Court File No. CV-19-616077-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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 IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

Applicants

BOOK OF AUTHORITIES OF THE APPLICANTS
(Response to Motion of Genstar US Pension Plan Beneficiaries)

April 24, 2019

OSLER, HOSKIN & HARCOURT LLP
P.O. Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Deborah Glendinning (LSO# 31070N)
Marc Wasserman (LSO# 44066M)
John A. MacDonald (LSO# 25884R)
Craig Lockwood (LSO# 46668M)

Tel: (416) 362-2111
Fax: (416) 862-6666

Lawyers to the Applicants, Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited

INDEX

TAB 1

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Caterpillar Financial Services Corporation v. Boale, Wood & Company Ltd.,* 2014 BCCA 419

Date: 20141031
Docket: CA041207

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

and

In the Matter of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 and the *Business Corporations Act*, S.B.C. 2002, c. 57

and

In the Matter of Worldspan Marine Inc., Crescent Custom Yachts Inc., Queenship Marine Industries Ltd., 27222 Developments Ltd. and Composite FRP Products Ltd.

Between:

Caterpillar Financial Services Corporation

Appellant
(Applicant)

And

Boale, Wood & Company Ltd.

Respondent
(Respondent)

Before: The Honourable Mr. Justice Chiasson
The Honourable Madam Justice Neilson
The Honourable Madam Justice Garson

On appeal from: An order of the Supreme Court of British Columbia, dated September 3, 2013 (*Worldspan Marine Inc. (Re)*, 2013 BCSC 1593, Vancouver Docket S113550).

Counsel for the Appellant: A.H. Brown

Counsel for the Respondent: G.H. Dabbs

Place and Date of Hearing:	Vancouver, British Columbia June 3, 2014
Place and Date of Judgment:	Vancouver, British Columbia October 31, 2014

Written Reasons by:
The Honourable Mr. Justice Chiasson

Concurring Reasons by:
The Honourable Madam Justice Garson (page 16, para. 44)

Concurring in both:
The Honourable Madam Justice Neilson

Summary:

Worldspan Marine Inc. designed, manufactured and sold luxury yachts. The Supreme Court granted an order under the Companies' Creditors Arrangement Act ("CCAA") providing protection to Worldspan and appointing the respondent as Monitor. The court also provided for an Administrative Charge in favour of the Monitor ranking in priority to the security of Worldspan's creditors. The appellant was a secured creditor with a mortgage on a vessel in Washington State, U.S.A. The Monitor was granted a Recognition Order by a Washington court. There was no specific reference to the Administrative Charge in the Washington proceedings or in the Recognition Order. That order recognized the CCAA proceedings as a foreign main proceeding and directed that the administration and realization of Worldspan's assets in the United States was entrusted to the Monitor acting in the CCAA case. The vessel was sold and the proceeds paid into court in the CCAA proceedings. The court rejected the appellant's contention that the Monitor's Administrative Charge did not apply because the vessel was in the United States when the charge was imposed on the basis that the Administrative Charge attached to the vessel in Washington.

Held: appeal dismissed. The Administrative Charge was an in rem order that did not have extra-territorial effect and did not attach to the vessel in Washington when it was made. The property over which the Administrative Charge had priority included proceeds. The Recognition Order vested the realization of the assets of Worldspan in the CCAA court. Insofar as the security on the vessel was realized in the CCAA proceedings, the Administration Charge attached to the proceeds of sale and had the priority given to it by the CCAA court.

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

[1] This appeal concerns the relationship between Canadian and United States insolvency proceedings.

Background

[2] Worldspan Marine Inc. ("Worldspan") designed, manufactured and sold luxury yachts. On June 6, 2011, the Supreme Court granted an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("*CCAA*"). The chambers judge described the situation at that time (2013 BCSC 1593):

> [3] … This Court, in its Reasons for Judgment granting the initial order, indexed as *Sargeant v. Worldspan Marine Inc*., 2011 BCSC 767, found that the petitioners collectively owned assets worth approximately $30.7 million. The petitioners' principal assets then consisted of the real property in Maple Ridge, British Columbia, owned by 27222 Developments Ltd. and appraised at $8.9 million, where the petitioners' shipyard was located, and a partially completed 142-foot Queenship motor yacht bearing hull number QE0142226C010, then valued at $15.1 million.

[3] The judge provided useful background to this appeal:

> [4] The petitioner, Worldspan Marine Inc. ("Worldspan") had entered into a vessel construction agreement with Mr. Harry Sargeant III for the construction of the 142-foot yacht, which has been referred to throughout these proceedings as the Sargeant yacht. A dispute arose between Worldspan and Mr. Sargeant concerning the cost of construction. Mr. Sargeant ceased making payments under the vessel construction agreement, which led to the insolvency of the petitioners and ultimately, to the initiation of these proceedings.
>
> [5] This Court's initial order included an Administration Charge, not to exceed $500,000, as security for the fees and disbursements of the Monitor [Boale, Wood & Company Ltd.], counsel to the Monitor, and counsel to the petitioners that charged the "Non-Vessel Property" as defined in the initial order. Under the terms of the initial order, the Administration Charge ranked in priority to all other security in the Non-Vessel Property.

[4] "Non-Vessel Property" is all of Worldspan's property other than the Sargeant yacht. In the initial order, property is defined as "including all proceeds". The judge continued:

> [6] At the time of the initial order, the applicant, CAT [Caterpillar Financial Services Corporation], held a mortgage charging another vessel, the Queenship 70' yacht with hull identification number A129 (the "A129"). In May 2011, CAT brought foreclosure proceedings against the A129 in Seattle, Washington.
>
> [7] The A129, a Canadian vessel, was owned by the petitioner Worldspan. … Worldspan had moved the A129 to Seattle, and was attempting to sell it there.
>
> [8] The issues arising on this application are whether the Administration Charge attaches to the A129, or the proceeds of sale of that vessel, and if so, whether the Administration Charge ranks in priority to the mortgage charging the A129 held by CAT.

[5] On May 10, 2011, on the application of Caterpillar Financial Services Corporation ("CAT"), the court in Washington State exercised its maritime jurisdiction

and issued an *in rem* warrant for the arrest of the A129. The *CCAA* court was aware of the initiation of the Washington State proceedings, the arrest of the A129 were noted in the court's reasons granting the initial order in the *CCAA* proceedings.

[6] At para. 20, the judge observed:

> [20] Following the pronouncement of the initial order, on June 8 and June 27, 2011, counsel for CAT wrote to counsel for Worldspan advising that if the petitioners did not apply to the United States Bankruptcy Court for the Western District of Washington at Seattle (the "U.S. Bankruptcy Court") for an order pursuant to Chapter 15 of the U.S. Bankruptcy Code recognizing the *CCAA* proceedings, CAT would continue to execute against the A129.

[7] On June 28, 2011, CAT applied to the Washington Court for an order of default. Worldspan was served with the application, but did not respond. The order was granted on July 1, 2011.

