuant to the laws of that jurisdiction to operate on-line poker gaming services. It has no physical presence in Ontario. Prior to her participation in the gaming activity the plaintiff was required to execute and did execute an agreement confirming that it was a condition of her participation that any dispute would be governed by the law of the Isle of Man and that the courts of the Isle of Man would have exclusive jurisdiction in relation to claims or disputes arising from these activities.
>
> In Sarabia v. Oceanic Mindoro (1996) 4 C.P.C. (4th) 11 B.C.C.A. Huddart J said:
>
> > "Since forum selection clauses are fundamentally similar to arbitration agreements ... there is no reason for (them) not to be treated in a manner consistent with the deference shown to arbitration agreements. Such deference ... achieves greater international commercial certainty, shows respect for the agreements that the parties have signed, and is consistent with the principle of international comity."
>
> Where, as here, both parties have agreed that the courts of the Isle of Man have exclusive jurisdiction, this defendant should not be forced to litigate in a foreign jurisdiction.
>
> The claim having been brought in the wrong jurisdiction it is hereby dismissed against the defendant Rational with costs fixed at $250.

13 For the record, I should also note that the other two defendants jointly moved before Justice Tierney for an order striking the claim for failure to disclose a reasonable cause of action. He held that the claim against these two entities had no hope of success and, therefore, Ms. Bérubé failed to show a reasonable cause of action. He dismissed the claim against those defendants. As noted earlier, no appeal has been taken with respect to that particular decision.

14 Ground number four upon which REEL relies in its motion to summarily dismiss this appeal is that "the appellant's appeal is frivolous and vexatious and her Notice of Appeal lacks merit and substance, is not grounded in fact or law, and contains language which clearly shows a lack of candour, courtesy, and respect to a judge of this province and to this Court generally."

15 The following are some extracts from Ms. Bérubé's Notice of Appeal:

> Althought [sic] the Plaintiff has tried incessantly to find the Defendant's place of business, that information was never provided to her. The Plaintiff suggests that it is certainly not the Isle of Men.
>
> ...
>
> Judge J. Tierney erred in his judgment when he states that this claim has no chance of success and does not show a cause of action. This is what the Courts were saying five years ago when someone was trying to sue 'les voleurs à cravates' or the business crooks. Millions of dollars are leaving Canada fraudulently and the Plaintiff has no cause of action. Only Justice Tierney seems to think so.
>
> Finally, the Plaintiff suggests that it is time to remove Justice Tierney from the bench. Not only is he out of touch with reality, he shows partially [sic] in most cases by taking the side who is represented by a lawyer. Since he does not know his law, he decides on issues as he sees fit to please the lawyers by siding with them and by adopting their theory. It is therefore a considerable loss of time and energy from [sic] anyone who wants to fight for her rights and for justice. The man has lost a complete understanding of the law and the meaning of justice and has foregone his role as a judge.
>
> THE APPELLANT SUGGESTS THAT IT IS IN THE INTEREST OF JUSTICE that this case be heard and judgement [sic] be amended because many important principles of law and of civil procedures are involved and were completely disregarded by Judge J. Tierney making this entire trial a mockery of the judicial justice, an abuse of power and a complete denial of justice.

16 REEL, in an affidavit filed in support of its motion, included information with respect to Ms. Bérubé's financial circumstances. This information establishes that Ms. Bérubé does not own any real estate in the City of Ottawa where she resides and that the Bank of Montreal has registered a Writ of Seizure and Sale against the appellant. This writ was renewed on May 4, 2009, and, as of November 27, 2009 the judgment was outstanding in the amount of $25,052.27. The supporting affidavit also establishes that Ms. Bérubé has a history of launching unsuccessful court actions against gambling entities and provincial and municipal governments. Indeed, REEL, in its factum, includes a copy of the Federal Court of Canada decision in Bérubé v. Canada, [2009] F.C.J. No. 75. The headnote of that decision reads, in part, as follows:

> Action by gambling addict to recover money lost as a result of her pathological dependency on gambling and punitive and exemplary damages. The plaintiff was a compulsive gambler who started going to the casino in about 1998 after the su-

> icide of her husband. She lost everything through gambling including her real property, her job and her friends. She extorted nearly $500,000 from family and lenders and when she could no longer care for her son, she placed him in foster care. The plaintiff sought damages of $20,000,000 from the government as a result of money lost in casinos in Quebec, loss of increase in market value of properties sold and loss of long-term income from those properties, damages in tort and punitive, exemplary and aggravated damages. The plaintiff claimed the government was liable because it was in breach of certain duties to conform with the law of Canada by failing to oppose the creation and operation of casinos by the province as it knew or ought to have known that the operation of casinos and the association of provinces to private enterprise in the operation of lotteries were illegal under the Criminal Code and that the operation of casinos was a threat to the life, liberty and security of the person. In addition to the current proceedings, the plaintiff had brought numerous other civil actions against various defendants, raising the same issues, and had applied to the court for a declaration that the manager of a government casino was operating a gaming house contrary to the Criminal Code.

17 Shore J. struck out her Statement of Claim on the ground that it contained no reasonable cause of action.

18 In para. 53 of the decision Shore J. said:

> 53. The plaintiffs repeated attempts to raise the same issues while naming different defendants is an abuse of process (Black v. MC Diesel Power Inc. (Trustee of) 2000, 183 F.T.R. 301, 97 A.C.W.S. (3d) 859).

19 It is important to observe that Ms. Bérubé did not file any affidavit evidence on the motion before Justice Tierney nor did she file any affidavit evidence on the motion before me.

Discussion and Decision

20 As I indicated on the argument of REEL's motion, the request for an order that the appeal be dismissed as a result of the Notice of Appeal being served more than 30 days after the date the order appealed from was made is dismissed. There is evidence before the Court that the decision of Justice Tierney was not forwarded immediately to Ms. Bérubé; that she exhibited an intention throughout to appeal the decision; and that she was only one day late in filing her Notice of Appeal. In these circumstances I extend the time for appealing and, therefore, the appeal should not be dismissed simply for failure to comply with the relevant time limits. In making this ruling I also take into consideration Rules 1.03, 2.01, 2.02 and 3.02.

21 However, the appeal should be quashed pursuant to s. 134(3) of the Courts of Justice Act, R.S.O. 1990, c. 43. In the event that I am in error in my decision to quash the appeal as aforesaid, I order that the appellant be required to post security for the costs of the appeal in the amount of $6,000 following which REEL shall have 30 days within which to file its responding material on the appeal.

22 Pursuant to s. 31 of the Courts of Justice Act an appeal lies to the Divisional Court from a final order of the Small Claims Court in an action for the payment of money in excess of $500. This is such an action. Justice Tierney's order disposed of the litigation between the parties and is, there-

fore, a final order. The Rules of Civil Procedure apply to such appeals. Section 21(2)(b) of the said Act provides that a proceeding in the Divisional Court may be heard and determined by one judge where the proceeding is an appeal under s. 31 from a provincial judge or a deputy judge presiding over the Small Claims Court. Accordingly, as a judge of the Superior Court of Justice, I have jurisdiction to entertain REEL's motion. I also observe that under s. 21(3) a motion in a Divisional Court "shall be heard and determined by one judge".

23 Section 134(3) of the Courts of Justice Act states that: "On motion, a court to which an appeal is taken may, in a proper case, quash the appeal." An appeal should be quashed where it is manifestly devoid of merit. (See Accord Oatway v. Canadian Wheat Board, [1945] S.C.R. 204; Lesyork Holdings Ltd. et al. v. Munden Acres Ltd. et al. (1976), 13 O.R. (2d) 430 (C.A.)).

24 Ms. Bérubé argues that her claim falls within Rule 6.01 of the Small Claims Court Rules, O. Reg. 258/98 as amended. Rule 6.01 provides as follows:

> Place of Commencement and Trial
>
> 6.01(1) An action shall be commenced,
>
> (a) in the territorial division,
>
> (i) in which the cause of action arose, or
> (ii) in which the defendant or, if there are several defendants, in which any one of them resides or carries on business; or
>
> (b) at the court's place of sitting that is nearest to the place where the defendant or, if there are several defendants, where any one of them resides or carries on business. O. Reg. 78/06, s. 8(1).
>
> (2) An action shall be tried in the place where it is commenced, but if the court is satisfied that the balance of convenience substantially favours holding the trial at another place than those described in subrule (1), the court may order that the action be tried at that other place. O. Reg. 78/06, s. 8(1).
>
> (3) If, when an action is called for trial or settlement conference, the judge finds that the place where the action was commenced is not the proper place of trial, the court may order that the action be tried in any other place where it could have been commenced under this rule. O. Reg. 78/06, s. 8(1).

25 In support of her argument Ms. Bérubé states that REEL is not physically situated in the Isle of Man and does not operate from that island. That statement is unsupported by the facts and, indeed, is absolutely contrary to the evidence before the Court. In any event, the focus of Rule 6.01 is on geographical areas of the court. It is not specifically concerned with issues regarding whether the court has jurisdiction over the subject matter of the litigation. Rule 6.01, therefore, does not assist Ms. Bérubé.

26 As aforesaid, Ms. Bérubé argues that para. 13 of the user agreement does not apply to her claim. Indeed, she argues that her claim has nothing to do with the agreement and, as aforesaid, that the claim deals with operating an on-line casino illegally, fraudulently and/or restitution of her money invested with PokerStars. In my opinion, she is incorrect. Her position is untenable. Her action does concern the agreement and/or "any matters relating" to the agreement. The subject matter

of her Statement of Claim; in my further opinion, relates to "any claim, dispute or difference concerning the agreement and any matter arising therefrom." The language of para. 13 is very wide and there is no valid reason why it should be given a narrow interpretation.

27 No law has been cited to me on this motion that would in any way suggest that Justice Tierney's decision was not a proper one. No facts have been brought to my attention that would question the validity of his decision. In my opinion, his decision is a correct one. Accordingly, in my opinion, the appeal is manifestly devoid of merit and should be, and is, quashed. I agree with the submission of Ms. Lewis that the law on forum selection clauses is a well-settled area of law in Ontario - i.e., deference to forum selection clauses achieves greater international certainty, shows respect for the agreements that the parties have signed, and is consistent with the principle of international comity.

28 The appeal is also, in my opinion, frivolous and vexatious and an abuse of the processes of this Court. Notwithstanding the limited scope of Justice Tierney's reasons for the dismissal of the claim, the appellant, on the argument of this motion, sought to argue the frivolous and vexatious issues raised in the Statement of Claim and in her Notice of Appeal.

29 I turn now to the request for security for costs. Obviously, no security will be necessary in the event that no successful appeal is launched from this decision. However, should a successful appeal be pursued, there should be an order for security for costs as requested. Rule 61.06 of the Rules of Civil Procedure states as follows:

> SECURITY FOR COSTS OF APPEAL
>
> 61.06(1) In an appeal where it appears that,
>
> (a) there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal;
> (b) an order for security for costs could be made against the appellant under rule 56.01; or
> (c) for other good reason, security for costs should be ordered,
>
> a judge of the appellate court, on motion by the respondent, may make such order for security for costs of the proceeding and of the appeal as is just.
>
> (1.1) If an order is made under subrule (1), rules 56.04, 56.05, 56.07 and 56.08 apply, with necessary modifications.
> (2) If an appellant fails to comply with an order under subrule (1), a judge of the appellate court on motion may dismiss the appeal.

30 Not only is there good reason to believe that the appeal is frivolous and vexatious, there is sufficient evidence before the Court upon which to find that Ms. Bérubé has insufficient assets in Ontario to pay the costs of the appeal. In addition, an order should be made, for the same reasons, under s. 56.01(e) of the Rules of Civil Procedure.

31 The claim for security in the amount of $6,000 is, in my opinion, reasonable notwithstanding that a detailed bill of costs was not provided. (See Schmidt v. Toronto-Dominion Bank, [1995] O.J. No. 1604 (C.A.)).

32 Therefore, for all of the foregoing reasons, the appeal is quashed. In the event that my decision to quash the appeal is subsequently overturned, an order should issue requiring Ms. Bérubé to provide security for costs of the appeal fixed at $6,000.

Costs

33 In the event that within 30 following the issuance of these Reasons for Decision the parties are unable to conclude an agreement with respect to the costs of this motion, they may make brief written submissions to me.

D.J. POWER J.

cp/s/qllxr/qljxr/qlaxw

TAB 3

Indexed as:

Oatway v. Canada (Wheat Board)

Arthur Henry Oatway (Plaintiff), Appellant; and
The Canadian Wheat Board (Defendant), Respondent.

[1945] S.C.R. 204

Supreme Court of Canada

1945: February 13, 14 / 1945: February 27.

Present: Rinfret C.J. and Kerwin, Hudson, Kellock and Estey JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Appeal -- Leave to appeal granted by appellate court -- Motion to quash maintained by this Court -- Appeal "manifestly devoid of merit and substance" -- No issue left to be decided between the parties -- Court declining to hear appeal -- Action by wheat producer against the Canadian Wheat Board for an accounting of operations of the Board -- Orders in Council passed under War Measures Act, when matter before appellate court, removing substratum of plaintiff's claim.

The appellant, a producer of wheat in Manitoba, who had delivered and sold wheat to the Canadian Wheat Board, brought an action against the Board, on behalf of himself and other producers, before the Court of King's Bench, asking among other relief for an accounting of the operations of the Board during the crop years of 1938 to 1942 both inclusive. The Board, besides submitting a statement of defence on different points of law and facts, launched a motion for an order dismissing appellant's action on the ground that, the Board being a servant or agent of the Crown, the Court of King's Bench had no jurisdiction, and, in the alternative, that the action was frivolous and vexatious. The motion was dismissed and the appellant appealed to the Court of Appeal. While the matter was still before that court, an Order in Council was passed under the War Measures Act, reciting that there was no surplus in either of the first two years and providing for the distribution of the surplus in each of the other three years. The majority of the Court of Appeal, later, held that the Board was an agent of the Crown and that the appellant's action could not be brought in the provincial court [[1944] 3 W.W.R. 337]. The appellant appealed to this Court upon special leave granted by the Court of Appeal. The respondent Board moved to quash the appeal on the grounds that the appellant's claim and appeal were without substance and merit and that the appeal was wholly academic

and futile, because, among other reasons, by the terms of the Canadian Wheat Board Act and the Order in Council, the appellant had and has no right to sue.

Held that the motion of the respondent Board should be allowed and the appeal dismissed.

The Supreme Court of Canada will entertain favourably a motion to quash an appeal to this Court, if such appeal, though within the jurisdiction of the Court, is manifestly entirely devoid of merit and substance. National Life Assurance Co. v. McCoubrey ([1926] S.C.R. 227), and judgments therein referred to; De Bortoli v. The King ([1927] S.C.R. 454, at foot of 457 and at 458); Bowman v. Panyard Machine & Mfg. Co. ([1928] S.C.R. 63); Cameron v. Excelsior Life Ins. Co. ([1937] 3 D.L.R. 224); Laing v. The Toronto General Trusts Corporation ([1941] S.C.R. 32) and Temple v. Bulmer ([1943] S.C.R. 265). More particularly, the recent decision of this Court in Coca Cola Co. of Canada v. Mathews ([1944] S.C.R. 385) is conclusive, where this Court held that it should decline to hear an appeal when there was no issue before it to be decided between the parties.

In this case, the Order in Council has removed the substratum of the appellant's claim, even if the matter could be brought before the ordinary courts at all and should not have been initiated in the Exchequer Court of Canada.

No opinion was expressed by this Court upon the judgment of the majority of the Court of Appeal.

APPEAL from a judgment of the Court of Appeal for Manitoba [[1944] 3 W.W.R. 337], reversing the judgment of Donovan J. and maintaining a motion by the respondent Board for an order dismissing the appellant's action on the ground that the Board was an agent of the Crown, was not suable in a provincial court and the action should have been taken before the Exchequer Court of Canada, after a fiat had been granted.

J.B. Coyne L.C. for the motion.
C.E. Finkelstein contra.

The judgment of the Court was delivered by

RINFRET C.J.:-- This is a motion on behalf of the Canadian Wheat Board to quash and dismiss an appeal from a judgment of the Court of Appeal of Manitoba. Counsel for the Wheat Board was also authorized to appear on behalf of the Attorney General of Canada so that we are at liberty to deal with the appellant's contention that certain Orders in Council hereafter referred to are invalid.

The motion is

> to quash and dismiss the appeal herein on the ground that, without reference to the basis of decision in the Court of Appeal, the plaintiff's claim and appeal are plainly unfounded and without substance or merit, and the appeal is wholly academic and futile, because, among other reasons: since the action began, Orders in Council have provided for the distribution of the surplus monies resulting from operations of the Board including the sale of all wheat, delivered to the Board, in

> respect of the crop years in question herein, being the relief claimed in this action, and have disposed of any issue which may have existed between the parties; and, by the terms of The Canadian Wheat Board Act and the Order in Council, the plaintiff had and has no right to sue.

Copies of the record in the courts below, including the pleadings and the reasons for the judgment of the Court of Appeal were placed before the Court in what was designated "Appeal Book".

The Canadian Wheat Board was established in 1935 under The Canadian Board Act, chapter 53 of the Dominion statutes of that year. Its purpose, among others, was

> to undertake the marketing of wheat in interprovincial and export trade,

the Board buying from producers only and having

> to sell and dispose of all wheat which the Board may acquire, for such price as it may consider reasonable, with the object of promoting the sale and use of Canadian wheat in world markets.

The plaintiff is a producer of wheat, residing in the province of Manitoba, who delivered and sold wheat to the Board. He bases his claim upon The Canadian Wheat Board Act.

The Board is a body corporate. The action was brought against the Board as if it were "an ordinary trading corporation", in the language of Richards J.A.

The plaintiff issued a statement of claim against the defendant

> on behalf of himself and all other producers who are holders of producers certificates issued by the defendant for the crop years of 1938, 1939, 1940, 1941 and 1942.

He asked, among other things, for an accounting of the operations of the Board and of the wheat received by it during the said crop years, of all receipts and expenditures in connection therewith; for an order that the Board pay and distribute to the producers what shall be found due to them on the taking of accounts; and for a reference and for other relief.

The Board submitted in its statement of defence that the action was bad in law, in that it did not allege a reasonable or any cause of action against the Board; and moreover, that if any cause of action against the Board was stated in the statement of claim, which was denied, then it was not a cause of action in which under the law and practice an action could be commenced and continued without a fiat from the Crown, which had not been granted, and even if a fiat had been granted, there was no cause of action stated against the Board, Under the reserve of these and all other objections to the sufficiency in law of the statement of claim, the Board then pleaded on the merits.

On the 27th of November, 1943, the Board launched a motion for an order dismissing plaintiff's action, on the ground that the Court of King's Bench had no jurisdiction to hear a trial or determine the matters at issue in the action. The Board alleged in support of its motion that it is an instrument of the Government of Canada, or, alternately, a servant or agent of the Crown, and that it had acted solely in the capacity aforesaid for His Majesty in the right of the Dominion. In the alternative, the Board asked that the action be dismissed as frivolous and vexatious. In support of this

motion an affidavit of William Aitken, accountant of the Canadian Wheat Board, of the city of Winnipeg, Manitoba was filed.

The motion was heard by Donovan J., of the Court of King's Bench, who dismissed it with costs. The Board thereupon appealed to the Court of Appeal and the appeal was allowed and the statement of claim in the action was struck out. The judgment is grounded upon a holding by a majority of the Court that the Canadian Wheat Board is an agent of the Crown in the matters in question and that this precludes the plaintiff's suit in the provincial court.

On the 21st of November, 1944, the Court of Appeal granted to the appellant (plaintiff) special leave to appeal to this Court from the last mentioned judgment.

As already stated, the Board now moves for an order to quash and dismiss the appeal herein, on the ground that the plaintiff's claim and appeal are plainly unfounded and without substance and merit, and the appeal is wholly academic and futile, because, since the action began, Orders in Council have given to the appellant, and all those whom he claims to represent, the relief prayed for in this action, and have disposed of any issue which may have existed between the parties.

The Board's motion is supported by affidavits by Thomas William Grindley, secretary of the Canadian Wheat Board, and Henry B. Monk, barrister, of the city of Winnipeg.

The Canadian Wheat Board Act was amended in 1939, chapter 39; in 1940, chapter 25; and in 1942, chapter 4. Part II of the Act, added in 1940, was repealed by Order in Council P.C. 5844 of 1941, under the War Measures Act. It is apparent that this Act is part of the effort to solve economic and political problems, particularly of Western agriculture, and financial problems which deeply involved the Dominion government, all of which were then acute by reason of the depression, low prices, drought, a small international market, and other factors. These efforts culminated at the time in the adoption of The Canadian Wheat Boar d Act.

After 1941, due to the war, a large number of Orders in Council have been enacted, under the War Measures Act, directing operations of the Board and conferring upon the Board additional powers, generally subject in their exercise to approval by the Governor in Council.

The purpose of The Canadian Wheat Board Act were many, but two of them were:--

(1) To create a corporation for the purpose of liquidating an obligation of the Dominion of Canada amounting to more than one hundred million dollars which arose from a guarantee by the Government to the banks of the huge indebtedness of the Wheat Pools to the banks which had been a problem of the Government since 1931, and, for that purpose, to dispose of approximately two hundred million bushels of wheat which were held by the banks as security for the indebtedness. Sections 7 (f) and 8 (c) of the original Act providing for this were repealed in 1940 when this obligation had been liquidated.

(2) To put a floor under wheat prices.

In the original Act, and in the amendments thereto, other wide powers were conferred, as for instance, the regulation of delivery of grain of all kinds by producers, whether the producers were delivering and selling wheat to the Board or not, investigation of operations of grain exchanges, regulation of storage and transport generally of grain from barn to exportation, collection of a Processing Levy on all wheat products and prohibition and regulation of imports.

The Board may accept delivery of wheat from producers and may purchase, sell, store and transport such wheat.

During the five year period involved in this action every producer had the option to deliver and sell to the Board, or to sell on the open market. As was natural, comparison of the prices paid by the Board on delivery and the price on the open market determined his course. In one year the Board handled practically no wheat, and in another year practically the whole marketed crop. If the producer delivered to the Board, he was, of course, governed by the terms of the Act, and more particularly the provisions above referred to.

When a producer delivers wheat to the Board, the Board is authorized to make a cash payment to the producer of a fixed amount, according to grade and quality, less freight and other charges to shipping port terminal. At the time of purchase and down payment, the Board, under subsection (f), is to issue to producers "certificates", indicating the number of bushels purchased, the grade and quality, which certificates

> entitle the producers named therein to share in the equitable distribution of the surplus, if any, of the operations of the Board with regard to wheat delivered in any crop year, it being the true intent and meaning of this Act that each producer shall receive for the same grade and quality of wheat the same price on the Fort William-Port Arthur or Vancouver basis.

The Act gives the Board power generally to do all such acts and things as may be necessary for the purpose of giving effect to its intent and meaning.

Section 12(1) of the Act provides that

> the Board shall, with the approval of the Governor in Council, provide for the form and contents of certificates * * *

Section 8, (subsections (d) to (g)), provide that the Board shall set up a proper system of accounting, appoint responsible outside auditors, make weekly audited reports of its operations to the Minister and any other reports he may require, all of which has been done, according to the affidavit of William Aitken.

Section 13(1) provides that

> as soon as the Board has received payment in full for all wheat delivered during any crop year, there shall be deducted from the receipts all monies, disbursed by or on behalf of the Board;

and then, by subsection (2),

> the balance shall be distributed pro rata among the producers holding certificates * * * in accordance with regulations of the Board approved by the Governor in Council.

In short, a system of pooling wheat was set up by the Act. A farmer delivering wheat to the Board received the sum which the Board was authorized to pay and a certificate showing grade, quality and quantity, and the Board marketed all the wheat received. If as a result of its operations there

was a surplus, the statute entitled the certificate holder to share in it pro rata with other producers delivering grain of the same grade and quantity. If there was a loss, as happened in 1938 and 1939, it was met by the Government.

At the time the appellant commenced his action (October 18th, 1943), no regulations had been made for distribution under subsection (2) of section 13, or otherwise (affidavit of W.T. Grindley).

The plaintiff's claim in this action is set out in paragraph 23 of the statement of claim:--

> (a) That an account may be taken of the operations of the defendant and of the wheat received by it during the crop years of 1938, 1939, 1940, 1941 and 1942, and of all sums of money received by, or come to the hands of, the defendant and of the application thereof and of the expenses disbursed by the defendant and all dealings and transactions of the defendant.
>
> (b) That a determination be made by this Honourable Court of what should be the proper expenses and disbursements chargeable against the receipts, within the meaning of the said Act and the respective crop years to which such expenses and disbursements are properly chargeable.
>
> (c) That a determination by a declaration of this Honourable Court be made of the amounts of the proper surpluses to which the plaintiff and the other producers are entitled to for each of the crop years 1938, 1939, 1940, 1941 and 1942 respectively.
>
> (d) That the defendant may be ordered to pay and distribute to the plaintiff, and to all other producers on whose behalf this action is brought, what, on taking such accounts, shall be found due from the defendant to the plaintiff and such other producers.

One of the grounds of the motion to dismiss the action made by the Board was that it was a n agent of the Crown and was not suable in the provincial courts and that if any action could be taken it must be in the Exchequer Court of Canada. It was on this ground that the Court of Appeal struck out the statement of claim, and it is against that judgment that this appeal has been taken to this Court.

While the matter was before the Court of Appeal, that is, before argument was concluded, an Order in Council was passed under the War Measures Act, P.C. 3541 of 1944. This Order recites that there was no surplus in either of the first two years in question in this action, but that there was a surplus in each of the other three years and it provides for the distribution of the surplus in each case.

The War Measures Act provides in section 3(2):--

> All orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe.

There is also section 8(h) of The Canadian Wheat Board Act, already mentioned, which provides that

> it shall be the duty of the Board to give effect to any Order in Council that may be passed with respect to its operations.

By paragraph two of the Order in Council,

> The Canadian Wheat Board shall distribute the surpluses (after deducting expenses as provided by section 13 of The Canadian Wheat Board Act, 1935), resulting from its operations during the three years commencing in 1940 by paying to each certificate holder for each bushel of wheat of the grade and quality stated in his certificate the specific sum of money set out in the Order (subsection (a));

and it provides that

> the Board and Governor in Council should similarly distribute the surpluses of the succeeding two years by determining the appropriate sum for each grade and quality of each year (subsection (b) and section 3).

By section 4,

> the Canadian Wheat Board shall not make any distribution or payment under the Canadian Wheat Board Act or otherwise in respect of certificates issued with regard to the wheat delivered to it in the five crop years commencing in 1938 and ending in 1943, except the distribution and payments provided for in section 2 of this Order;

and it further provides that

> there shall be no liability in respect of such certificates except as provided in this Order.

In September, 1944, Order in Council P.C. 6898 was made in accordance with paragraphs 2(b) and 3 of P.C. 3541 fixing the amount payable in respect of grades and qualities in the remaining two years.

It was urged by the Board (respondent), on the authority of the Gray case [In re George Edwin Gray (1918) 57 Can. S.C.R. 150], and the Reference re Chemicals [[1943] S.C.R. 1] that Orders in Council adopted under the War Measures Act are equivalent to statutes; that the Orders in Council referred to completely cover the field of distribution of the surplus in respect of the years in question in the action, and any right that the plaintiff has to receive any sums of money from any surplus in the years in question is such sum as he may be entitled to under these Orders in Council.

It was, therefore, argued that any issue between the parties in this case has disappeared and that accordingly the appeal should be quashed and dismissed. For authorities the respondent re-

ferred to Cameron v. Excelsior Life Ins. Co. (S.C.C.) [[1937] 3 D.L.R. 224]; Attorney General of Alberta v. Attorney General of Canada, [[1939] A.C. 117; [1938] 3 W.W.R. 337]; Coca-Cola Company of Canada v. Matthews [[1944] S.C.R. 385].

In the Alberta case [[1939] A.C. 117; [1938] 3 W.W.R. 337] a reference had been made to this court in respect of an Alberta statute and that statute was repealed after judgment was rendered by this Court. The Privy Council declined to hear the appeal on the ground, as stated in the W.W.R., at p. 341:--

> It is contrary to the long established practice of this Board to entertain appeals which have no relation to existing rights.

The Court was informed at bar that there are more than two hundred thousand holders of certificates interested in the distribution about which this action was brought, and that over one million certificates have been issued by the Board in connection with crop years mentioned in the action. This shows the great importance of the matter and the undoubted urgency for an early decision by this Court.

As the appellant argued that a matter of this kind should not be summarily disposed of on a motion, the Court offered to extend the motion so that it might be heard, at the same time as the merits of the case, during the present sittings; but, as the appellant insisted that the matter should go over until the April sittings, which would have meant a delay of at least three months, the Court decided to hear the respondent's motion immediately, and counsel on both sides were given full opportunity to be heard on all the points raised, and they availed themselves of the opportunity.

It is far from being the first time that this Court has been called upon to decide in such a way appeals which, on their face, appear either to be devoid of any substance or merit, or to require a speedy decision. It is not necessary to advert beyond the year 1926 when this Court, in National Life Assurance Co. of Canada v. McCoubrey [[1926] S.C.R. 277], held that if an appeal, though within the jurisdiction of the Court, be manifestly entirely devoid of merit or substance, the Court will entertain favourably a motion to quash it.

In that case, the plaintiff sued to recover the amount of a policy of insurance and interest thereon, and, having begun action by a specially endorsed writ, moved before a judge in chambers for speedy judgment under Order XIV, r.1 of the Rules of the Supreme Court of British Columbia, and it was ordered that judgment be entered for the plaintiff for the sum mentioned in the policy and that the action should proceed as to the demand for interest. The order was affirmed by the Court of Appeal for British Columbia. It was held that the order did not amount merely to an exercise of judicial discretion within the purview of section 38 of the Supreme Court Act; and that grounds urged against the defendant's right of appeal to the Supreme Court of Canada were not maintainable; but the Court, applying the principles above stated, quashed the appeal on the ground that it was manifestly devoid of merit. In the course of delivering the judgment of the Court, Anglin C.J.C. said, at p. 283:--

> After full consideration we are satisfied that the appeal lacks merit and that interference with the order for judgment, unanimously affirmed by the provincial appellate court, would be clearly unjustifiable.

It was said that

> every Court of justice has an inherent jurisdiction to prevent such abuse of its own procedure;

and an appeal

> having such manifest lack of substance as would bring it within the character of vexatious proceedings designed merely to delay

should not be entertained. The following judgments were referred to: Fontaine v. Payette, [(1905) 36 Can. S.C.R. 613, at 615]; Reichel v. McGrath, [(1889) 14 App. Cas. 665]; Schlomann v. Dowker, [(1900) 30 Can. S.C.R. 332, at 325]; Angers v. Duggan, 19 Feb., 1907, Cameron, 3rd Ed, p. 92; Moir v. Huntingdon, [(1891) 19 Can. S.C.R. 363]; Assn. Pharmaceutique v. Fauteux, 20 Feb., 1923.

The Chief Justice added:--

> This court will entertain favourably a motion to quash * * * as a convenient way of disposing of the appeal before further costs have been incurred.

The same principle was again affirmed and applied in this Court in De Bortoli v. The King [[1927] S.C.R. 454, at foot of 457 and at 458]; Bowman v. Panyard Machine & Mfg. Co. [[1928] S.C.R. 63 at 64]; Cameron v. Excelsior Life Ins. Co. [[1937] 3 D.L.R. 224], where Sir Lyman P. Duff C.J.C. said:--

> We have come to the conclusion that this appeal ought not to be permitted to proceed further. We have before us all the material necessary to enable us to decide whether, if the appeal were allowed to continue in the usual course, there is any reasonable probability that the appellant could succeed. After a full examination of all the pertinent considerations, we are satisfied that to interfere with the judgment of the Court of Appeal would be clearly unjustifiable; and that in this case we ought to exercise the well - established jurisdiction to quash summarily an appeal where, to quote the expression employed in the judgment of this Court in National Life Co. v. McCoubrey [[1926] S.C.R. 277; [1926] 2 D.L.R. 550, at 554], it is "manifestly entirely devoid of merit or substance".

Again, in Laing v. The Toronto General Trusts Corporation [[1941] S.C.R. 32, at 33], Sir Lyman P. Duff C.J.C. said:--

> We have come to the conclusion that this is one of those cases in which it is plain that if the appeal came on for hearing in the ordinary way it could not be entertained by the Court, conformably to the course of the Court with regard to such matters * * *
>
> It is the settled course of this Court that when on a motion to quash it plainly appears to the Court that the appeal is one which, if it came on in the reg-

> ular and ordinary way, must be dismissed, the Court will on that ground quash the appeal.

The same reasoning was followed in Temple v. Bulmer (10). And, of course, the respondent was perfectly justified in referring to the recent judgment of this Court in Coca-Cola Co. of Canada Ltd. v. Matthews [[1943] S.C.R. 265], where several other judgments of this Court to the same effect are referred to, and more particularly the judgment of the House of Lords in Sun Life Assurance Co. of Canada v. Jervis [(1944) 113 L.J. K.B. 174], and the judgment of the Privy Council in Attorney-General for Ontario v. The Hamilton Street Railway Co. [[1903] A.C. 524].

We express no opinion upon the judgment of the majority of the Court of Appeal which deals with the status of the appellant to invoke the jurisdiction of the courts, if there were such jurisdiction. As was said by the former Chief Justice of this Court in Temple v. Bulmer [[1913] 1 S.C.R. 265]:--

> That is a question which we shall be free to consider whenever it may be necessary to pass upon it.

The ground upon which we think the motion of the respondent ought to be allowed is the same as that in the Coca-Cola case [[1944] S.C.R. 385]. We should decline to hear the appeal because there is no issue left to be decided between the parties. We are bound by our judgment in that case to the effect that this Court will not decide abstract propositions of law, even if to determine the liability as to costs; and such a situation is not affected by the fact that the provincial court of appeal has granted leave to appeal to this Court.

In the premises, the Orders in Council have removed the substratum of the plaintiff's claim, even if the matter could be brought before the ordinary courts at all and not before the Exchequer Court of Canada or if it could be said that this is a matter upon which any court is competent to pronounce.

We have stated, in the course of the present judgment, the conclusions of the plaintiff's action and the relief sought by him. The Orders in Council provide that the Canadian Wheat Board shall not make any distribution or payment under the Canadian Wheat Board Act or otherwise in respect of certificates issued with regard to the action, except the distribution and payments provided for in section (2) of the Order (that is to say, distribution and payment in connection with the questions raised in the action), and "there shall be no liability in respect of such certificates except as provided in this Order" (P.C. 3541, section 4). It is true that the appellant is not granted an accounting by the Orders in Council but they unequivocally determine the only bases upon which payments to holders of producers' certificates may be made.