[8] Further proceedings in the Washington Court were described by the chambers judge at paras. 24 and 27:

> On September 11, 2011, on the application of the petitioners and the Monitor, the U.S. Bankruptcy Court granted an order recognizing these proceedings as a "Foreign Main Proceeding" under Chapter 15 of the U.S. Bankruptcy Code (the "Recognition Order").
>
> …
>
> Although CAT put evidence before the U.S. Court that the petitioners were seeking to increase the Administration Charge from $500,000 to $1 million, neither CAT nor Grand Banks Yacht Sales LLC opposed the grant of the Recognition Order on the ground that the Administration Charge would have priority over their claims respecting the A129.

[9] The chambers judge quoted at length from the Recognition Order:

> D. This Chapter 15 case was properly commenced pursuant to §§1504 and 1515 of the United States Bankruptcy Code (the "Code") and the petition on file in this case meets all requirements of §1515 of the Code;
>
> E. The *CCAA* Case now pending before the Supreme Court of British Columbia is a "foreign proceeding" within the meaning of §101(23) of the Code;
>
> F. The Monitor is a duly appointed "foreign representative"; within the meaning of §101(24) of the Code;

G. Notwithstanding the fact that one asset of Worldspan is in Washington State, the center of main interest of Worldspan is in British Columbia, Canada, and the *CCAA* Proceeding is properly designated a "foreign main proceeding" within the meaning of §§1502(4) and 1517(b)(1) of the Code with respect to the Petitioners;

H. The relief requested by the Monitor and the Petitioners is necessary and appropriate and in the interest of international comity and the purposes of Chapter 15, as provided in §1501 of the Code;

I. As the duly appointed foreign representative of a foreign main proceeding, the Monitor is entitled to all of the relief provided under §1520 of the Code;

J. The relief sought by the Monitor pursuant to §1521 of the Code is necessary and appropriate to effectuate the purposes of Chapter 15 and to protect the assets of Worldspan in the United States and to protect the interests of all creditors of the Petitioners; and

K. Notice of these proceedings was sufficient and proper under the circumstances and no further notice is required or necessary.

…

… the application filed on behalf of the Foreign Applicants is hereby granted and this Court hereby recognizes the *CCAA* Case as a foreign main proceeding pursuant to Chapter 15 (the "Foreign Main Proceeding") with the Monitor and the Petitioners or either of them as appropriate under the supervision of the Canadian Court, serving as the foreign representatives as authorized under orders the *CCAA* Case and applicable provisions of the *CCAA* (the "Foreign Representatives");

…

The following are stayed:

a. the commencement or continuation of an individual action or proceeding concerning the Petitioners' assets, rights, obligations or liabilities, other than pursuit of claims through the *CCAA* Case and this Chapter 15 case; and

b. any execution against the Petitioners' assets in the United States;

… except with respect to the Foreign Representatives' rights as authorized in the Foreign Main Proceeding …

… the administration and realization of the Petitioners' assets within the United States are hereby entrusted to the Foreign Representative acting in the *CCAA* Case.

[10] At para. 30 he observed:

On the hearing of the application for the Recognition Order, counsel made no submissions respecting the Administration Charge. There was no discussion or argument on the question of whether the Administration Charge might attach to the A129.

[11] On April 20, 2012, the *CCAA* court approved a sale of the A129 and ordered the net proceeds to be held in trust. The order further provided at para. 3:

> The Net Proceeds…shall stand in the place and stead of the A129 on the basis that it is located in Seattle Washington, USA, and without prejudice to the rights of the parties as if the disposition approved herein had not occurred.

[12] With respect to this aspect of the order the judge stated:

> [32] … the net proceeds stood in the place of the A129 and that any claim that the net proceeds were subject to the Administration Charge would be determined as if the A129 was still located in Seattle, Washington. Claims against the net proceeds based on the assertion that they were subject to the Administration Charge were limited to the aggregate amount of $170,000.

[13] On the application of CAT, supported by all other interested parties, an order was obtained from the Washington Court releasing the A129 from arrest and she was sold. An application was brought in the *CCAA* proceedings for payment out of the proceeds of sale, and it is the outcome of this application that is now under appeal.

[14] CAT took the position that it was entitled to full payment because the Washington Court did not attach the Administration Charge to the A129 when it issued the Recognition Order and that it would be unlikely to do so if that request had been made. CAT relied on the opinion of a United States attorney that in United States financial restructuring cases under Chapter 11 of United States bankruptcy legislation, administrative expenses normally rank behind secured creditors. It also relied on Canadian maritime law to similar effect.

[15] The Monitor asserted that there is "no restriction … on the type or location of property that may be subject to a charge for the benefit of a monitor". The Monitor also argued that CAT had the opportunity to contend its charge ranked in priority in the proceedings before the *CCAA* and Washington Court, but did not.

The Chambers Judgment

[16] The judge concluded that the Administration Charge was an *in rem* charge which attached both to the A129 and to the proceeds of sale from the vessel. The judge also held that the charge ranked in priority to CAT's mortgage.

[17] The judge began his analysis by referring to the law concerning the court's jurisdiction to make orders in *CCAA* proceedings. He then addressed the role of the Monitor and the purpose and operation of the Administration Charge, stating at paras. 48-52:

> [48] The Monitor, as an officer of the court, oversees the financial affairs and restructuring of the insolvent company. The Administration Charge serves the purposes of the *CCAA* and facilitates the restructuring process by providing security for fees and expenses incurred by the Monitor in its oversight of the debtor, and by counsel retained by the Monitor and the debtor company to provide necessary assistance in the *CCAA* proceedings.
>
> [49] Section 11.52(1) of the *CCAA* authorizes the court to make an order declaring that "all or part of the property of the debtor company" is subject to a security or charge, in an amount the court considers appropriate, in respect of the fees and expenses of the Monitor, legal experts engaged by the Monitor, and legal experts engaged by the debtor company for the purpose of the *CCAA* proceedings.
>
> [50] Section 11.52(2) provides:
>
> > The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> [51] There is no restriction in s. 11.52 on the type or location of property that may be subject to the security or charge.
>
> [52] When Parliament enacted s. 11.52 in 2009, it authorized courts in *CCAA* proceedings to grant a super priority charge attaching to all or part of the property of the debtor as security for the fees and expenses of the Monitor. That super priority serves the objectives of the *CCAA* by providing some assurance to the Monitor and other professionals engaged by it or by the debtor company for the purpose of *CCAA* proceedings that they will be paid for their services.

[18] The judge continued at para. 54:

> … Bearing in mind that the *CCAA* is remedial insolvency legislation, and reading the words of s. 11.52 in the context of the *CCAA* as a whole, and taking into account the purpose of the *Act*, I interpret s. 11.52 as providing the court with authority to grant an Administration Charge that attaches to all or

> part of the property of the debtor company, whether or not that property is located in British Columbia.