Then the Canadian Wheat Board, having been empowered by Order in Council 3541, with the approval of the Governor General in Council, to determine and fix the amounts to which producers were entitled per bushel according to grade and quality, under Producers' Certificates issued in respect of wheat delivered to the said Board commencing in 1941 and 1942, His Excellency the Governor General in Council, on the recommendation of Acting Minister of Trade and Commerce and under and by virtue of the powers conferred under the War Measures Act, and otherwise, was, by the subsequent Order in Council P.C. 6898, pleased to approve and did approve the said amounts to be paid to producers as aforesaid as determined and fixed by the said Board and set forth in the schedules attached to the two Orders in Council.

While it was competent for this Court to take judicial notice of these Orders in Council, as a matter of fact, they formed part of the material placed before the Court accompanying the motion to quash and dismiss the appeal. It is abundantly evident that these Orders in Council disposed of the whole case and

> that no further lis exists between the parties and that they leave nothing for them to fight over. (Coca-Cola case, [[1944] S.C.R. 385, at 386]).

Of course, the appellant urged that the Orders in Council were ultra vires, but, in order to dispose of that argument, it should be sufficient to refer to the decisions of this Court in the Gray case [(1918) 57 Can. S.C.R. 100], and the unanimous judgment of this Court In the matter of a Reference as to the validity of the Regulations in relation to Chemicals enacted by the Governor of Canada on the 10th of July, 1941, P.C. 4996 [[1943] S.C.R. 1].

Accordingly, the motion of the respondent should be allowed and the appeal dismissed. In the special circumstances, there will be no order as to costs in this Court.

Motion allowed, appeal dismissed, no costs.

---- End of Request ----
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TAB 4

Indexed as:

Kourtessis v. Canada (Minister of National Revenue - M.N.R.)

Constantine Kourtessis and Hellenic Import-Export Co. Ltd., appellants;
v.
Minister of National Revenue, respondent, and The Attorney General for Ontario and the Attorney General of Quebec, interveners.

[1993] 2 S.C.R. 53

[1993] S.C.J. No. 45

File No.: 21645.

Supreme Court of Canada

1992: February 6 / 1993: April 22.

Present: La Forest, L'Heureux-Dubé, Sopinka, Cory, McLachlin, Stevenson* and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (100 paras.)

* Stevenson J. took no part in the judgment.

Income tax -- Enforcement -- Search and seizure -- Warrant authorizing search and seizure quashed but material seized not returned -- Second warrant issued with respect to retained material but subject to right to challenge -- Appellants challenging warrant by bringing application for declaration that search warrant and enabling legislation unconstitutional and for order quashing warrant -- Application dismissed -- Court of Appeal finding no right to appeal because search and seizure effected under federal criminal law power and no right to appeal existing in Criminal Code or Income Tax Act -- Whether or not appeal could be effected under provincial procedures -- Whether or not search and seizure unreasonable contrary to s. 8 of Charter -- Income Tax Act, S.C. 1970-71-72, c. 63, as amended by S.C. 1986, c. 6, ss. 231.3, 231.3(7), 239 -- Canadian Charter of Rights and Freedoms, s. 8.

Courts -- Jurisdiction -- Right of appeal -- Income tax -- Enforcement -- Search and seizure -- Warrant authorizing search and seizure quashed but material seized not returned -- Second warrant issued with respect to retained material but subject to right to challenge [page54] -- Appellants challenging warrant by bringing application for declaration that search warrant and enabling legislation unconstitutional and for order quashing warrant -- Application dismissed -- Court of Appeal finding no right to appeal because search and seizure effected under federal criminal law power and no right to appeal existing in Criminal Code or Income Tax Act -- Whether or not appeal could be effected under provincial procedures.

Courts -- Procedure -- Income tax -- Enforcement -- Search and seizure -- Warrant authorizing search and seizure quashed but material seized not returned -- Second warrant issued with respect to retained material but subject to right to challenge -- Appellants challenging warrant by bringing application for declaration that search warrant and enabling legislation unconstitutional and for order quashing warrant -- Application dismissed -- Court of Appeal finding no right to appeal because search and seizure effected under federal criminal law power and no right to appeal existing in Criminal Code or Income Tax Act -- Whether or not appeal could be effected under provincial procedures.

Officers of Revenue Canada believed that appellants were evading or attempting to evade tax by making false and deceptive statements in income tax returns contrary to s. 239 of the Income Tax Act (ITA). The British Columbia Supreme Court issued warrants to search for and seize documents which could afford evidence of the alleged violations. These warrants were subsequently quashed by another judge of that court. The items that had been seized, however, were not returned and McEachern C.J.S.C. issued a search warrant for the seizure of relevant documents located at the Department's premises, provided that everything seized be sealed and that appellants have thirty days to challenge the warrant.

Appellants instituted proceedings in the B.C. Supreme Court by way of originating petition challenging the warrant under s. 231.3(7) of the ITA, s. 24(1) of the Canadian Charter of Rights and Freedoms, and the inherent jurisdiction of the court. The relief sought [page55] was an order quashing the warrant and the search and seizure executed under it, ordering the return of the material seized, prohibiting its use and ordering its destruction and declaring s. 231.3 of the ITA to be contrary to ss. 7, 8 and 15 of the Charter.

The entire application was dismissed by the B.C. Supreme Court in two judgments -- one dealing with non-constitutional issues and one with constitutional issues. On appeal to the Court of Appeal, appellants, unsure whether leave was required, gave both notice of appeal and notice of application for leave to appeal. The Minister brought a motion to quash on the ground that no appeal lay from the B.C. Supreme Court's judgment. The Court of Appeal allowed the motion to quash, holding that it had no jurisdiction to hear the appeal. It reasoned that the litigation in question was a criminal proceeding subject to Parliament's exclusive jurisdiction to prescribe criminal procedure and no right of appeal could be found in the ITA or the Criminal Code. The Court of Appeal would in any event have dismissed the appeal on the merits.

The preliminary issue to be decided here was whether the British Columbia Court of Appeal had jurisdiction to entertain the appellants' appeal. The constitutional question before the Court queried whether s. 231.3 of the ITA infringed ss. 7 and 8 of the Charter.

Held: The appeal should be allowed. Section 231.3 of the Income Tax Act infringes s. 8 of the Charter.

Per La Forest, L'Heureux-Dubé and Cory JJ.: Section 231.3 was held to violate s. 8 of the Charter in Baron v. Canada, [1993] 1 S.C.R. 416. The procedural issues, nevertheless, have very important implications for the working of the enforcement provisions of the ITA and other federal statutes to which federal criminal procedures apply.

An appeal is not available because no appeal has been provided by the relevant legislative body and courts of appeal have no inherent rights to create appeals. Only superior court judges appointed under s. 96 of the Constitution Act, 1867 have inherent jurisdiction. The appellants, however, may pursue an action for a declaration, [page56] to which the ordinary rules of procedure in civil actions apply, including provisions for appeal.

Various policy reasons underlie enacting a procedure that limits rights of appeal. Sometimes the opportunity for more opinions does not serve the ends of justice. There should not be unnecessary delay in the final disposition of proceedings, particularly proceedings of a criminal character. This is especially applicable to interlocutory matters which can ultimately be decided at trial. As well, there is the simple value of a final decision to resolve a dispute without the costs, in time, effort and money, of further hearings.

The offence created by s. 239 of the ITA is constitutionally supportable under both Parliament's criminal law power and its taxing power. The procedure to secure its enforcement is that set forth in the Criminal Code which notably provides only limited rights of appeal. Section 34(2) of the Interpretation Act provides that the provisions of the Criminal Code are to apply to offences created by Parliament unless the statute creating the offence provides otherwise. No right of appeal from an order issuing a search warrant is provided in the Criminal Code. Section 231.3 of the ITA was enacted for search warrants as contemplated by s. 34(2) of the Interpretation Act. It also makes no provision for appeal other than the review process set forth in s. 231.3(7).

Parliament, in the exercise of a federal head of power, may provide procedures for the enforcement of the measures it has enacted. That is a matter within its exclusive competence. Parliament can adopt provincial procedures for that purpose, and such an adoption will be assumed where it is necessary to give effect to a right. When Parliament selects a specific and integrated procedure, however, there is no room for the operation of provincial law. The enforcement provisions of the ITA form part of the uniform and integrated procedure for the investigation and prosecution of offences under the Act. No federal adoption was made or can be assumed here. Barring such adoption it is constitutionally unacceptable to read in appeals for other interlocutory proceedings or to adopt other provincial rules of procedure.

The admixture of provincial civil procedure with criminal procedure could result in an unpredictable mish-mash. In dealing with procedure, and particularly [page57] criminal procedure, it is important to know the precise steps to be pursued. Parliament accordingly adopted a comprehensive procedure under the Criminal Code and adopted that procedure for the enforcement of penal provisions in other statutes, including the ITA.

A number of pre-trial remedies are available to a person who has been the subject of a search. Section 231.3(7) provides for review and the Criminal Code makes provision for a speedy application for the return of seized goods. If the matter should proceed to trial, the accused may attack the search warrant in any way he considers appropriate, including the allegation that it infringes the

provisions of s. 8 of the Charter. If the matter should not go to trial, a party may still seek civil damages for compensation.

The general right of appeal set forth in the Federal Court Act should not be assumed to apply to a proceeding provided in a separate statute that is a mere adjunct to a general system of criminal procedure where appeals of this nature are not provided. Parliament arguably did not intend by this minor grant of jurisdiction to the Federal Court (in what is for it an untypical jurisdiction) to have had in contemplation the general right of appeal devised for quite different types of proceedings. There may, in other words, be no anomaly at all.

The declaration does not constitute a review of a decision taken in a criminal proceeding because it merely states the law without changing anything. It should not be widely used as a separate collateral procedure to, in effect, create an automatic right of appeal where Parliament has, for sound policy reasons, refused to do so. Another procedure need not be provided as long as a reasonably effective procedure exists. A reasonably effective procedure has not been provided here, however. Section 231.3(7) and other procedures afford a measure of protection to the appellants but do not provide an adequate statutory provision for constitutional review of a search warrant.

Where a search is being conducted at the pre-trial stage, there is no trial judge and unlike the situation after the charge, no express Charter guarantee that proceedings must take place within a reasonable time. An [page58] investigation can go on indefinitely in continuing breach (if the search provisions are unconstitutional) of the appellants' Charter rights for an extensive period. The property of the individual subject to the search may remain in the custody of the state for a protracted period in violation of Charter norms.

The power to issue a search warrant under the ITA is vested in a superior court judge and at common law a decision of a superior court judge cannot be the subject of collateral attack. The judge issuing the warrant is not in a position to review for constitutionality at an ex parte hearing, and may not have the jurisdiction to do so on a later review of the ex parte order. An action for a declaration would not be barred, even if on later review the judge is competent to review the warrant and the empowering legislation on the basis of constitutionality, because that remedy would not provide sufficient constitutional protection.

The appellants should be permitted to pursue an action for a declaration. Since the action for a declaration is a discretionary remedy, however, the judge, in the exercise of his or her discretion, should consider the specific circumstances presented and refuse to entertain the action if satisfied that criminal proceedings against the accused would be initiated within a reasonable time. This would avoid the overlap and delay that have been among the major informing considerations in devising the rules for the governance of the discretion to allow or not to allow an action for a declaration to proceed.

A declaration should issue declaring s. 231.3 of the ITA and the search warrant issued thereunder to be of no force or effect. The appellants, in light of that declaration, are also entitled to the return of their documents and other property and all copies and notes thereof.

While an action for a declaration is an appropriate remedy at this stage of the proceedings, certiorari generally appears to be a more suitable instrument for reviewing the constitutionality of the action, and the possibility that it might have issued in this case should be left open. At common law certiorari does not lie against a decision of a superior court judge, but what is alleged here is a breach of a constitutional right which [page59] may call for an adaptation of the inherent powers of a superior

court to make the procedure conform to constitutional norms. If certiorari might have issued, there would appear to be little use for the declaratory action in this context.

Per L'Heureux-Dubé J.: The reasons of La Forest J. were joined given that the majority decision in Knox Contracting Ltd. v. Canada, [1990] 2 S.C.R. 338, applied.

Per Sopinka, McLachlin and Iacobucci JJ.: Section 231.3 of the ITA violates the reasonable search guarantee found in s. 8 of the Charter for the reasons given in Baron v. Canada, [1993] 1 S.C.R. 416.

The offence and search warrant provisions of the ITA are referrable to both the federal criminal law and taxation power, and jurisdiction to legislate procedure in matters relating to these provisions is shared between the provinces and the federal government, subject to federal paramountcy in the event of conflict between federal and provincial legislation. Parliament is free to assign jurisdiction to any tribunal it chooses, whatever the source of its legislative power. If federal legislation is silent, the ordinary rule is that a litigant suing on a federal matter in a provincial court takes the procedure of that court as he or she finds it. This does not mean that provincial legislation does not apply unless "adopted" by federal legislation. The authorities make it clear that a province has legislative authority to adjudicate federal matters and that such legislation is only ousted if it conflicts with federal legislation. The fact that there is alleged to be a comprehensive procedure contained in federal legislation is only relevant to determine whether provincial legislation is ousted because it conflicts with federal legislation. It is not ousted in relation to declaratory relief, which includes the right of appeal conferred by provincial legislation, and should also extend to ancillary relief which enables the Court to give effect to the declaration.

Knox Contracting Ltd. v. Canada, [1990] 2 S.C.R. 338, should be distinguished so as not to foreclose an [page60] appeal in proceedings relating to a declaration that the statute authorizing a search warrant violates the Constitution, coupled with an application to set aside the search warrant. These two remedies can be exercised, in combination, prior to the laying of charges, and the result of such exercise may be appealed.

An application under s. 231.3(7) would be a wholly inappropriate proceeding to test the constitutional validity of the provision under which the seizure is made. It applies only if the judge is satisfied that the documents seized are not needed for an investigation or prosecution or were not seized in accordance with the warrant. Section 231.3(7) can only be resorted to if both the warrant and the statutory provision under which the warrant was issued are valid. Not only is subs. (7) not an appropriate forum with respect to a constitutional challenge of the search and seizure provision, but a judge would also not have jurisdiction to deal with such a challenge upon a plain reading of the words of the subsection.

In the alternative, Knox Contracting can be distinguished on the basis that the procedure relating to proceedings for declaratory relief on constitutional grounds cannot be characterized as criminal law so as to exclude a right of appeal. In Knox Contracting the proceeding taken was a motion to quash. There was no constitutional challenge to legislation in that case. Here, the proceeding taken was not simply to quash the warrant but an action for a declaration that s. 231.3 was invalid on constitutional grounds. A motion to quash, when not combined with an action for declaratory relief, may take its character for the purpose of division of powers from the underlying proceeding which it attacked. On the other hand, an action for a declaration as to the constitutional validity of a statute does not necessarily partake of the character of the statute which is attacked. It has a life of its own.

An action to declare a statutory provision unconstitutional is not transformed from a civil remedy to a criminal remedy merely because the declaration relates to a criminal statutory provision. It cannot be used as a substitute for an application to the trial judge in a criminal case in order to acquire a right of appeal. By virtue of s. 24(1) of the Charter, there are some proceedings available to an accused in the context of a criminal case in respect to issues that could be the subject of an action [page61] for a declaration. The superior courts have jurisdiction to entertain such applications even if the superior court to which the application is made is not the trial court. However, a superior court has a discretion to refuse to do so unless, in the opinion of the superior court, given the nature of the violation and the need for a timely review, it is better suited than the trial court to deal with the matter. The superior court would therefore have jurisdiction to entertain an action for a declaration seeking this kind of relief but subject to the same discretion to refuse to exercise it. The court is justified in refusing to entertain the action if there is another procedure available in which more effective relief can be obtained or the court decides that the legislature intended that the other procedure should be followed.

As a general rule, the court should exercise its discretion to refuse to entertain declaratory relief when such relief is sought as a substitute for obtaining a ruling in a criminal case. This will be the apt characterization of any declaration which is sought with respect to relief that could be obtained from a trial court which has been ascertained. The same considerations apply before a trial court has been ascertained if the relief sought will determine some issue in pending criminal proceedings and does not have as a substantial purpose vindication of an independent civil right. In such circumstances, the mere fact that relief was sought in the guise of an action for a declaration would not confer a right of appeal from the refusal to entertain the action.

No issue was raised here in respect of the British Columbia Supreme Court's jurisdiction or in respect of the exercise of its discretion to entertain the appellants' application by way of originating petition. There was no trial court because no charge was laid. The attack on the validity of the statutory provision authorizing the search, while it would affect the admissibility at trial of the things seized, was also vital to the taxpayers' civil interests. The search warrant would not only authorize a trespass but also seizure of personal property. The petition for a declaration was therefore properly entertained under the British Columbia rules of procedure. Those rules which clearly applied at first instance should also apply to permit an appeal here. If Parliament did not intend to exclude a petition for a declaration under provincial [page62] rules, it cannot have intended to exclude an appeal pursuant to the same rules.

Cases Cited

By La Forest J.

Applied: Baron v. Canada, [1993] 1 S.C.R. 416; followed: Knox Contracting Ltd. v. Canada, [1990] 2 S.C.R. 338; referred to: R. v. Meltzer, [1989] 1 S.C.R. 1764; Mills v. The Queen, [1986] 1 S.C.R. 863; R. v. Seaboyer, [1991] 2 S.C.R. 577; R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627; Attorney General of Canada v. Canadian National Transportation, Ltd., [1983] 2 S.C.R. 206; In re Storgoff, [1945] S.C.R. 526; Attorney-General for Alberta v. Atlas Lumber Co., [1941] S.C.R. 87; Attorney General of Quebec v. Attorney General of Canada, [1945] S.C.R. 600; Ministre du Revenu National v. Lafleur, [1964] S.C.R. 412, 46 D.L.R. (2d) 439; R. v. Wetmore, [1983] 2 S.C.R. 284; Goldman v. Hoffmann-La Roche Ltd. (1987), 35 C.C.C. (3d) 488; Adler v. Adler, [1966] 1 O.R. 732; Ontario (Attorney General) v. Pembina Exploration Canada Ltd., [1989] 1

S.C.R. 206; Welch v. The King, [1950] S.C.R. 412; Taylor v. Attorney-General (1837), 8 Sim. 413, 59 E.R. 164; Guaranty Trust Co. of New York v. Hannay & Co., [1915] 2 K.B. 536; Dyson v. Attorney-General, [1911] 1 K.B. 410; Attorney General of Canada v. Law Society of British Columbia, [1982] 2 S.C.R. 307; Terrasses Zarolega Inc. v. Régie des installations olympiques, [1981] 1 S.C.R. 94; Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236; Re Southam Inc. and The Queen (No. 1) (1983), 41 O.R. (2d) 11; Canadian Newspapers Co. v. Attorney-General for Canada (1985), 49 O.R. (2d) 557; Wilson v. The Queen, [1983] 2 S.C.R. 594; Argentina v. Mellino, [1987] 1 S.C.R. 536; Crevier v. Attorney General of Quebec, [1981] 2 S.C.R. 220; Canada Labour Relations Board v. Paul L'Anglais Inc., [1983] 1 S.C.R. 147.

By L'Heureux-Dubé J.

Followed: Knox Contracting Ltd. v. Canada, [1990] 2 S.C.R. 338.

By Sopinka J.

Applied: Baron v. Canada, [1993] 1 S.C.R. 416; distinguished: Knox Contracting Ltd. v. Canada, [1990] 2 S.C.R. 338; [page63] disapproved: Kohli v. Moase (1988), 55 D.L.R. (4th) 737; referred to: Goldman v. Hoffmann-La Roche Ltd. (1987), 35 C.C.C. (3d) 488; Mills v. The Queen, [1986] 1 S.C.R. 863; R. v. Meltzer, [1989] 1 S.C.R. 1764; R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627; Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425; R. v. Trimarchi (1987), 63 O.R. (2d) 515 (C.A.), leave to appeal refused, [1988] 1 S.C.R. xiv; Attorney-General for Alberta v. Atlas Lumber Co., [1941] S.C.R. 87; In re Storgoff, [1945] S.C.R. 526; Attorney General of Canada v. Law Society of British Columbia, [1982] 2 S.C.R. 307; Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342; R. v. Morgentaler, [1988] 1 S.C.R. 30; R. v. Morgentaler (1984), 16 C.C.C. (3d) 1; R. v. Smith, [1989] 2 S.C.R. 1120; City of Lethbridge v. Canadian Western Natural Gas, Light, Heat and Power Co., [1923] S.C.R. 652; Terrasses Zarolega Inc. v. Régie des installations olympiques, [1981] 1 S.C.R. 94; Adler v. Adler, [1966] 1 O.R. 732; Re Church of Scientology and The Queen (No. 6) (1987), 31 C.C.C. (3d) 449; Shumiatcher v. Attorney-General of Saskatchewan (No. 2) (1960), 34 C.R. 154; R. v. Sismey (1990), 55 C.C.C. (3d) 281; Wilson v. The Queen, [1983] 2 S.C.R. 594; R. v. Garofoli, [1990] 2 S.C.R. 1421; Ontario (Attorney General) v. Pembina Exploration Canada Ltd., [1989] 1 S.C.R. 206.

Statutes and Regulations Cited

British Columbia Rules of Court, Rule 5(22).
Canadian Charter of Rights and Freedoms, ss. 7, 8, 15, 24(1).
Constitution Act, 1867, ss. 91(3), (27), 96.
Constitution Act, 1982, s. 52.
Court of Appeal Act, S.B.C. 1982, c. 7, ss. 6(1)(a), 6.1(2) [ad. 1985, c. 51, s. 12].
Criminal Code, R.S.C., 1985, c. C-46, ss. 487 [am. c. 27 (1st Supp.), s. 68], 490 [rep. & sub. idem, s. 73], 674, 813 [am. idem, s. 180; 1991, c. 43, s. 9 (item 12)].
Federal Court Act, R.S.C., 1985, c. F-7, s. 28 [am. c. 30 (2nd Supp.), s. 61; rep. & sub. 1990, c. 8, s. 8; am. 1992, c. 26, s. 17, c. 49, s. 128].
Income Tax Act, S.C. 1970-71-72, c. 63, ss. 231 "judge" [rep. & sub. 1986, c. 6, s. 121], 231.3 [idem], (1), (7), 239 [am. 1980-81-82-83, c. 158, s. 58, item 2(17)].
Interpretation Act, R.S.C., 1985, c. I-21, s. 34(2).

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Supreme Court Act, R.S.C., 1985, c. S-26, s. 40 [am. c. 34 (3rd Supp.), s. 3; 1990, c. 8, s. 37].

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APPEAL from a judgment of the British Columbia Court of Appeal (1989), 39 B.C.L.R. (2d) 1, [1990] 1 W.W.R. 97, 50 C.C.C. (3d) 201, 72 C.R. (3d) 196, 89 D.T.C. 5464, [1990] 1 C.T.C. 241, dismissing an appeal from a judgment of Lysyk J. (constitutional issues) (1988), 30 B.C.L.R. (2d) 342, [1989] 1 W.W.R. 508, 44 C.C.C. (3d) 79, 89 D.T.C. 5214, [1989] 1 C.T.C. 56, and from a judgment of McKenzie J. (non-constitutional issues) (1987), 15 B.C.L.R. (2d) 200, 36 C.C.C. (3d) 304, following the issuance of a search warrant by McEachern C.J.S.C. Appeal allowed. Section 231.3 of the Income Tax Act infringes s. 8 of the Charter.

Guy Du Pont, Basile Angelopoulos and Ariane Bourque, for the appellants.
John R. Power, Q.C., Pierre Loiselle, Q.C., and Robert Frater, for the respondent.
Janet E. Minor and Tanya Lee, for the intervener the Attorney General for Ontario.
Yves Ouellette, Judith Kucharsky and Diane Bouchard, for the intervener the Attorney General of Quebec.

Solicitors for the appellants: Phillips & Vineberg, Montréal.
Solicitor for the respondent: John C. Tait, Ottawa.
Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.
Solicitors for the intervener the Attorney General of Quebec: Ouellette, Desruisseaux, Veillette, Montréal.

[page65]

The judgment of La Forest, L'Heureux-Dubé and Cory JJ. was delivered by

1 **LA FOREST J.**:-- The substantive question to be resolved in this appeal, i.e., whether s. 231.3 of the Income Tax Act, as amended by S.C. 1986, c. 6, violates s. 8 of the Canadian Charter of Rights and Freedoms, has already been determined in favour of the appellants. In Baron v. Canada, [1993] 1 S.C.R. 416, it was held that the section does violate the Charter and so was of no force or effect. It is to be expected that the law enforcement and judicial authorities in the present case will act accordingly, whatever the result of this appeal may be. But, two broad procedural issues have very important implications for the workings of the enforcement provisions of the Income Tax Act and other federal statutes to which federal criminal procedures apply.

2 The first of these procedural issues concerns the extent to which procedures enacted by a province to govern civil procedure in the province can be engrafted on procedures of a criminal nature enacted by Parliament. Specifically, may provincial procedures be used to review the issuance of a search warrant under s. 231.3 of the Income Tax Act? Ultimately, the issue involves the constitutional power of the province to legislate respecting the matter.

3 The second of these issues is whether the inherent powers of a superior court can be used, by way of a declaratory judgment, to grant the appellants an appropriate remedy.

4 With respect to the first of the procedural issues just described, I do not think an appeal can be mounted against an order made in the course of proceedings under the Income Tax Act by resort to provincial procedures for appeals. Simply put, I do not believe that such an appeal is available because no appeal has been provided by the relevant legislative body, the federal Parliament, as was recently decided by this Court in Knox Contracting Ltd. v. Canada, [1990] 2 S.C.R. 338. And courts of [page66] appeal have no inherent rights to create appeals. Only superior court judges appointed under s. 96 of the Constitution Act, 1867 have inherent jurisdiction.

5 Turning to the second procedural issue, however, I am of the view that the appellants may pursue an action for a declaration in the provincial court. That being so, the ordinary rules of procedure in civil actions apply, including provisions for appeal.

6 Finally, I shall add some comments about the possibility of a better remedy in this type of case.

Facts

7 The facts and lower court judgments are summarized in the judgment of McKenzie J. in the non-constitutional review hearing (reported at (1987), 15 B.C.L.R. (2d) 200, 36 C.C.C. (3d) 304), and in the judgment of Justice Sopinka. For clarity, however, I shall repeat the facts most directly in issue.

8 Following an investigation, officers of Revenue Canada formed the belief that the appellants were evading or attempting to evade the payment of taxes by making false and deceptive statements in income tax returns for the years 1979 to 1984 contrary to s. 239 of the Income Tax Act. They, therefore, sought to obtain search warrants pursuant to s. 231.3 of the Act and such warrants were issued by Callaghan J. on October 22, 1986. These warrants were, however, subsequently quashed by Proudfoot J. of the same court. The items seized under these warrants had not been returned to the appellants, however, when McEachern C.J.S.C. (now C.J.B.C.) issued the search warrant challenged in this appeal for the seizure of the documents located in the Department's premises, subject to the conditions that every item seized would [page67] be sealed and the appellants would have thirty days to challenge the warrant.

9 Within that period, the appellants instituted proceedings by way of originating petition seeking an order quashing the warrant and the search and seizure, declaring s. 231.3 of no force or effect as violating ss. 7, 8 and 15 of the Charter, the return of the items seized along with the summaries, notes and outlines of these items, and prohibiting the Department from using any of this information and the destruction of any copies not returned. In seeking these remedies, the appellants resorted to a variegated mélange of procedures. They first invoked s. 231.3(7) of the Income Tax Act, which provides its own review of search warrants under which a judge may order the return of any item seized if the judge is satisfied that they are not needed for a criminal investigation or were not seized in accordance with the warrant or the section. They then invoked the provincial Rules of Court, s. 24 of the Charter as well as the inherent jurisdiction of the court. The constitutional and non-constitutional attacks were heard separately by Lysyk J. (reported at (1988), 30 B.C.L.R. (2d) 342, [1989] 1 W.W.R. 508, 44 C.C.C. (3d) 79, [1989] 1 C.T.C. 56, 89 D.T.C. 5214) and McKenzie J., respectively. Both failed.

10 I note in passing that both in the procedures they invoked and the remedies they sought, the appellants make no distinction between those that may broadly be described as criminal, and those that may be described as civil in character. This admixture of federal and provincial procedure would seem to be at best irregular, and has been a source of considerable confusion. However, in their factum, the appellants advised us that no objection to the manner in which declaratory relief was sought was raised by the respondent or in the courts below. Under these circumstances, I think it best at [page68] this stage of the proceedings to deal with the whole matter without regard to these procedural irregularities.

11 The appeal to the British Columbia Court of Appeal was dismissed, the court holding that it had no jurisdiction to hear the appeal: (1989), 39 B.C.L.R. (2d) 1, [1990] 1 W.W.R. 97, 50 C.C.C. (3d) 201, 72 C.R. (3d) 196, [1990] 1 C.T.C. 241, 89 D.T.C. 5464. In doing so, the court categorized the whole of the proceedings as criminal in nature. It only briefly mentioned the request for a declaration, and appeared to treat it as an interlocutory matter in a criminal proceeding. I must say that, given the manner in which the procedures were engaged, that approach seems quite understandable. However, as mentioned earlier, it seems best at this stage of the proceedings to overlook the procedural irregularities and deal with the substantive issue of whether an action for a declaration may be pursued.

12 On the appeal to this Court, the issue was limited to the constitutional validity of the legislation. At this stage, there was again a generous intermixture of federal and provincial procedures. The appellants submitted that the Court of Appeal erred in holding that it had no jurisdiction to hear the appeal for the following reasons:

(a) the judgment of the Supreme Court of British Columbia was one made in the course of civil proceedings seeking a declaration and consequently was appealable as of right under s. 6 of the Court of Appeal Act, S.B.C. 1982, c. 7, as amended;

(b) the order was made in a taxation matter under s. 91(3) of the Constitution Act, 1867 and not in a criminal matter (s. 91(27)), and in the absence of specific legislation, was appealable under s. 6 of the Court of Appeal Act; and

[page69]

(c) the judgment appealed from denied the appellants a remedy under s. 24(1) of the Charter and was also appealable under s. 6 of the Court of Appeal Act.

13 I should first note that if the appellants are successful in their claim that an action for a declaration can properly be entertained, then it becomes unnecessary to pursue their other arguments, for the action for a declaration was begun in the British Columbia Supreme Court and was thus subject to its ordinary rules of procedure, including any right to appeal from that action. The second issue, however, has serious implications for criminal procedure in provincial courts and involves a serious misunderstanding of this Court's recent decision in Knox Contracting, which it is important to correct. It also serves as a useful backdrop for a discussion of whether an action for a declaration properly lies, so I shall discuss it first. The third issue, regarding s. 24(1) of the Charter, seems to me to be covered by the considerations discussed under the second issue and has already been adequately dealt with by this Court. I shall, therefore, only refer to it tangentially.

Rights of Appeal Generally

14 Since the appellants' efforts were largely directed to finding a right of appeal in this case, I will first make some comments about the nature of rights of appeal generally.

15 Appeals are solely creatures of statute; see R. v. Meltzer, [1989] 1 S.C.R. 1764, at p. 1773. There is no inherent jurisdiction in any appeal court. Nowadays, however, this basic proposition tends at times to be forgotten. Appeals to appellate courts and to the Supreme Court of Canada have become so established and routine that there is a widespread expectation that there must be some way to appeal the decision of a court of first instance. But it remains true that there is no right of appeal on [page70] any matter unless provided for by the relevant legislature.

16 There are various policy reasons for enacting a procedure that limits rights of appeal. Sometimes the opportunity for more opinions does not serve the ends of justice. A trial court, for example, is in a better position to assess the factual record. Thus most criminal appeals are restricted to questions of law or mixed questions of law and fact. A further policy rationale, and one that is important to the case before this Court, is that there should not be unnecessary delay in the final disposition of proceedings, particularly proceedings of a criminal character. This is especially applicable to interlocutory matters which can ultimately be decided at trial; see Mills v. The Queen, [1986] 1 S.C.R. 863. On this point, McLachlin J., speaking for the majority in R. v. Seaboyer, [1991] 2 S.C.R. 577, noted that there was a valid policy concern to control the "plethora of interlocutory appeals and the delays which inevitably flow from them" (at p. 641). Such review should, in the Court's view, normally take place at trial. This McLachlin J. added, "will also permit a fuller view of the issue by the reviewing courts, which will have the benefit of a more complete picture of the evidence and the case" (at p. 641). Especially in the context of criminal procedure, there is value in not constantly interrupting the process, if the issues are all going to be heard eventually at trial in any event. As well, there is the simple value of a final decision to resolve a dispute without the costs, in time, effort and money, of further hearings.

17 For most civil matters, the provincial legislatures have created a right of appeal. In British Columbia, that right is found in the Court of Appeal Act. Section 6 sets forth the circumstances where appeals are available. The first issue in this case is whether that procedure applies to a penal

proceeding falling within the exclusive jurisdiction [page71] of the federal Parliament, specifically a proceeding taken in respect of an alleged offence under the Income Tax Act.

The Procedure Under s. 231.3 of the Income Tax Act

18 The availability of appeal is one of the questions determined by the choice of procedure created in the particular statute involved. To understand the nature of the procedure with which we are here concerned, it is important, then, to look closely at the workings of the Income Tax Act. By and large as Wilson J. noted in R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627, at p. 636, "the system is a self-reporting and self-assessing one which depends upon the honesty and integrity of the taxpayers for its success". But Wilson J. (at p. 637) was quick to add that it would be naive to suppose that this system could work fairly without the assistance of an effective enforcement mechanism. To that end, the Act creates a number of offences, some very serious, to ensure compliance with the Act. Among these is that set forth in s. 239(1) of the Act, in relation to which the search warrant was issued in this case. It reads:

> 239. (1) Every person who has
>
> (a) made, or participated in, assented to or acquiesced in the making of, false or deceptive statements in a return, certificate, statement or answer filed or made as required by or under this Act or a regulation,
> (b) to evade payment of a tax imposed by this Act, destroyed, altered, mutilated, secreted or otherwise disposed of the records or books of account of a taxpayer,
> (c) made, or assented to or acquiesced in the making of, false or deceptive entries, or omitted, or assented to or acquiesced in the omission, to enter a material particular, in records or books of account of a taxpayer,
> (d) wilfully, in any manner, evaded or attempted to evade, compliance with this Act or payment of taxes imposed by this Act, or

[page72]

> (e) conspired with any person to commit an offence described by paragraphs (a) to (d),
>
> is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to
>
> (f) a fine of not less than 25% and not more than double the amount of the tax that was sought to be evaded, or
> (g) both the fine described in paragraph (f) and imprisonment for a term not exceeding 2 years.

This offence, I say in passing, seems to me to be constitutionally supportable both under Parliament's criminal law power and its taxing power; see Constitution Act, 1867, s. 91(27) and s. 91(3), respectively.

19 Such offences, of course, require a procedural scheme for their enforcement. As in the case of other federal statutes containing penal provisions, the procedure selected by Parliament is that set forth in the Criminal Code, R.S.C., 1985, c. C-46. Section 34(2) of the Interpretation Act, R.S.C., 1985, c. I-21, provides that the provisions of the Criminal Code are to apply to indictable and summary conviction offences created by Parliament unless the statute creating the offence provides otherwise. The Criminal Code, of course, provides a comprehensive scheme of criminal procedure. Notably, though, it provides only limited rights of appeal. Section 674 stipulates that for indictable offences, the right of appeal is limited to those authorized under Parts XXI and XXVI of the Code. For summary conviction offences, the appeals are those provided under Part XXVII, s. 813. No right of appeal from an order issuing a search warrant is provided in the Criminal Code. So far as search warrants under the Income Tax Act are concerned, however, Parliament has, as s. 34(2) of the Interpretation Act contemplates, enacted a special provision to meet the specific requirements of that Act. That provision, s. 231.3, [page73] is central to this case. Of special relevance are ss. 231.3(1) and (7) which read as follows:

> 231.3 (1) A judge may, on ex parte application by the Minister, issue a warrant in writing authorizing any person named therein to enter and search any building, receptacle or place for any document or thing that may afford evidence as to the commission of an offence under this Act and to seize and, as soon as practicable, bring the document or thing before, or make a report in respect thereof to, the judge or, where the judge is unable to act, another judge of the same court to be dealt with by the judge in accordance with this section.
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> ...
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> (7) Where any document or thing seized under subsection (1) or (5) is brought before a judge or a report in respect thereof is made to a judge, the judge may, of his own motion or on summary application by a person with an interest in the document or thing on three clear days notice of application to the Deputy Attorney General of Canada, order that the document or thing be returned to the person from whom it was seized or the person who is otherwise legally entitled thereto if the judge is satisfied that the document or thing
>
> (a) will not be required for an investigation or a criminal proceeding; or
> (b) was not seized in accordance with the warrant or this section.

Section 231.3, not unnaturally, bears a considerable resemblance to its counterpart in the Criminal Code. Noteworthy is that, like it, it provides no appeal other than the review process set forth in s. 231.3(7). I note, however, that s. 231 defines "judge" to mean "a judge of a superior court having jurisdiction in the province where the matter arises or a judge of the Federal Court", a fact upon which considerable reliance was placed in seeking to find a right of appeal, an issue I shall discuss later.

20 As I see it, the characterization of the foregoing procedure has already been settled by this Court in [page74] Knox Contracting, supra. In that case, this Court examined and characterized the

search provisions of the Income Tax Act for the purposes of determining whether the court of appeal there had jurisdiction to hear an appeal on a search warrant. Cory J., Wilson and Gonthier JJ. concurring, ruled that the s. 231.3 search procedures under the Income Tax Act were enacted pursuant to federal jurisdiction over criminal law and procedure under s. 91(27) of the Constitution Act, 1867. He considered the search provisions to be the investigative arm of s. 239 which, in his view, were clearly criminal law because they punished deliberate acts, protected the public interest, and contained severe penalties. Section 231.3 was held to be the investigative arm of the criminal law because it was unrealistic "to divorce s. 231.3 from the offences sought to be uncovered by the search" (p. 356). He concluded that the power of the provincial legislatures under s. 92(14) of the Constitution Act, 1867 does not extend to jurisdiction over the conduct of criminal prosecutions, citing Attorney General of Canada v. Canadian National Transportation, Ltd., [1983] 2 S.C.R. 206. Clearly on this view, the procedure for this case must be the procedure created by the federal Parliament.

21 Sopinka J., L'Heureux-Dubé and McLachlin JJ. concurring, disagreed with Cory J.'s position. He found that the search provisions could be justified under both the federal criminal law power (s. 91(27) of the Constitution Act, 1867) and the federal taxing power (s. 91(3) of the Constitution Act, 1867). He then held that the normal provincial procedure continues to operate, including a right of appeal, unless a contrary intention is evidenced.

22 It was left to me to break the deadlock in Knox Contracting. I agreed with the conclusion reached by Cory J., but gave separate reasons, though these [page75] do not take issue with what he had to say. In the result, then, a majority of this Court held that there was no appeal from a search warrant issued under the Income Tax Act, and that a right of appeal provided by provincial procedure has no application. These, of course, are the very questions now placed before this Court.

23 In my brief reasons, I first observed that I agreed with Sopinka J.'s approach to the juristic character of the relevant provisions. In other words, I agreed with him that the relevant provisions were justifiable under both the criminal law power and the taxing power. If, as the appellants suggest, there is any significance to the fact that a provision is criminal law, I fail to understand why it should make a difference for present purposes that it is also justifiable under the taxing power.

24 I did not really find it necessary to get into this in Knox Contracting, for, in my view, Parliament had in the exercise of its exclusive powers provided a comprehensive procedure for the enforcement of Income Tax offences. I thus put it at pp. 356-57:

> In choosing a criminal sanction and applying all the provisions of the Criminal Code "except to the extent that the enactment otherwise provides" (see Interpretation Act, R.S.C., 1985, c. I-21, s. 34(2)), Parliament, it seems to me, has shown a disposition to adopt the ordinary procedures of the criminal law for their enforcement, subject to any variations spelled out in the Income Tax Act, S.C. 1970-71-72, c. 63. [Emphasis in original.]

I then concluded by saying that I found it unnecessary to consider whether a province could in other circumstances deal with procedure respecting a penal provision. What I had in mind, and all I had in mind, was the (I think unlikely) situation that could arise if Parliament provided an incomplete scheme in some statute, as sometimes happens in the civil field.

[page76]

25 In Knox Contracting, then, I came to the same conclusion as Cory J., that there was no appeal. While I believed that the provisions could be justified under both s. 91(27) and s. 91(3), I concluded, at pp. 356-57, that Parliament by enacting s. 34(2) of the Interpretation Act has shown a disposition to adopt the ordinary procedures of the criminal law for their enforcement subject to any variations spelled out in the Income Tax Act. In the result, then, a majority of this Court held that there was no appeal from a search warrant under the Income Tax Act, and that the general right of appeal provided for under provincial law had no application.

26 In Knox Contracting, I did not elaborate further on the reasons for my conclusion. I simply found it self-evident that Parliament, in the exercise of a power, be it criminal or taxation or any other head of power, may if it wishes provide procedures for the enforcement of the measures it has enacted. That is a matter within its exclusive competence. This proposition is supported by long-standing authority in this Court. One need go no further than the well-known case of In re Storgoff, [1945] S.C.R. 526, at pp. 563 (Hudson J.), 579 and 583 (Rand J.), 588 (Kellock J.), 591 and 594 (Estey J.). Cory J. said the same thing in Knox Contracting, supra, at pp. 351-52. This approach is not limited to criminal law. It is a general principle applying to all areas of federal jurisdiction as can be seen from the following remarks of Rinfret J. in Attorney-General for Alberta v. Atlas Lumber Co., [1941] S.C.R. 87, at p. 100:

> ... it has long since been decided that, with respect to matters coming within the enumerated heads of sec. 91, the Parliament of Canada may give jurisdiction to provincial courts and regulate proceedings in such courts to the fullest extent. [Emphasis added.]

Similarly, Taschereau J. in Attorney General of Quebec v. Attorney General of Canada, [1945] S.C.R. 600, had this to say, at p. 602:

[page77]

> It is also well established that, although a court may be provincially organized and maintained, its jurisdiction and the procedure to be followed for the application of laws enacted by the Parliament of Canada, in relation to matters confided to that Parliament, are within its exclusive jurisdiction. That applies to criminal law and procedure in criminal matters which by subsection 27 of section 91 of the B.N.A. Act are subject to the legislative powers of the Dominion.

27 The same approach was later followed in the unanimous decision of this Court in respect of an offence, significantly for our purposes, under the Income Tax Act in Ministre du Revenu National v. Lafleur, [1964] S.C.R. 412, 46 D.L.R. (2d) 439. And in Attorney General of Canada v. Canadian National Transportation, Ltd., supra, and R. v. Wetmore, [1983] 2 S.C.R. 284, this Court held

that Parliament is competent to legislate respecting the enforcement of all federal offences, regardless of the federal head of power under which the substantive offences were enacted.

28 I do not doubt that Parliament can, if it wishes, adopt provincial procedures for that purpose, and, such an adoption will be assumed, where it is necessary to give effect to a right, for example, when it confers a civil right without providing a forum or procedure for its enforcement. But when it selects a specific and integrated procedure, as it has done here, then there is no room for the operation of provincial law in relation to that procedure. That again is demonstrated by Storgoff, where the Court refused to countenance the use of the writ of habeas corpus in the manner provided by provincial law, even though the right to habeas corpus may be looked upon as a civil right (see, for example, p. 571). This reasoning applies a fortiori to appeals. This appears perhaps most clearly in the reasons of Hudson J., at p. 563:

> It would seem to be logical that the legislature which has exclusive power to enact criminal law and prescribe procedure in criminal matters should also have the sole [page78] right to prescribe the means and methods by which the validity of such procedure should be tested.
>
> Parliament has accepted this view and ever since Confederation exercised the right to make provision for appeals in criminal matters and prescribed the conditions under which such appeals were permitted and the courts to which they might be taken.
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> ...
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> A writ of habeas corpus differs in many respects from an appeal but, in cases like the present, it is just another means of bringing in question the validity of proceedings in criminal matters. It would appear strange indeed if Parliament could provide for and control appeals but not interference with criminal administration by way of habeas corpus.

See also at pp. 575 (Taschereau J.), 579 and 582 (Rand J.).

29 What, of course, motivated the judges in that case was the need for a uniform and integrated procedure; see pp. 566 (Hudson J.) and 584 (Rand J.). It was this uniform and integrated procedure that was selected by Parliament for the enforcement of the Income Tax Act. Indeed the need to look at the entire procedure as an integrated whole is most strongly stated in Lafleur, supra, which as I noted was a case involving the Income Tax Act. See esp. pp. 443, 444 and 446 D.L.R., where Fauteux J. (speaking for the Court) refers to these provisions, respectively, as [TRANSLATION] "uniform", "systematically welded into a single body" and "an integrated whole".

30 The integrated procedure I have described is not confined to the period following the charge. Thus, Meltzer, supra, involved an authorization to intercept private communications--an electronic search--and it was held that no right of appeal existed because none had been provided as part of the procedure provided by the federal Parliament. The power to issue an authorization appears in the Criminal Code, but there is no magic in this. In Goldman v. Hoffmann-La Roche Ltd. (1987), 35 C.C.C. (3d) 488 (Ont. C.A.), it was held that [page79] there was no appeal in the parallel situation

of a search warrant issued under the Competition Act, R.S.C. 1970, c. C-23, which is sustainable under both the trade and commerce power and the criminal law power.

31 I fail to see how it detracts from this integrated scheme that it is the Income Tax Act itself which provides a provision respecting searches that may afford evidence of an offence. That provision is rather similar to its counterpart in the Criminal Code (s. 487) and was obviously intended to meet the particular exigencies relating to income tax offences. It forms part of the uniform and integrated procedure for the investigation and prosecution of offences under the Act. I am quite unable to accept the appellants' thesis that the provinces share jurisdiction with the federal Parliament to regulate procedure over matters exclusively vested in Parliament by the Constitution. This is a far cry from the principle they cite that "where no other procedure is prescribed, a litigant suing on a federal matter in a provincial court takes the procedure of that court as he finds it" (emphasis added); see Laskin's Canadian Constitutional Law (5th ed. 1986), vol. 1, at p. 185. There may be other cases where Parliament, because it has created a substantive right that is clearly dependent for its functioning on the rules governing general civil procedure in the province, may be assumed to have adopted necessary parts of such procedure, or to adapt the words of Laskin J.A. in Adler v. Adler, [1966] 1 O.R. 732 (C.A.), at p. 735, where substantive law within federal jurisdiction feeds the jurisdiction of the provincial court by giving it material upon which to operate. Ontario (Attorney General) v. Pembina Exploration Canada Ltd., [1989] 1 S.C.R. 206, is another recent example; there s. 22 of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, expressly provided for concurrent jurisdiction. But no such assumption can be made in the present case. Here a comprehensive [page80] procedure is prescribed by the legislative body having power over the matter.

32 The admixture of provincial civil procedure with criminal procedure could, I fear, result in an unpredictable mish-mash where, in applying federal procedural law, one would forever be looking over one's shoulder to see what procedure the provinces have adopted (and this may differ from province to province) to see if there was something there that one judge or another would like to add if he or she found the federal law inadequate. And I see no reason in principle why appeals could not be read in for other interlocutory proceedings, or indeed why other provincial rules of procedure might not be adopted, as was attempted in Lafleur. That, barring federal adoption, is in my view constitutionally unacceptable. It is certainly impractical. In dealing with procedure, and particularly criminal procedure, it is important to know what one should do next. That is why, no doubt, Parliament adopted a comprehensive procedure under the Criminal Code, and that is why it adopted that procedure for the enforcement of penal provisions in other statutes, including the Income Tax Act. The nature of this procedure is well stated by Fauteux J. in Lafleur, supra, at pp. 443-44 D.L.R.:

> [TRANSLATION] It is obvious, however, that, particularly in the area of procedure, the criminal law existing in 1867 in the various territorial jurisdictions later united into what is now the one Canadian territorial jurisdiction of Confederation has evolved considerably during this lengthy period of history. This evolution, moving towards the formation of a uniform criminal law for Canada, has been accomplished through changes resulting expressly or by implication from the various legislative enactments effected by Parliament over the years. This uniform criminal law, achieved not by mere consolidations, but by two codifications, appears today in that grouping of legislative provisions which Parliament has systematically welded into a single body -- the Criminal Code of 1953-54 --

> which is the product [page81] of additions, deletions and amendments as well as changes in structure. The relative interdependence of the provisions in diversified parts of the Criminal Code has already been noted in Welch v. The King ... [1950] S.C.R. 412 at p. 427, where, referring to the powers conferred by s. 873 on the Attorney-General, this Court said:
>
> > Like many others in the Code, they remain subject to qualifications and restrictions implicitly and necessarily flowing from other provisions in the same Act.

The same considerations, in my view, apply to qualifications and restrictions made, as contemplated in s. 34(2) of the Interpretation Act, by other Acts for which the procedure has been adopted. One would in any event be led to this conclusion by the inherent nature of appeals. In Welch v. The King, [1950] S.C.R. 412, Fauteux J., speaking for the majority, thus described the nature of appeals, at p. 428:

> The right of appeal is an exceptional right. That all the substantive and procedural provisions relating to it must be regarded as exhaustive and exclusive, need not be expressly stated in the statute. That necessarily flows from the exceptional nature of the right.

More recently, McIntyre J. in Meltzer, supra, at pp. 1769-70, made it clear (citing with approval a passage from Laycraft C.J.A. in R. v. Cass (1985), 71 A.R. 248) that a provincial statute or rule of court relating to civil matters that purported to govern an appeal from a criminal law matter would be ultra vires.

33 Nor are Canadian courts alone in resisting an admixture of civil and criminal procedure. The British courts have done the same, a fact that is all the more significant because Great Britain is a unitary state and because criminal procedure in that country is in no way limited to situations that would in Canada be considered criminal for constitutional purposes (the British approach is amply discussed in Storgoff). The practical considerations [page82] to which I have referred earlier underlie this approach.

34 It is certainly a matter of concern that there appears to be no general procedure for quashing search warrants issued under the Income Tax Act, but assuming that is so, I do not think that makes resort to the provincial procedure constitutionally permissible. The courts have, it is true, at times turned to civil procedure to assist in formulating rules in criminal matters, but as McIntyre J. emphasized in Meltzer, supra, at p. 1770, "[t]he fact that a procedural step deriving from civil practice was employed to meet this problem cannot be said to have converted the matter into anything approaching a civil appeal." In short, the rule discussed in Meltzer was simply a rule of criminal procedure, though it was no doubt inspired by its counterpart in civil procedure. I must confess to finding it strange that this Court would find it necessary to incorporate provincial civil procedure on appeals into federal criminal procedure to remedy the alleged defect to protect a person who is the object of a search under an income tax statute when it has shown itself to be unwilling to make such an implication in relation to habeas corpus, which not only has a civil component but involves the liberty of the subject. It also overlooks the policy referred to in Seaboyer, supra, against importing appeals into interlocutory matters. As Cory J. put it in Knox Contracting, supra, at pp. 353-54:

> In summary, the issuance of search warrants is an interlocutory procedure. Appeals from interlocutory orders by the parties in criminal proceedings must be based upon a statutory provision. No such statutory provision exists and thus no appeal lies to the Court of Appeal. It is appropriate that the Code provides no avenue for appeal from these procedures, as such appeals are neither desirable nor necessary and should not, as a [page83] general rule, be encouraged. See Mills v. The Queen, supra, and R. v. Meltzer, [1989] 1 S.C.R. 1764.

Matters of this kind are best dealt with at trial. Any other course invites delay.

35 I should observe that there are a number of pre-trial remedies available to a person who has been the subject of a search. I have earlier referred to s. 231.3(7) which provides for review. Under this provision, a judge may order the return of anything seized that is not required for an investigation or a criminal prosecution or was not seized in accordance with the warrant or s. 231.3. Cory J. refers to other possibilities in his reasons in Knox Contracting in the following passage, at p. 353:

> This does not mean that an accused is left without remedies. Wide powers are provided in the Criminal Code for a person from whom articles are seized pursuant to a search warrant to make a speedy application for their return. See Criminal Code, R.S.C., 1985, c. C-46, s. 490(7), (8), (10) and (17). If the matter should proceed to trial then of course the accused may attack the search warrant in any way he considers appropriate, including the allegation that it infringes the provisions of s. 8 of the Canadian Charter of Rights and Freedoms. If, for any reason, the matter should not go to trial, a party may still seek civil damages for compensation. No injustice arises from the absence of a right to appeal the order issuing the search warrants.

The "Anomaly"

36 I will now comment on the "anomaly" that different rights of appeal may exist depending on whether a search warrant is sought before a judge of a provincial superior court or a judge of the Federal Court.

37 But, before arriving at any conclusion about what a court should do in the face of this alleged anomaly, one should examine the relevant policies behind the legislation. I should first of all say that the principal forum for the operation of criminal procedure is, of course, in the provincial court system, [page84] and there no appeal is provided. The likelihood is that Parliament did not really advert to the different procedures in the two courts. The right of appeal to the Federal Court of Appeal was not tailored to the needs of the criminal justice process, as it was in respect of criminal procedure in the provincial courts. Rather the provision for appeal in the Federal Court is a general one intended to meet the needs of the ordinary jurisdiction of that court, the major function of which is to deal with questions of a civil and administrative character and other matters peculiarly of federal concern, rather than the criminal justice process where different considerations may come into play. In short, the anomaly may lie in the assumption that a right of appeal to the Federal Court of Appeal exists. For there are strong reasons of policy for not providing appeals from interlocutory decisions in criminal proceedings generally. While I quite understand the temptation to read in a right of appeal in this case for the sake of consistency, I am deeply concerned about the general implications of courts of appeal reading in rights of appeals and other procedures into criminal pro-

ceedings. I might also note that there may still be an issue of the appropriate role for appellate review of the issue of search warrants by the Federal Court of Appeal pursuant to s. 28 of the Federal Court Act, R.S.C., 1985, c. F-7. It would amount to an unusual venture of the Federal Court of Appeal into the realm of what is largely criminal procedure.

38 There is another factor that must be kept in mind. I am not, as I shall indicate later, completely certain that the judge issuing the warrant was intended to entertain a constitutional question of the kind raised here. If so, there could be no appeal from that question and, in any event, since the issues with which the judge deals in performing [page85] his functions are of a factual nature, there is little, if any, room for an appeal at all.

39 In view of all these unanswered questions, it would be unsafe in the absence of argument to simply assume that the general right of appeal set forth in the Federal Court Act applies to a proceeding provided in a separate statute that is a mere adjunct to a general system of criminal procedure where appeals of this nature are not provided. If one reads all the relevant legislative provisions harmoniously in accordance with their underlying purpose, it is certainly arguable that Parliament did not intend by this minor grant of jurisdiction to the Federal Court (in what is for it an untypical jurisdiction) to have had in contemplation the general right of appeal devised for quite different types of proceedings. There may, in other words, be no anomaly at all.

40 I should add that there is nothing in Baron v. Canada, supra, that touches the matter. That case involved an action for a declaration which was clearly subject to appeal. At all events, no issue of jurisdiction was raised in that case.

The Declaration of Unconstitutionality

41 Since I agree with my colleague that the appellants should be permitted to pursue their action for a declaration, I can be brief.

42 The action for a declaration ultimately rests in the inherent powers of the Court of Chancery (see Taylor v. Attorney-General (1837), 8 Sim. 413, 59 E.R. 164; and Guaranty Trust Co. of New York v. Hannay & Co., [1915] 2 K.B. 536, at p. 538), but the courts were for many years very wary about exercising it; see I. Zamir, The Declaratory Judgment (1962), at pp. 7-9. Two judicial policies seemed to effectively prevent the use of the declaration: first, the discretion to refuse the declaration where other remedies were available, and second, the refusal to grant the declaration where no other relief was sought. Statutory reform provided the initial impetus to free the use of the declaration by removing the second barrier. In England, statutory [page86] changes culminated in Order 25, rule 5, adopted in 1883 which provided that a declaration could be given even when no other relief was sought. Statutory provisions to the same effect now exist in all Canadian jurisdictions; in British Columbia, it appears in the Rules of Court, r. 5(22). Partly in response to the statutory changes, the courts came to realize the value of the declaration as a remedy in the modern law; see Zamir, supra, at pp. 4-6. The landmark decision of Dyson v. Attorney-General, [1911] 1 K.B. 410, signalled the awareness in the courts of the utility of the declaration as a remedy for contesting Crown actions. This proved of great value in Canada as a means of determining whether laws fell within federal or provincial powers; see Attorney General of Canada v. Law Society of British Columbia, [1982] 2 S.C.R. 307, and it seems quite natural that it should also be used as a means of testing the conformity of legislation with the Charter in appropriate cases.

43 In my view, the action can appropriately be used here. Since the declaration by its nature merely states the law without changing anything (see B. L. Strayer, The Canadian Constitution and

the Courts (3rd ed. 1988)), it does not, in essence, constitute a review of a decision taken in a criminal proceeding.

44 It by no means follows, however, that the declaratory judgment should be widely used as a separate collateral procedure to, in effect, create an automatic right of appeal where Parliament has, for sound policy reasons, refused to do so. It must be remembered that the inherent power of the courts to declare laws invalid is a discretionary one, and that discretion must be used on a proper basis. If the power is routinely used whenever any particular step in a criminal proceeding is thought to be unconstitutional, it would result in bringing [page87] through the back door all the problems Parliament sought to avoid by restricting appeals.

45 The policy concern against allowing declarations, even of unconstitutionality, as a separate and overriding procedure is that they will, in many cases, result in undesirable procedural overlap and delay. As long as a reasonably effective procedure exists for the consideration of constitutional challenges, I fail to see why another procedure must be provided. This is consistent with the discretion to grant the declaratory remedy in its traditional use (see Zamir, supra, c. 6; Terrasses Zarolega Inc. v. Régie des installations olympiques, [1981] 1 S.C.R. 94). It is also consistent with the practice in respect of public interest standing declarations, where the courts are concerned that there be no other reasonable and effective way to bring the issue before the courts; see Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236.

46 The question then becomes whether there is a reasonably effective procedure. In the present state of the law, I do not think there is. While s. 231.3(7) and other procedures afford a measure of protection to the appellants, they do not fully respond to the concern that there is no adequate statutory provision for constitutional review of a search warrant. This may be contrasted with the situation after an accused has been charged. When the trial process begins, there will be a "competent court", the trial judge, to deal with Charter applications and, where necessary, special problems can be dealt with by interventions under s. 24(1) by another superior court judge; see Rahey, supra, Smith, supra. At that stage, there must be few circumstances indeed when an accused should be permitted to pursue an action for a declaration, though it has proved useful as a tool by persons other than the accused whose constitutional rights are directly affected by a decision taken in the course of criminal proceedings; see Re Southam Inc. and The [page88] Queen (No. 1) (1983), 41 O.R. (2d) 113 (C.A.), Canadian Newspapers Co. v. Attorney-General for Canada (1985), 49 O.R. (2d) 557 (C.A.).

47 It is different at the pre-trial stage. Where a search is being conducted, as in this case, there is no trial judge and unlike the situation after the charge, no express Charter guarantee that proceedings must take place within a reasonable time. An investigation can go on indefinitely in continuing breach (if the search provisions are unconstitutional) of the appellants' Charter rights for an extensive period. The property of the individual subject to the search may remain in the custody of the state for a protracted period in violation of Charter norms.

48 In ordinary criminal cases, the problem presented in this case does not arise. Power to issue search warrants under s. 487 of the Criminal Code is vested in a justice of the peace and, accordingly, certiorari may issue from a superior judge to test the legality of the procedure, and if found invalid, the warrant may be quashed and any items seized must be returned. The difficulty here is that the power to issue a search warrant under the Income Tax Act is vested in a superior court judge and at common law a decision of a superior court judge cannot be the subject of collateral attack.

49 The judge issuing the warrant is not in a position to review for constitutionality at an ex parte hearing, and I rather doubt that the judge, or another judge acting for him, could do so on a Wilson type review: Wilson v. The Queen, [1983] 2 S.C.R. 594. Neither Wilson nor Meltzer is clear on this point.

[page89]

50 The limited function of the judge and the manner in which it must be performed, along possibly with the fact that it is the kind of function ordinarily assigned to a justice, may invite this construction. I note that this Court has held that, absent legislation, an extradition judge, who performs a function similar to a justice at a preliminary hearing, has no jurisdiction to entertain Charter challenges: Argentina v. Mellino, [1987] 1 S.C.R. 536. The fact that an extradition judge is usually a superior court judge does not alter the matter. But even assuming that the judge is competent to review the warrant and the empowering legislation on the basis of constitutionality, I do not think that would be a sufficiently effective remedy to bar resort to an action for a declaration. I say this because the judge's decision could not be collaterally attacked at trial since it would be res judicata for a trial judge and could not then be raised in appeals from the initial decision (see Meltzer). The end result, then, is that the appellants could well be convicted on the basis of an unconstitutional statute, without opportunity of review, and so be deprived of the full measure of constitutional protection that is afforded in a prosecution under the Criminal Code for even the vilest offence. The appellants would thus be caught between allowing the Crown to retain their property indefinitely or lose the opportunity of having the impugned provision tested on appeal in the ordinary way. The same scenario would follow by resorting to s. 24(1) of the Charter; see Mills, supra, Meltzer, supra. Since the decision of the judge would appear to be a final one, it would, I should think, be open to appeal to this Court under s. 40 of the Supreme Court Act, R.S.C., 1985, c. S-26 (see Argentina v. Mellino, supra, at pp. 545-57), but such an appeal, of course, can only be obtained with leave.

51 My colleague, Sopinka J., feels there must be a remedy. I share that sentiment. Like him, I think it appropriate to permit the appellants to pursue an action for a declaration. Since the action for a declaration [page90] is a discretionary remedy, however, I think it would be proper for a judge, in the exercise of his or her discretion, to consider the specific circumstances presented and to refuse to entertain the action if satisfied that criminal proceedings against the accused would be initiated within a reasonable time. This would avoid the overlap and delay that have been among the major informing considerations in devising the rules for the governance of the discretion to allow or not to allow an action for a declaration to proceed.

52 I conclude that a declaration should issue declaring s. 231.3 of the Income Tax Act and the search warrant issued thereunder to be of no force or effect. While the officials can be relied on to return the goods in light of this declaration, I would further order the return of the goods and copies as consequential relief, in order to make effective this declaration; see Attorney General of Canada v. Law Society of British Columbia, supra, at pp. 329-31.

Another Remedy

53 I stated earlier that, at this stage of the proceedings, an action for a declaration is an appropriate and just remedy. I leave open the possibility, however, that certiorari might have issued. That

would leave little room for the exercise of the discretion to permit a declaratory action. I realize, of course, that at common law certiorari does not lie against a decision of a superior court judge, and that there are very sound reasons for this rule. But, it must not be forgotten that what is alleged here is a breach of a constitutional right which may call for an adaptation of the inherent powers of a superior court to make the procedure conform to constitutional norms. The courts are the guardians of the Constitution and they must have the powers to forge the instruments necessary to maintain the integrity of the Constitution and to protect the rights it guarantees. In Mills, supra, at pp. 971-72, [page91] I expressed my general approach to questions like these in words that are apt here:

> It should be obvious from the foregoing remarks that I am sympathetic to the view that Charter remedies should, in general, be accorded within the normal procedural context in which an issue arises. I do not believe s. 24 of the Charter requires the wholesale invention of a parallel system for the administration of Charter rights over and above the machinery already available for the administration of justice.
>
> Nonetheless, it is the Charter that governs, and if the ordinary procedures fail to meet the requirements of the Charter fully, then a means must be found to give it life. In Ashby v. White (1703), 2 Ld. Raym. 938, 92 E.R. 126, at p. 136, Holt C.J. instructs us that "it is a vain thing to imagine a right without a remedy". The problem does not directly arise here, of course, because the Charter by s. 24(1) provides that a court of competent jurisdiction may provide such remedy as it considers appropriate and just in the circumstances. But there must at all times be a court to enforce this remedy. The notion that the remedy must fail or be ineffective for lack of a competent court within the confines of the ordinary procedures for the administration of criminal justice can no more be imagined than can the notion of a right without a remedy.

54 Even before the advent of the Charter, this Court had asserted some constitutional limits to the power of legislative bodies to insulate from judicial review decision makers performing certain functions under statute; see Crevier v. Attorney General of Quebec, [1981] 2 S.C.R. 220, and Canada Labour Relations Board v. Paul L'Anglais Inc., [1983] 1 S.C.R. 147. In these Charter days, this may call for a consideration of the extent to which proceedings that involve the liberty and security of the individual can be insulated from prompt and effective review for constitutionality by the device of assigning to a superior court judge functions which for centuries have been performed by inferior court judges subject to judicial review and which, even today, are still performed by inferior court judges in the case of the most serious criminal offences. As I earlier mentioned, the [page92] judge issuing the warrant is not really in a position to review for constitutionality at an ex parte hearing, and assuming that judge is competent to review the warrant and the empowering legislation for constitutionality later, the effect, since the judge's decision is unreviewable, is to deprive the individual of that full measure of constitutional protection which is afforded in a prosecution under the Criminal Code to even the vilest criminal.

55 A court must look at least askance at such a statutory scheme. I note parenthetically that there is at least one other instance where the actions of a superior court judge are made subject to judicial review. In extradition, the decision of the extradition judge, who is usually a superior court

judge, is subject to review by habeas corpus. Moreover, this Court has held that, absent legislation, the reviewing judge, and not the extradition judge, is the court of competent jurisdiction for the purposes of s. 24(1) of the Charter; see Argentina v. Mellino, supra.

56 I add one final word. I mentioned earlier that, at this stage of the proceedings, an action for a declaration was appropriate. It must be said, however, that certiorari generally appears to be a more suitable instrument for reviewing the constitutionality of the action. The procedure has been honed to that use for centuries. Those who operate in the criminal law area fully understand its workings. It is a more expeditious instrument, and its discretionary character is well known and adjustable to time and circumstance. It has the advantage, too, of being subject to a system of appeals carefully crafted and timed to meet the needs of the criminal justice system. I add that in view of Parliament's obvious intention to insulate review the discretion should be exercised in this kind of case subject to similar informing considerations as those discussed in relation to declaratory relief to avoid overlap and delay in proceedings. If this approach is adopted, [page93] there would appear to be little use for the declaratory action in this context.

Disposition

57 For the above reasons, I would, like my colleague, allow the appeal and set aside the judgments of the British Columbia Court of Appeal and the British Columbia Supreme Court, and would answer the constitutional question as follows:

Question: Whether s. 231.3 of the Income Tax Act, S.C. 1970-71-72, c. 63, as amended by S.C. 1986, c. 6, limits the rights and freedoms guaranteed by ss. 7 and 8 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, and is consequently of no force or effect pursuant to s. 52 of the Constitution Act, 1982, Schedule B, Canada Act 1982, c. 11 (U.K.).

Answer: Yes, in so far as s. 8 is concerned. It is not necessary to consider s. 7.

58 A declaration should issue declaring s. 231.3 of the Income Tax Act and the search warrant issued against the appellants on February 27, 1993 are of no force or effect. In addition, an order should issue for the return of all documents, books, records, papers and things seized together with any copies or notes that have been made thereof. The appellants are entitled to their costs throughout.

The following are the reasons delivered by

59 L'HEUREUX-DUBÉ J.:-- Although I was part of the minority in Knox Contracting Ltd. v. Canada, [1990] 2 S.C.R. 338, I feel bound by the majority decision in that case and, accordingly, join Justice La Forest J.'s reasons in the present case.

[page94]

The reasons of Sopinka, McLachlin and Iacobucci JJ. were delivered by

SOPINKA J.:--

I. Introduction

60 This is the second of two decisions which concern the validity of search warrants under the Income Tax Act, S.C. 1970-71-72, c. 63 (hereinafter "ITA"). The decisions arise in two appeals which were heard together. In the first decision, Baron v. Canada, [1993] 1 S.C.R. 416, I concluded that s. 231.3 ITA and the search warrants issued under the authority of that section violated s. 8 of the Canadian Charter of Rights and Freedoms and were of no force or effect. The present appeal raises the identical substantive issue. It arises out of an attack on a search warrant issued by McEachern C.J.S.C. under s. 231.3 ITA. But the respondent contends that notwithstanding that these appeals raise identical issues, we cannot come to the same conclusion nor provide the same relief in this appeal. This is because in Baron the Minister chose to apply to a Federal Court judge for the search warrant whereas in this case the Minister applied to the Chief Justice of the British Columbia Supreme Court in his capacity as a judge of a provincial supreme court. Relying on Knox Contracting Ltd. v. Canada, [1990] 2 S.C.R. 338, the respondent says there was no appeal to the Court of Appeal and hence no appeal to this Court.

61 I conclude that our decision in Knox Contracting is not determinative in this case and that the Court of Appeal had the jurisdiction to hear the appeal. In this regard, I limit my discussion to the form of proceedings for which an appeal was actually sought in this case. The basic relief requested was a declaration that the relevant provisions of the ITA authorizing search and seizure violated s. 8 of the Charter. This was coupled with a motion to set aside the warrants and seizure and for return of the documents. This ancillary relief was premised on the authorizing legislation is being declared invalid. [page95] For the reasons I gave in Baron, I conclude that the impugned provisions of the ITA, the warrants issued under them and the searches and seizures carried out on the strength of the warrants are inconsistent with s. 8 of the Charter and consequently of no force or effect, pursuant to s. 52 of the Constitution Act, 1982.

II. The Facts

62 The facts of the present case are fully set out in the reasons for decision of McKenzie J. in Kourtessis v. M.N.R. (1987), 15 B.C.L.R. (2d) 200 (S.C.), 36 C.C.C. (3d) 304 (hereinafter Kourtessis (Part 1), cited to C.C.C.). Following an investigation, officers of Revenue Canada formed the opinion that the appellants Kourtessis and his company Hellenic Import-Export Co. had violated s. 239 ITA in that they were evading or attempting to evade the payment of taxes by making false and deceptive statements in income tax returns for the years 1979-1984. On October 22, 1986, Callaghan J. of the British Columbia Supreme Court issued warrants to search for and seize documents which could afford evidence of the alleged violations. These warrants were subsequently quashed by Proudfoot J. of the same court (as she then was) due largely to the Department's nondisclosure of material information in the affidavit material used before Callaghan J. In particular, the Department had failed to disclose that the investigators had been in contact with appellants' counsel who had offered to supply any further documentation that was required. The items that had been seized were not, however, returned to the appellants and on February 27, 1987 McEachern C.J.S.C.