He stated at para. 58 that by its initial order the court "granted an Administration Charge that attached the A129 *in rem*", but added at para. 59:

> Before the U.S. Bankruptcy Court made the Recognition Order, any attempt to enforce the Administration Charge against the A129 in Seattle, Washington would have required the assistance and cooperation of the Washington Court, or the U.S. Bankruptcy Court.

[19] The judge described the effect of the Recognition Order at para. 60:

> By the Recognition Order of September 29, 2011, the U.S. Bankruptcy Court recognized the *CCAA* proceedings and ordered that the administration and realization of the petitioners' only asset in the United States, the A129, was entrusted to the foreign representative acting in the *CCAA* case. That foreign representative is the Monitor. By the Recognition Order, the U.S. Bankruptcy Court deferred to this Court matters relating to the administration and realization of the petitioners' assets in the United States, including the issue of whether the Administration Charge attached to the A129. The Recognition Order precluded CAT from executing against the A129 in the United States. After the Recognition Order, CAT had no means of asserting its security interest in the A129, other than through the *CCAA* proceedings.

[20] It was the judge's view that it was unnecessary to determine what the Washington Court would have done if asked to determine whether the Administration Charge attached to the A129 or whether it ranked in priority to CAT's mortgage under United States law. He stated, "I must decide this case having regard to the orders actually made by this Court, and by the [Washington Court]" (para. 61).

[21] The judge concluded at para. 65:

> The Administration Charge is an in rem charge that attached to the A129 and continues to attach the proceeds of sale, which now stand in place of the vessel. Accordingly, the solicitors for CAT, Boughton Law Corporation, will pay and deliver to the Monitor the balance of the proceeds of sale of the A129 in the amount of $170,000.

Discussion

[22] Two different lines of inquiry are relevant to the determination of whether the Administration Charge ultimately attached to the sale proceeds of the A129. The first question is whether the Administration Charge attached to the A129 *in rem* under the *CCAA* proceedings. The second question relates to the status of the charge in light of both the *CCAA* proceedings and the Recognition Order.

Extra-territoriality

[23] The judge stated that the Administration Charge attached to the A129 *in rem*. Insofar as this may suggest the extra-territorial operation of the order granting the charge, I do not agree. As the judge noted, prior to the Recognition Order, resort would have been required to the United States courts to enforce the charge.

[24] The Supreme Court of Canada has stated that while Parliament has the legislative competence to enact laws having extra-territorial effect, it is presumed not to intend to do so in the absence of clear words or necessary implication to the contrary: *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45 at para. 54:

> While the Parliament of Canada, unlike the legislatures of the Provinces, has the legislative competence to enact laws having extraterritorial effect, it is presumed not to intend to do so, in the absence of clear words or necessary implication to the contrary. This is because '[i]n our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least generally, respected'; see *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1051, *per* La Forest J.

[25] The *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, is an example of legislation that explicitly allows a court to deal with property outside Canada. It defines "property" as:

> … any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property.

When a court assigns the property of a bankrupt to a trustee, this includes assigning movable and immovable property outside Canada. The *CCAA* does not contain a definition of property and does not explicitly specify whether it refers to property within Canada only or property everywhere.

[26] Although the implications of the definition of property in the *Bankruptcy and Insolvency Act* is not a matter before us on this appeal, in my view it operates *in personam*, not *in rem*; the rights of the debtor are vested in the trustee. Realization of those rights is governed by the law where the property is located. The issue does not arise under the *CCAA* because there is nothing in the legislation to suggest that its reach extends *in rem* to property outside Canada.

[27] More importantly, Part IV of the *CCAA* deals specifically with cross-border insolvency. It is based on the *Model Law on Cross-Border Insolvency* drafted by the United Nations Commission on International Trade Law in 1997. Chapter 15 of the *United States Bankruptcy Code* (USC tit 11 §§1501-1532) also is based on the *Model Law*.

[28] In the present case, the initial *CCAA* order from June 6, 2011 contained the following provisions:

> 46. THIS COURT REQUESTS the aid and recognition of other Canadian and foreign Courts, tribunal, regulatory or administrative bodies, including any Court or administrative tribunal of any Federal or State Court or administrative body in the United States of America, to act in aid of and to be complementary to this Court in carrying out the terms of this Order where required. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Petitioners and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Petitioners and the Monitor and their respective agents in carrying out the terms of this Order.
>
> …

> 48. Each of the Petitioners and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada, including acting as a foreign representative of the Petitioners to apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *United States Bankruptcy Code*, 11 U.S.C. §§101-1330, as amended.

[29] In my view, it is clear that neither the *CCAA* nor the orders made in this case support the proposition that the Administration Charge attached *in rem* to the A129. They are inconsistent with the unilateral attachment of the charge to property in the United States.

Effect of the court orders

[30] The starting point in the analysis is the *CCAA*. Pursuant to s. 11.52, a *CCAA* court may establish a charge to cover the costs and expenses of a monitor and those who assist the monitor. The court also is authorized to order that the charge ranks in priority over the claim of any secured creditor. The Administration Charge at issue in this case was made in accordance with s. 11.52. It ranked in priority to the interests of creditors who had security on the non-vessel property of Worldspan. As noted, property was defined as "including all proceeds".

[31] The Recognition Order was granted on the joint application of Worldspan and the Monitor. The United States court was provided with information concerning the initiation of the *CCAA* proceedings. A copy of the order appointing the Monitor was exhibited to the affidavit of a member of the firm appointed as the Monitor.

[32] The judge recited the style of cause and action number of the *CCAA* proceeding and declared it to be a "foreign proceeding" under United States bankruptcy law. He stated:

> The Monitor is a duly appointed "foreign representative" within the meaning of §101(24) of the Code.

He then designated the *CCAA* proceeding as a "foreign main proceeding".

[33] The judge made the following orders:

> … this Court hereby recognizes the *CCAA* Case as a foreign main proceeding pursuant to Chapter 15 (the "Foreign Main Proceeding") with the Monitor and the Petitioners or either of them as appropriate under the supervision of the Canadian Court, serving as the foreign representatives as authorized under orders the *CCAA* Case and applicable provisions of the *CCAA* (the "Foreign Representatives");
>
> … the following are stayed:
>
> a. the commencement or continuation of an individual action or proceeding concerning the Petitioners' assets, rights, obligations or liabilities, other than pursuit of claims through the *CCAA* Case and this Chapter 15 case; and
>
> b. any execution against the Petitioners' assets in the United States;
>
> … except with respect to the Foreign Representatives rights to act as authorized in the Foreign Main Proceeding as provided herein, the right to transfer, encumber, or otherwise dispose of any assets of the Petitioners in the United States is suspended;
>
> … the administration and realization of the Petitioners' assets within the United States are hereby entrusted to the Foreign Representative acting in the *CCAA* Case.