(as he then was) issued the search warrant challenged in this appeal for the seizure of relevant documents located at the Department's premises, subject to the conditions that everything seized would be [page96] sealed and the appellants would have 30 days to challenge the warrant.

63 Within the 30-day period the appellants instituted proceedings in the British Columbia Supreme Court by way of originating petition challenging the warrant on constitutional and other grounds. The relief sought was an order:

> (a) quashing the warrant issued by McEachern C.J.S.C.;
>
> (b) quashing the search and seizure executed thereunder;
>
> (c) declaring s. 231.3 ITA to be inconsistent with ss. 7, 8 and 15 of the Charter and consequently pursuant to s. 52 of the Constitution Act, 1982 of no force or effect;
>
> (d) to return the items seized;
>
> (e) to return all summaries, notes and outlines taken of the items seized;
>
> (f) prohibiting the Department from using the items or copies, summaries, notes or outlines thereof or any information obtained therefrom; and
>
> (g) to destroy all copies, summaries, notes and outlines of the items that were not for any reason returned to the appellants.

64 The non-constitutional grounds for the petition were summarized by McKenzie J. as follows in Kourtessis (Part 1), supra, at pp. 310-11:

> The [appellants] argue that the application for the second warrant [issued by McEachern C.J.S.C.] was an abuse of the court's process in that it was an attempt to relitigate issues which had been adversely and finally decided against the Crown by Proudfoot J., that it was in effect a disguised appeal from her order which cannot be entertained by another judge of the same court and that the application and information put before the Chief Justice alleges facts and raises issues which went to the root of the matter in the application before Proudfoot J. [page97] and which should have been brought forward or emphasized at that time, consequently the Crown is estopped from bringing forward those facts at this stage.

The appellants also argued that the Department's application to McEachern C.J.S.C. for a warrant was an interference with the court's administration of justice; that the Department failed to exhaust all means available to them before applying for a warrant, as required by Proudfoot J.'s order; that the information in support of the application for a warrant failed to disclose the real purpose of the search; and that the warrant was not reasonably specific. The non-constitutional attack was dis-

missed by McKenzie J. (Kourtessis (Part 1), supra) and again by the Court of Appeal (Kourtessis v. Minister of National Revenue (1989), 39 B.C.L.R. (2d) 1, [1990] 1 W.W.R. 97, 50 C.C.C. (3d) 201, 72 C.R. (3d) 196, [1990] 1 C.T.C. 241, 89 D.T.C. 5464 (hereinafter Kourtessis (B.C.C.A.), cited to C.C.C.)).

65 The constitutional grounds for the petition were first, that for the reasons given as non-constitutional grounds (abuse of process, disguised appeal, material non-disclosure, etc.), the application for and issuance of the warrant violated ss. 7 and 8 of the Charter and second, that s. 231.3 ITA is inconsistent with ss. 7, 8 and 15 of the Charter and consequently pursuant to s. 52 of the Constitution Act, 1982 of no force or effect. Neither the non-constitutional grounds nor the first leg of the constitutional attack, challenging the application for and issuance of the warrant in this case as distinct from the legislation under which the warrant was issued, were pursued by the appellants before this Court. The appellants' constitutional attack is thus restricted to a direct attack on the legislation. If the direct attack succeeds, the warrant of February 27, 1987 and the search and seizure will be declared [page98] invalid and set aside as a consequence of striking down the legislation.

III. Points in Issue

A. Jurisdiction

66 The following preliminary issue arises which will occupy the bulk of my reasons: did the British Columbia Court of Appeal have jurisdiction to entertain the appellants' appeal from the judgment of McKenzie and Lysyk JJ. of the British Columbia Supreme Court dismissing the appellants' application for a declaration and other ancillary relief?

B. The Charter

67 On April 15, 1991, a constitutional question identical to that stated in Baron was stated by order of the Chief Justice:

> Whether s. 231.3 of the Income Tax Act, S.C. 1970-71-72, c. 63, as amended by S.C. 1986, c. 6, limits the rights and freedoms guaranteed by ss. 7 and 8 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, and is consequently of no force or effect pursuant to s. 52 of the Constitution Act, 1982, Schedule B, Canada Act 1982, c. 11 (U.K.).

IV. Judgments Below

68 Since our decision in Baron is dispositive of the Charter questions in this appeal, and the judgments of the courts below in this appeal on the Charter issues were discussed in that case, it is unnecessary to reproduce here the reasoning of the courts below on the Charter challenge. The following summary thus concentrates on the jurisdiction issue.

69 The appellants' non-constitutional arguments were heard by McKenzie J. and dismissed on July 6, 1987: Kourtessis (Part 1), supra. Their constitutional attack was rejected on August 16, 1988 by Lysyk J., and as a result the entire application was [page99] dismissed: Kourtessis v. M.N.R. (1988), 30 B.C.L.R. (2d) 342 (S.C.), [1989] 1 W.W.R. 508, 44 C.C.C. (3d) 79, [1989] 1 C.T.C. 56, 89 D.T.C. 5214. The appellants appealed to the British Columbia Court of Appeal. Apparently un-

sure whether leave was required, they gave both notice of appeal and notice of application for leave to appeal pursuant to the British Columbia Court of Appeal Act, S.B.C. 1982, c. 7, ss. 6(1)(a) and 6.1(2). The Minister then brought a motion to quash the appeal on the ground that no appeal lay from the B.C. Supreme Court's judgment. After reserving judgment on the motion to quash and hearing the merits of the appeal, the Court of Appeal allowed the motion to quash, holding that it had no jurisdiction to hear the appeal and that in any event it would dismiss the appeal on the merits: Kourtessis (B.C.C.A.), supra. Leave to appeal to this Court was granted on December 20, 1990, [1990] 2 S.C.R. viii.

70 In the British Columbia Court of Appeal, Taggart J.A., writing for a unanimous court on the issue of appellate jurisdiction, held that the litigation in question was a criminal proceeding subject to Parliament's exclusive jurisdiction to prescribe criminal procedure, and that since no right of appeal could be found in the ITA or the Criminal Code, R.S.C., 1985, c. C-46, there was no appeal from the Supreme Court's judgment. The issue, according to Taggart J.A., was to characterize the nature of the proceedings taken under s. 231.3 ITA. If they were criminal law proceedings, any right of appeal would have to be found in the Criminal Code due to s. 34(2) of the Interpretation Act, R.S.C., 1985, c. I-21, by virtue of which all the provisions of the Criminal Code concerning indictable and summary conviction offences apply to ITA offences.

[page100]

71 Relying on the reasoning in Goldman v. Hoffmann-La Roche Ltd. (1987), 35 C.C.C. (3d) 488, in which the Ontario Court of Appeal held that the offence provisions of the Competition Act, R.S.C. 1970, c. C-23, could be sustained exclusively by reference to the federal criminal law power in s. 91(27) of the Constitution Act, 1867 even though other parts of the Act might rely on the trade and commerce power, Taggart J.A. concluded that while other parts of the ITA may rely on other federal heads of power, the "offence and ancillary provisions of the Act are constitutionally supported by s. 91(27)": Kourtessis (B.C.C.A.), supra, at p. 210. Accordingly, jurisdiction to entertain an appeal from the British Columbia Supreme Court's judgment had to be found in the ITA or the Criminal Code and not the Court of Appeal Act. Taggart J.A. found no appeal right in the ITA or the Criminal Code. It made no difference in his view that the appellants were seeking a Charter remedy. He held, following Mills v. The Queen, [1986] 1 S.C.R. 863, and R. v. Meltzer, [1989] 1 S.C.R. 1764, that the Charter itself does not confer an appeal right and moreover that in criminal proceedings there are no appeals from interlocutory decisions which do not have the effect of terminating the extant proceedings. Since in his view the decisions of McKenzie and Lysyk JJ. did not finally dispose of the trial proceedings, he held that there was no appeal therefrom to the Court of Appeal. Finally, after dismissing the appellants' remaining arguments, Taggart J.A. concluded that the Court of Appeal was without jurisdiction to entertain the appeal and accordingly the appeal was quashed.

V. Analysis

A. Does an Appeal Lie?

72 I turn now to the issue of whether an appeal lies to a provincial court of appeal from a superior court judge's judgment dismissing an application [page101] which seeks, inter alia, (1) a decla-

ration that s. 231.3 is unconstitutional, and (2) an order quashing and setting aside a s. 231.3 search warrant and the search and seizure carried out thereunder. This comes down to a question of the division of legislative powers between the federal government and the provinces. Whether the Province of British Columbia has the power to legislate appellate procedure in respect of the present proceeding turns on the nature of the proceeding. This brings us face to face with Knox Contracting, supra.

73 In Knox Contracting, officials of the Department of National Revenue brought an ex parte application before a judge of the New Brunswick Court of Queen's Bench for the issuance of search warrants under s. 231.3 ITA. The warrants were issued and executed, and the taxpayers applied to the issuing judge to quash the warrants on the grounds that they were too vague or broad in scope, they were based partly on information obtained in violation of a court order, and being based partly on information illegally obtained they contravened the unreasonable search provision in the Charter. Unlike in Baron or Kourtessis, no declaratory relief was sought. The issuing judge dismissed the application to quash the warrants. An appeal to the New Brunswick Court of Appeal was dismissed.

74 The taxpayers' appeal to this Court was also dismissed. The issue before this Court was, as I said in my reasons, "whether an appeal lies from the decision of a superior court judge not to quash a search warrant issued pursuant to s. 231.3 of the Income Tax Act": Knox Contracting, supra, at p. 357. It will immediately be seen that the only relevant differences between Knox Contracting and the present appeal are that the constitutionality of the governing legislation was not challenged, nor was declaratory relief sought, in Knox Contracting. This Court split three ways and in the [page102] result held that there was no appeal to the provincial court of appeal from the superior court judge's decision on the application to quash the warrants. Cory J. (Wilson and Gonthier JJ. concurring) held that the proceeding in question was truly criminal in that ss. 231.3 and 239 ITA were supportable by reference to the federal s. 91(27) criminal law power. That being so, Cory J. held, any appeal right must be found in federal legislation and since there was no such provision in the ITA or the Criminal Code, the New Brunswick Court of Appeal lacked jurisdiction to entertain the appeal. It was my opinion, on the contrary, in which L'Heureux-Dubé and McLachlin JJ. concurred, that identifying s. 91(27) as a source of constitutional support for the ITA did not end the inquiry, as the ITA was also supportable under the federal taxation power (s. 91(3)). That being so, the proceeding instituted by the taxpayers had two aspects, one criminal and one civil, and provincial rules of civil procedure would apply to give a right of appeal in the absence of conflict with federal legislation, of which I found none. Finally, La Forest J. preferred my approach to the juristic character of the relevant provisions of the ITA, but found that Parliament had shown an intention to subject the proceeding to the ordinary rules of criminal procedure. Hence he agreed with Cory J.'s disposition of the appeal.

75 With respect to the juristic character of the ITA, which was supported by the majority, I concluded that ss. 231.3 and 239 ITA were supportable under both the criminal law power and the power in relation to federal taxation. I said, at pp. 358-59:

> While I accept that ss. 231.3 and 239 are supportable under the power over criminal law and procedure, that does not end the inquiry. If these provisions are also [page103] supportable under s. 91(3) of the Constitution Act, 1867, the federal taxation power, then the jurisdiction to provide for an appeal is not exclusively federal. Section 92(14) of the Constitution Act, 1867 confers jurisdiction on the province to legislate in respect of procedure in civil matters. Accordingly,

> if ss. 231.3 and 239 are supportable under two heads of power, one criminal and one civil in nature, a right of appeal can be conferred by either federal or provincial legislation. In the absence of conflict, both forms of legislation are valid on the basis of the double aspect doctrine: see Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161.
>
> The notion that a statute is supportable under two heads of legislation is well established: see R. v. Hauser, [1979] 1 S.C.R. 984; R. v. Wetmore, [1983] 2 S.C.R. 284. The fact that provision is made for enforcement, including the creation of severe penalties, does not mean that the legislation is necessarily criminal.
>
> ...
>
> The nature of the Income Tax Act is such that it was undoubtedly passed under the federal taxation power. Most of its provisions have nothing to do with the criminal law power.

In support of this last proposition, I referred to passages from R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627, at p. 641, and Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, at pp. 516-17, to the effect that the ITA is essentially a regulatory statute enacted under the federal taxation power, not a criminal statute. I went on to observe that, while the procedure to be followed in the application of federal laws is within the paramount jurisdiction of Parliament, provincial procedure was not ousted in the absence of conflict with federal legislation. Absent conflict, provincial laws of procedure, including rights of appeal, were applicable except in respect of proceedings that are exclusively criminal in nature. Accordingly, in a matter arising under a federal statute supportable under a head of power in addition to the criminal law power, a provincial court which is seized of the matter may validly apply its own rules of civil procedure [page104] unless precluded by federal legislation or the matter is clearly related to a criminal proceeding.

76 Applying this analytical framework to the proceedings in Knox Contracting, I concluded that there was no conflict with federal legislation and thus an appeal did lie pursuant to the New Brunswick Judicature Act, R.S.N.B. 1973, c. J-2. I was, however, in the minority in this conclusion. Cory J. (Gonthier and Wilson JJ. concurring), as noted, having held that the relevant provisions were enacted pursuant to the exclusive federal criminal law power, stated that a right of appeal would have to be found in federal legislation and that it was not necessary to inquire further into the relevant provisions' supportability as tax law. This was also a minority position. The opinion of La Forest J., speaking for himself, which was decisive of the result, approved of my reasoning on the juristic character of the ITA but agreed with Cory J.'s disposition of the appeal. He was of the view that in the circumstances Parliament had shown a disposition to adopt "the ordinary procedures of the criminal law for their enforcement" (at p. 356). He concluded, however, with the following caveat (at p. 357):

> It is unnecessary to consider whether a province could, in other circumstances, constitutionally deal with procedure respecting a penal provision conjointly supportable under the criminal law power and some other head of federal legislative power.

77 I conclude from the foregoing that in Knox Contracting a majority supported the view that the offence and search warrant provisions of the ITA [page105] are referrable to both the federal criminal law and taxation power, and jurisdiction to legislate procedure in matters relating to these provisions is shared between the provinces and the federal government, subject to federal paramountcy in the event of conflict between federal and provincial legislation. I would add that, in this situation, Parliament is free to assign jurisdiction to any tribunal it chooses, whatever the source of its legislative power: see R. v. Trimarchi (1987), 63 O.R. (2d) 515 (C.A.), leave to appeal refused, [1988] 1 S.C.R. xiv; Attorney-General for Alberta v. Atlas Lumber Co., [1941] S.C.R. 87. If, however, federal legislation is silent, the ordinary rule is that "where no other procedure is prescribed, a litigant suing on a federal matter in a provincial court takes the procedure of that court as he finds it: see Alexander v. Vancouver Harbour Commrs., [1922] 1 W.W.R. 1254 (B.C.C.A.); Morris v. Morris, [1950] O.R. 697 (H.C.)": Laskin's Canadian Constitutional Law (5th ed. 1986), vol. 1, at p. 185. This is because the provincial superior courts are truly courts of general jurisdiction, as Professor Hogg points out:

> The general jurisdiction of the provincial courts means that there is no need for a separate system of federal courts to decide "federal" questions. Nor does the power to decide federal questions have to be specifically granted to the provincial courts by the federal Parliament. On the contrary, if federal law calls for the exercise of adjudication, but is silent as to the forum, the appropriate forum will be the provincial courts.
>
> (P. W. Hogg, Constitutional Law of Canada (3rd ed. 1992), vol. 1, at p. 7-3.)

78 This does not mean that provincial legislation does not apply unless "adopted" by federal legislation as my colleague suggests. The authorities make it clear that a province has legislative authority to adjudicate federal matters and that such legislation is only ousted if it conflicts with federal legislation. In Adler v. Adler, [1966] 1 O.R. 732, [page106] Laskin J.A. (as he then was), speaking for the Court of Appeal of Ontario, found s. 7(1) of the Matrimonial Causes Act, R.S.O. 1960, c. 232, an Ontario statute, intra vires. This section provided that no appeal lay from a judgment absolute in divorce cases. Divorce is a federal matter and it was argued that provincial legislation was incompetent. At page 736, Laskin J.A. stated:

> Of course, it was open to the Ontario Legislature (save as competent Federal legislation on divorce procedure might inhibit it) to vary its laws of procedure in the disposition of divorce actions and appeals therein.

Moreover, in Ontario (Attorney General) v. Pembina Exploration Canada Ltd., [1989] 1 S.C.R. 206, La Forest J. went to considerable pains to stress the same point in relation to admiralty. In his judgment for the Court upholding provincial legislation which conferred admiralty jurisdiction on a small claims court, he relied on a number of authorities which upheld provincial jurisdiction in respect of the adjudication of divorce cases. At pages 219-20, he stated:

> The foregoing position is supported by the following statement of Rand J. in Hellens v. Densmore, [1957] S.C.R. 768, at p. 783:

> That after Confederation a right of appeal could be given by provincial law (in respect of divorce) appears to me to be unquestionable although the opposite opinion seems to have been held in the provincial Courts: the administration of justice by the Province surely extends to the final determination within the Province of the judgments of its own Courts.

Indeed, unlike the cases already discussed, Rand J.'s holding cannot be explained on the basis of the historical inherent jurisdiction of a superior court. Appellate jurisdiction must be conferred by statute.

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79 This conclusion was no way dependent on adoption of provincial legislation by appropriate federal legislation. Rather, it was based on the provincial legislative power under s. 92(14) of the Constitution Act, 1867. La Forest J. made this plain in the following passage at p. 220:

> It seems to me, however, that such jurisdiction is inherent in the essentially unitary character of the Canadian court system. If, as indicated by the divorce cases above cited, one accepts that jurisdiction in the provincial superior courts is not solely derived from the specific character of superior courts, but that s. 92(14) of the Constitution Act, 1867 empowers the provinces to grant them general jurisdiction, whether originally or on appeal as in Hellens v. Densmore, supra, there is no reason why this should not apply to provincial courts of inferior jurisdiction as well. There are considerations of a historical and practical nature that militate in favour of this solution as well to which I shall advert later. I turn first, however, to a discussion of the cases that have dealt directly with the issue.

80 The fact that there is alleged to be a comprehensive procedure contained in federal legislation is only relevant to determine whether provincial legislation is ousted because it conflicts with federal legislation. My colleague and I agree that it is not ousted in relation to declaratory relief. This includes, perforce, the right of appeal conferred by provincial legislation. In my view, it should also extend to ancillary relief which enables the Court to give effect to the declaration.

81 It would be anomalous if taxpayers who must challenge ITA search warrants in the provincial superior courts were to find themselves without a right of appeal in the event of an unsuccessful challenge, whereas no question arises with respect to the appellate jurisdiction of the Federal Court of Appeal in identical proceedings brought in the Federal Court. The juxtaposition of Kourtessis and Baron illustrates this practical difficulty. In the former, the Minister applied to the provincial superior [page108] court for a warrant, and in the latter the Minister applied to the Federal Court for a warrant. The ITA provides that the Minister may make this choice in his or her discretion. In most cases, the option is exercised on the basis of convenience. The exercise of this option will have grave implications for the rights of the taxpayer if we approve the blanket application of Knox Contracting to all proceedings challenging ITA warrants in provincial courts. If we uphold the judgment of the British Columbia Court of Appeal in Kourtessis, taxpayers who have the bad luck of being subject to a warrant issued by a provincial superior court will have no appeal from a provincial su-

perior court judge's refusal to set aside the warrant, whereas if the warrant is issued by the Federal Court there will be no problem of appellate jurisdiction, as Baron demonstrates. It would be unfortunate to allow a taxpayer's appellate rights to be determined on the basis of the Minister's whim.

82 My colleague, La Forest J., suggests that there is no anomaly because, as I understand his reasons, there may be no appeal to the Federal Court of Appeal in the circumstances outlined in Baron. The relief claimed in Baron was identical to the relief claimed in this appeal and included a motion to set aside the search warrants as well as an action for a declaration. Relying on this right of appeal, the Court of Appeal quashed the search warrants and declared s. 231.3 ITA invalid. That appeal was heard together with this appeal in which jurisdiction was very much a live issue. The issue of jurisdiction in Baron, in contrast to this appeal, was not dealt with per incuriam but on the basis that no question with respect to jurisdiction existed. If indeed the Federal Court of Appeal lacked jurisdiction, then this Court's decision was a nullity. Our jurisdiction to hear an appeal and to affirm the judgment on appeal depends on the judgment on [page109] appeal being a valid exercise of that court's jurisdiction.

83 To avoid this anomaly, I would distinguish Knox Contracting so as not to foreclose an appeal in proceedings relating to:

(i) a declaration that the statute authorizing a search warrant violates the Constitution, coupled with
(ii) an application to set aside the search warrant.

In my view, having had the benefit of a more elaborate explanation of my colleague's (La Forest J.) reasons in Knox Contracting, these two remedies can be exercised, in combination, prior to the laying of charges, and the result of such exercise may be appealed consistently with the majority opinion in that case. I will deal with each of these two remedies separately.

(i) Motion to Set Aside in Aid of an Action for a Declaration

84 This form of remedy is frequently employed to review the issuance of process pursuant to legislation that is attacked on constitutional grounds. Although often combined with an action for a declaration, when employed alone, the distinction between this remedy and an action for a declaration with consequential relief is not of substance. In both cases there is a finding or declaration that the statute is invalid and anything obtained pursuant to the process issued thereunder must be returned. The principle of federal procedural exclusivity in respect of proceedings to review search warrants issued under s. 231.3 ITA would permit an action for a declaration that the statute is invalid and consequential relief, including return of the articles seized. This is discussed hereunder and is a matter in respect of which my colleague and I are in agreement. The declaration that the statutory provision is invalid leads to the inexorable conclusion that the warrant issued thereunder is also invalid. Indeed, the declaration could presumably [page110] expressly include the warrants. If this proceeding, conducted under provincial law, does not conflict with the comprehensive regime relating to the enforcement of the ITA, I find it difficult to accept that the additional mechanical step of setting aside the warrant oversteps the bounds of constitutional propriety. Indeed, it seems peculiar to order the return of articles seized under a warrant that is left standing, albeit mortally wounded by a declaration.

85 Furthermore, it must be stressed that a warrant under s. 231.3 ITA is granted ex parte. A motion to the superior court judge who issued the ex parte order or to another judge of the same

court to set aside the ex parte order in accordance with civil procedure has been recognized by our Court as an appropriate procedure to review an ex parte authorization to wiretap issued under the Criminal Code. In Wilson v. The Queen, [1983] 2 S.C.R. 594, McIntyre J., after reviewing a body of jurisprudence describing the procedure for such review in civil cases, stated, at p. 608:

> It is my opinion that, in view of the silence on this subject in the Criminal Code and the confusion thereby created, the practice above-described should be adopted.

86 I see no reason why a superior court judge reviewing an ex parte order would be precluded from entertaining a Charter argument. Even if we assume that the superior court judge issuing the ex parte order is not empowered to decide a Charter issue, this does not mean that the reviewing court will be similarly limited. For example, the reviewing judge with respect to a wiretap authorization issued ex parte by a superior court judge is entitled to entertain an attack at trial on the authorization under s. 8 of the Charter even if the reviewing judge is not a superior court judge. See R. v. Garofoli, [1990] 2 S.C.R. 1421. This conclusion applies a fortiori when the reviewing judge is also seized of an action for a declaration of invalidity based on the Charter. In that situation, the motion [page111] to set aside is simply called in aid to give effect to the right declared by the court. The court is clothed with jurisdiction to decide the Charter issue by virtue of the declaratory action.

87 General federal legislation should not be interpreted or applied to deny an effective remedy where there has been a Charter breach. In Re Church of Scientology and The Queen (No. 6) (1987), 31 C.C.C. (3d) 449, the Ontario Court of Appeal considered the reviewability of search warrants issued under the Criminal Code. The court concluded that if certiorari did not apply because the Charter violation did not constitute an error of jurisdiction, the reviewing judge was bound to consider a remedy under s. 24(1) of the Charter. This accords with the view expressed by a unanimous Court in R. v. Smith, [1989] 2 S.C.R. 1120, to which I refer hereunder.

88 Accordingly, in my view, in combination with an action for a declaration of constitutional invalidity, a motion to set aside partakes of the same character as the declaration for constitutional purposes. For the reasons outlined below, when employed in this manner it can be appealed as part of the disposition of a proceeding for a declaration.

89 I need not address two other issues which are alluded to in my colleague's reasons, that is: whether a motion to set aside can be brought (i) independently of an action for a declaration, or (ii) on grounds other than constitutional grounds. Any suggestion that s. 231.3(7) is the exclusive basis for questioning search warrants under the ITA on conventional grounds must be left to proceedings which raise that issue.

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90 I would simply note that s. 231.3(7) does not appear to permit a challenge to the validity of the warrant on grounds that have been traditionally permitted. Indeed, in an earlier proceeding in this case, warrants were quashed by Proudfoot J. for lack of disclosure and specificity. Searches and seizures involve the most serious invasion of privacy. Search warrants issued under the Criminal Code can be attacked by motion to quash brought before the superior court of the province. The

grounds include failure to disclose, lack of specificity, the existence of less intrusive investigatory procedures and the like. See Shumiatcher v. Attorney-General of Saskatchewan (No. 2) (1960), 34 C.R. 154 (Sask. Q.B.), Re Church of Scientology, supra, and R. v. Sismey (1990), 55 C.C.C. (3d) 281. I would be surprised if this procedure were not available to a citizen who is subject to a search under the ITA.

91 An application under s. 231.3(7) would be a wholly inappropriate proceeding to test the constitutional validity of the provision under which the seizure is made. Subsection (7) applies only if the judge is satisfied that the documents seized will not be needed for an investigation or prosecution or were not seized in accordance with the warrant. It can only be resorted to if both the warrant and the statutory provision under which the warrant was issued are valid. The subsection is similar to s. 490 of the Criminal Code which sets up a more elaborate and detailed procedure for the return of documents. If the respondent's argument were accepted, it would follow that a motion to quash a search warrant issued under the Code could not be taken unless it were somehow fitted into an application for relief under s. 490. In my view, not only is subs. (7) not an appropriate forum with respect to a constitutional challenge of the search and seizure provision, but a judge would not have jurisdiction to deal with such a challenge upon a plain reading of the words of the subsection. To the extent that Kohli v. Moase (1988), 55 D.L.R. (4th) 737 (N.B.C.A.), [page113] suggests the contrary, I must respectfully disagree with it.

(ii) Declaratory Relief

92 In the alternative, I would distinguish Knox Contracting on the basis that the procedure relating to proceedings for declaratory relief on constitutional grounds cannot be characterized as criminal law so as to exclude a right of appeal. In Knox Contracting the proceeding taken was a motion to quash. There was no constitutional challenge to legislation. In this case, the proceeding taken was not simply to quash the warrant but an action for a declaration that s. 231.3 was invalid on constitutional grounds. A motion to quash, when not combined with an action for declaratory relief, may take its character for the purpose of division of powers from the underlying proceeding which it attacked. See In re Storgoff, [1945] S.C.R. 526, at pp. 585-86. On the other hand, an action for a declaration as to the constitutional validity of a statute does not necessarily partake of the character of the statute which is attacked. It has a life of its own.

93 This type of proceeding owes its independent character in part to the fundamental role of the provincial superior courts in Canada's constitutional system, particularly their power to declare federal and provincial legislation unconstitutional. The jurisdiction of the provincial superior courts to issue declaratory judgments on the constitutional validity of provincial and federal legislation (whether as to vires or consistency with the Charter) is fundamental to Canada's federal system: see Attorney General of Canada v. Law Society of British Columbia, [1982] 2 S.C.R. 307, at p. 328. This jurisdiction is "constant, complete, and concurrent" with the jurisdiction of a criminal trial court: Mills v. The Queen, supra, at p. 892, per Lamer J. (as he then was) (Dickson C.J., concurring); see also at p. 956, per McIntyre J. (Beetz and Chouinard JJ., concurring) (the provincial [page114] superior court is always a court of competent jurisdiction), and at p. 972, per La Forest J. This plenary jurisdiction is necessary both to enable the provincial superior courts to discriminate between valid and invalid federal laws so as to refuse to apply the invalid ones (Attorney General v. Law Society of British Columbia) and to ensure that the subject always has access to a remedy for violation of his or her Charter rights and freedoms (Mills).

94 The declaration is a traditionally civil remedy which in its modern incarnation originated in the United Kingdom rules of court of 1883 (W. Wade, Administrative Law (6th ed. 1988), at p. 594). They provided that no action was open to objection simply because it sought a declaration and no other relief. This provision is preserved today in almost identical form in the British Columbia Rules of Court, r. 5(22), and in the rules or statutory provisions of other provinces.

95 The declaratory action to declare a statutory provision unconstitutional is not transformed from a civil remedy to a criminal remedy merely because the declaration relates to a criminal statutory provision. In Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342, this Court held that a citizen who had an interest in the Criminal Code provisions relating to abortion other than that of a potential accused could bring an action for a declaration that it was invalid on constitutional grounds. The action was tried and appeals taken in accordance with the civil rules of procedure. The appeal to this Court was dismissed by reason of mootness, the provisions under attack having been struck down by this Court's judgment in R. v. Morgentaler, [1988] 1 S.C.R. 30. No issue was raised at any stage questioning its civil character. A taxpayer under investigation, quite apart from his interest as a possible accused, must have a right at least equal to that of an interested bystander to attack on constitutional grounds a law under which [page115] his books and records have been seized and are being retained. The right to do so must surely include an equal right to take the case to a higher court.

96 This does not mean that an action for a declaration can be used as a substitute for an application to the trial judge in a criminal case in order to acquire a right of appeal. By virtue of s. 24(1) of the Charter, there are some proceedings available to an accused in the context of a criminal case in respect to issues that could be the subject of an action for a declaration. One example is an application to quash an information or indictment on the grounds that the section of the Criminal Code upon which the charge is based violates the Charter. See R. v. Morgentaler (1984), 16 C.C.C. (3d) 1 (Ont. C.A.). The same issue could be litigated by means of an action to declare the section invalid. The superior courts have jurisdiction to entertain such applications even if the superior court to which the application is made is not the trial court. However, a superior court has a discretion to refuse to do so unless, in the opinion of the superior court, given the nature of the violation and the need for a timely review, it is better suited than the trial court to deal with the matter. See Mills, supra, per Lamer J. at pp. 891-96, and per La Forest J. at pp. 976-77, affirmed by the full Court in R. v. Smith, supra, at pp. 1129-30. The superior court would therefore have jurisdiction to entertain an action for a declaration seeking this kind of relief but subject to the same discretion to refuse to exercise it. The superior court's discretion to decline to exercise its jurisdiction on the basis set out in Mills and Smith, supra, is buttressed by the discretionary nature of declaratory relief by virtue of which the court can refuse to entertain such an action for a variety of reasons. The court is justified in refusing to entertain the action if there is another procedure available in which more effective relief can be obtained or the court decides that the legislature intended that the other procedure should be followed. See E. Borchard, Declaratory Judgments (2nd ed. 1941), at p. 303, and I. Zamir in The [page116] Declaratory Judgment (1962), at p. 226. See also City of Lethbridge v. Canadian Western Natural Gas, Light, Heat and Power Co., [1923] S.C.R. 652, at p. 659, and Terrasses Zarolega Inc. v. Régie des installations olympiques, [1981] 1 S.C.R. 94, at pp. 103 and 106. As a general rule, this discretion should be exercised to refuse to entertain the action when declaratory relief is being sought as a substitute for obtaining a ruling in a criminal case. This will be the apt characterization of any declaration which is sought with respect to relief that could be obtained from a trial court which has been ascertained. The same considerations apply before a trial court has been ascertained

if the relief sought will determine some issue in pending criminal proceedings and does not have as a substantial purpose vindication of an independent civil right. In such circumstances, the mere fact that relief was sought in the guise of an action for a declaration would not confer a right of appeal from the refusal to entertain the action.

97 In the present case, however, no issue was raised in respect of the British Columbia Supreme Court's jurisdiction nor in respect of the exercise of its discretion to entertain the appellants' application by way of originating petition. There was no trial court in sight because no charge or charges had been laid. While the attack on the validity of the statutory provision authorizing the search would affect the admissibility, at trial, of the things seized, it was also vital to the civil interests of the taxpayer. The search warrant would not only authorize a trespass but seizure of personal property. The petition for a declaration was therefore properly entertained under the British Columbia rules of procedure. There is no reason why those rules which clearly applied at first instance should not apply to permit an appeal in the circumstances [page117] of this case. If Parliament did not intend to exclude a petition for a declaration under provincial rules, it cannot have intended to exclude an appeal pursuant to the same rules.

B. Constitutionality of Section 231.3

98 For the reasons that I gave in Baron, supra, I hold that s. 231.3 ITA violates the reasonable search guarantee found in s. 8 of the Charter, and is consequently, pursuant to s. 52(1) of the Constitution Act, 1982, of no force or effect. I would answer the constitutional question in the affirmative.

VI. Disposition

99 I would therefore allow the appeal and set aside the judgments of the British Columbia Court of Appeal and the British Columbia Supreme Court. I would answer the constitutional question as follows:

Question:	Whether s. 231.3 of the Income Tax Act, S.C. 1970-71-72, c. 63, as amended by S.C. 1986, c. 6, limits the rights and freedoms guaranteed by ss. 7 and 8 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, and is consequently of no force or effect pursuant to s. 52 of the Constitution Act, 1982, Schedule B, Canada Act 1982, c. 11 (U.K.).
Answer:	Yes, in so far as s. 8 is concerned. It is not necessary to consider s. 7.

100 A declaration will issue declaring that s. 231.3 ITA and the search warrant issued thereunder are of no force or effect. In addition, an order will issue for the return of all documents, books,

records, [page118] papers and things seized together with any copies or notes that have been made thereof. The appellants will have their costs here and in the courts below.

TAB 5

Indexed as:

Knox Contracting Ltd. v. Canada

Knox Contracting Limited and Harold Hazen Knox, appellants;
v.
Her Majesty The Queen, the Minister of National Revenue, the Attorney General of Canada, the Deputy Attorney General of Canada, the Attorney General for New Brunswick, John Byron Clarke and Bernard Gerard Gillis, respondents.

[1990] 2 S.C.R. 338

[1990] S.C.J. No. 74

File No.: 21271.

Supreme Court of Canada

1989: December 7 / 1990: August 16.

Present: Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK (61 paras.)