[34] In my view, there is nothing in the Recognition Order to suggest that the portion of the *CCAA* order authorizing the Administration Charge and granting it priority would not apply to funds realized from the sale of the A129. The United States court did not purport to limit in any way the process of realization to be undertaken under the supervision of the *CCAA* court. It specifically entrusted that realization to the Monitor acting in the *CCAA* case.

[35] In argument, the parties did not address the implications of para. 3 of the judge's April 20, 2012 order or his comments about the provision in para. 32 of his reasons for the order under appeal. In my view, para. 3 and the judge's comments flowed out of his view that the Administrative Charge attached to the A129 in the United States. As noted, in my view, it did not.

[36] More importantly, I agree with the judge that the issue in this case must be determined by looking at the orders of the *CCAA* court and the Recognition Order. The latter stayed execution on the debtor's assets in the United States and, as

noted, entrusted realization to the Monitor "acting in the *CCAA* Case". Those proceedings attached the Administrative Charge to the proceeds of sale in Canada.

[37] I do not suggest that questions of foreign law may not arise in these matters, but they do not do so in the context of the issue on this appeal.

[38] Although the appellant argued that priorities must be determined in the context of maritime law, in my view, it is not necessary to deal with that issue in this case. The Federal Court's maritime jurisdiction was engaged in the context of the Sargeant yacht because a maritime lien was involved. The United States court discharged the maritime lien filed against the A129 in that jurisdiction to enable the vessel to be sold. No challenge was made to the authority of the *CCAA* court to grant the Administration Charge. This issue is the effect of that order in conjunction with the Recognition Order on the proceeds of the sale of the A129.

Conclusion

[39] The Administration Charge did not attach *in rem* to the A129.

[40] The Monitor's entitlement to the Administration Charge in priority to the rights of CAT is determined on a consideration of the *CCAA* proceedings and the Recognition Order.

[41] The United States court directed that all matters concerning the A129 be dealt with by the Monitor in the *CCAA* proceedings. The United States court was fully cognizant of the terms of the *CCAA* order appointing the Monitor and establishing the Administration Charge. It placed no limitation on its direction.

[42] While the Administration Charge did not attach *in rem* to the A129, insofar as the security on that vessel was realized in the *CCAA* proceedings, the Administration Charge attached to the proceeds of sale and had the priority given to it by the *CCAA* court.

[43] I would dismiss this appeal.

"The Honourable Mr. Justice Chiasson"

Concurring Reasons for Judgment of the Honourable Madam Justice Garson:

[44] I have had the privilege of reading in draft the reasons for judgment of my colleague, Mr. Justice Chiasson. I agree with his analysis and his conclusions but wish to add the following further analysis concerning the application of the Model Law on Cross-Border Insolvency.

[45] The *CCAA* order is an *in rem* order. This is clear from paras. 32 and 35 of the order, which were framed in *in rem* language as follows:

> The monitor, counsel to the Monitor, if any, and counsel to the Petitioners shall be entitled to the benefit of and are hereby granted a charge (the "Administration Charge") on the Non-Vessel Property . . . .
>
> . . .
>
> Each of the Administration Charge and the Directors' Charge . . . shall constitute a mortgage, security interest, assignment by way of security and charge on the Non-Vessel Property and such Charges shall rank in priority to all other security interests . . .
>
> [Emphasis added.]

[46] This is consistent with the language of s. 11.52 of the *CCAA*, which states,

> (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge …
>
> . . .
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

This language contemplates the court making an order declaring all or part of the property of a debtor subject to a charge. This can only be interpreted as an *in rem* order.

[47] The chambers judge was correct that the *CCAA* order was an *in rem* order, but incorrect when he suggested that, without more, it could have extra-territorial effect. Thus the *CCAA* order could not, without more, attach a priority charge to a foreign asset (i.e., the vessel situated in Washington).

[48] The May 10, 2011 Washington arrest warrant in the Washington foreclosure proceeding was an arrest warrant in which that court exercised its *in rem* jurisdiction over the vessel in Washington.

[49] The April 20, 2012 British Columbia Supreme Court order for sale preserves the parties' positions; that is, it provided that the sale proceeds were to be treated on the same basis as the vessel itself.

[50] Therefore the Recognition order is the only basis by which the British Columbia court could exert any extra-territorial reach in order to enforce a British Columbia priority charge on foreign property or proceeds. The effect of the recognition order is to stay the Washington foreclosure proceeding in favour of the "foreign main proceeding"; that is, the British Columbia *CCAA* proceeding.

[51] The recognition order was made pursuant to Chapter 15 of the *Bankruptcy Code*, which is the U.S. enactment based on the Model Law on Cross-Border Insolvency. The Model Law on Cross-Border Insolvency was drafted by the United Nations Commission on International Trade Law ("UNCITRAL"), and approved by the General Assembly of the United Nations without objection in 1997: A/RES/52/158. The Model Law was also adopted by the Parliament of Canada through the enactment of Part IV of the *CCAA*, ss. 44 to 61: see Bill C-55, *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, 1st Sess, 38th Parl, 2005, cls. 124–31 (as given royal assent on November 25, 2005). The intention of Parliament to adopt the Model Law is evidenced by a review of the Parliamentary debate surrounding the passage of the amendments to Canada's insolvency regime: see *House of Commons Debates*, 38th Parl, 1st Sess, No. 128 (September 29, 2004) at 1243, 1345 (Hon. Hedy Fry; Hon. Don Boudria).

[52] The Guide to Enactment and Interpretation of the UNCITRAL Model Law describes the purpose of the model law:

> **Purpose**
>
> The Model Law is designed to assist States to equip their insolvency laws with a modern legal framework to more effectively address cross-border insolvency proceedings concerning debtors experiencing severe financial distress or insolvency. It focuses on authorizing and encouraging cooperation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency law, and respects the differences among national procedural laws. For the purposes of the Model Law, a cross-border insolvency is one where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place.

The Guide describes the key provisions of the law. Of relevance to this appeal is the key provision relating to Recognition:

> *(b) Recognition*
>
> One of the key objectives of the Model Law is to establish simplified procedures for recognition of qualifying foreign proceedings in order to avoid time-consuming legalization or other processes that often apply and to provide certainty with respect to the decision to recognize. These core provisions accord recognition to orders issued by foreign courts commencing qualifying foreign proceedings and appointing the foreign representative of those proceedings. Provided it satisfies specified requirements, a qualifying foreign proceeding should be recognized as either a main proceeding, taking place where the debtor had its centre of main interests at the date of commencement of the foreign proceeding or a non-main proceeding, taking place where the debtor has an establishment. Recognition of foreign proceedings under the Model Law has several effects—principal amongst them is the relief accorded to assist the foreign proceeding.

[53] The relevant (for the purposes of this appeal) provisions of the *CCAA* implementing the Model Law are found at ss. 44, 45, and 48, under the Part titled "Cross Border Insolvencies":

> Purpose
>
> **44.** The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote
>
> (*a*) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
>
> (*b*) greater legal certainty for trade and investment;

> (*c*) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
>
> (*d*) the protection and the maximization of the value of debtor company's property; and
>
> (*e*) the rescue of financially troubled businesses to protect investment and preserve employment.
>
> …
>
> Definitions
>
> **45.** (1) The following definitions apply in this Part.
>
> "foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding.
>
> "foreign main proceeding" means a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests.
>
> "foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding.
>
> …
>
> **48.** (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,
>
> (*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the *Bankruptcy and Insolvency Act or* the *Winding-up and Restructuring Act*;
>
> (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and
>
> (*d*) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

[54] The Model Law has previously been recognized by Canadian courts as the basis of Part IV of the *CCAA*: see e.g. *Probe Resources Ltd. (Re)*, 2011 BCSC 552 at para. 18; *MtGox Co. (Re)*, 2014 ONSC 5811 at para. 11.

[55] Consistent with the goals and objectives of the Model Law, Chapter 15 of the United States' *Bankruptcy Code* includes mirror provisions to Part IV of the *CCAA*:

> (a) The purpose of [Chapter 15] is to incorporate the Model law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of—
>
> (1) cooperation between—
>
> (A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and
>
> (B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;
>
> (2) greater legal certainty for trade and investment;
>
> (3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;
>
> (4) protection and maximization of the value of the debtor's assets; and
>
> (5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.
>
> . . .
>
> In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.
>
> [11 U.S.C. §§ 1501, 1508]

[56] In summary, the Recognition Order was made pursuant to the Model Law adopted by Chapter 15. This order recognized the British Columbia *CCAA* proceeding as the foreign main proceeding. It stayed the local proceeding (the foreclosure) pursuant to §§ 1521(a)(1) and (2) of Chapter 15, and, most importantly, it ordered that "the administration and realization of Worldspan's assets within the United States are entrusted to the foreign representative acting in the *CCAA* case pursuant to s. 1521(5)". The only U.S. asset of Worldspan was the vessel. It was unnecessary for the Recognition order to specify that it applied to that one specific asset. The whole purpose of the Model Law as adopted into U.S. and Canadian law is to coordinate the two regimes. Once the Canadian proceedings were recognized as the foreign main proceeding, it was entirely for the British Columbia Supreme Court to determine priority. This is consistent with Part IV of the *CCAA*.

[57] I conclude that the chambers judge was correct in ordering that the monitor's charge had priority over the CAT mortgage. The adoption of the Model Law into Part IV provided him with the jurisdiction to make the order under appeal, despite the general principle that a domestic court will not make an *in rem* order affecting title to foreign property, as the Washington Court had deferred such determinations to the British Columbia Supreme Court. In such circumstances, comity dictates that the chambers judge had the jurisdiction to give priority to the *CCAA in rem* Administrative Charge over CAT's mortgage.

[58] I would dismiss the appeal.

"The Honourable Madam Justice Garson"

I agree with both my colleagues:

"The Honourable Madam Justice Neilson"

2007 BCCA 14
British Columbia Court of Appeal

Caterpillar Financial Services Ltd. v. 360networks Corp.

2007 CarswellBC 29, 2007 BCCA 14, [2007] B.C.W.L.D. 869, [2007] B.C.W.L.D. 870, [2007] B.C.W.L.D. 871, [2007] B.C.W.L.D. 934, [2007] B.C.J. No. 22, 10 P.P.S.A.C. (3d) 311, 154 A.C.W.S. (3d) 719, 235 B.C.A.C. 95, 279 D.L.R. (4th) 701, 27 C.B.R. (5th) 115, 28 E.T.R. (3d) 186, 388 W.A.C. 95, 61 B.C.L.R. (4th) 334

Caterpillar Financial Services Limited (Appellant / Plaintiff) and 360networks corporation, 360fiber ltd., 360finance ltd., Carrier Centers (Canada) Ltd., 360Urbanlink Ltd., 360networks (cdn fiber) Ltd., 360networks services ltd., 360cayer ltée (Respondents / Defendants) and JPMorgan Chase Bank (Respondent / Intervenor)

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; In the Matter of the Nova Scotia Companies Act, S.C., c. 81; In the Matter of the Companies Act, R.S.B.C. 1996, c. 62; In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44; Caterpillar Financial Services Limited (Appellant) and 360networks inc., 360networks (holdings) ltd., 360fiber ltd., 360finance ltd., Carrier Centers (Canada) Ltd., 360 Urbanlink Ltd., 360Networks (Cdn Fiber) Ltd., 360networks services ltd., 360cayer ltée 360engineering ltd., 360pacific (canada) inc., 360networks sub inc., Threesixty Atlantic (Barbados) Inc., 360atlantic (canada) inc., 360atlantic (usa) inc., 360atlantic sales (usa) inc. (Petitioners / Respondents)

Prowse, Saunders, Kirkpatrick JJ.A.

Heard: November 17, 2006
Judgment: January 9, 2007
Docket: Vancouver CA32259, CA32286

Proceedings: affirming *Caterpillar Financial Services Ltd. v. 360networks corp.* (2004), 7 P.P.S.A.C. (3d) 1, 10 E.T.R. (3d) 59, 4 C.B.R. (5th) 4, 35 B.C.L.R. (4th) 145, 2004 BCSC 1066, 2004 CarswellBC 1835 (B.C. S.C.)

Counsel: D.A. Garner, J.A. Rost for Appellants
R.A. Millar, K. Robertson for Respondents

Headnote

Bankruptcy and insolvency --- Proving claim — Disallowance of claim — Appeal from disallowance — Grounds

Lessee entered into leases in 1997 and 1999 with lessor — Under terms of lease, there was option at end of term of each lease agreement to purchase units, return units or agree with lessor to extend terms of lease — By February 2001, lessee was experiencing financial difficulties and sought to dispose of leased equipment — Lessee commenced proceedings under Companies' Creditors Arrangement Act ("CCAA") on June 28, 2001 — Confirmation order contained stay of all proceedings against lessee and restricted lessee to payment of obligations incurred only after Filing Date to persons who advanced or supplied goods after Filing Date — On July 24, 2002, procedural order was granted permitting lessee to file plan of arrangement — Plan was sanctioned on September 4, 2002 — Lessor submitted its proof of claim and lessee disallowed claim — Lessor appealed disallowance — Lessor was granted leave to commence separate action in which it claimed that it had constructive trust over all sale proceeds of units — Both actions were heard at same time — Trial judge concluded that lessor fell within definition of Secured Creditor as defined by plan but that full amounts owing under lease agreements were compromised by plan as deficiency claims — Lessor appealed — Appeal dismissed — In absence of specified date for calculating realizable value, trial judge considered all other reasonable sources for determining that critical date — To suggest that Plan should not be considered in making that determination was unreasonable —

There was no doubt that lessor's security position was eroded between Filing Date and Plan Filing Date — Lessor had knowledge that lessee intended to sell lessor's collateral — Lessor had sufficient opportunity to demand payment prior to Filing Date — After Filing Date, lessee was prohibited by terms of initial order to make any payments to creditors holding pre-filing claim — Trial judge did not err in finding that proper date for determining realizable value of assets was July 24, 2002.