Income tax -- Search warrants -- Offences alleged as defined in s. 239 of Income Tax Act -- Search warrants issued under s. 231.3 of Income Tax Act -- Application to quash -- Whether or not issuing judge had jurisdiction to review -- Whether or not ss. 231.3 and 239 of the Income Tax Act derive their constitutional validity from the federal government's taxing power or from its criminal law power -- Income Tax Act, S.C. 1970-71-72, c. 63, ss. 231.3(1), 239(1), (2) -- Constitution Act, 1867, ss. 91(3), (27) -- Judicature Act, R.S.N.B. 1973, c. J-2, s. 8(3).

Courts -- Jurisdiction -- Search warrants -- Offences alleged as defined in s. 239 of Income Tax Act -- Search warrants issued under s. 231.3 of Income Tax Act -- Application to quash -- Whether or not issuing judge had jurisdiction to review -- Whether or not ss. 231.3 and 239 of the Income Tax Act derive their constitutional validity from the federal government's taxing power or from its criminal law power.

Constitutional law -- Division of powers -- Taxation and criminal law powers -- Offences alleged as defined in s. 239 of Income Tax Act -- Search warrants issued under s. 231.3 of Income Tax Act -- Application to quash -- Whether or not issuing judge had jurisdiction to review -- Whether or not ss. 231.3 and 239 of the Income Tax Act derive their constitutional validity [page339] from the federal government's taxing power or from its criminal law power.

As a result of alleged offences contrary to s. 239 of the Income Tax Act, search warrants issued for appellants' premises following an ex parte application by the Ministry of National Revenue pursuant to s. 231.3 of that Act. Appellants brought an application to quash before the judge who had issued the search warrants. The judge determined that he had an inherent jurisdiction as a judge making an ex parte order to review or rescind an ex parte order. He then considered the matter on the merits, found that the search warrants were validly issued and dismissed the application. The Court of Appeal dismissed the appeal and vacated the order sealing the documents.

At issue here was whether or not ss. 231.3 and 239 of the Income Tax Act derive their constitutional validity from the federal government's taxing power or from its criminal law power. If the constitutional authority for the provisions were derived from the criminal law power, no appeal would lie to the Court of Appeal from the decision of a Superior Court judge to issue the search warrants because no such right of appeal was given by the statute.

Held (L'Heureux-Dubé, Sopinka and McLachlin JJ. dissenting): The appeal should be dismissed.

Per Wilson, Gonthier and Cory JJ.: The criminal law embraces acts which the law, with appropriate penal sanctions, forbids because of some evil or injurious or undesirable effect upon the public against which the law is directed. The criminal law has also been defined as laws prohibiting, with penal consequences, acts or omissions considered to be harmful to the State, or to persons or property within the State.

The offences described in s. 239 (fraud, deception, destruction and alteration of documents, false statements, false documents and the wilful evasion of income tax) are criminal in nature and are clearly harmful to the State. These offences may be prosecuted upon indictment and substantial prison terms may be imposed. The Act, which depends on the integrity of the taxpayer, imposes a public duty and a breach of that fundamentally important public duty should constitute a criminal offence. The fact that the Act is concerned with [page340] taxation does not prevent its penal provisions from also being characterized as criminal law.

The jurisdiction and the procedures to be followed by a court in the application of laws enacted by the federal government fall within the paramount jurisdiction of the federal government. This is particularly true of criminal law. The provisions of s. 92(14) of the Constitution Act, 1867 cannot be construed to include jurisdiction over the conduct of criminal prosecutions.

Any right to appeal the issuance of a search warrant under that Act must be found within a statute. No common law right to appeal in interlocutory matters in criminal cases exists. A right of appeal cannot be founded upon the provincial Judicature Act, which is concerned with civil procedures, because ss. 231.3 and 239 constitute an exercise of the criminal law jurisdiction. The Income Tax Act does not provide for an appeal from such an order.

An accused is not without remedies. The Criminal Code provides wide powers for a person from whom articles are seized pursuant to a search warrant to make a speedy application for their return.

If the matter should proceed to trial, the accused may attack the search warrant in any way he or she considers appropriate, including the allegation that it infringes the provisions of s. 8 of the Canadian Charter of Rights and Freedoms. If the matter should not go to trial, a party may still seek civil damages for compensation. No injustice arises from the absence of a right to appeal the order issuing the search warrants.

The fact that the legislative authority for the enactment of these statutes may arise under both the criminal law power and the federal taxation power does not mean that the provisions in them creating offences and imposing penal sanctions are not criminal law. An otherwise predominantly regulatory piece of legislation may contain criminal prohibitions and sanctions and a challenge to specific provisions in the statute under the division of powers must be directed at the challenged provisions, not at the statute as a whole. To the extent the legislation makes the filing of a fraudulent and dishonest return an offence punishable by fine or imprisonment, it is just as clearly legislation in relation to criminal law.

[page341]

It was unrealistic, for purposes of deciding whether or not there was an appeal from a refusal to quash a search warrant, to divorce s. 231.3 from the offences sought to be uncovered by the search and to characterize the former as a matter of civil procedure and the latter as criminal law. It was not necessary to explore aspects of the case arising from the fact that ss. 231.3 and 239 may be constitutionally justified under the general taxing power. These sections are truly criminal in their nature, and criminal procedure is expressly excluded from provincial jurisdiction.

Per La Forest J.: Notwithstanding a general preference for Sopinka J.'s approach to the juristic character of the relevant provisions, the appeal should be dismissed. In choosing a criminal sanction and applying all the provisions of the Criminal Code "except to the extent that the enactment otherwise provides", Parliament has shown a disposition to adopt the ordinary procedures of the criminal law for their enforcement, subject to any variations spelled out in the Income Tax Act.

Per L'Heureux-Dubé, Sopinka and McLachlin JJ. (dissenting): Sections 231.3 and 239 of the Income Tax Act are supportable under both the criminal law power and the federal taxation power. Since s. 92(14) of the Constitution Act, 1867 confers jurisdiction on the province to legislate in respect of procedure in civil matters, an appeal lies not only under federal legislation but also under New Brunswick's Judicature Act. Absent conflict, both forms of legislation are valid on the basis of the double aspect doctrine. Provision for enforcement, including the creation of severe penalties, does not mean that the legislation is necessarily criminal.

Provincial procedure is not ousted because the procedures to be followed by a court in the application of federal laws are within the paramount jurisdiction of Parliament. The provincial courts are competent to and do adjudicate in relation to federal law and apply their procedure unless that law prescribes otherwise.

A motion to review the issuance of a search warrant takes its character from earlier proceedings out of which it arises. The motion for review cannot therefore be characterized as exclusively criminal for the purpose of determining rights of appeal -- no charges were laid and indeed may not be laid. Nothing in the nature of the application can convert the proceeding into an exclusively criminal proceeding.

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Finally, the appellants may find themselves without a remedy. If the matter should proceed to trial (assuming charges are laid), the problems arising out of Wilson v. The Queen, which precludes a collateral attack on an order made by a court having jurisdiction to make it, make it doubtful that the trial judge would have jurisdiction to set aside an order of a superior court judge. Sections 490(7), (10) and (17) of the Criminal Code, if applicable to a seizure under the Income Tax Act, have no application where the search is alleged to be unlawful and it is sought to prevent or terminate the search. If the matter does not go to trial, an action for damages, grounded on conduct of the authorities pursuant to an order of the superior court which had not been set aside, is highly unlikely.

Cases Cited

By Cory J.

Referred to: Wilson v. The Queen, [1983] 2 S.C.R. 594; Scowby v. Glendinning, [1986] 2 S.C.R. 226; Reference re Validity of Section 5(a) of the Dairy Industry Act (Margarine Reference), [1949] S.C.R. 1; R. v. Hauser, [1979] 1 S.C.R. 984; Re Ramm (1957), 120 C.C.C. 44; Attorney-General of Quebec v. Attorney-General of Canada, [1945] S.C.R. 600; Reference re Validity of the Combines Investigation Act and of s. 498 of the Criminal Code, [1929] S.C.R. 409; Attorney General of Canada v. Canadian National Transportation, Ltd., [1983] 2 S.C.R. 206; R. v. Hoffmann-La Roche Ltd. (1981), 33 O.R. (2d) 694; Mills v. The Queen, [1986] 1 S.C.R. 863; R. v. Meltzer, [1989] 1 S.C.R. 1764; R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627; Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425; Stelco Inc. v. Canada (Attorney General), [1990] 1 S.C.R. 617.

By Sopinka J. (dissenting)

Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161; R. v. Hauser, [1979] 1 S.C.R. 984; R. v. Wetmore, [1983] 2 S.C.R. 284; General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R. 641; R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627; Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425; Board v. Board, [1919] A.C. 956; Attorney General of Canada v. Canadian National Transportation, Ltd., [1983] 2 S.C.R. 206; R. v. Meltzer, [1989] 1 S.C.R. 1764; R. v. Cass (1985), 71 A.R. 248; Poje v. A.G. for British Columbia, [1953] 1 S.C.R. 516; In re Storgoff, [1945] S.C.R. 526; Hunter [page343] v. Southam Inc., [1984] 2 S.C.R. 145, aff'g (1983), 3 C.C.C. (3d) 497, rev'g (1982), 68 C.C.C. (2d) 356; Wilson v. The Queen, [1983] 2 S.C.R. 594; R. v. Komadowski (1986), 27 C.C.C. (3d) 319, leave to appeal denied [1986] 1 S.C.R. x; Re Zevallos and The Queen (1987), 37 C.C.C. (3d) 79.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 8.
Combines Investigation Act, R.S.C. 1970, c. C-23, s. 17.
Courts of Justice Act, 1984, S.O. 1984, c. 11.
Constitution Act, 1867, ss. 91(3), (27), 92(14).
Criminal Code, R.S.C., 1985, c. C-46, s. 490(7), (8), (10), (17).

Federal Court Act, R.C.S., 1985, c. F-7.
Income Tax Act, R.S.O. 1980, c. 213, ss. 38, 43.
Income Tax Act, S.C. 1970-71-72, c. 63, ss. 231.3(1), 239(1), (2).
Interpretation Act, R.S.C., 1985, c. I-21, s. 34(2).
Judicature Act, R.S.N.B. 1973, c. J-2, s. 8(3).
Public Accountancy Act, R.S.O. 1950, c. 302.
Rules of Civil Procedure, O. Reg. 560/84.

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APPEAL from a judgment of the New Brunswick Court of Appeal (1988), 94 N.B.R. (2d) 8, 46 C.C.C. (3d) 75, 89 DTC 5075, [1989] C.T.C. 174, dismissing an appeal from a judgment of Turnbull J. (1987), 35 C.C.C. (3d) 466, dismissing an application to revoke an ex parte order for search warrants issued by him. Appeal dismissed, L'Heureux-Dubé, Sopinka and McLachlin JJ. dissenting.

Guy Du Pont and R. Bruce Eddy, for the appellants.
John R. Power, Q.C., and Douglas L. Richard, Q.C., for the respondents.

Solicitors for the appellants: Phillips & Vineberg, Montréal.
Solicitor for the respondents: John C. Tait, Ottawa.

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The judgment of Wilson, Gonthier and Cory JJ. was delivered by

1 **CORY J.**:-- The question presented in this case is whether a Court of Appeal has jurisdiction to hear an appeal from the decision of a Superior Court judge not to quash a search warrant which that judge had earlier issued upon an ex parte motion pursuant to s. 231.3 of the Income Tax Act, S.C. 1970-71-72, c. 63, as am.

Factual Background

2 On July 5, 1986, Turnbull J. of the Court of Queen's Bench of New Brunswick heard an ex parte application brought by officials of the Ministry of National Revenue to issue a search warrant pursuant to s. 231.3 of the Income Tax Act. At the conclusion of the hearing, Turnbull J. issued search warrants for the premises occupied by Knox Contracting Ltd. as well as for the home and garage of the corporation's President, Harold Hazen Knox. On July 22, 1986, further search warrants were issued for the offices of their auditors. When the warrants were executed the appellants, Knox Contracting Ltd. and its President, brought an application before Turnbull J. seeking to quash

the warrants on the ground that they were invalid and to impound the material seized until the disposition of the matter. On August 22, 1986, it was ordered that all the documents seized pursuant to the warrants were to be impounded and sealed pending a decision on the application.

3 Turnbull J. considered the matter carefully. He determined that he had jurisdiction to review the ex parte order on the ground that there is an inherent jurisdiction in a judge who makes an ex parte order to revoke or rescind it. He then considered the matter on the merits. He found that the search warrants were validly issued and dismissed the application on March 3, 1987.

4 The appellants then appealed. The Court of Appeal once again ordered that the documents be impounded and sealed pending its decision on the matter. The court held that Turnbull J. did not [page345] have jurisdiction to review the issuing of the search warrants. It found that while a trial judge has jurisdiction to review his or her own orders, there was no order in existence which could be reviewed or appealed. A distinction was drawn between the ordering of the issuance of a search warrant and the mere act of issuing the warrant. It was held that no order had been given and that the issuing of the search warrants was an administrative process which could not be reviewed. The appeal was dismissed and the order sealing the documents was vacated.

Position of the Parties

5 At the outset, the respondents very properly conceded that the Court of Appeal was in error in holding that the issuance of search warrants was not an ex parte order. There can be no question that the issuing of the search warrant pursuant to s. 231.3 of the Income Tax Act, must be considered to be an order of the judge. Since it is an ex parte order, it was properly reviewable pursuant to the inherent jurisdiction of trial judges to review such an ex parte order. See for example, Wilson v. The Queen, [1983] 2 S.C.R. 594. It still must be determined whether or not the Court of Appeal had jurisdiction to review or to hear an appeal from the review of the ex parte order.

6 The appellants contended that s. 231.3 derives its constitutional validity from the taxing power of the federal government pursuant to s. 91(3) of the Constitution Act, 1867. It is argued that the constitutional basis for the impugned section rests upon the taxation power for the federal government and not upon the criminal law power provided by s. 91(27). As a result, the appellants argued that the province, pursuant to s. 92(14), had the constitutional authority to dictate the appropriate routes, methods and procedures of appeal. This, it was said, had been done in the present case by means of s. 8(3) of the Judicature Act, R.S.N.B. 1973, c. J-2, as amended, which granted jurisdiction to the Court of Appeal to entertain the appeal.

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7 The respondents took the position that s. 231.3 is purely criminal in nature in that it authorizes search warrants to obtain documents which may afford evidence of the commission of an "offence" as defined in s. 239 of the Act. It is said that the offences described in that section should be considered to be criminal in nature and that, therefore, search warrants issued to obtain evidence for the prosecution of those offences should also be considered criminal in nature. The respondents submitted that criminal law and criminal procedure come within the exclusive jurisdiction of the federal government, and this must include the authority to legislate regarding provisions for appeals.

8 The respondents argued that since s. 231.3 must be considered to be criminal in nature and no appeal procedure from the issuance of search warrants is provided in the Income Tax Act, it is then necessary to look to the Criminal Code to determine whether the decision may be appealed. The Code does not provide for an appeal from an order issuing search warrants and thus it is said the appellants cannot appeal the order of Turnbull J. If ss. 231.3 and 239 are, as I believe them to be, criminal in nature, then this submission must prevail.

Are ss. 231.3 and 239 of the Income Tax Act in their Essence Criminal Law?

9 This appeal can be resolved by determining but one issue, namely, whether the provisions of ss. 231.3 and 239 of the Income Tax Act are by their nature criminal law. If they are, then no appeal lies to the Court of Appeal from the decision of a Superior Court judge to issue the search warrants.

10 These sections of the Income Tax Act read as follows:

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> 231.3 (1) A judge may, on ex parte application by the Minister, issue a warrant in writing authorizing any person named therein to enter and search any building, receptacle or place for any document or thing that may afford evidence as to the commission of an offence under this Act and to seize and, as soon as practicable, bring the document or thing before, or make a report in respect thereof to, the judge or, where the judge is unable to act, another judge of the same court to be dealt with by the judge in accordance with this section.
>
> 239. (1) Every person who has
>
> (a) made, or participated in, assented to or acquiesced in the making of, false or deceptive statements in a return, certificate, statement or answer filed or made as required by or under this Act or a regulation,
> (b) to evade payment of a tax imposed by this Act, destroyed, altered, mutilated, secreted or otherwise disposed of the records or books of account of a taxpayer,
> (c) made, or assented to or acquiesced in the making of, false or deceptive entries, or omitted, or assented to or acquiesced in the omission, to enter a material particular, in records or books of account of a taxpayer,
> (d) wilfully, in any manner, evaded or attempted to evade, compliance with this Act or payment of taxes imposed by this Act, or
> (e) conspired with any person to commit an offence described by paragraphs (a) to (d),
>
> is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to

> (f) a fine of not less than 25% and not more than double the amount of the tax that was sought to be evaded, or
> (g) both the fine described in paragraph (f) and imprisonment for a term not exceeding 2 years.
>
> (2) Every person who is charged with an offence described in subsection (1) may, at the election of the Attorney General of Canada, be prosecuted upon indictment and, if convicted, is, in addition to any penalty otherwise provided, liable to imprisonment for a term not exceeding 5 years and not less than 2 months.

11 As a point of commencement, it may be helpful to consider what constitutes criminal law. While, like a work of art, it is something that may be easier to recognize than define, some guidelines have been established. It would be going too far to [page348] say that a law needs only to prohibit an act with penal consequences to be criminal. Such an overly wide definition would permit Parliament to "colourably invade areas of exclusively provincial legislative competence": Scowby v. Glendinning, [1986] 2 S.C.R. 226, at p. 237.

12 A very helpful definition of criminal law can be found in the Reference re Validity of Section 5(a) of the Dairy Industry Act (Margarine Reference), [1949] S.C.R. 1. In that case Rand J. stated at p. 49:

> A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.

13 Dickson J., as he then was, in dissenting reasons in R. v. Hauser, [1979] 1 S.C.R. 984, defined the subject in this way at p. 1026:

> Head 27 of s. 91 of the British North America Act empowers Parliament to make substantive laws prohibiting, with penal consequences, acts or omissions considered to be harmful to the State, or to persons or property within the State.

Section 239 and its investigative arm s. 231.3 fall within these definitions.

14 Section 231.3 provides for the issuance of search warrants where they may afford evidence of an "offence" under the Act. Section 239 describes those offences. They are by their very nature criminal. Upon reading s. 239 the key descriptive words spring from the page, such as: "false or deceptive statements", "to evade payment of a tax imposed by this Act, destroyed, altered, mutilated, secreted ... records", "false or deceptive entries" and "wilfully ... evaded". The section speaks of fraud, deception, destruction and alteration of [page349] documents, false statements, false documents and the wilful evasion of income tax.

15 It is readily apparent that those who commit these offences have deliberately committed acts which by their very nature come well within the definition of what constitutes criminal law. The

offences described in s. 239 are "clearly harmful to the State". The fact that these offences may be prosecuted upon indictment and that terms of imprisonment of up to 5 years may be imposed serves to further strengthen the conclusion that these offences are criminal in nature.

16 The criminal nature of making false or deceptive statements on income tax returns has long been recognized. In Re Ramm (1957), 120 C.C.C. 44, the Ontario Court of Appeal considered whether the Public Accountants Council could revoke the appellant's licence to practise after he had been convicted of making a false or deceptive statement on an income tax return. This was dependent upon whether the conviction constituted a "criminal offence" under the Public Accountancy Act, R.S.O. 1950, c. 302. The court held that a conviction for such an offence under the earlier Income Tax Act would be a criminal offence. As stated by LeBel J.A. at p. 47:

> ... we are convinced that to make false or deceptive statements in a return filed or made as required by either tax Act is to commit a crime, and a serious crime, rather than to contravene a statutory law not ordinarily regarded as criminal.

17 It is fitting and appropriate that the s. 239 offences be considered as criminal law. The Income Tax Act is a major source of funds for the federal government. Its provisions are applicable to most adult Canadians. The vast majority pay their income tax by way of payroll deduction with little or no opportunity for evasion or misstatement. Those who do evade the payment of income tax not only cheat the State of what is owing to it, but inevitably increase the burden placed upon the [page350] honest taxpayers. It is ironic that those who evade payment of taxes think nothing of availing themselves of the innumerable services which the State provides by means of taxes collected from others.

18 The entire system of levying and collecting income tax is dependent upon the integrity of the taxpayer in reporting and assessing income. If the system is to work, the returns must be honestly completed. All taxpayers have the right to know that it is a criminal violation to commit any of the offences described in s. 239. The Act imposes a public duty. A breach of that fundamentally important public duty should constitute a criminal offence.

Federal Jurisdiction Flowing from Criminal Law Authority

19 The appellants submitted that the Income Tax Act must derive its constitutional validity from the taxing provision set out in s. 91(3) of the Constitution Act, 1867 and not the criminal law powers provided in s. 91(27). The submission is not appropriate when considering ss. 231.3 and 239 of the Act. It is no doubt correct that the Act is concerned with taxation, but that does not prevent its penal provisions from also being characterized as criminal law. And for the reasons I have set out earlier, I am convinced that ss. 231.3 and 239 are truly criminal in their nature. They must be considered as enacted pursuant to the exclusive federal jurisdiction in the domain of criminal law.

20 The relevant provisions of the Constitution Act, 1867 are as follows:

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this

> [page351] Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, --
>
> ...
>
> 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
>
> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say, --
>
> ...
>
> 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

21 It has long been held that although a court may be provincially organized and maintained, its jurisdiction and the procedures to be followed by such a court in the application of laws enacted by the federal government are within the paramount jurisdiction of the federal government. This is particularly true of criminal law.

22 In Attorney-General of Quebec v. Attorney-General of Canada, [1945] S.C.R. 600, Taschereau J. stated at p. 602:

> It is also well established that, although a court may be provincially organized and maintained, its jurisdiction and the procedure to be followed for the application of laws enacted by the Parliament of Canada, in relation to matters confided to that Parliament, are within its exclusive jurisdiction. That applies to criminal law and procedure in criminal matters which by subsection 27 of section 91 of the B.N.A. Act are subject to the legislative powers of the Dominion.

Still earlier, Duff J. set forth the same principle in Reference re Validity of the Combines Investigation Act and of s. 498 of the Criminal Code, [1929] S.C.R. 409, at p. 418:

> The authority in relation to the Criminal Law and Criminal Procedure given by s. 91(27) would appear to confer upon the Dominion, not as an incidental power merely, but as an essential part of it, the power to provide for investigation into crime, actual and potential.

[page352]

23 It has been made quite clear that the provisions of s. 92(14) of the Constitution Act, 1867 cannot be construed to include jurisdiction over the conduct of criminal prosecutions. Laskin C.J. in Attorney General of Canada v. Canadian National Transportation, Ltd., [1983] 2 S.C.R. 206, at p. 223 stated:

> Section 92(14) grants jurisdiction over the administration of justice, including procedure in civil matters and including also the constitution, maintenance and organization of civil and criminal provincial courts. The section thus narrows the scope of the criminal law power under s. 91, but only with respect to what is embraced within "the Constitution, Maintenance, and Organization of Provincial Courts ... of Criminal Jurisdiction". By no stretch of language can these words be construed to include jurisdiction over the conduct of criminal prosecutions. Moreover, as a matter of conjunctive assessment of the two constitutional provisions, the express inclusion of procedure in civil matters in provincial Courts points to an express provincial exclusion of procedure in criminal matters specified in s. 91(27).

24 In that same case Laskin C.J. expressly adopted the reasons of Martin J.A. in R. v. Hoffmann-La Roche Ltd. (1981), 33 O.R. (2d) 694, where it was held that legislation which in pith and substance pertains to criminal procedure is within the exclusive competence of Parliament. The investigation and prosecution of offences under the Income Tax Act is thus a valid exercise of the exclusive criminal law power of the federal government.

25 Any right to appeal the issuance of a search warrant under that Act must be found within a statute since at the least a right to appeal in interlocutory matters in criminal cases does not exist at common law: Mills v. The Queen, [1986] 1 S.C.R. 863, at p. 958. However, because ss. 231.3 and 239 constitute an exercise of the criminal law jurisdiction, a right of appeal cannot be founded upon the provincial Judicature Act, which is concerned with civil procedures. Nor does the [page353] Income Tax Act itself provide for an appeal from such an order.

26 Section 34(2) of the Interpretation Act, R.S.C., 1985, c. I-21, states that the provisions of the Criminal Code are to apply to indictable and summary conviction offences created by an Act of Parliament unless the enacting statute provides otherwise. It reads:

> 34. ...
>
> (2) All the provisions of the Criminal Code relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of that Code relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

The Criminal Code does not provide for an appeal from the issuance of a search warrant. Thus Parliament has refrained from providing for an appeal of such an order and the Court of Appeal therefore lacked jurisdiction to hear the appeal.

27 This does not mean that an accused is left without remedies. Wide powers are provided in the Criminal Code for a person from whom articles are seized pursuant to a search warrant to make

a speedy application for their return. See Criminal Code, R.S.C., 1985, c. C-46, s. 490(7), (8), (10) and (17). If the matter should proceed to trial then of course the accused may attack the search warrant in any way he considers appropriate, including the allegation that it infringes the provisions of s. 8 of the Canadian Charter of Rights and Freedoms. If, for any reason, the matter should not go to trial, a party may still seek civil damages for compensation. No injustice arises from the absence of a right to appeal the order issuing the search warrants.

28 In summary, the issuance of search warrants is an interlocutory procedure. Appeals from interlocutory orders by the parties in criminal proceedings [page354] must be based upon a statutory provision. No such statutory provision exists and thus no appeal lies to the Court of Appeal. It is appropriate that the Code provides no avenue for appeal from these procedures, as such appeals are neither desirable nor necessary and should not, as a general rule, be encouraged. See Mills v. The Queen, supra, and R. v. Meltzer, [1989] 1 S.C.R. 1764.

29 It is unnecessary to consider the effect of s. 8 of the Canadian Charter of Rights and Freedoms as no submission was advanced that the proceedings before the judge of first instance on the issuance of the search warrants infringed in any way s. 8.

30 Since preparing the above, I have had the benefit of reading the reasons of my colleague, Sopinka J. and would add the following observations.

31 In R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627, Wilson J. indicated, for the majority of the Court, that the Income Tax Act, R.S.C. 1952, c. 148, was essentially administrative and regulatory in nature since it put in place a self-reporting and self-assessing system which depended upon the honesty and integrity of taxpayers for its effectiveness. In this respect she carefully contrasted the Income Tax Act with the Combines Investigation Act, R.S.C. 1970, c. C-23, dealt with in Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, and Stelco Inc. v. Canada (Attorney General), [1990] 1 S.C.R. 617, which was essentially a policing statute designed to uncover and punish anti-competitive behaviour.

32 L'Heureux-Dubé J., relying on Attorney General of Canada v. Canadian National Transportation, Ltd., supra, held in Thomson that the combines legislation was supportable under the federal trade and commerce power. Sopinka J. in the [page355] present case similarly asserts that the Income Tax Act was passed pursuant to the federal taxing power. I take no issue with my colleagues as to the legislative authority for the enactment of these statutes. This does not mean, however, that the provisions in them creating offences and imposing penal sanctions are not criminal law. The Income Tax Act, for example, to the extent it creates a regulatory scheme for the calculation and payment of taxes by taxpayers and authorizes spot audits to ensure that voluntary compliance is working, is not criminal law. It is clearly tax law. But to the extent the legislation makes the filing of a fraudulent and dishonest return an offence punishable by fine or imprisonment, it just as clearly appears to be legislation in relation to criminal law. Those provisions recognize that not all taxpayers can be trusted to report their incomes accurately and that the self-reporting and self-assessing system has to have some teeth in it in order to deal with miscreants. While it is, of course, possible to view these provisions as part of administration or regulation in that they may have a deterrent effect on those disposed in the future to stray from the straight and narrow path, they are more than that. They deal with deliberate misconduct that has already taken place by characterizing it as an offence punishable on summary conviction or by indictment. They are aimed at the suppression of an evil and an injury to the public interest. In that sense they are quintessential criminal law. There

is, in my view, nothing unusual or inconsistent about an otherwise predominantly regulatory piece of legislation containing criminal prohibitions and sanctions and a challenge to specific provisions in the statute under the division of powers must, in my view, be directed at the challenged provisions, not at the statute as a whole.

33 In this case the question is whether, in the absence of any right of appeal in either the Income Tax Act or the Criminal Code from a decision of a [page356] superior court judge not to quash a search warrant issued pursuant to s. 231.3 of the Income Tax Act, the province can confer such a right pursuant to its power under s. 92(14). It seems fairly clear that the purpose of the search contemplated in s. 231.3 of the Income Tax Act is to gather evidence of an offence under s. 239. Such offence may be proceeded on by way of summary conviction under s. 239(1) or by way of indictment under s. 239(2) at the election of the Attorney General of Canada. It is, in my view, unrealistic, for purposes of deciding whether or not there is an appeal from a refusal to quash a search warrant, to divorce s. 231.3 from the offences sought to be uncovered by the search and to characterize the former as a matter of civil procedure and the latter as criminal law. Thus, although ss. 231.3 and 239 may be constitutionally justified under the general taxing power, it is not necessary for the purposes of this case to explore that aspect. These sections are truly criminal in their nature, and criminal procedure is expressly excluded from provincial jurisdiction: see Attorney General of Canada v. Canadian National Transportation, Ltd., supra, at pp. 216-23.

Conclusion

34 In the result, the appeal must be dismissed although for reasons that are different from those of the Court of Appeal.

The following are the reasons delivered by

35 LA FOREST J.:-- I have had the advantage of reading the reasons of my colleagues, Sopinka and Cory JJ. While I generally prefer Sopinka J.'s approach to the juristic character of the relevant provisions, I would dispose of the appeal in the manner proposed by Cory J. for the following reason. In choosing a criminal sanction and applying all the provisions of the Criminal Code "except to the extent that the enactment otherwise provides" (see Interpretation Act, R.S.C., 1985, c. I-21, s. 34(2)), Parliament, it seems to me, has shown a disposition to adopt the ordinary procedures of the criminal law for their enforcement, [page357] subject to any variations spelled out in the Income Tax Act, S.C. 1970-71-72, c. 63. It is unnecessary to consider whether a province could, in other circumstances, constitutionally deal with procedure respecting a penal provision conjointly supportable under the criminal law power and some other head of federal legislative power.

The reasons of L'Heureux-Dubé, Sopinka and McLachlin JJ. were delivered by

36 SOPINKA J. (dissenting):-- I have had the advantage of reading the reasons for judgment herein of my colleague, Cory J., but I am unable to agree with either his reasons or his disposition of this appeal.

37 The appellants claim that the trial judge erred in refusing to quash search warrants under s. 231.3 of the Income Tax Act, S.C. 1970-71-72, c. 63, as amended. Without considering the merits of their claim, the Court of Appeal determined that the trial judge, Turnbull J., did not have the jurisdiction to review the s. 231.3 search warrants. While the respondents now concede that the trial judge did have such jurisdiction, they contend that there was no appeal from the trial judge's decision.

38 The issue in this appeal, therefore, is whether an appeal lies from the decision of a superior court judge not to quash a search warrant issued pursuant to s. 231.3 of the Income Tax Act. Cory J. finds that ss. 231.3 and 239 of the Income Tax Act are supportable under s. 91(27) of the Constitution Act, 1867 and that appeal procedures are therefore within the federal government's exclusive jurisdiction over criminal procedure. In his opinion, since the Income Tax Act and the Criminal Code are silent with respect to appeals from an [page358] order regarding search warrants, then necessarily no appeal lies.

39 In my opinion, these provisions are supportable under both the criminal law power and the power in relation to federal taxation. Accordingly, an appeal lies under New Brunswick's Judicature Act, R.S.N.B. 1973, c. J-2.

40 While I accept that ss. 231.3 and 239 are supportable under the power over criminal law and procedure, that does not end the inquiry. If these provisions are also supportable under s. 91(3) of the Constitution Act, 1867, the federal taxation power, then the jurisdiction to provide for an appeal is not exclusively federal. Section 92(14) of the Constitution Act, 1867 confers jurisdiction on the province to legislate in respect of procedure in civil matters. Accordingly, if ss. 231.3 and 239 are supportable under two heads of power, one criminal and one civil in nature, a right of appeal can be conferred by either federal or provincial legislation. In the absence of conflict, both forms of legislation are valid on the basis of the double aspect doctrine: see Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161.

41 The notion that a statute is supportable under two heads of legislation is well established: see R. v. Hauser, [1979] 1 S.C.R. 984; R. v. Wetmore, [1983] 2 S.C.R. 284. The fact that provision is made for enforcement, including the creation of severe penalties, does not mean that the legislation is necessarily criminal. For example, the Combines Investigation Act, R.S.C. 1970, c. C-23, which contains provision for the issue of search warrants and creates indictable offences, has been held by this Court to be supportable under the trade and commerce power: see General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R. 641. In R. v. Hauser, supra, Pigeon J. stated, at p. 1000:

> The mere fact that severe penalties are provided for violations cannot of itself stamp out a federal statute as criminal law. Such is the case for most revenue acts [page359] which are clearly a class of statutes founded on legislative authority other than head 27. [Emphasis added.]

42 Similar enforcement provisions, including powers of search and seizure, are found in provincial taxing statutes. See Income Tax Act, R.S.O. 1980, c. 213, ss. 38 and 43. Could it be suggested that these are ultra vires the province because they create penalties by way of fines and imprisonment?

43 The nature of the Income Tax Act is such that it was undoubtedly passed under the federal taxation power. Most of its provisions have nothing to do with the criminal law power. In R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627, we held that the Income Tax Act is a taxation statute and not criminal in nature. Wilson J. states, at p. 641:

> Section 231(3) is not criminal or quasi-criminal legislation. The Income Tax Act is essentially a regulatory statute since it controls the manner in which income tax is calculated and collected. This Court pointed out in R. v. Grimwood, [1987]

> 2 S.C.R. 755, at p. 756, that "the purpose of ss. 231(3) and 238(2), when read together, is not to penalize criminal conduct but to enforce compliance with the Act".

44 McKinlay dealt with the Income Tax Act as it stood before the amendment which added s. 231.3 in its present form -- S.C. 1986, c. 6, s. 121. But as pointed out by La Forest J. in his reasons in Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, the offence sections do not remove the Act from the regulatory, administrative sphere. He stated, at pp. 516-17:

> All of these offences relate to conduct that might well be discovered by the exercise of the power to order the production of documents which s. 231(3) confers on the Minister of National Revenue. This has not prevented this Court from characterizing s. 231(3) as a regulatory or administrative power of investigation; see R. v. McKinlay Transport Ltd., supra.
>
> ...

[page360]

> ... the degree of privacy that can reasonably be expected within the investigative scope of the Act is akin to that which can be expected by those subject to other administrative and regulatory legislation, rather than to that which can legitimately be expected by those subject to police investigation for what I have called "real" or "true" crimes.

45 While I agree with the statement of Cory J. that the procedures to be followed by a court in the application of federal laws are within the paramount jurisdiction of Parliament, it does not follow that in the absence of conflict, provincial procedure is ousted. The provincial courts are competent to and do adjudicate in relation to federal law and apply their procedure unless that law prescribes otherwise. The contrary view would leave a huge hiatus in the procedure to be followed because federal laws seldom specify either the court or the procedure by which they are to be administered. In the absence of a provision in the Federal Court Act, R.S.C., 1985, c. F-7, conferring exclusive jurisdiction on that court, provincial courts have jurisdiction, and in that case apply their own procedure.