Estates and trusts --- Trusts — Constructive trust — Miscellaneous issues

Lessee entered into leases in 1997 and 1999 with lessor — By February 2001, lessee was experiencing financial difficulties and sought to dispose of leased equipment — Lessee commenced proceedings under CCAA on June 28, 2001 — On July 24, 2002, procedural order was granted permitting lessee to file plan of arrangement — Lessor submitted its proof of claim on or about September 19, 2002 and lessee disallowed claim — Lessor appealed disallowance — Lessor was granted leave to commence separate action in which it claimed that it had constructive trust over all sale proceeds of units — Both actions were heard at same time — Trial judge concluded that lessor was not entitled to declaration of constructive trust over sale proceeds from units 1, 2, and 3 but was entitled to declaration to extent of buyout amounts in respect to units 4, 7 and 8 — Lessor appealed — Appeal dismissed — Lessee conceded that lessor suffered deprivation — Trial judge found enrichment by lessee in form of reduction of its indebtedness — Trial judge found two independent juristic reasons for deprivation — Lessor's loss was product of its failure to protect its security upon receiving notice that lessee intended to sell units — Leases merely permitted lessee to sell its rights to units — Sales constituted blatant breach of leases — It was clear that when lessor entered into leases, it intended to secure obligations owed by lessee by retaining title to units — Pursuant to Personal Property Security Act ("PPSA"), lessor could perfect its security by registration — Failure to register or perfect its security meant that, as between lessor and any third parties, lessor was general creditor in respect of units 2 and 3 — Although lessor had negotiated with lessee to be secured creditor, it ultimately failed to protect its status as secured creditor under PPSA — As such, lessor must be taken to have accepted risk posed by lessee's eventual insolvency — Lessor should not be able to invoke constructive trust principles to alter its reduced creditor status — Lessor appeared to be employing remedy of constructive trust to vault its security position in respect of units 1, 2, and 3, contrary to provisions of PPSA and CCAA — Trial judge did not err in his analysis.

Bankruptcy and insolvency --- Proposal — Practice and procedure

Lessee entered into leases in 1997 and 1999 with lessor — By February 2001, lessee was experiencing financial difficulties and sought to dispose of leased equipment — Lessee commenced proceedings under CCAA on June 28, 2001 — On July 24, 2002, procedural order was granted permitting lessee to file plan of arrangement — Lessor submitted its proof of claim on or about September 19, 2002 and lessee disallowed claim — Lessor appealed disallowance — Lessor was granted leave to commence separate action in which it claimed that it had constructive trust over all sale proceeds of units — Both actions were heard at same time — Trial judge concluded that lessor was not entitled to declaration of constructive trust over sale proceeds from units 1, 2, and 3 but was entitled to declaration to extent of buyout amounts in respect to units 4, 7 and 8 — Lessor appealed — Appeal dismissed — Failure to file notice of name change did not undermine validity of registration of security interest — Failure to file notice of name change solely impacted priority — Application of s. 51(2) of PPSA resulted in lessor's perfected security interest with respect to unit being subordinate to Senior Lenders' perfected security interest.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Lessee entered into leases in 1997 and 1999 with lessor — Under terms of lease, there was option at end of term of each lease agreement to purchase units, return units or agree with lessor to extend terms of lease — By February 2001, lessee was experiencing financial difficulties and sought to dispose of leased equipment — Lessee commenced proceedings under CCAA on June 28, 2001 — Confirmation order contained stay of all proceedings against lessee and restricted lessee to payment of obligations incurred only after Filing Date to persons who advanced or supplied goods after Filing Date — On July 24, 2002, procedural order was granted permitting lessee to file plan of arrangement — Plan was sanctioned on September 4, 2002 — Lessor submitted its proof of claim on or about September 19, 2002 and lessee disallowed claim — Lessor appealed disallowance — Lessor was granted leave to commence separate action in which it claimed that it had constructive trust over all sale proceeds of units — Both actions were heard at same time — Breach of trust relating to sale proceeds from unit 4 constituted Post-Filing Claim that was not compromised by Plan — Lessor appealed — Appeal dismissed — Both lessor and lessee agreed that holding of funds without lessor's authorization constituted

breach of trust — Lessee was in breach from moment it retained sale proceeds without either remitting them to lessor or lessor's authorization — Breach continued until lessor's claim was either satisfied or compromised by Plan — Lessor, after acknowledging that there was breach of trust prior to Filing Date, could not identify post-Filing Date event to convert its entire claim to post-Filing claim — It was act of writing cheques and delivering them to payee that constituted breach of trust — Trial judge did not err in fixing date of breach to be when breach was being actively committed, as opposed to when it was allegedly being committed by omission.

***Kirkpatrick J.A.*:**

1 The appellant, Caterpillar Financial Services Limited ("Caterpillar") appeals from the 11 August 2004 order of the Supreme Court that, with one relatively modest exception, denied Caterpillar's claim to recover the amounts owed to it under its equipment leases to the respondents, the 360 group of companies ("360"). Caterpillar's claims were determined in the context of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), in which 360 sought to reorganize its affairs.

Background

2 The background facts to this appeal are deceptively straightforward because, as it will become evident, application of the law to these facts is complex. The essential facts are as follows.

3 At all material times in question, 360 was involved in the development and construction of a worldwide fibre optic communications network. The work was initially undertaken by Ledcor Industries Limited. Ledcor Industries Limited subsequently transferred the fibre optic portion of its business to Ledcor Communications Ltd. in 1999. The trial judge found that Ledcor Communications Ltd. changed its name to 360fiber ltd. no later than on 28 June 2000.

4 Caterpillar is in the business of leasing heavy duty construction equipment. On 14 February 1997, 360fiber's pre-predecessor company, Ledcor Industries Limited, entered into a Master Finance Lease with Caterpillar. The lease contemplated that each piece of equipment (referred to as a "unit") leased by Caterpillar would be documented by a subsequently issued schedule. Essentially, each schedule constituted a separate lease agreement, but the provisions of the Master Finance Lease applied to each lease agreement.

5 On 30 March 1999, 360fiber's predecessor company, Ledcor Communications Ltd., entered into a new Master Finance Lease. Under the terms of that lease, 360fiber had the option at the end of the term of each lease agreement to purchase the equipment, return the equipment, or agree with Caterpillar to extend the term of the lease.

6 The governing Master Finance Lease provided:

> 4.1 Lessee shall not ... (f) sell, assign or transfer, or directly or indirectly create, incur or suffer to exist any lien, claim, security interest or encumbrance on any of its rights hereunder or in any Unit.
>
> . . .
>
> 4.6 The Units are and shall remain the personal property of Lessor irrespective of their use or manner of attachment to realty, unless such units are purchased by the Lessee at the end of the lease term or at such time as Lessee has paid to Lessor the "Balance Due" (as hereinafter defined).
>
> . . .
>
> 11. Unless assigned by Lessor or applicable law provides otherwise, title to and ownership of the Units shall remain in Lessor as security for the obligations of Lessee hereunder until Lessee has fulfilled all of such obligations. Lessee hereby grants to Lessor a continuing security interest in the Units ... and all proceeds of all of the foregoing, to secure the payment of all sums due hereunder.

"Balance Due" was defined under each Master Finance Lease as the sum of:

> (i) all amounts then due or accrued under this Lease with respect to such Unit, (ii) the present value of the entire unpaid balance of all rental for such Unit, and (iii) the present value of the ... "Purchase Option Price" ... of such Unit set forth on the applicable Schedule, (iv) less any insurance proceeds ...

Each of the schedules issued pursuant to the Master Finance Leases contained the following option:

> At the end of the Lease term with respect to the Units, provided this Lease has not been earlier terminated with respect to such Units, Lessee may by written notice to Lessor no more than 60 days prior to the end of the Lease Term with respect to any Unit, elect to purchase at the end of such term such Unit for the Purchase Price of $ ... If Lessee does not elect to purchase such Unit at the end of such term, Lessee shall return such Unit to Lessor as provided in Section 4 of the Master Finance Lease ...

7 This appeal centers on six units:

> (a) Unit 1 was leased for four years commencing April 1997. Financing statements were registered for this unit under s. 43 of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 ("*PPSA*"). However, Caterpillar did not file a financing change statement under s. 51 of the *PPSA* when Ledcor Communications Limited changed its name to 360fiber.
>
> (b) Unit 2 was leased for three years commencing August 1999. The trial judge found, and Caterpillar does not contest this finding on appeal, that Caterpillar failed to register a financing statement for this unit under the *PPSA*.
>
> (c) Unit 3 was leased for three years commencing August 1999. No financing statement was registered for this unit.
>
> (d) Unit 4 was leased for three years commencing December 1997. The term was extended for two years by a modification agreement. Caterpillar registered financing statements and financing change statements for this unit.
>
> (e) Unit 7 was leased for three years commencing April 2000. Financing statements and financing change statements were registered for this unit.
>
> (f) Unit 8 was leased for one year commencing June 2000. The term was extended for three years by a modification agreement. Financing statements and financing change statements were registered for this unit.

8 The total amount claimed by Caterpillar in respect of these units was $785,392.27.

Disposition of the Units and Use of Sale Proceeds

9 By February 2001, 360 was experiencing financial difficulties. Consequently, 360 sought to dispose of its leased equipment. The trial judge accepted that, in late January or early February 2001, Caterpillar consented to 360fiber's sale of about 60 of Caterpillar's leased units during the currency of the applicable leases and subsequent retention of the "equity."

10 On 16 February 2001, 360fiber provided Caterpillar with a list of 66 units that were to be auctioned. The list did not include the six units that are the subject of this appeal.

11 In April 2001, 360fiber sold units 7 and 8 directly to a U.S. railroad company. The sale proceeds of $231,902.79 (U.S.) were deposited into 360's U.S. bank account on 9 May 2001. At the time of the deposit, the account had a credit balance. However, it went into an overdraft position by the close of business on 29 June 2001.

12 360 concedes that the sale of units 7 and 8, and the deposit of the proceeds therefrom into its U.S. account, was in breach of its covenant to pay Caterpillar under the Master Lease Agreement. However, Caterpillar recognizes its

inability to trace the sale proceeds because 360 deposited the proceeds into an account that became overdrawn at the material time.

13 On 12 June 2001, Ritchie Bros. Auctioneers ("Ritchie") wrote two letters to Caterpillar. One letter was from Ritchie in Richmond, B.C., advising Caterpillar that on or about 26 June 2001, it was selling in Canada, the equipment described in two schedules attached to the letter. The letter requested Caterpillar to confirm if it had an interest in any of the pieces of equipment and, if so, to confirm that it would release its interest upon receipt of either a buyout amount indicated by Caterpillar as of 18 July 2001 or the net sale proceeds.

14 The second letter was from Ritchie in Portland, Oregon, advising Caterpillar that on or about 22 June 2001, Ritchie was selling in the U.S., the equipment described in the schedule attached to the letter. It similarly requested Caterpillar to confirm if it had an interest in any of the pieces of equipment and, if so, to confirm that it would release its interest upon receipt of either a buyout amount indicated by Caterpillar as of 16 July 2001 or the net sale proceeds.

15 In faxed responses to Ritchie, Caterpillar indicated a buyout figure beside each description of equipment in which it claimed an interest. Caterpillar indicated that it would release its interest in the equipment upon receipt of the buyout amounts.

16 Units 1, 3 and 4 were included in the schedule attached to the Canadian letter. Caterpillar failed to quote a figure or otherwise indicate an interest in those units.

17 Unit 2 was included in the schedule attached to the U.S. letter. Again, Caterpillar failed to quote a figure or otherwise indicate an interest in this unit.

18 The U.S. auction was held on or about 22 June 2001. The net proceeds, including those from the sale of unit 2, were $863,563.34 (U.S.). On or about 11 July 2001, Ritchie distributed the net sale proceeds by forwarding $760,470 (U.S.) to Caterpillar and $103,093.34 (U.S.) to 360. 360 deposited the cheque into its U.S. current account in Vancouver on 15 August 2001, at which time the account was in an overdraft position.

19 The Canadian auction was held on or about 26 June 2001. The net proceeds, including those from the sale of units 1, 3 and 4, were $827,365.94. On or about 13 July 2001, Ritchie distributed the net sale proceeds by forwarding $178,556.89 to another equipment lessor and $648,809.05 to 360. 360 deposited the cheque into its current account in Vancouver on 15 August 2001, at which time the account was in an overdraft position.

360's CCAA Proceedings

20 During the period 360 was disposing of the leased equipment, it was also planning to restructure its affairs under the *CCAA*. On 28 June 2001 (the "Filing Date"), 360 commenced proceedings under the *CCAA*. The initial stay order was obtained on the Filing Date. The confirmation order granted on 20 July 2001 contained, *inter alia*, a stay of all proceedings against 360. Most significantly, the initial stay order and the confirmation order restricted 360 to payment of obligations incurred only after the Filing Date to persons who advance or supply goods after the Filing Date. 360 could make no payments on account of amounts owed by it to its creditors as of the Filing Date.

21 Approximately one year later, on 24 July 2002 (the strongest candidate for the "Plan Filing Date"), the trial judge (who managed the case from the commencement of the *CCAA* proceedings) granted the procedural order that authorized 360 to file a plan of arrangement (the "Plan") substantially in the form of a plan dated 18 July 2002 and that set out the mechanisms for the filing of proofs of claim by creditors, the disallowance of claims by 360, and appeals from disallowances.