46 Professor P. W. Hogg, in Constitutional Law of Canada (2nd ed. 1985), summarizes this set-up as follows, at p. 135:

> The general jurisdiction of the provincial courts means that there is no need for a separate system of federal courts to decide "federal" questions. Nor does the power to decide federal questions have to be specifically granted to the provincial courts by the federal Parliament. On the contrary, if federal law calls for the exercise of adjudication, but is silent as to the forum, the appropriate forum will be the provincial courts.

The learned author refers in support to Board v. Board, [1919] A.C. 956; Laskin, "The Constitutional Systems of Canada and the United States: Some Comparisons" (1967), 16 Buffalo L. Rev. 591, at p. 592; and Laskin, The British Tradition in Canadian Law, at p. 114.

[page361]

47 There is nothing in Attorney General of Canada v. Canadian National Transportation, Ltd., [1983] 2 S.C.R. 206, that conflicts with this view. That case dealt with the power to legislate with respect to the prosecution of offences under the Combines Investigation Act. Parliament had legislated to confer on the Attorney General of Canada concurrent jurisdiction with the Attorney General of a province over prosecution of offences under that Act. In upholding the legislation, Laskin C.J. opined that the federal government had exclusive legislative jurisdiction in relation to the prosecution of all federal offences. This obiter dictum, concurred in by three judges, has been criticized. See Hogg, supra, at p. 430. It is clear, however, that the exclusivity of federal legislation depended on the fact that Parliament had legislated. Laskin C.J. explained why the province did not have concurrent jurisdiction in the following passage (at pp. 226-27):

> It is patent that neither the respondents nor their supporting interveners view the present case as pointing to possible concurrency. Since Parliament has in fact legislated, that would defeat their contention without more. Yet there is good reason to say that even if there is merit in the respondents' position, there is at least equal merit in the assertion of parliamentary authority to control prosecution for violation of the federal criminal law. The issue, put in these terms, is not a new one. The Privy Council explained the matter in terms of the so-called trenching doctrine in Tennant v. Union Bank of Canada, [1894] A.C. 31, as supporting a privileged encroachment on provincial legislative authority to give effect to exclusive and paramount federal power in relation to the classes of subjects assigned to Parliament under the enumerated heads of s. 91. The obverse view arises, as shown in the Assignments and Preferences case, Attorney-General of Ontario v. Attorney-General of Canada, [1894] A.C. 189, when there is an absence of federal legislation to supersede the lawful enactment of provincial legislation within one of its assigned powers. [Emphasis added.]

48 In the present case, Parliament has not legislated and concurrency does arise. The obverse view referred to by Laskin C.J. therefore applies.

[page362]

49 The operation of the constitutional scheme referred to above is illustrated by this very case. The application to quash the search warrants was made to Turnbull J. of the New Brunswick Court of Queen's Bench. No procedure for such an application is prescribed in the Income Tax Act. In dealing with the application, the judge applied the procedure applicable on a motion to a judge of

that court. The propriety of so doing is not contested. The rule that a judge may review an ex parte order is itself a rule inhering in a superior court judge of the province, and is often the subject of a specific rule of procedure. For an example one may refer to R. 37.14 of the Ontario Rules of Civil Procedure, O. Reg. 560/84. It would be anomalous if provincial procedure applied in first instance but ceased to apply thereafter. I know of no constitutional principle which would distinguish between proceedings at first instance and appeal with respect to the legislative jurisdiction over procedure.

50 Provincial law of procedure is inapplicable only in respect of proceedings that are exclusively criminal in nature. By virtue of s. 91(27) of the Constitution Act, 1867, Parliament is given exclusive legislative power over criminal law and procedure. Matters arising out of a statute enacted exclusively under the criminal law power must be dealt with under federal laws, including laws of procedure. A recent example can be found in R. v. Meltzer, [1989] 1 S.C.R. 1764. This Court held that no appeal lay from the decision of a judge renewing a wiretap authorization. In so doing, McIntyre J., for the Court, adopted the following passage from R. v. Cass (1985), 71 A.R. 248:

> In my view it cannot be argued that a wire tap authorization, or a review of it, or an appeal from such a review, is anything other than a criminal matter. Indeed, Parliament's authority in the field of interception of private communications derives from its criminal law [page363] jurisdiction. An Alberta statute or rule of court relating to civil matters purporting to govern an appeal from the review of an authorization would be ultra vires. [Meltzer, at pp. 1769-70.]

Poje v. A.G. for British Columbia, [1953] 1 S.C.R. 516, and In re Storgoff, [1945] S.C.R. 526, contain further examples of proceedings that are exclusively criminal in nature.

51 As previously stated, a matter arising under a federal statute that is supportable under another head of power in addition to the criminal law power can have two aspects: one criminal and one civil. A provincial court which is seized of the matter may validly apply its own rules of civil procedure unless resort thereto is precluded by federal legislation or the matter is clearly related to a criminal proceeding. This is particularly true of proceedings to review a search warrant or other process issued under federal legislation that is supportable under a head of power other than the criminal law power.

52 In General Motors of Canada Ltd. v. City National Leasing, supra, this Court found the Combines Investigation Act as a whole supportable under the trade and commerce power as well as the criminal law power. That Act contains provision for searches and seizures pursuant to warrants to search. The sections authorizing the issue of search warrants were found to violate s. 8 of the Charter in Hunter v. Southam Inc., [1984] 2 S.C.R. 145, and were struck down. The proceeding to review the warrant was by way of interlocutory injunction to a judge of the Court of Queen's Bench of Alberta. The appeals were taken and eventually reached this court. The proceedings by way of interlocutory injunction and the appeal were taken in accordance with the procedure applicable to civil proceedings in the Alberta Court of Queen's Bench and Court of Appeal: see (1982), 68 C.C.C. (2d) 356, and (1983), 3 C.C.C. (3d) 497 [page364].

53 Similarly, in Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), supra, the proceeding to quash, on Charter grounds, orders issued under s. 17 of the Combines Investigation Act for the attendance of witnesses and pro-

duction of documents could not have reached this Court but for the provisions of the Ontario Courts of Justice Act, 1984, S.O. 1984, c. 11, and the Ontario Rules of Civil Procedure.

54 A motion to review the issuance of a search warrant, like a prerogative proceeding, takes its character from earlier proceedings out of which it arises. In Storgoff, supra, Kellock J. stated, at pp. 585-86 and 588:

> In my opinion, all the members of the Court approach the matter first from the standpoint of the situation with regard to the nature of certiorari as it was understood before the Judicature Acts were passed, and they determine that its nature depends upon the character of the earlier proceedings to which the proceeding by way of certiorari is directed.
>
> ...
>
> In my opinion, all these authorities are based on the view that habeas corpus, being procedural, partakes of the nature of the earlier proceeding, as a result of which it has been invoked, and that this view of its nature is not dependent upon anything enacted in England by the Judicature Acts but was well recognized long before their enactment.

55 I have explained above that in my opinion the provision out of which this proceeding arises has both a civil and criminal aspect. The motion for review cannot therefore be characterized as exclusively criminal for the purpose of determining rights of appeal. This is particularly so in view of the fact that no charges have been laid and indeed may not be laid. The main purpose of the application is stated in the Notice of Application as follows:

[page365]

> 5. The Applicants seek the order for return of the documents and things that were seized from the Applicants and from Thorne Riddell on July 7, 1986 and July 23, 1986, respectively, and all extracts therefrom, on the following grounds ... .

56 There is nothing therefore in the nature of the application itself to convert the proceeding into an exclusively criminal proceeding.

57 Finally, I am concerned that, contrary to the views expressed by my colleague, the appellants and others in the same position will find themselves without a remedy. If the matter should proceed to trial (assuming charges are laid), it is doubtful that the trial judge would have jurisdiction to set aside an order of a superior court judge. In New Brunswick, the trial would be before a provincial court judge. The applicant would be faced with this Court's decision in Wilson v. The Queen, [1983] S.C.R. 594, which precludes a collateral attack on an order made by a court having jurisdiction to make it. The application of this principle to an attempt to review a search warrant at trial is illustrated by the case of R. v. Komadowski (1986), 27 C.C.C. (3d) 319 (leave to appeal to the Supreme Court of Canada denied, [1986] 1 S.C.R. x). O'Sullivan J.A. stated, at p. 325:

> Since the search was conducted under a search warrant, which is valid on its face and which has not been quashed or set aside in a proceeding directly attacking it, the search warrant should be upheld.

He dismissed an appeal from the trial judge who refused to reject evidence obtained as a result of the execution of a search warrant which was attacked at trial by the appellant.

58 Although Wilson, supra, may have no application where the attack on a previous order is based on Charter grounds, it presents grave difficulties for an applicant who seeks to attack a search warrant on traditional grounds for the first time at trial. Apart from Wilson, it has been suggested that where the purpose of the motion is to obtain the property seized and not a rejection of the evidence obtained, the trial judge may not be the [page366] appropriate forum. See Re Zevallos and The Queen (1987), 37 C.C.C. (3d) 79, at pp. 86-87.

59 Furthermore, if ss. 490(7), (10) and (17) of the Criminal Code, R.S.C., 1985, c. C-46, have any application to a seizure under the Income Tax Act, they have no application where it is alleged that the search is unlawful and it is sought to prevent or terminate the search.

60 On the other hand, if the matter does not go to trial, I fail to see how an action for damages could be pursued grounded on conduct of the authorities pursuant to an order of the superior court which had not been set aside.

61 I would therefore allow the appeal and remit the matter to the Court of Appeal to hear the appeal on its merits.

qp/i/qlplh

---- End of Request ----
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TAB 6

Indexed as:

Dabbs v. Sun Life Assurance Co. of Canada

Between
Paul Dabbs, plaintiff (respondent) moving party, and
Sun Life Assurance Company of Canada, defendant (respondent),
and
Jack Maclean, class member (appellant)

[1998] O.J. No. 3622

41 O.R. (3d) 97

165 D.L.R. (4th) 482

113 O.A.C. 307

7 C.C.L.I. (3d) 38

27 C.P.C. (4th) 243

[1999] I.L.R. I-3629

82 A.C.W.S. (3d) 638

Docket Nos. C30326, M22971 and M23028

Ontario Court of Appeal
Toronto, Ontario

Laskin, Charron and O'Connor JJ.A.

Heard: August 26, 1998.
Judgment: September 14, 1998.

(9 pp.)

Practice -- Persons who can sue and be sued -- Individuals and corporations, status or standing -- Class actions, members of class -- Status to appeal from approval of settlement -- Statutes -- Opera-

tion and effect -- Effect on earlier statutes -- Contrariety or conflict between statutes -- General and special statutes.

This was a motion by Dabbs to quash an appeal from an order that this action be certified as a class action and a motion for leave to appeal by Maclean from the certification order. Dabbs was a representative plaintiff in a class proceedings against the defendant Sun Life Assurance Company. The parties entered into a settlement agreement. Maclean, a member of the class, participated in the settlement approval proceedings. He did not ask for party status. Maclean objected to the approval of the settlement. The agreement affected 400,000 class members across Canada and had been approved by British Columbia and Quebec courts. The trial judge approved the settlement pursuant to the Class Proceedings Act and found it to be fair, reasonable and in the best interest of those affected by it. Dabbs argued that Maclean had no standing to bring an appeal.

HELD: The motion by Dabbs was allowed and the motion by Maclean was dismissed. The appeal was quashed. Maclean had no right of appeal pursuant to section 30(3) of the Act as he was not a party and had not applied to be a representative plaintiff or to intervene as an added party. As well, he had no right of appeal under section 6(1)(b) of the Courts of Justice Act, which permitted appeals from final orders of a judge of the Ontario Court (General Division). Section 30(3) took precedence over section 6(1)(b) as section 30(3) was the more recent enactment and specifically addressed the rights of appeal in class proceedings. It was not appropriate to grant Maclean leave to act as a representative party under section 30(5) of the Act for the purpose of allowing him to appeal. There was nothing indicating that Maclean would adequately represent the interests of the class on an appeal. The wishes of one class member was not to govern the interests of the entire class. As well, Maclean could opt out of the class and pursue his claim against Sun Life personally.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5, 8(3), 9, 10(1), 12, 14, 16(1), 18, 19, 25, 29, 30(3), 30(5).
Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 6(1)(b), 134.
Ontario Rules of Civil Procedure, Rule 13.

Counsel:

Michael S. Deverett, for the appellant.
H. Lorne Morphy, Q.C. and Patricia D.S. Jackson, for the respondent, Sun Life.
Michael A. Eizenga and Michael J. Peerless, for the plaintiff, respondent.

The judgment of the Court was delivered by

1 **O'CONNOR J.A.**:-- These reasons deal with two motions. The first is a motion by the representative plaintiff in this class proceeding, Paul Dabbs, to quash an appeal brought by a class member, Jack Maclean. The second is a motion by Maclean for leave to appeal.

THE MOTION TO QUASH

2 Maclean seeks to appeal the judgment of Sharpe J. dated July 3, 1998 in which he ordered that this action be certified as a class proceeding and that a settlement agreement entered into between Dabbs and others as proposed representatives of the plaintiff class and the defendant Sun Life Assurance Company of Canada ("Sun Life") be approved under s. 29 of the Class Proceedings Act, 1992, S.O. 1992, c. 6 (the "Act").

3 Maclean is a member of the class and had been permitted under s. 14 of the Act to participate in the settlement approval proceedings. He did not ask for and was not granted party status. Maclean objected to the approval of the settlement, raising essentially the same arguments as he makes in the material filed with this court.

4 Sharpe J. rejected those arguments, approved the settlement and found it to be fair, reasonable and in the best interest of those affected by it. The courts in British Columbia and Quebec have also approved the settlement agreement. In all, it affects the interests of an estimated 400,000 class members across Canada.

5 Maclean's notice of appeal raises issues relating to procedural rulings made by Sharpe J. and to the fairness and adequacy of the settlement agreement. Dabbs moves under s. 134 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended, to quash the appeal primarily on the basis that Maclean is not a party to the proceeding and therefore has no standing to bring the appeal. Sun Life supports the motion. For the reasons set out below, I agree with their position.

6 One of the objects of the Act is to achieve the efficient handling of potentially complex cases of mass wrongs. See Abdool et al. v. Anaheim Management Limited et al. (1995), 21 O.R. (3d) 453 (Div. Ct.), per O'Brien J. at p. 455. This efficiency is accomplished, in part, by the court appointment of one or more class members under s. 5 to be representative plaintiffs or defendants as the case may be. The criteria for appointment include the ability to fairly and adequately represent the interests of the class. A representative plaintiff or defendant is a party to the proceeding and has the specific rights and responsibilities for the carriage of the litigation on behalf of the class that are set out in the Act.

7 The Act makes a clear distinction between the role of a party and that of a class member.[1] Section 14 gives the court a broad discretion to permit class members to participate in a proceeding and to provide for the manner and terms upon which the participation is permitted. Not surprisingly, s. 14 does not provide that class members who are permitted to participate thereby become parties to the proceeding. The section does not restrict participation to those class members who are able to fairly and adequately represent the class. Indeed, the court may permit participation by those who oppose the manner in which the party representing the class is conducting the proceeding and who assert positions that differ from those of the majority of the class. While the court may consider it useful to hear from these class members and to permit them to participate in a limited manner, it could frustrate the orderly and efficient management of the proceeding if they became parties simply because of their participation.

8 If class members are dissatisfied with the conduct of a proceeding or do not wish to be bound by the result, they may opt out under s. 9 and pursue their claims or defences in a personal capacity.

9 The rights of appeal to the Court of Appeal in class proceedings are set out in s. 30(3) of the Act. It provides:

> 30(3) A party may appeal to the Court of Appeal from a judgment on common issues and from an order under section 24, other than an order that determines individual claims made by class members.

10 These rights are conferred on parties. Section 30(5) permits class members in certain circumstances to move for leave to act as representative parties for purposes of bringing an appeal under s. 30(3). It provides:

> (5) If a representative party does not appeal as permitted by subsection(3), or if a representative party abandons an appeal under subsection (3), any class member may make a motion to the Court of Appeal for leave to act as a representative party for the purposes of subsection 3.

Absent leave, class members have no standing to bring an appeal to this court under the Act.

11 Maclean is not a party to this proceeding. He did not apply to be a representative plaintiff nor did he apply to intervene as an added party under Rule 13.[2] He participated in the settlement approval proceedings as a class member not as a party. He therefore has no right of appeal under s. 30(3).

12 Maclean argues that because Sharpe J.'s judgment is a final order of the Ontario Court (General Division), he has a right of appeal under s. 6(1)(b) of the Courts of Justice Act, R.S.O. 1990, c. C.4. Section 6(1)(b) provides:

> 6(1) An appeal lies to the Court of Appeal from,
>
> ...
>
> (b) a final order of a judge of the Ontario Court (General Division), except an order referred to in clause 19(1)(a) or an order from which an appeal lies to the Divisional Court under another Act.

He argues that if the Act does not provide him with a right of appeal, either because he is not a party to the class proceeding or because s. 30(3) does not provide for a right of appeal from a judgment approving a settlement[3], then s. 6(1)(b) operates to confer a right where the Act has failed to do so. I do not accept that argument.

13 In my view, s. 30(3), which grants specific rights of appeal to this court in class proceedings, takes precedence over and excludes provisions of general application such as s. 6(1)(b) of the Courts of Justice Act. Two rules of statutory interpretation assist in determining the intention of the Legislature. First, a "general statute is made to 'yield' by regarding the special statute as an exception to the general."[4] Second, a more recent statute takes precedence over prior legislation because "the more recent expression of the will of the legislature should be retained."[5] In this case, the Act is the more recent enactment and specifically addresses the rights of appeal in class proceedings. The Courts of Justice Act was enacted earlier and is of more general ambit. These rules support the conclusion that the appeal provisions in s. 30(3) of the Act take precedence over s. 6(1)(b).

14 This conclusion is consistent with the dicta of Doherty J.A. in 792266 Ontario Ltd. v. Monarch Trust Co. (Liquidation) (1996), 94 O.A.C. 384 (C.A.). At p. 389, he said:

> ... I would, however, observe that this court has held that statutory provisions granting a specific right of appeal take precedence over and exclude provisions of more general application: Overseas Missionary Fellowship v. 578369 Ontario Ltd. (1990), 73 O.R. (2d) 73 at 75 (C.A.). that conclusion is consistent with the well-recognized principle of statutory interpretation which provides that where a statutory provision in specific legislation appears to conflict with a provision in a general statutory scheme, the former is seen as an exception to the latter: R. v. Greenwood (1992), 7 O.R. (3d) 1 at 6-7 (C.A.), leave to appeal to S.C.C. refused, [1992] 1 S.C.R. viii.

I agree with that statement.

15 The logic of this interpretation is apparent in this case. The intent of the Act is clear that the rights of appeal to this court are conferred on parties, not class members. A class member requires leave under s. 30(5) to act as a representative party for the purpose of bringing an appeal under s. 30(3). If, as Maclean argues, a class member has a right of appeal under s. 6(1)(b) of the Courts of Justice Act, that intent would be defeated. Further, assuming, as Dabbs and Sun Life argue, that s. 30(3) does not confer a right to appeal a judgment approving a settlement, it would make no sense for the Legislature to have provided for specific limited rights of appeal in s. 30(3) if the general right of appeal in s. 6(1)(b) was also to apply. Section 30(3) would be redundant and whatever limits result from its specific wording would be frustrated.

16 Relying upon the case of Re O'Donohue and Silva et al. (1995), 27 O.R. (3d) 162 (C.A.), Maclean argues that the right of appeal in s. 6(1)(b) can only be excluded by express statutory provision. In that case, the court considered appeal rights under the Municipal Elections Act, R.S.O. 1990, c. M.53, as amended, which provides for an appeal from a judicial recount to a judge of the Ontario Court (General Division). The Municipal Elections Act does not provide for a further appeal. The court found that in the absence of an express statutory exclusion of an appeal from a final order of a General Division judge, the Legislature could not be deemed to have limited the jurisdiction granted to the Court of Appeal by s. 6(1)(b). Significantly, there was no right of appeal to the Court of Appeal set out in the Municipal Elections Act. It is the inclusion of the specific appeal provisions in the Act which, in my view, operate to exclude the jurisdiction under s. 6(1)(b) for proceedings under the Act.

17 In summary I am of the view that s. 30(3) of the Act provides the rights of appeal to this court for class proceedings and that s. 6(1)(b) of the Courts of Justice Act does not supplement those rights.

MACLEAN'S MOTION

18 Maclean brought a motion for leave, if necessary, to appeal the judgment of Sharpe J. During the course of argument he requested that the court consider this motion as a motion for leave under s. 30(5) of the Act to permit him to act as a representative party for purposes of bringing his appeal under s. 30(3). The court indicated that it was prepared to deal with the motion on this basis. In my view, this is not an appropriate case for leave.

19 The court's discretion to grant leave under s. 30(5) is guided by the best interests of the class and in particular by a consideration whether the class member applying would fairly and adequately represent the interests of the class. There is nothing in the record which indicates that Maclean would adequately represent the interests of this class by bringing an appeal which seeks to set aside

the settlement agreement. Courts in three jurisdictions have approved the agreement. Maclean is the only class member of an estimated 400,000 who now seeks to set it aside. The wishes of one class member ought not to govern the interests of the entire class.

20 Importantly, if Maclean is dissatisfied with this settlement, he has the opportunity under the terms of Sharpe J.'s judgment and s. 9 of the Act to opt out of the class and pursue his claim against Sun Life in his personal capacity.

21 I would therefore dismiss the motion brought by Maclean under s. 30(5) of the Act. For the reasons above, I would allow the motion under s. 134 of the Courts of Justice Act and quash the appeal. Because the motions involved a novel point raised by an individual class member, I would make no order as to costs.

O'CONNOR J.A.
LASKIN J.A. -- I agree.
CHARRON J.A. -- I agree.

cp/d/ln/mii/DRS

1 See ss. 8(3), 10(1), 12, 16(1), 18, 19 and 25.

2 Section 35 of the Act provides that the rules of court apply to class proceedings.

3 Dabbs and Sun Life argued that even if Maclean is a party, s. 30(3) does not confer a right of appeal from a judgment approving a settlement under s. 29 of the Act.

4 Elmer Driedger, Construction of Statutes, 2nd ed. (1983), at p. 227.

5 Pierre-André Côté, The Interpretation of Legislation in Canada, 2nd ed. (1991), at p. 301.

TAB 7

Case Name:

Nortel Networks Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, Applicants

[2010] O.J. No. 1232

2010 ONSC 1708

63 C.B.R. (5th) 44

81 C.C.P.B. 56

2010 CarswellOnt 1754

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: March 3-5, 2010.
Judgment: March 26, 2010.

(106 paras.)

Bankruptcy and insolvency law -- Property of bankrupt -- Pensions and benefits -- Motion by the applicant Nortel corporations for approval of a settlement agreement dismissed -- The settlement agreement contained a clause that stating that no party was precluded from arguing the applicability of any amendment to the Bankruptcy and Insolvency Act that changed the priority of claims -- The clause was not fair and reasonable -- The clause resulted in an agreement that did not provide certainty and did not provide finality of a fundamental priority issue -- Companies' Creditors Arrangement Act, s. 5.1(2).

Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Sanction by court -- Motion by the applicant Nortel corporations for approval of a settlement agreement dismissed -- The settlement agreement contained a clause that stating that no party was precluded from arguing the applicability of any amendment to the Bankruptcy and Insolvency Act that changed the priority of claims -- The clause was not fair and reasonable -- The clause resulted in an agreement that did not provide certainty and did not provide finality of a fundamental priority issue -- Companies' Creditors Arrangement Act, s. 5.1(2).

Motion by the applicant Nortel corporations for approval of a settlement agreement. The settlement agreement provided for the termination of pension payments and the termination of benefits paid through Nortel's Health and Welfare Trust (HWT). The applicants were granted a stay of proceedings on January 14, 2009, pursuant to the Companies' Creditors Arrangement Act, but had continued to provide the HWT benefits and had continued contributions and special payments to the pension plans. The opposing long-term disability employees opposed the settlement agreement, principally as a result of the inclusion of a release of Nortel and its successors, advisors, directors and officers, from all future claims regarding the pension plans and the HWT in the absence of fraud. The Official Committee of Unsecured Creditors of Nortel Networks Inc. ("UCC"), and the informal Nortel Noteholder Group (the "Noteholders") opposed Clause H.2 of the settlement agreement. Clause H.2 stated that no party was precluded from arguing the applicability of any amendment to the Bankruptcy and Insolvency Act that changed the priority of claims. The Monitor supported the Settlement Agreement, submitting that it was necessary to allow the Applicants to wind down operations and to develop a plan of arrangement. The CAW and Board of Directors of Nortel also supported the settlement agreement.

HELD: Motion dismissed. Cause H.2 was not fair and reasonable. Clause H.2 resulted in an agreement that did not provide certainty and did not provide finality of a fundamental priority issue. The third party releases were necessary and connected to a resolution of the claims against the applicants, benefited creditors generally and were not overly broad or offensive to public policy.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.1(2)

Counsel:

Derrick Tay, Jennifer Stam and Suzanne Wood, for the Applicants.

Lyndon Barnes and Adam Hirsh, for the Nortel Directors.

Benjamin Zarnett, Gale Rubenstein, C. Armstrong and Melaney Wagner, for Ernst & Young Inc., Monitor.

Arthur O. Jacques, for the Nortel Canada Current Employees.

Deborah McPhail, for the Superintendent of Financial Services (non-PBGF).

Mark Zigler and Susan Philpott, for the Former and Long-Term Disability Employees.

Ken Rosenberg and M. Starnino, for the Superintendent of Financial Services in its capacity as Administrator of the Pension Benefit Guarantee Fund.

S. Richard Orzy and Richard B. Swan, for the Informal Nortel Noteholder Group.

Alex MacFarlane and Mark Dunsmuir, for the Unsecured Creditors' Committee of Nortel Networks Inc.

Leanne Williams, for Flextronics Inc.

Barry Wadsworth, for the CAW-Canada.

Pamela Huff, for the Northern Trust Company, Canada.

Joel P. Rochon and Sakie Tambakos, for the Opposing Former and Long-Term Disability Employees.

Robin B. Schwill, for the Nortel Networks UK Limited (In Administration).

Sorin Gabriel Radulescu, In Person.

Guy Martin, In Person, on behalf of Marie Josee Perrault.

Peter Burns, In Person.

Stan and Barbara Arnelien, In Person.

ENDORSEMENT

G.B. MORAWETZ J.:--

INTRODUCTION

1 On January 14, 2009, Nortel Networks Corporation ("NNC"), Nortel Networks Limited "(NNL"), Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation (collectively, the "Applicants") were granted a stay of proceedings pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") and Ernst & Young Inc. was appointed as Monitor.

2 The Applicants have historically operated a number of pension, benefit and other plans (both funded and unfunded) for their employees and pensioners, including:

(i) Pension benefits through two registered pension plans, the Nortel Networks Limited Managerial and Non-Negotiated Pension Plan and the Nortel Networks Negotiated Pension Plan (the "Pension Plans"); and

(ii) Medical, dental, life insurance, long-term disability and survivor income and transition benefits paid, except for survivor termination benefits, through Nortel's Health and Welfare Trust (the "HWT").

3 Since the CCAA filing, the Applicants have continued to provide medical, dental and other benefits, through the HWT, to pensioners and employees on long-term disability ("Former and LTD

Employees") and active employees ("HWT Payments") and have continued all current service contributions and special payments to the Pension Plans ("Pension Payments").

4 Pension Payments and HWT Payments made by the Applicants to the Former and LTD Employees while under CCAA protection are largely discretionary. As a result of Nortel's insolvency and the significant reduction in the size of Nortel's operations, the unfortunate reality is that, at some point, cessation of such payments is inevitable. The Applicants have attempted to address this situation by entering into a settlement agreement (the "Settlement Agreement") dated as of February 8, 2010, among the Applicants, the Monitor, the Former Employees' Representatives (on their own behalf and on behalf of the parties they represent), the LTD Representative (on her own behalf and on behalf of the parties she represents), Representative Settlement Counsel and the CAW-Canada (the "Settlement Parties").

5 The Applicants have brought this motion for approval of the Settlement Agreement. From the standpoint of the Applicants, the purpose of the Settlement Agreement is to provide for a smooth transition for the termination of Pension Payments and HWT Payments. The Applicants take the position that the Settlement Agreement represents the best efforts of the Settlement Parties to negotiate an agreement and is consistent with the spirit and purpose of the CCAA.

6 The essential terms of the Settlement Agreement are as follows:

(a) until December 31, 2010, medical, dental and life insurance benefits will be funded on a pay-as-you-go basis to the Former and LTD Employees;

(b) until December 31, 2010, LTD Employees and those entitled to receive survivor income benefits will receive income benefits on a pay-as-you-go basis;

(c) the Applicants will continue to make current service payments and special payments to the Pension Plans in the same manner as they have been doing over the course of the proceedings under the CCAA, through to March 31, 2010, in the aggregate amount of $2,216,254 per month and that thereafter and through to September 30, 2010, the Applicants shall make only current service payments to the Pension Plans, in the aggregate amount of $379,837 per month;

(d) any allowable pension claims, in these or subsequent proceedings, concerning any Nortel Worldwide Entity, including the Applicants, shall rank *pari passu* with ordinary, unsecured creditors of Nortel, and no part of any such HWT claims shall rank as a preferential or priority claim or shall be the subject of a constructive trust or trust of any nature or kind;

(e) proofs of claim asserting priority already filed by any of the Settlement Parties, or the Superintendent on behalf of the Pension Benefits Guarantee Fund are disallowed in regard to the claim for priority;

(f) any allowable HWT claims made in these or subsequent proceedings shall rank *pari passu* with ordinary unsecured creditors of Nortel;

(g) the Settlement Agreement does not extinguish the claims of the Former and LTD Employees;

(h) Nortel and, *inter alia*, its successors, advisors, directors and officers, are released from all future claims regarding Pension Plans and the HWT, provided that nothing in the release shall release a director of the Applicants

from any matter referred to in subsection 5.1(2) of the CCAA or with respect to fraud on the part of any Releasee, with respect to that Releasee only;

(i) upon the expiry of all appeals and rights of appeal in respect thereof, Representative Settlement Counsel will withdraw their application for leave to appeal the decision of the Court of Appeal, dated November 26, 2009, to the Supreme Court of Canada on a with prejudice basis;'

(j) a CCAA plan of arrangement in the Nortel proceedings will not be proposed or approved if that plan does not treat the Pension and HWT claimants *pari passu* to the other ordinary, unsecured creditors ("Clause H.1"); and

(k) if there is a subsequent amendment to the *Bankruptcy and Insolvency Act* ("BIA") that "changes the current, relative priorities of the claims against Nortel, no party is precluded by this Settlement Agreement from arguing the applicability" of that amendment to the claims ceded in this Agreement ("Clause H.2").

7 The Settlement Agreement does *not* relate to a distribution of the HWT as the Settlement Parties have agreed to work towards developing a Court-approved distribution of the HWT corpus in 2010.

8 The Applicants' motion is supported by the Settlement Parties and by the Board of Directors of Nortel.

9 The Official Committee of Unsecured Creditors of Nortel Networks Inc. ("UCC"), the informal Nortel Noteholder Group (the "Noteholders"), and a group of 37 LTD Employees (the "Opposing LTD Employees") oppose the Settlement Agreement.

10 The UCC and Noteholders oppose the Settlement Agreement, principally as a result of the inclusion of Clause H.2.

11 The Opposing LTD Employees oppose the Settlement Agreement, principally as a result of the inclusion of the third party releases referenced in [6h] above.

THE FACTS

A. Status of Nortel's Restructuring

12 Although it was originally hoped that the Applicants would be able to restructure their business, in June 2009 the decision was made to change direction and pursue sales of Nortel's various businesses.

13 In response to Nortel's change in strategic direction and the impending sales, Nortel announced on August 14, 2009 a number of organizational updates and changes including the creation of groups to support transitional services and management during the sales process.

14 Since June 2009, Nortel has closed two major sales and announced a third. As a result of those transactions, approximately 13,000 Nortel employees have been or will be transferred to purchaser companies. That includes approximately 3,500 Canadian employees.

15 Due to the ongoing sales of Nortel's business units and the streamlining of Nortel's operations, it is expected that by the close of 2010, the Applicants' workforce will be reduced to only 475 employees. There is a need to wind-down and rationalize benefits and pension processes.

16 Given Nortel's insolvency, the significant reduction in Nortel's operations and the complexity and size of the Pension Plans, both Nortel and the Monitor believe that the continuation and funding of the Pension Plans and continued funding of medical, dental and other benefits is not a viable option.

B. The Settlement Agreement

17 On February 8, 2010 the Applicants announced that a settlement had been reached on issues related to the Pension Plans, and the HWT and certain employment related issues.

18 Recognizing the importance of providing notice to those who will be impacted by the Settlement Agreement, including the Former Employees, the LTD Employees, unionized employees, continuing employees and the provincial pension plan regulators ("Affected Parties"), Nortel brought a motion to this Court seeking the approval of an extensive notice and opposition process.

19 On February 9, 2010, this Court approved the notice program for the announcement and disclosure of the Settlement (the "Notice Order").

20 As more fully described in the Monitor's Thirty-Sixth, Thirty-Ninth and Thirty-Ninth Supplementary Reports, the Settlement Parties have taken a number of steps to notify the Affected Parties about the Settlement.

21 In addition to the Settlement Agreement, the Applicants, the Monitor and the Superintendent, in his capacity as administrator of the Pension Benefits Guarantee Fund, entered into a letter agreement on February 8, 2010, with respect to certain matters pertaining to the Pension Plans (the "Letter Agreement").

22 The Letter Agreement provides that the Superintendent will not oppose an order approving the Settlement Agreement ("Settlement Approval Order"). Additionally, the Monitor and the Applicants will take steps to complete an orderly transfer of the Pension Plans to a new administrator to be appointed by the Superintendent effective October 1, 2010. Finally, the Superintendent will not oppose any employee incentive program that the Monitor deems reasonable and necessary or the creation of a trust with respect to claims or potential claims against persons who accept directorships of a Nortel Worldwide Entity in order to facilitate the restructuring.

POSITIONS OF THE PARTIES ON THE SETTLEMENT AGREEMENT

The Applicants

23 The Applicants take the position that the Settlement is fair and reasonable and balances the interests of the parties and other affected constituencies equitably. In this regard, counsel submits that the Settlement:

(a) eliminates uncertainty about the continuation and termination of benefits to pensioners, LTD Employees and survivors, thereby reducing hardship and disruption;

(b) eliminates the risk of costly and protracted litigation regarding Pension Claims and HWT Claims, leading to reduced costs, uncertainty and potential disruption to the development of a Plan;
(c) prevents disruption in the transition of benefits for current employees;
(d) provides early payments to terminated employees in respect of their termination and severance claims where such employees would otherwise have had to wait for the completion of a claims process and distribution out of the estates;
(e) assists with the commitment and retention of remaining employees essential to complete the Applicants' restructuring; and
(f) does not eliminate Pension Claims or HWT Claims against the Applicants, but maintains their quantum and validity as ordinary and unsecured claims.

24 Alternatively, absent the approval of the Settlement Agreement, counsel to the Applicants submits that the Applicants are not required to honour such benefits or make such payments and such benefits could cease immediately. This would cause undue hardship to beneficiaries and increased uncertainty for the Applicants and other stakeholders.

25 The Applicants state that a central objective in the Settlement Agreement is to allow the Former and LTD Employees to transition to other sources of support.

26 In the absence of the approval of the Settlement Agreement or some other agreement, a cessation of benefits will occur on March 31, 2010 which would have an immediate negative impact on Former and LTD Employees. The Applicants submit that extending payments to the end of 2010 is the best available option to allow recipients to order their affairs.

27 Counsel to the Applicants submits that the Settlement Agreement brings Nortel closer to finalizing a plan of arrangement, which is consistent with the sprit and purpose of the CCAA. The Settlement Agreement resolves uncertainties associated with the outstanding Former and LTD Employee claims. The Settlement Agreement balances certainty with clarity, removing litigation risk over priority of claims, which properly balances the interests of the parties, including both creditors and debtors.

28 Regarding the priority of claims going forward, the Applicants submit that because a deemed trust, such as the HWT, is not enforceable in bankruptcy, the Former and LTD Employees are by default *pari passu* with other unsecured creditors.

29 In response to the Noteholders' concern that bankruptcy prior to October 2010 would create pension liabilities on the estate, the Applicants committed that they would not voluntarily enter into bankruptcy proceedings prior to October 2010. Further, counsel to the Applicants submits the court determines whether a bankruptcy order should be made if involuntary proceedings are commenced.

30 Further, counsel to the Applicants submits that the court has the jurisdiction to release third parties under a Settlement Agreement where the releases (1) are connected to a resolution of the debtor's claims, (2) will benefit creditors generally and (3) are not overly broad or offensive to public policy. See *Re Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (C.A.), [*Metcalfe*] at para. 71, leave to appeal refused, [2008] S.C.C.A. No. 337 and *Re Grace* [2008] O.J. No. 4208 (S.C.J.) [*Grace 2008*] at para. 40.

31 The Applicants submit that a settlement of the type put forward should be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all the circumstances. Elements of fairness and reasonableness include balancing the interests of parties, including any objecting creditor or creditors, equitably (although not necessarily equally); and ensuring that the agreement is beneficial to the debtor and its stakeholders generally, as per *Re Air Canada*, [2003] O.J. No. 5319 (S.C.J.) [*Air Canada*]. The Applicants assert that this test is met.

The Monitor

32 The Monitor supports the Settlement Agreement, submitting that it is necessary to allow the Applicants to wind down operations and to develop a plan of arrangement. The Monitor submits that the Settlement Agreement provides certainty, and does so with input from employee stakeholders. These stakeholders are represented by Employee Representatives as mandated by the court and these Employee Representatives were given the authority to approve such settlements on behalf of their constituents.

33 The Monitor submits that Clause H.2 was bargained for, and that the employees did give up rights in order to have that clause in the Settlement Agreement; particularly, it asserts that Clause H.1 is the counterpoint to Clause H.2. In this regard, the Settlement Agreement is fair and reasonable.

34 The Monitor asserts that the court may either (1) approve the Settlement Agreement, (2) not approve the Settlement Agreement, or (3) not approve the Settlement Agreement but provide practical comments on the applicability of Clause H.2.

Former and LTD Employees

35 The Former Employees' Representatives' constituents number an estimated 19,458 people. The LTD Employees number an estimated 350 people between the LTD Employee's Representative and the CAW-Canada, less the 37 people in the Opposing LTD Employee group.

36 Representative Counsel to the Former and LTD Employees acknowledges that Nortel is insolvent, and that much uncertainty and risk comes from insolvency. They urge that the Settlement Agreement be considered within the scope of this reality. The alternative to the Settlement Agreement is costly litigation and significant uncertainty.

37 Representative Counsel submits that the Settlement Agreement is fair and reasonable for all creditors, but especially the represented employees. Counsel notes that employees under Nortel are unique creditors under these proceedings, as they are not sophisticated creditors and their personal welfare depends on receiving distributions from Nortel. The Former and LTD Employees assert that this is the best agreement they could have negotiated.

38 Representative Counsel submits that bargaining away of the right to litigate against directors and officers of the corporation, as well at the trustee of the HWT, are examples of the concessions that have been made. They also point to the giving up of the right to make priority claims upon distribution of Nortel's estate and the HWT, although the claim itself is not extinguished. In exchange, the Former and LTD Employees will receive guaranteed coverage until the end of 2010. The Former and LTD Employees submit that having money in hand today is better than uncertainty going forward, and that, on balance, this Settlement Agreement is fair and reasonable.

39 In response to allegations that third party releases unacceptably compromise employees' rights, Representative Counsel accepts that this was a concession, but submits that it was satisfac-

tory because the claims given up are risky, costly and very uncertain. The releases do not go beyond s. 5.1(2) of the CCAA, which disallows releases relating to misrepresentations and wrongful or oppressive conduct by directors. Releases as to deemed trust claims are also very uncertain and were acceptably given up in exchange for other considerations.

40 The Former and LTD Employees submit that the inclusion of Clause H.2 was essential to their approval of the Settlement Agreement. They characterize Clause H.2 as a no prejudice clause to protect the employees by not releasing any future potential benefit. Removing Clause H.2 from the Settlement Agreement would be not the approval of an agreement, but rather the creation of an entirely new Settlement Agreement. Counsel submits that without Clause H.2, the Former and LTD Employees would not be signatories.

CAW

41 The CAW supports the Settlement Agreement. It characterizes the agreement as Nortel's recognition that it has a moral and legal obligation to its employees, whose rights are limited by the laws in this country. The Settlement Agreement temporarily alleviates the stress and uncertainty its constituents feel over the winding up of their benefits and is satisfied with this result.

42 The CAW notes that some members feel they were not properly apprised of the facts, but all available information has been disclosed, and the concessions made by the employee groups were not made lightly.

Board of Directors

43 The Board of Directors of Nortel supports the Settlement Agreement on the basis that it is a practical resolution with compromises on both sides.

Opposing LTD Employees

44 Mr. Rochon appeared as counsel for the Opposing LTD Employees, notwithstanding that these individuals did not opt out of having Representative Counsel or were represented by the CAW. The submissions of the Opposing LTD Employees were compelling and the court extends it appreciation to Mr. Rochon and his team in co-ordinating the representatives of this group.

45 The Opposing LTD Employees put forward the position that the cessation of their benefits will lead to extreme hardship. Counsel submits that the Settlement Agreement conflicts with the spirit and purpose of the CCAA because the LTD Employees are giving up legal rights in relation to a $100 million shortfall of benefits. They urge the court to consider the unique circumstances of the LTD Employees as they are the people hardest hit by the cessation of benefits.

46 The Opposing LTD Employees assert that the HWT is a true trust, and submit that breaches of that trust create liabilities and that the claim should not be released. Specifically, they point to a $37 million shortfall in the HWT that they should be able to pursue.

47 Regarding the third party releases, the Opposing LTD Employees assert that Nortel is attempting to avoid the distraction of third party litigation, rather than look out for the best interests of the Former and LTD Employees. The Opposing LTD Employees urge the court not to release the only individuals the Former and LTD Employees can hold accountable for any breaches of trust. Counsel submits that Nortel has a common law duty to fund the HWT, which the Former and LTD Employees should be allowed to pursue.

48 Counsel asserts that allowing these releases (a) is not necessary and essential to the restructuring of the debtor, (b) does not relate to the insolvency process, (c) is not required for the success of the Settlement Agreement, (d) does not meet the requirement that each party contribute to the plan in a material way and (e) is overly broad and therefore not fair and reasonable.

49 Finally, the Opposing LTD Employees oppose the *pari passu* treatment they will be subjected to under the Settlement Agreement, as they have a true trust which should grant them priority in the distribution process. Counsel was not able to provide legal authority for such a submission.

50 A number of Opposing LTD Employees made in person submissions. They do not share the view that Nortel will act in their best interests, nor do they feel that the Employee Representatives or Representative Counsel have acted in their best interests. They shared feelings of uncertainty, helplessness and despair. There is affidavit evidence that certain individuals will be unable to support themselves once their benefits run out, and they will not have time to order their affairs. They expressed frustration and disappointment in the CCAA process.

UCC

51 The UCC was appointed as the representative for creditors in the U.S. Chapter 11 proceedings. It represents creditors who have significant claims against the Applicants. The UCC opposes the motion, based on the inclusion of Clause H.2, but otherwise the UCC supports the Settlement Agreement.

52 Clause H.2, the UCC submits, removes the essential element of finality that a settlement agreement is supposed to include. The UCC characterizes Clause H.2 as a take back provision; if activated, the Former and LTD Employees have compromised nothing, to the detriment of other unsecured creditors. A reservation of rights removes the finality of the Settlement Agreement.

53 The UCC claims it, not Nortel, bears the risk of Clause H.2. As the largest unsecured creditor, counsel submits that a future change to the BIA could subsume the UCC's claim to the Former and LTD Employees and the UCC could end up with nothing at all, depending on Nortel's asset sales.

Noteholders

54 The Noteholders are significant creditors of the Applicants. The Noteholders oppose the settlement because of Clause H.2, for substantially the same reasons as the UCC.

55 Counsel to the Noteholders submits that the inclusion of H.2 is prejudicial to the non-employee unsecured creditors, including the Noteholders. Counsel submits that the effect of the Settlement Agreement is to elevate the Former and LTD Employees, providing them a payout of $57 million over nine months while everyone else continues to wait, and preserves their rights in the event the laws are amended in future. Counsel to the Noteholders submits that the Noteholders forego millions of dollars while remaining exposed to future claims.

56 The Noteholders assert that a proper settlement agreement must have two elements: a real compromise, and resolution of the matters in contention. In this case, counsel submits that there is no resolution because there is no finality in that Clause H.2 creates ambiguity about the future. The very object of a Settlement Agreement, assert the Noteholders, is to avoid litigation by withdrawing claims, which this agreement does not do.

Superintendent

57 The Superintendent does not oppose the relief sought, but this position is based on the form of the Settlement Agreement that is before the Court.

Northern Trust

58 Northern Trust, the trustee of the pension plans and HWT, takes no position on the Settlement Agreement as it takes instructions from Nortel. Northern Trust indicates that an oversight left its name off the third party release and asks for an amendment to include it as a party released by the Settlement Agreement.

LAW AND ANALYSIS

A. Representation and Notice Were Proper

59 It is well settled that the Former Employees' Representatives and the LTD Representative (collectively, the "Settlement Employee Representatives") and Representative Counsel have the authority to represent the Former Employees and the LTD Beneficiaries for purposes of entering into the Settlement Agreement on their behalf: *see Grace 2008, supra* at para. 32.

60 The court appointed the Settlement Employee Representatives and the Representative Settlement Counsel. These appointment orders have not been varied or appealed. Unionized employees continue to be represented by the CAW. The Orders appointing the Settlement Employee Representatives expressly gave them authority to represent their constituencies "for the purpose of settling or compromising claims" in these Proceedings. Former Employees and LTD Employees were given the right to opt out of their representation by Representative Settlement Counsel. After provision of notice, only one former employee and one active employee exercised the opt-out right.

B. Effect of the Settlement Approval Order

61 In addition to the binding effect of the Settlement Agreement, many additional parties will be bound and affected by the Settlement Approval Order. Counsel to the Applicants submits that the binding nature of the Settlement Approval Order on all affected parties is a crucial element to the Settlement itself. In order to ensure all Affected Parties had notice, the Applicants obtained court approval of their proposed notice program.

62 Even absent such extensive noticing, virtually all employees of the Applicants are represented in these proceedings. In addition to the representative authority of the Settlement Employee Representatives and Representative Counsel as noted above, Orders were made authorizing a Nortel Canada Continuing Employees' Representative and Nortel Canada Continuing Employees' Representative Counsel to represent the interests of continuing employees on this motion.

63 I previously indicated that "the overriding objective of appointing representative counsel for employees is to ensure that the employees have representation in the CCAA process": *Re Nortel Networks Corp.,* [2009] O.J. No. 2529 at para. 16. I am satisfied that this objective has been achieved.

64 The Record establishes that the Monitor has undertaken a comprehensive notice process which has included such notice to not only the Former Employees, the LTD Employees, the unionized employees and the continuing employees but also the provincial pension regulators and has given the opportunity for any affected person to file Notices of Appearance and appear before this court on this motion.

65 I am satisfied that the notice process was properly implemented by the Monitor.

66 I am satisfied that Representative Counsel has represented their constituents' interests in accordance with their mandate, specifically, in connection with the negotiation of the Settlement Agreement and the draft Settlement Approval Order and appearance on this Motion. There have been intense discussions, correspondence and negotiations among Representative Counsel, the Monitor, the Applicants, the Superintendent, counsel to the Board of the Applicants, the Noteholder Group and the Committee with a view to developing a comprehensive settlement. NCCE's Representative Counsel have been apprised of the settlement discussions and served with notice of this Motion. Representatives have held Webinar sessions and published press releases to inform their constituents about the Settlement Agreement and this Motion.

C. Jurisdiction to Approve the Settlement Agreement

67 The CCAA is a flexible statute that is skeletal in nature. It has been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *Re Nortel,* [2009] O.J. No. 3169 (S.C.J.) at paras. 28-29, citing *Metcalfe, supra,* at paras. 44 and 61.

68 Three sources for the court's authority to approve pre-plan agreements have been recognized:

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;
(b) the power of the court to make an order "on such terms as it may impose" pursuant to s. 11(4) of the CCAA; and
(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects: see *Re Nortel,* [2009] O.J. No. 3169 (S.C.J.) at para. 30, citing *Re Canadian Red Cross Society*, [1998] O.J. No. 3306 (Gen. Div.) [*Canadian Red Cross*] at para. 43; *Metcalfe, supra* at para. 44.

69 In *Re Stelco Inc.*, (2005), 78 O.R. (3d) 254 (C.A.), the Ontario Court of Appeal considered the court's jurisdiction under the CCAA to approve agreements, determining at para. 14 that it is not limited to preserving the *status quo*. Further, agreements made prior to the finalization of a plan or compromise are valid orders for the court to approve: *Grace 2008, supra* at para. 34.

70 In these proceedings, this court has confirmed its jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial Order and prior to the proposal of any plan of compromise or arrangement: see, for example, *Re Nortel*, [2009] O.J. No. 5582 (S.C.J.); *Re Nortel* [2009] O.J. 5582 (S.C.J.) and *Re Nortel*, 2010 ONSC 1096 (S.C.J.).

71 I am satisfied that this court has jurisdiction to approve transactions, including settlements, in the course of overseeing proceedings during a CCAA stay period and prior to any plan of arrangement being proposed to creditors: see *Re Calpine Canada Energy Ltd.,* [2007] A.J. No. 917 (C.A.) [*Calpine*] at para. 23, affirming [2007] A.J. No. 923 (Q.B.); *Canadian Red Cross, supra*; *Air Canada, supra*; *Grace 2008, supra,* and *Re Grace Canada* [2010] O.J. No. 62 (S.C.J.) [*Grace 2010*], leave to appeal to the C.A. refused February 19, 2010; *Re Nortel*, 2010 ONSC 1096 (S.C.J.).

D. Should the Settlement Agreement Be Approved?

72 Having been satisfied that this court has the jurisdiction to approve the Settlement Agreement, I must consider whether the Settlement Agreement *should* be approved.

73 A Settlement Agreement can be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all circumstances. What makes a settlement agreement fair and reasonable is its balancing of the interests of all parties; its equitable treatment of the parries, including creditors who are not signatories to a settlement agreement; and its benefit to the Applicant and its stakeholders generally.

i) Sprit and Purpose

74 The CCAA is a flexible instrument; part of its purpose is to allow debtors to balance the conflicting interests of stakeholders. The Former and LTD Employees are significant creditors and have a unique interest in the settlement of their claims. This Settlement Agreement brings these creditors closer to ultimate settlement while accommodating their special circumstances. It is consistent with the spirit and purpose of the CCAA.

ii) Balancing of Parties' Interests

75 There is no doubt that the Settlement Agreement is comprehensive and that it has support from a number of constituents when considered in its totality.

76 There is, however, opposition from certain constituents on two aspects of the proposed Settlement Agreement: (1) the Opposing LTD Employees take exception to the inclusion of the third party releases; (2) the UCC and Noteholder Groups take exception to the inclusion of Clause H.2.

Third Party Releases

77 Representative Counsel, after examining documentation pertaining to the Pension Plans and HWT, advised the Former Employees' Representatives and Disabled Employees' Representative that claims against directors of Nortel for failing to properly fund the Pension Plans were unlikely to succeed. Further, Representative Counsel advised that claims against directors or others named in the Third Party Releases to fund the Pension Plans were risky and could take years to resolve, perhaps unsuccessfully. This assisted the Former Employees' Representatives and the Disabled Employees' Representative in agreeing to the Third Party Releases.

78 The conclusions reached and the recommendations made by both the Monitor and Representative Counsel are consistent. They have been arrived at after considerable study of the issues and, in my view, it is appropriate to give significant weight to their positions.

79 In *Grace 2008, supra,* and *Grace 2010, supra,* I indicated that a Settlement Agreement entered into with Representative Counsel that contains third party releases is fair and reasonable where the releases are necessary and connected to a resolution of claims against the debtor, will benefit creditors generally and are not overly broad or offensive to public policy.

80 In this particular case, I am satisfied that the releases are necessary and connected to a resolution of claims against the Applicants.

81 The releases benefit creditors generally as they reduces the risk of litigation against the Applicants and their directors, protect the Applicants against potential contribution claims and indemnity claims by certain parties, including directors, officers and the HWT Trustee; and reduce the risk

of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs.

82 Further, in my view, the releases are not overly broad or offensive to public policy. The claims being released specifically relate to the subject matter of the Settlement Agreement. The parties granting the release receive consideration in the form of both immediate compensation and the maintenance of their rights in respect to the distribution of claims.

Clause H.2

83 The second aspect of the Settlement Agreement that is opposed is the provision known as Clause H.2. Clause H.2 provides that, in the event of a bankruptcy of the Applicants, and notwithstanding any provision of the Settlement Agreement, if there are any amendments to the BIA that change the current, relative priorities of the claims against the Applicants, no party is precluded from arguing the applicability or non-applicability of any such amendment in relation to any such claim.

84 The Noteholders and UCC assert that Clause H.2 causes the Settlement Agreement to not be a "settlement" in the true and proper sense of that term due to a lack of certainty and finality. They emphasize that Clause H.2 has the effect of undercutting the essential compromises of the Settlement Agreement in imposing an unfair risk on the non-employee creditors of NNL, including NNI, after substantial consideration has been paid to the employees.

85 This position is, in my view, well founded. The inclusion of the Clause H.2 creates, rather than eliminates, uncertainty. It creates the potential for a fundamental alteration of the Settlement Agreement.

86 The effect of the Settlement Agreement is to give the Former and LTD Employees preferred treatment for certain claims, notwithstanding that priority is not provided for in the statute nor has it been recognized in case law. In exchange for this enhanced treatment, the Former Employees and LTD Beneficiaries have made certain concessions.

87 The Former and LTD Employees recognize that substantially all of these concessions could be clawed back through Clause H.2. Specifically, they acknowledge that future Pension and HWT Claims will rank *pari passu* with the claims of other ordinary unsecured creditors, but then go on to say that should the BIA be amended, they may assert once again a priority claim.

88 Clause H.2 results in an agreement that does not provide certainty and does not provide finality of a fundamental priority issue.

89 The Settlement Parties, as well as the Noteholders and the UCC, recognize that there are benefits associated with resolving a number of employee-related issues, but the practical effect of Clause H.2 is that the issue is not fully resolved. In my view, Clause H.2 is somewhat inequitable from the standpoint of the other unsecured creditors of the Applicants. If the creditors are to be bound by the Settlement Agreement, they are entitled to know, with certainty and finality, the effect of the Settlement Agreement.

90 It is not, in my view, reasonable to require creditors to, in effect, make concessions in favour of the Former and LTD Employees today, and be subject to the uncertainty of unknown legislation in the future.

91 One of the fundamental purposes of the CCAA is to facilitate a process for a compromise of debt. A compromise needs certainty and finality. Clause H.2 does not accomplish this objective. The inclusion of Clause H.2 does not recognize that at some point settlement negotiations cease and parties bound by the settlement have to accept the outcome. A comprehensive settlement of claims in the magnitude and complexity contemplated by the Settlement Agreement should not provide an opportunity to re-trade the deal after the fact.

92 The Settlement Agreement should be fair and reasonable in all the circumstances. It should balance the interests of the Settlement Parties and other affected constituencies equitably and should be beneficial to the Applicants and their stakeholders generally.

93 It seems to me that Clause H.2 fails to recognize the interests of the other creditors of the Applicants. These creditors have claims that rank equally with the claims of the Former Employees and LTD Employees. Each have unsecured claims against the Applicants. The Settlement Agreement provides for a transfer of funds to the benefit of the Former Employees and LTD Employees at the expense of the remaining creditors. The establishment of the Payments Charge crystallized this agreed upon preference, but Clause H.2 has the effect of not providing any certainty of outcome to the remaining creditors.

94 I do not consider Clause H.2 to be fair and reasonable in the circumstances.

95 In light of this conclusion, the Settlement Agreement cannot be approved in its current form.

96 Counsel to the Noteholder Group also made submissions that three other provisions of the Settlement Agreement were unreasonable and unfair, namely:

(i) ongoing exposure to potential liability for pension claims if a bankruptcy order is made before October 1, 2010;
(ii) provisions allowing payments made to employees to be credited against employees' claims made, rather than from future distributions or not to be credited at all; and
(iii) lack of clarity as to whether the proposed order is binding on the Superintendent in all of his capacities under the *Pension Benefits Act* and other applicable law, and not merely in his capacity as Administrator on behalf of the Pension Benefits Guarantee Fund.

97 The third concern was resolved at the hearing with the acknowledgement by counsel to the Superintendent that the proposed order would be binding on the Superintendent in all of his capacities.

98 With respect to the concern regarding the potential liability for pension claims if a bankruptcy order is made prior to October 1, 2010, counsel for the Applicants undertook that the Applicants would not take any steps to file a voluntary assignment into bankruptcy prior to October 1, 2010. Although such acknowledgment does not bind creditors from commencing involuntary bankruptcy proceedings during this time period, the granting of any bankruptcy order is preceded by a court hearing. The Noteholders would be in a position to make submissions on this point, if so advised. This concern of the Noteholders is not one that would cause me to conclude that the Settlement Agreement was unreasonable and unfair.

99 Finally, the Noteholder Group raised concerns with respect to the provision which would allow payments made to employees to be credited against employees' claims made, rather than from future distributions, or not to be credited at all. I do not view this provision as being unreasonable and unfair. Rather, it is a term of the Settlement Agreement that has been negotiated by the Settlement Parties. I do note that the proposed treatment with respect to any payments does provide certainty and finality and, in my view, represents a reasonable compromise in the circumstances.

DISPOSITION

100 I recognize that the proposed Settlement Agreement was arrived at after hard-fought and lengthy negotiations. There are many positive aspects of the Settlement Agreement. I have no doubt that the parties to the Settlement Agreement consider that it represents the best agreement achievable under the circumstances. However, it is my conclusion that the inclusion of Clause H.2 results in a flawed agreement that cannot be approved.

101 I am mindful of the submission of counsel to the Former and LTD Employees that if the Settlement Agreement were approved, with Clause H.2 excluded, this would substantively alter the Settlement Agreement and would, in effect, be a creation of a settlement and not the approval of one.

102 In addition, counsel to the Superintendent indicated that the approval of the Superintendent was limited to the proposed Settlement Agreement and would not constitute approval of any altered agreement.

103 In *Grace 2008*, *supra*, I commented that a line-by-line analysis was inappropriate and that approval of a settlement agreement was to be undertaken in its entirety or not at all, at para. 74. A similar position was taken by the New Brunswick Court of Queen's Bench in *Wandlyn Inns Limited (Re)* (1992), 15 C.B.R. (3d) 316. I see no reason or basis to deviate from this position.

104 Accordingly, the motion is dismissed.

105 In view of the timing of the timing of the release of this decision and the functional funding deadline of March 31, 2010, the court will make every effort to accommodate the parties if further directions are required.

106 Finally, I would like to express my appreciation to all counsel and in person parties for the quality of written and oral submissions.

G.B. MORAWETZ J.

cp/e/qlrxg/qlpxm/qlaxw/qlced/qljyw

1 On March 25, 2010, the Supreme Court of Canada released the following: *Donald Sproule et al. v. Nortel Networks Corporation et al.* (Ont.) (Civil) (By Leave) (33491) (The motions for directions and to expedite the application for leave to appeal are dismissed. The application for leave to appeal is dismissed with no order as to costs./La requête en vue d'obtenir des directives et la requête visant à accélérer la procédure de demande d'autorisation d'appel sont rejetées. La demande d'autorisation d'appel est rejetée; aucune ordonnance n'est rendue con-

cernant les dépens.): <http://scc.lexum.umontreal.ca/en/news_release/2010/10-03-25.3a/10-03-25.3a.html>

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Time Of Request: Friday, May 10, 2013 10:00:58

TAB 8

Case Name:

Robertson v. ProQuest Information and Learning Co.

RE: IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc.
AND RE: Heather Robertson, Plaintiff, and ProQuest Information and Learning Company, Cedrom-SNI Inc., Toronto Star Newspapers Ltd., Rogers Publishing Limited and Canwest Publishing Inc., Defendants

[2011] O.J. No. 1160

2011 ONSC 1647

Court File Nos. 03-CV-252945CP, CV-10-8533-00CL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

March 15, 2011.

(34 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Sanction by court -- Application by the representative plaintiff and by one of the defendants, who was governed by an order under the Companies' Creditors Arrangement Act, for approval of a settlement that would resolve plaintiff's class proceeding and claim under the Act allowed -- Settlement would result in fair and reasonable outcome -- Settlement was recommended by all of the involved parties and it was not opposed by the defendants in the class proceeding who were not included in it.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Settlements -- Application by the representative plaintiff and by one of the defendants, who was governed by an order under the Companies' Creditors Arrangement Act, for approval of a settlement that would resolve plaintiff's class proceeding and claim under the Act allowed -- Settlement would result in fair and

reasonable outcome -- Settlement was recommended by all of the involved parties and it was not opposed by the defendants in the class proceeding who were not included in it.

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Settlements -- Approval -- Application by the representative plaintiff and by one of the defendants, who was governed by an order under the Companies' Creditors Arrangement Act, for approval of a settlement that would resolve plaintiff's class proceeding and claim under the Act allowed -- Settlement would result in fair and reasonable outcome -- Settlement was recommended by all of the involved parties and it was not opposed by the defendants in the class proceeding who were not included in it.

Application by Robertson and by the defendant Canwest Publishing Inc. for approval of a settlement. Robertson, who was a plaintiff in her own capacity and was also the representative plaintiff in a class proceeding, commenced this action in July 2003. The action was certified as a class proceeding in October 2008. Robertson claimed compensatory damages of $500 million and punitive and exemplary damages of $250 million against the defendants for copyright infringement. In January 2010 Canwest was granted an initial order pursuant to the Companies' Creditors Arrangement Act. In April 2010 Robertson filed a claim under the Arrangement Act for $500 million. The Monitor's opinion was that this claim was worth $0. The proposed settlement would resolve the class proceeding and the proceeding under the Arrangement Act. Court approval was not required for the claim under the Arrangement Act but it was required for the class proceeding. Under the settlement the claim under the Arrangement Act would be allowed in the amount of $7.5 million for voting and distribution purposes. Robertson undertook to vote in favour of the proposed Plan under the Arrangement Act. The action would be dismissed against Canwest, which did not admit liability. The action would not be dismissed against the other defendants. The Monitor was involved in the negotiation of the settlement and recommended approval for it concluded that the settlement agreement was a fair and reasonable resolution for Canwest.

HELD: Application allowed. The settlement agreement met the tests for approval under the Arrangement Act and under the Class Act. No one, including the non-settling defendants who received notice, opposed the settlement. Robertson was a very experienced and sophisticated litigant who previously resolved a similar class proceeding against other media companies. The settlement agreement was recommended by experienced counsel and it was entered into after serious negotiations between sophisticated parties. It would result in a fair and reasonable outcome, partly because Canwest was in an insolvency proceeding with all of its attendant risks and uncertainties.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 29, s. 34

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36,

Counsel:

Kirk Baert, for the Plaintiff.

Peter J. Osborne and *Kate McGrann*, for Canwest Publishing Inc.

Alex Cobb, for the CCAA Applicants.

Ashley Taylor and *Maria Konyukhova*, for the Monitor.

REASONS FOR DECISION

S.E. PEPALL J.:--

Overview

1 On January 8, 2010, I granted an initial order pursuant to the provisions of the *Companies' Creditors Arrangement Act* ("*CCAA*") in favour of Canwest Publishing Inc. ("CPI") and related entities (the "LP Entities"). As a result of this order and subsequent orders, actions against the LP Entities were stayed. This included a class proceeding against CPI brought by Heather Robertson in her personal capacity and as a representative plaintiff (the "Representative Plaintiff"). Subsequently, CPI brought a motion for an order approving a proposed notice of settlement of the action which was granted. CPI and the Representative Plaintiff then jointly brought a motion for approval of the settlement of both the class proceeding as against CPI and the *CCAA* claim. The Monitor supported the request and no one was opposed. I granted the judgment requested and approved the settlement with endorsement to follow. Given the significance of the interplay of class proceedings with *CCAA* proceedings, I have written more detailed reasons for decision rather than simply an endorsement.

Facts

2 The Representative Plaintiff commenced this class proceeding by statement of claim dated July 25, 2003 and the action was case managed by Justice Cullity. He certified the action as a class proceeding on October 21, 2008 which order was subsequently amended on September 15, 2009.

3 The Representative Plaintiff claimed compensatory damages of $500 million plus punitive and exemplary damages of $250 million against the named defendants, ProQuest Information and Learning LLC, Cedrom-SNI Inc., Toronto Star Newspapers Ltd., Rogers Publishing Limited and CPI for the alleged infringement of copyright and moral rights in certain works owned by class members. She alleged that class members had granted the defendants the limited right to reproduce the class members' works in the print editions of certain newspapers and magazines but that the defendant publishers had proceeded to reproduce, distribute and communicate the works to the public in electronic media operated by them or by third parties.

4 As set out in the certification order, the class consists of:

> A. All persons who were the authors or creators of original literary works ("Works") which were published in Canada in any newspaper, magazine, periodical, newsletter, or journal (collectively "Print Media") which Print Media have been reproduced, distributed or communicated to the public by telecommunication by, or pursuant to the purported authorization or permission of, one or more of the defendants, through any electronic database, excluding electronic databases in which only a precise electronic reproduction of the Work or substantial portion thereof is made available (such as PDF and analogous copies) (collectively "Electronic Media"), excluding:

(a) persons who by written document assigned or exclusively licensed all of the copyright in their Works to a defendant, a licensor to a defendant, or any third party; or

(b) persons who by written document granted to a defendant or a licensor to a defendant a license to publish or use their Works in Electronic Media; or

(c) persons who provided Works to a not for profit or non-commercial publisher of Print Media which was licensor to a defendant (including a third party defendant), and where such persons either did not expect or request, or did not receive, financial gain for providing such Works; or

(d) persons who were employees of a defendant or a licensor to a defendant, with respect to any Works created in the course of their employment.

Where the Print Media publication was a Canadian edition of a foreign publication, only Works comprising of the content exclusive to the Canada edition shall qualify for inclusion under this definition.

(Persons included in clause A are thereinafter referred to as "Creators". A "licensor to a defendant" is any party that has purportedly authorized or provided permission to one or more defendants to make Works available in Electronic Media. References to defendants or licensors to defendants include their predecessors and successors in interest)

B. All persons (except a defendant or a licensor to a defendant) to whom a Creator, or an Assignee, assigned, exclusively licensed, granted or transmitted a right to publish or use their Works in Electronic Media.

(Persons included in clause B are hereinafter referred to as "Assignees")

C. Where a Creator or Assignee is deceased, the personal representatives of the estate of such person unless the date of death of the Creator was on or before December 31, 1950.

5 As part of the *CCAA* proceedings, I granted a claims procedure order detailing the procedure to be adopted for claims to be made against the LP Entities in the *CCAA* proceedings. On April 12, 2010, the Representative Plaintiff filed a claim for $500 million in respect of the claims advanced against CPI in the action pursuant to the provisions of the claims procedure order. The Monitor was of the view that the claim in the *CCAA* proceedings should be valued at $0 on a preliminary basis.

6 The Representative Plaintiff's claim was scheduled to be heard by a claims officer appointed pursuant to the terms of the claims procedure order. The claims officer would determine liability and would value the claim for voting purposes in the *CCAA* proceedings.

7 Prior to the hearing before the claims officer, the Representative Plaintiff and CPI negotiated for approximately two weeks and ultimately agreed to settle the *CCAA* claim pursuant to the terms of a settlement agreement.

8 When dealing with the consensual resolution of a *CCAA* claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceeding

settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

9 Pursuant to section 34 of the *Class Proceedings Act*, the same judge shall hear all motions before the trial of the common issues although another judge may be assigned by the Regional Senior Judge (the "RSJ") in certain circumstances. The action had been stayed as a result of the CCAA proceedings. While I was the supervising CCAA judge, I was also assigned by the RSJ to hear the class proceeding notice and settlement motions.

10 Class counsel said in his affidavit that given the time constraints in the *CCAA* proceedings, he was of the view that the parties had made reasonable attempts to provide adequate notice of the settlement to the class. It would have been preferable to have provided more notice, however, given the exigencies of insolvency proceedings and the proposed meeting to vote on the *CCAA* Plan, I was prepared to accept the notice period requested by class counsel and CPI.

11 In this case, given the hybrid nature of the proceedings, the motion for an order approving notice of the settlement in both the class action proceeding and the *CCAA* proceeding was brought before me as the supervising *CCAA* judge. The notice procedure order required:

1) the Monitor and class counsel to post a copy of the settlement agreement and the notice order on their websites;
2) the Monitor to publish an English version of the approved form of notice letter in the National Post and the Globe and Mail on three consecutive days and a French translation of the approved form of notice letter in La Presse for three consecutive days;
3) distribution of a press release in an approved form by Canadian Newswire Group for dissemination to various media outlets; and
4) the Monitor and class counsel were to maintain toll-free phone numbers and to respond to enquiries and information requests from class members.

12 The notice order allowed class members to file a notice of appearance on or before a date set forth in the order and if a notice of appearance was delivered, the party could appear in person at the settlement approval motion and any other proceeding in respect of the class proceeding settlement. Any notices of appearance were to be provided to the service list prior to the approval hearing. In fact, no notices of appearance were served.

13 In brief, the terms of the settlement were that:

a) the *CCAA* claim in the amount of $7.5 million would be allowed for voting and distribution purposes;
b) the Representative Plaintiff undertook to vote the claim in favour of the proposed *CCAA* Plan;
c) the action would be dismissed as against CPI;
d) CPI did not admit liability; and
e) the Representative Plaintiff, in her personal capacity and on behalf of the class and/or class members, would provide a licence and release in respect of the freelance subject works as that term was defined in the settlement agreement.

14 The claims in the action in respect of CPI would be fully settled but the claims which also involved ProQuest would be preserved. The licence was a non-exclusive licence to reproduce one or more copies of the freelance subject works in electronic media and to authorize others to do the same. The licence excluded the right to licence freelance subject works to ProQuest until such time as the action was resolved against ProQuest, thereby protecting the class members' ability to pursue ProQuest in the action. The settlement did not terminate the lawsuit against the other remaining defendants. Under the *CCAA* Plan, all unsecured creditors, including the class, would be entitled to share on a pro rata basis in a distribution of shares in a new company. The Representative Plaintiff would share pro rata to the extent of the settlement amount with other affected creditors of the LP Entities in the distributions to be made by the LP Entities, if any.

15 After the notice motion, CPI and the Representative Plaintiff brought a motion to approve the settlement. Evidence was filed showing, among other things, compliance with the claims procedure order. Arguments were made on the process and on the fairness and reasonableness of the settlement.

16 In her affidavit, Ms. Robertson described why the settlement was fair, reasonable and in the best interests of the class members:

> In light of Canwest's insolvency, I am advised by counsel, and verily believe, that, absent an agreement or successful award in the Canwest Claims Process, the prospect of recovery for the Class against Canwest is minimal, at best. However, under the Settlement Agreement, which preserves the claims of the Class as against the remaining defendants in the class proceeding in respect of each of their independent alleged breaches of the class members' rights, as well as its claims as against ProQuest for alleged violations attributable to Canwest content, there is a prospect that members of the Class will receive some form of compensation in respect of their direct claims against Canwest.
>
> Because the Settlement Agreement provides a possible avenue of recovery for the Class, and because it largely preserves the remaining claims of the Class as against the remaining defendants in the class proceeding, I am of the view that the Settlement Agreement represents a reasonable compromise of the Class claim as against Canwest, and is both fair and reasonable in the circumstances of Canwest's insolvency.

17 In the affidavit filed by class counsel, Anthony Guindon of the law firm Koskie Minsky LLP noted that he was not in a position to ascertain the approximate dollar value of the potential benefit flowing to the class from the potential share in a pro rata distribution of shares in the new corporation. This reflected the unfortunate reality of the *CCAA* process. While a share price of $11.45 was used, he noted that no assurance could be given as to the actual market price that would prevail. In addition, recovery was contingent on the total quantum of proven claims in the claims process. He also described the litigation risks associated with attempting to obtain a lifting of the *CCAA* stay of proceedings. The likelihood of success was stated to be minimal. He also observed the problems associated with collection of any judgment in favour of the Representative Plaintiff. He went on to state:

> ... The Representative Plaintiff, on behalf of the Class, could have elected to challenge Canwest's initial valuation of the Class claim of $0 before a Claims Officer, rather than entering into a negotiated settlement. However, a number of factors militated against the advisability of such a course of action. Most importantly, the claims of the Class in the class proceeding have not been proven, and the Class does not enjoy the benefit of a final judgment as against Canwest. Thus, a hearing before the Claims Officer would necessarily necessitate a finding of liability as against Canwest, in addition to a quantification of the claims of the Class against Canwest.
>
> ... a negative outcome in a hearing before a Claims Officer could have the effect of jeopardizing the Class claims as against the remaining defendants in the class proceeding. Such a finding would not be binding on a judge seized of a common issues trial in the class proceeding; however, it could have persuasive effect.
>
> Given the likely limited recovery available from Canwest in the Claims Process, it is the view of Class Counsel that a negotiated resolution of the quantification of Class claim as against Canwest is preferable to risking a negative finding of liability in the context of a contested Claims hearing before a Claims Officer.

18 The Monitor was also involved in the negotiation of the settlement and was also of the view that the settlement agreement was a fair and reasonable resolution for CPI and the LP Entities' stakeholders. The Monitor indicated in its report that the settlement agreement eliminated a large degree of uncertainty from the *CCAA* proceeding and facilitated the approval of the Plan by the requisite majorities of stakeholders. This of course was vital to the successful restructuring of the LP Entities. The Monitor recommended approval of the settlement agreement.

19 The settlement of the class proceeding action was made prior to the creditors' meeting to vote on the Plan for the LP Entities. The issues of the fees and disbursements of class counsel and the ultimate distribution to class members were left to be dealt with by the class proceedings judge if and when there was a resolution of the action with the remaining defendants.

Discussion

20 Both motions in respect of the settlement were heard by me but were styled in both the *CCAA* proceedings and the class proceeding.

21 As noted by Jay A. Swartz and Natasha J. MacParland in their article "*Canwest Publishing - A Tale of Two Plans*"[1]:

> "There have been a number of *CCAA* proceedings in which settlements in respect of class proceedings have been implemented including *McCarthy v. Canadian Red Cross Society*, *(Re:) Grace Canada Inc.*, *Muscletech Research and Development Inc.*, and *(Re:) Hollinger Inc.* ... The structure and process for notice and approval of the settlement used in the LP Entities restructuring appears to be the most efficient and effective and likely a model for future approvals. Both motions in respect of the Settlement, discussed below, were heard by the *CCAA* judge but were styled in both proceedings." [citations omitted]

(a) Approval

(i) *CCAA* Settlements in General

22 Certainly the court has jurisdiction to approve a *CCAA* settlement agreement. As stated by Farley J. in *Re Lehndorff General Partner Ltd.*,[2] the *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Very broad powers are provided to the *CCAA* judge and these powers are exercised to achieve the objectives of the statute. It is well settled that courts may approve settlements by debtor companies during the *CCAA* stay period: *Re Calpine Canada Energy Ltd.*[3]; *Re Air Canada*[4]; and *Re Playdium Entertainment Corp.*[5] To obtain approval of a settlement under the *CCAA*, the moving party must establish that: the transaction is fair and reasonable; the transaction will be beneficial to the debtor and its stakeholders generally; and the settlement is consistent with the purpose and spirit of the *CCAA*. See in this regard *Re Air Canada*[6] and *Re Calpine.*[7]

(ii) Class Proceedings Settlement

23 The power to approve the settlement of a class proceeding is found in section 29 of the *Class Proceedings Act*, 1992[8]. That section states:

> 29(1) A proceeding commenced under this *Act* and a proceeding certified as a class proceeding under this *Act* may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.
>
> (2) A settlement of a class proceeding is not binding unless approved by the court.
>
> (3) A settlement of a class proceeding that is approved by the court binds all class members.
>
> (4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,
>
> (a) an account of the conduct of the proceedings;
> (b) a statement of the result of the proceeding; and
> (c) a description of any plan for distributing settlement funds.

24 The test for approval of the settlement of a class proceeding was described in *Dabbs v. Sun Life Assurance Co. of Canada*[9]. The court must find that in all of the circumstances the settlement is fair, reasonable and in the best interests of those affected by it. In making this determination, the court should consider, amongst other things:

a) the likelihood of recovery or success at trial;
b) the recommendation and experience of class counsel; and
c) the terms of the settlement.

As such, it is clear that although the *CCAA* and class proceeding tests for approval are not identical, a certain symmetry exists between the two.

25 A perfect settlement is not required. As stated by Sharpe J. (as he then was) in *Dabbs v. Sun Life Assurance Co. of Canada*[10]:

> Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

26 Where there is more than one defendant in a class proceeding, the action may be settled against one of the defendants provided that the settlement is fair, reasonable and in the best interests of the class members: *Ontario New Home Warranty Program et al. v. Chevron Chemical et al.*[11]

(iii) The Robertson Settlement

27 I concluded that the settlement agreement met the tests for approval under the *CCAA* and the *Class Proceedings Act*.

28 As a general proposition, settlement of litigation is to be promoted. Settlement saves time and expense for the parties and the court and enables individuals to extract themselves from a justice system that, while of a high caliber, is often alien and personally demanding. Even though settlements are to be encouraged, fairness and reasonableness are not to be sacrificed in the process.

29 The presence or absence of opposition to a settlement may sometimes serve as a proxy for reasonableness. This is not invariably so, particularly in a class proceeding settlement. In a class proceeding, the court approval process is designed to provide some protection to absent class members.

30 In this case, the proposed settlement is supported by the LP Entities, the Representative Plaintiff, and the Monitor. No one, including the non-settling defendants all of whom received notice, opposed the settlement. No class member appeared to oppose the settlement either.

31 The Representative Plaintiff is a very experienced and sophisticated litigant and has been so recognized by the court. She is a freelance writer having published more than 15 books and having been a regular contributor to Canadian magazines for over 40 years. She has already successfully resolved a similar class proceeding against Thomson Canada Limited, Thomson Affiliates, Information Access Company and Bell Global Media Publishing Inc. which was settled for $11 million after 13 years of litigation. That proceeding involved allegations quite similar to those advanced in the action before me. In approving the settlement in that case, Justice Cullity described the involvement of the Representative Plaintiff in the class proceeding:

> The Representative Plaintiff, Ms. Robertson, has been actively involved throughout the extended period of the litigation. She has an honours degree in English from the University of Manitoba, and an M.A. from Columbia University in New York. She is the author of works of fiction and non-fiction, she has been a regular contributor to Canadian magazines and newspapers for over 40 years, and she was a founder member of each of the Professional Writers' Association of Canada and the Writers' Union of Canada. Ms. Robertson has been in

> communication with class members about the litigation since its inception and has obtained funds from them to defray disbursements. She has clearly been a driving force behind the litigation: *Robertson v. Thomson Canada*[12].

32 The settlement agreement was recommended by experienced counsel and entered into after serious and considered negotiations between sophisticated parties. The quantum of the class members' claim for voting and distribution purposes, though not identical, was comparable to the settlement in *Robertson v. Thomson Canada*. In approving that settlement, Justice Cullity stated:

> Ms. Robertson's best estimate is that there may be 5,000 to 10,000 members in the class and, on that basis, the gross settlement amount of $11 million does not appear to be unreasonable. It compares very favourably to an amount negotiated among the parties for a much wider class in the U.S. litigation and, given the risks and likely expense attached to a continuation of the proceeding, does not appear to be out of line. On this question I would, in any event, be very reluctant to second guess the recommendations of experienced class counsel, and their well informed client, who have been involved in all stages of the lengthy litigation.[13]

33 In my view, Ms. Robertson's and Mr. Guindon's description of the litigation risks in this class proceeding were realistic and reasonable. As noted by class counsel in oral argument, issues relating to the existence of any implied license arising from conduct, assessment of damages, and recovery risks all had to be considered. Fundamentally, CPI was in an insolvency proceeding with all its attendant risks and uncertainties. The settlement provided a possible avenue for recovery for class members but at the same time preserved the claims of the class against the other defendants as well as the claims against ProQuest for alleged violations attributable to CPI content. The settlement brought finality to the claims in the action against CPI and removed any uncertainty and the possibility of an adverse determination. Furthermore, it was integral to the success of the consolidated plan of compromise that was being proposed in the *CCAA* proceedings and which afforded some possibility of recovery for the class. Given the nature of the CCAA Plan, it was not possible to assess the final value of any distribution to the class. As stated in the joint factum filed by counsel for CPI and the Representative Plaintiff, when measured against the litigation risks, the settlement agreement represented a reasonable, pragmatic and realistic compromise of the class claims.

34 The Representative Plaintiff, Class Counsel and the Monitor were all of the view that the settlement resulted in a fair and reasonable outcome. I agreed with that assessment. The settlement was in the best interests of the class and was also beneficial to the LP Entities and their stakeholders. I therefore granted my approval.

S.E. PEPALL J.

cp/e/qllxr/qlvxw/qlbdp

1 Annual Review of Insolvency Law, 2010, J.P. Sarra Ed, Carswell, Toronto at page 79.

2 (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) at 31.

3 2007 ABQB 504 at para. 71; leave to appeal dismissed 2007 ABCA 266 (Alta. C.A.).

4 (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J.).

5 (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J.) at para. 23.

6 *Supra.* at para. 9.

7 *Supra.* at para. 59.

8 S.O. 1992, c. 6.

9 [1998] O.J. No. 1598 (Ont. Gen. Div.) at para. 9.

10 (1998), 40 O.R. (3d) 429 at para 30.

11 [1999] O.J. No. 2245 (Ont. S.C.J.) at para. 97.

12 [2009] O.J. No. 2650 at para. 15.

13 *Robertson v. Thomson Canada*, [2009] O.J. No. 2650 para. 20.

TAB 9

Case Name:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a Plan of Compromise and Arrangement involving Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 4446372 Canada Inc. and 6932819 Canada Inc., Trustees of the Conduits Listed In Schedule "A" Hereto

Between

The Investors represented on the Pan-Canadian Investors Committee for Third-Party Structured Asset-Backed Commercial Paper listed in Schedule "B" hereto, Applicants (Respondents in Appeal), and Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 6932819 Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits listed in Schedule "A" hereto, Respondents (Respondents in Appeal), and Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal Inc., Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Domtar Inc., Domtar Pulp and Paper Products Inc., GIRO Inc., Vêtements de sports R.G.R. Inc., 131519 Canada Inc., Air Jazz LP, Petrifond Foundation Company Limited, Petrifond Foundation Midwest Limited, Services hypothécaires la patrimoniale Inc., TECSYS Inc., Société générale de financement du Québec, VibroSystM Inc., Interquisa Canada L.P., Redcorp Ventures Ltd., Jura Energy Corporation, Ivanhoe Mines Ltd., WebTech Wireless Inc., Wynn Capital Corporation Inc., Hy Bloom

Inc., Cardacian Mortgage Services, Inc., West Energy Ltd., Sabre Enerty Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd. and Standard Energy Inc., Respondents (Appellants)

[2008] O.J. No. 3164

2008 ONCA 587

45 C.B.R. (5th) 163

296 D.L.R. (4th) 135

2008 CarswellOnt 4811

168 A.C.W.S. (3d) 698

240 O.A.C. 245

47 B.L.R. (4th) 123

92 O.R. (3d) 513

Docket: C48969 (M36489)

Ontario Court of Appeal
Toronto, Ontario

J.I. Laskin, E.A. Cronk and R.A. Blair JJ.A.

Heard: June 25-26, 2008.
Judgment: August 18, 2008.

(121 paras.)

Bankruptcy and insolvency law -- Proceedings in bankruptcy and insolvency -- Practice and procedure -- General principles -- Legislation -- Interpretation -- Courts -- Jurisdiction -- Federal -- Companies' Creditors Arrangement Act -- Application by certain creditors opposed to a Plan of Compromise and Arrangement for leave to appeal sanctioning of that Plan -- Pan-Canadian Investors Committee was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that formed the subject matter of the proceedings -- Plan dealt with liquidity crisis threatening Canadian market in Asset Backed Commercial Paper -- Plan was sanctioned by court -- Leave to appeal allowed and appeal dismissed -- CCAA permitted the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court -- Companies' Creditors Arrangement Act, ss. 4, 6.

Application by certain creditors opposed to a Plan of Compromise and Arrangement for leave to appeal the sanctioning of that Plan. In August 2007, a liquidity crisis threatened the Canadian market in Asset Backed Commercial Paper (ABCP). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on US sub-prime mortgages. By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007, pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that formed the subject matter of the proceedings. The Plan was sanctioned on June 5, 2008. The applicants raised an important point regarding the permissible scope of restructuring under the Companies' Creditors Arrangement Act: could the court sanction a Plan that called for creditors to provide releases to third parties who were themselves insolvent and not creditors of the debtor company? They also argued that if the answer to that question was yes, the application judge erred in holding that the Plan, with its particular releases (which barred some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

HELD: Application for leave to appeal allowed and appeal dismissed. The appeal raised issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There were serious and arguable grounds of appeal and the appeal would not unduly delay the progress of the proceedings. In the circumstances, the criteria for granting leave to appeal were met. Respecting the appeal, the CCAA permitted the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where the releases were reasonably connected to the proposed restructuring. The wording of the CCAA, construed in light of the purpose, objects and scheme of the Act, supported the court's jurisdiction and authority to sanction the Plan proposed in this case, including the contested third-party releases contained in it. The Plan was fair and reasonable in all the circumstances.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 4, s. 6

Constitution Act, 1867, R.S.C. 1985, App. II, No. 5, s. 91(21), s. 92(13)

Appeal From:

On appeal from the sanction order of Justice Colin L. Campbell of the Superior Court of Justice, dated June 5, 2008, with reasons reported at [2008] O.J. No. 2265.

Counsel:

See Schedule "A" for the list of counsel.

The judgment of the Court was delivered by

R.A. BLAIR J.A.:--

A. INTRODUCTION

1 In August 2007 a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

2 By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007 pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

3 Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to Appeal

4 Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument we encouraged counsel to combine their submissions on both matters.

5 The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and -- given the expedited time-table -- the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as *Re Cineplex Odeon Corp.* (2001), 24 C.B.R. (4th) 21 (Ont. C.A.), and *Re Country Style Food Services* (2002), 158 O.A.C. 30, are met. I would grant leave to appeal.

Appeal

6 For the reasons that follow, however, I would dismiss the appeal.

B. FACTS

The Parties

7 The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer, and several holding companies and energy companies.

8 Each of the appellants has large sums invested in ABCP -- in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants -- slightly over $1 billion -- represent only a small fraction of the more than $32 billion of ABCP involved in the restructuring.

9 The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies, and some smaller holders of ABCP product. They participated in the market in a number of different ways.

The ABCP Market

10 Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment -- usually 30 to 90 days -- typically with a low interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

11 ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

12 The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over $116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately $32 billion of non-bank sponsored ABCP the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

13 As I understand it, prior to August 2007 when it was frozen, the ABCP market worked as follows.

14 Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

15 The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

16 When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The Liquidity Crisis

17 The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

18 When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

19 The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes -- partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

The Montreal Protocol

20 The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze -- the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement -- known as the Montréal Protocol -- the parties committed to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

21 The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation, and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two thirds of the $32 billion of ABCP sought to be restructured in these proceedings.

22 Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

23 Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible, and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the

other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian ABCP market.

The Plan

a) Plan Overview

24 Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution." The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper -- which has been frozen and therefore effectively worthless for many months -- into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

25 The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

26 Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

27 The Plan does not apply to investors holding less than $1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the $1-million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be designed to secure votes in favour of the Plan by various Noteholders, and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABCP collapse.

b) The Releases

28 This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in Article 10.

29 The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers, and other market participants -- in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" -- from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor,

acting in conflict of interest, and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

30 The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

31 The releases, in effect, are part of a *quid pro quo*. Generally speaking, they are designed to compensate various participants in the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets, and provide below-cost financing for margin funding facilities that are designed to make the notes more secure;
b) Sponsors -- who in addition have cooperated with the Investors' Committee throughout the process, including by sharing certain proprietary information -- give up their existing contracts;
c) The Canadian banks provide below-cost financing for the margin funding facility and,
d) Other parties make other contributions under the Plan.

32 According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation."

The CCAA Proceedings to Date

33 On March 17, 2008 the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25th. The vote was overwhelmingly in support of the Plan -- 96% of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the Monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan -- 99% of those connected with the development of the Plan voted positively, as did 80% of those Noteholders who had not been involved in its formulation.

34 The vote thus provided the Plan with the "double majority" approval -- a majority of creditors representing two-thirds in value of the claims -- required under s. 6 of the CCAA.

35 Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

36 The result of this renegotiation was a "fraud carve-out" -- an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

37 A second sanction hearing -- this time involving the amended Plan (with the fraud carve-out) -- was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

38 The appellants attack both of these determinations.

C. LAW AND ANALYSIS

39 There are two principal questions for determination on this appeal:

1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors?
2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it?

(1) Legal Authority for the Releases

40 The standard of review on this first issue -- whether, as a matter of law, a CCAA plan may contain third-party releases -- is correctness.

41 The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company.[1] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

a) on a proper interpretation, the CCAA does not permit such releases;
b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;
c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the *Constitution Act*, 1867;
d) the releases are invalid under Quebec rules of public order; and because
e) the prevailing jurisprudence supports these conclusions.

42 I would not give effect to any of these submissions.

Interpretation, "Gap Filling" and Inherent Jurisdiction

43 On a proper interpretation, in my view, the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

44 The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society (Re)* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.). As Farley J. noted in *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 at 111 (Ont. Gen. Div.), "[t]he history of CCAA law has been an evolution of judicial interpretation."

45 Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

46 These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters,"[2] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools -- statutory interpretation, gap-filling, discretion and inherent jurisdiction -- it is not necessary in my view to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

47 The Supreme Court of Canada has affirmed generally -- and in the insolvency context particularly -- that remedial statutes are to be interpreted liberally and in accordance with Professor

Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); *Bell Expressvu Ltd. Partnership v. R.*, [2002] 2 S.C.R. 559 at para. 26.

48 More broadly, I believe that the proper approach to the judicial interpretation and application of statutes -- particularly those like the CCAA that are skeletal in nature -- is succinctly and accurately summarized by Jackson and Sarra in their recent article, *supra*, at p. 56:

> The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in *Québec* as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

49 I adopt these principles.

50 The remedial purpose of the CCAA -- as its title affirms -- is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 4 C.B.R. (3d) 311 at 318 (B.C.C.A.), Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

> Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

51 The CCAA was enacted in 1933 and was necessary -- as the then Secretary of State noted in introducing the Bill on First Reading -- "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the

statement of the Hon. C.H. Cahan, Secretary of State, *House of Commons Debates (Hansard)* (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Elan Corp. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (C.A.), *per* Doherty J.A. in dissent; *Re Skydome Corp.* (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div.); *Re Anvil Range Mining Corp.* (1998), 3 C.B.R. (4th) 93 (Ont. Gen. Div.).

52 In this respect, I agree with the following statement of Doherty J.A. in *Elan, supra,* at pp. 306-307:

> ... [T]he Act was designed to serve a "broad constituency of investors, creditors and employees".[3] Because of that "broad constituency" the court must, when considering applications brought under the Act, *have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.* [Emphasis added.]

Application of the Principles of Interpretation

53 An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the application judge pointed out, the restructuring underpins the financial viability of the Canadian ABCP market itself.

54 The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

55 This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP *Dealers*, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as *Asset Providers* and *Liquidity Providers*, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore -- as the application judge found -- in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and ... providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark at para. 50 that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments at paras. 48-49:

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the li-

> quidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, *it is unduly technical to classify the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors*, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring. [Emphasis added.]

56 The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper ..." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor and creditors. His focus was on *the effect* of the restructuring, a perfectly permissible perspective, given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal."

57 I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

The Statutory Wording

58 Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

a) the skeletal nature of the CCAA;
b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in
c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

59 Sections 4 and 6 of the CCAA state:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class

of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

(*a*) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(*b*) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or Arrangement

60 While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 3rd ed., vol. 4 (Toronto: Thomson Carswell) at 10A-12.2, N para. 10. It has been said to be "a very wide and indefinite [word]": *Re Refund of Dues under Timber Regulations*, [1935] A.C. 184 at 197 (P.C.), affirming S.C.C. [1933] S.C.R. 616. See also, *Re Guardian Assur. Co.*, [1917] 1 Ch. 431 at 448, 450; *Re T&N Ltd. and Others (No. 3)*, [2007] 1 All E.R. 851 (Ch.).

61 The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement." I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

62 A proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. Ltd. v. Ideal Petroleum* (1959) Ltd. [1978] 1 S.C.R. 230 at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 at para. 11 (C.A.). In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Re Air Canada* (2004), 2 C.B.R. (5th) 4 at para. 6 (Ont. S.C.J.); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 at 518 (Gen. Div.).

63 There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan -- including the provision for releases -- becomes binding on all creditors (including the dissenting minority).

64 *Re T&N Ltd. and Others, supra,* is instructive in this regard. It is a rare example of a court focussing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. *Companies Act 1985*, a provision virtually identical to the scheme of the CCAA -- including the concepts of compromise or arrangement.[4]

65 T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the "EL claimants") would assert their claims. In return, T&N's former employees and dependants (the "EL claimants") agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

66 Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The Court rejected this argument. Richards J. adopted previous jurisprudence -- cited earlier in these reasons -- to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example.[5] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

> In my judgment it is not a necessary element of an arrangement for the purposes of s. 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s. 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach

> over many years to give the term its widest meaning. *Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party.* [Emphasis added.]

67 I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in *T&N* were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial third parties are making to the ABCP restructuring. The situations are quite comparable.

The Binding Mechanism

68 Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes[6] and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The Required Nexus

69 In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

70 The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. This nexus exists here, in my view.

71 In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

a) The parties to be released are necessary and essential to the restructuring of the debtor;
b) *The claims to be released are rationally related to the purpose of the Plan and necessary for it*;
c) The Plan cannot succeed without the releases;
d) *The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan*; and

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72 Here, then -- as was the case in *T&N* -- there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77 he said:

> [76] I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> [77] This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

73 I am satisfied that the wording of the CCAA -- construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation -- supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The Jurisprudence

74 Third party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Re Canadian Airlines Corp.* (2000), 265 A.R. 201, leave to appeal refused by *Resurgence Asset Management LLC v. Canadian Airlines Corp.* (2000), 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, (2001) 293 A.R. 351 (S.C.C.). In *Re Muscle Tech Research and Development Inc.* (2006), 25 C.B.R (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

75 We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of *Re Canadian Airlines*, however, the releases in those restructurings -- including *Muscle Tech* -- were not opposed. The appellants argue that those cases are wrongly decided, because the court simply does not have the authority to approve such releases.

76 In *Re Canadian Airlines* the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the well-spring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

77 Justice Paperny began her analysis of the release issue with the observation at para. 87 that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company." It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in *Michaud v. Steinberg,*[7] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument -- dealt with later in these reasons -- that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

78 Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

79 The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Michaud v. Steinberg, supra*; *NBD Bank, Canada v. Dofasco Inc.*, (1999), 46 O.R. (3d) 514 (C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C.S.C.); and *Re Stelco Inc.* (2005), 78 O.R. (3d) 241 (C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg* does not express a correct view of the law, and I decline to follow it.

80 In *Pacific Coastal Airlines*, Tysoe J. made the following comment at para. 24:

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

81 This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action

dismissed on grounds of *res judicata* or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

82 The facts in *Pacific Coastal* are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian -- at a contractual level -- may have had some involvement with the particular dispute. Here, however, the disputes that are the subject-matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

83 Nor is the decision of this Court in the *NBD Bank* case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly-owned subsidiary of Dofasco. The Bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors." Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the Bank. On appeal, he argued that since the Bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process -- in short, he was personally protected by the CCAA release.

84 Rosenberg J.A., writing for this Court, rejected this argument. The appellants here rely particularly upon his following observations at paras. 53-54:

> 53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at 297, the *CCAA* is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.
>
> 54 In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to

> the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Footnote omitted.]

85 Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third party releases was not under consideration at all. What the Court was determining in *NBD Bank* was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in *NBD* to the facts now before the Court" (para. 71). Contrary to the facts of this case, in *NBD Bank* the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release -- as is the situation here. Thus, *NBD Bank* is of little assistance in determining whether the court has authority to sanction a plan that calls for third party releases.

86 The appellants also rely upon the decision of this Court in *Stelco I*. There, the Court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves *and not directly involving the company*. [Citations omitted; emphasis added.]
>
> See *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J.) at para. 7.

87 This Court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the Court were quite different from those raised on this appeal.

88 Indeed, the Stelco plan, as sanctioned, included third party releases (albeit uncontested ones). This Court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the

reach of the CCAA and therefore that they were entitled to a separate civil action to determine their rights under the agreement: *Re Stelco Inc.*, (2006), 21 C.B.R. (5th) 157 (Ont. C.A.) ("*Stelco II*"). The Court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The Court said (para. 11):

> In [*Stelco I*] -- the classification case -- the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company ... *[H]owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process*. [Emphasis added.]

89 The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third party releases here are very closely connected to the ABCP restructuring process.

90 Some of the appellants -- particularly those represented by Mr. Woods -- rely heavily upon the decision of the Quebec Court of Appeal in *Michaud v. Steinberg, supra*. They say that it is determinative of the release issue. In *Steinberg*, the Court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 -- English translation):

> [42] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
>
> ...
>
> [54] The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
>
> ...
>
> [58] The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

91 Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third party releases in this fashion (para. 7):

> In short, the Act will have become the Companies' *and Their Officers and Employees* Creditors Arrangement Act -- an awful mess -- and likely not attain its purpose, which is to enable the company to survive in the face of *its* creditors and

> through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of operation, contrary to its purposes and, for this reason, is to be banned.

92 Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature -- they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company -- rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para. 90 he said:

> The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms *encompass all that should enable the person who has recourse to it to fully dispose of his debts*, both those that exist on the date when he has recourse to the statute and *those contingent on the insolvency in which he finds himself* ... [Emphasis added.]

93 The decision of the Court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself," however. On occasion such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in *Steinberg*, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analysing the Act -- an approach inconsistent with the jurisprudence referred to above.

94 Finally, the majority in *Steinberg* seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this Court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases -- as I have concluded it does -- the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

95 Accordingly, to the extent *Steinberg* stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in *Steinberg* considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 Amendments

96 *Steinberg* led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

> 5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> Exception
>
> (2) A provision for the compromise of claims against directors may not include claims that
>
> (*a*) relate to contractual rights of one or more creditors; or
>
> (*b*) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> Powers of court
>
> (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.
>
> Resignation or removal of directors
>
> (4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.
>
> 1997, c. 12, s. 122.

97 Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? *Expressio unius est exclusio alterius*, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

98 The maxim is not helpful in these circumstances, however. The reality is that there *may* be another explanation why Parliament acted as it did. As one commentator has noted:[8]

> Far from being a rule, [the maxim *expressio unius*] is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes its does not,

> and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

99 As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg*. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring, rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden and Morawetz, vol. 1, *supra*, at 2-144, Es.11A; *Le Royal Penfield Inc. (Syndic de)*, [2003] R.J.Q. 2157 at paras. 44-46 (C.S.).

100 Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The Deprivation of Proprietary Rights

101 Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect: *Halsbury's Laws of England*, 4th ed. reissue, vol. 44 (1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., *supra,* at 183; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

The Division of Powers and Paramountcy

102 Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the *Constitution Act, 1867*, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the *Civil Code of Quebec.*

103 I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re: Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659. As the Supreme Court confirmed in that case (p. 661), citing

Viscount Cave L.C. in *Royal Bank of Canada v. Larue* [1928] A.C. 187, "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament." Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

104 That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action -- normally a matter of provincial concern -- or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

Conclusion With Respect to Legal Authority

105 For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "Fair and Reasonable"

106 The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

107 Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In the absence of a demonstrable error an appellate court will not interfere: see *Re Ravelston Corp. Ltd.* (2007), 31 C.B.R. (5th) 233 (Ont. C.A.).

108 I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties -- including leading Canadian financial institutions -- that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

109 The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

110 The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers, (ii) limits the type of damages that may be claimed (no punitive damages, for example), (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order, and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

111 The law does not condone fraud. It is the most serious kind of civil claim. There is therefore some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotinis Restaurant Corp. v. White Spot Ltd.* (1998), 38 B.L.R. (2d) 251 at paras. 9 and 18 (B.C.S.C.). There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings -- the claims here all being untested allegations of fraud -- and to include releases of such claims as part of that settlement.

112 The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, that the need "to avoid the potential cascade of litigation that ... would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

113 At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here -- with two additional findings -- because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

a) The parties to be released are necessary and essential to the restructuring of the debtor;
b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
c) The Plan cannot succeed without the releases;
d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
g) The releases are fair and reasonable and not overly broad or offensive to public policy.

114 These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

115 The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they -- as individual creditors -- make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

116 All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

117 In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices," inasmuch as everyone is adversely affected in some fashion.

118 Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of <u>all</u> Noteholders, not just the interests of the appellants, whose notes represent only about 3% of that total. That is what he did.

119 The application judge noted at para. 126 that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized at para. 134 that:

> No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity among all stakeholders.

120 In my view we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

D. DISPOSITION

121 For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

R.A. BLAIR J.A.
J.I. LASKIN J.A.:-- I agree.
E.A. CRONK J.A.:-- I agree.

* * * * *

SCHEDULE "A" - CONDUITS

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

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SCHEDULE "B" - APPLICANTS

ATB Financial

Caisse de Dépôt et Placement du Québec

Canaccord Capital Corporation

Canada Post Corporation

Credit Union Central of Alberta Limited

Credit Union Central of British Columbia

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank Financial Inc./National Bank of Canada

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

* * * * *

SCHEDULE "A" - COUNSEL

1) Benjamin Zarnett and Frederick L. Myers for the Pan-Canadian Investors Committee.
2) Aubrey E. Kauffman and Stuart Brotman for 4446372 Canada Inc. and 6932819 Canada Inc.
3) Peter F.C. Howard and Samaneh Hosseini for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG.
4) Kenneth T. Rosenberg, Lily Harmer and Max Starnino for Jura Energy Corporation and Redcorp Ventures Ltd.
5) Craig J. Hill and Sam P. Rappos for the Monitors (ABCP Appeals).
6) Jeffrey C. Carhart and Joseph Marin for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor.
7) Mario J. Forte for Caisse de Dépôt et Placement du Québec.
8) John B. Laskin for National Bank Financial Inc. and National Bank of Canada.
9) Thomas McRae and Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al).
10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.
11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank.

12) Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees.
13) Usman Sheikh for Coventree Capital Inc.
14) Allan Sternberg and Sam R. Sasso for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.
15) Neil C. Saxe for Dominion Bond Rating Service.
16) James A. Woods, Sebastien Richemont and Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP.
17) Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.
18) R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

cp/e/ln/qlkxl/qllkb/qlltl/qlrxg/qlhcs/qlcas/qlhcs/qlhcs

1 Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

2 Justice Georgina R. Jackson and Dr. Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., *Annual Review of Insolvency Law, 2007* (Vancouver: Thomson Carswell, 2007).

3 Citing Gibbs J.A. in *Chef Ready Foods, supra,* at pp. 319-320.

4 The Legislative Debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the *Companies Act 1985* (U.K.): see *House of Commons Debates (Hansard), supra.*

5 See *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 192; *Ontario Business Corporations Act,* R.S.O. 1990, c. B.16, s. 182.

6 A majority in number representing two-thirds in value of the creditors (s. 6).

7 *Steinberg* was originally reported in French: [1993] R.J.Q. 1684 (C.A.). All paragraph references to *Steinberg* in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055.

8 Reed Dickerson, *The Interpretation and Application of Statutes* (1975) at pp. 234-235, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at 621.

IN THE MATTER OF THE *COMPANIES CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court of Appeal File No.: C56961
Court File No. CV-12-9667-00-CL

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

BOOK OF AUTHORITIES OF ERNST & YOUNG LLP

(Motion to Quash Appeal Returnable June 28, 2013)

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