22 Caterpillar submitted its proof of claim on or about 19 September 2002 and when 360 disallowed the claim, Caterpillar appealed the disallowance.

23 On 27 August 2002, the requisite majorities of 360's creditors approved the Plan. The Supreme Court sanctioned the Plan on 4 September 2002.

24 The Plan contained numerous conditions precedent, including the resolution of Caterpillar's claims. It established two classes of creditors: the Senior Lenders and the General Creditors. The Senior Lenders, of which JPMorgan Chase Bank was the agent, were to receive $135 million in cash, new secured notes in the amount of $215 million, and 80.5% of the equity of 360networks corporation. The Senior Lenders underwrote the *CCAA* proceedings by providing funding to 360 during the restructuring process. The amount owed to the Senior Lenders as of the Filing Date was $1.176 billion (U.S.). The Plan specified that it did not affect or compromise the claims of certain specified creditors, including:

> **3.3 Unaffected Creditors**
>
> This Plan does not affect or compromise the Claims of the following Creditors and other Persons:
>
> (a) Post-Filing Claims of any Person;
>
> . . .
>
> (g) Claims of Secured Creditors (including Lien Creditors but excluding the Senior Lenders) to the extent that the Charge of such Secured Creditors against any affected assets, property and undertaking of any one of the Canadian Companies was properly registered or perfected on the Filing Date, up to the realizable value of such assets as determined pursuant to the Procedural Order, except to the extent provided for in section 3.4 hereof.
>
> [Emphasis added.]

25 Section 3.4 of the Plan reads:

> **3.4 Affected Claims of Secured Creditors**
>
> Secured Creditors other than Senior Lenders shall have no Voting Claim or Distribution Claim, except to the extent of any Deficiency Claim to which they may be entitled, in respect of the realizable value of the collateral for which a Charge has been properly registered or perfected by them, which value shall be determined by agreement between the Canadian Companies and such Secured Creditors, or by Order of the Court. The Canadian Companies shall satisfy their obligations to the Secured Creditors (other than in respect of that portion of the obligation which constitutes a Deficiency Claim) in accordance with the terms of the relevant security agreement ...

26 Certain definitions from the Plan are relevant to this appeal:

> "Charge" means a valid and enforceable security interest, lien, charge, pledge, encumbrance, ... on any assets, property or proceeds of sale of any of the Canadian Companies or a right of ownership on any equipment which was leased by any of the Canadian Companies.
>
> "Claim" means any right or claim of any Person against any one or more of the Canadian Companies whatsoever, ... in connection with any indebtedness, liability or obligation of any kind of the Canadian Companies, which indebtedness, liability or obligation is in existence at the Filing Date and which is not a Post-Filing Claim, and any interest that may accrue thereon up to and including the Filing Date where there is an obligation to pay such interest, pursuant to the terms of any contract with such Person by operation of law or in equity, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, ...based in whole or in part on facts which exist on or before the Filing Date, together with any other claims that would have been claims provable in bankruptcy had the Canadian companies become bankrupt on the Filing Date including, without restriction, a claim arising after the

Filing Date as a result of the termination of an executory contract or lease by any of the Canadian Companies as part of the restructuring of the business of the Canadian Companies.

"Creditor" means any Person having a Claim or a Post-Filing Claim against any one of the Canadian Companies

. . .

"Deficiency Claim" means that portion of the Claim of a Secured Creditor for which there would be no realizable value on liquidation of the Charge held by such Secured Creditor and which constitutes a General Creditor Claim under the Plan.

"Plan Filing Date" means the date upon which this Plan is first filed with the Court in the CCAA Proceedings.

"Secured Creditors" means any Creditor asserting a Charge, including the Senior Lenders and the Lien Creditors.

27 The Plan essentially provided that Secured Creditors' security agreements would be honoured as long as the realizable value of the assets covered by the security agreement was equal to or greater than the amount due under the security agreement. If the realizable value was less than the amount owed under the security agreement, the Plan treated the creditor as an unsecured creditor for the amount of the shortfall or deficiency and as a secured creditor to the extent of the realizable value of the assets.

28 A significant flaw in the procedural order of 24 July 2002 was the absence of a mechanism for determining the realizable value of assets. Further, the order was silent as to the date on which that determination was to be made: this date came to have critical importance.

29 If the relevant date was the Filing Date (28 June 2001), the proceeds of sale of the units were traceable and exceeded the amounts owed by 360 under the lease agreements. In this scenario, Caterpillar would not have a Deficiency Claim in respect of any of the units and would be entitled to payment in full.

30 However, if the relevant date was the Plan Filing Date (24 July 2002), the sale proceeds, having been deposited into bank accounts that were either overdrawn or became overdrawn by 24 July 2002, were no longer traceable and the realizable value of Caterpillar's collateral in the units was zero. In this scenario, Caterpillar would have a Deficiency Claim in the full amounts owed under the lease, which would be compromised under the Plan.

31 The Plan clarified that the treatment of claims was final and binding on all creditors.

The Trial Judgment

32 Caterpillar appealed from 360's disallowance of its claims in the *CCAA* proceeding. In addition, Caterpillar was granted leave to commence a separate action in which it claimed, *inter alia*, that it had a constructive trust over all the sale proceeds of the units.

33 The trial judge heard both actions at the same time. He framed the issues as follows at para. 34 of his reasons ((2004), 4 C.B.R. (5th) 4, 35 B.C.L.R. (4th) 145 (B.C. S.C.)):

> [34] The issues raised in the CCAA appeal and Action No. LO32238, as framed by counsel for Caterpillar but in my words, are as follows:
>
> > (a) is Caterpillar a Secured Creditor under the Plan entitled to payment under its lease agreements covering the Units (the "Lease Agreements") pursuant to section 3.4 of the Plan?
> >
> > (b) does Caterpillar have Post-Filing Claims under the Plan as a result of breaches of constructive trusts after the Filing Date?

(c) what is the amount owed to Caterpillar in respect of the Units which was not compromised by the Plan?

34 As the trial judge noted, Caterpillar abandoned its claim that it was entitled to a trust over all of 360's assets or that it could trace the proceeds from the sales of the units.

35 The trial judge concluded as follows:

(a) Caterpillar fell within the definition of "Secured Creditor" as defined by the Plan. However, the full amounts owing under the lease agreements were compromised by the Plan as Deficiency Claims. This conclusion was premised on the trial judge's determination that the date for ascertaining the realizable value of Caterpillar's collateral was the Plan Filing Date (24 July 2002).

(b) Caterpillar was not entitled to a declaration of constructive trust over the sale proceeds from units 1, 2 and 3, but was entitled to such a declaration to the extent of the buyout amounts under the relevant lease agreements in respect of units 4, 7 and 8. The trial judge noted that 360 improperly sold *the units themselves*, as opposed to *its rights in any units*. Further, the trial judge concluded that there were two independent juristic reasons for 360's enrichment in respect of units 1, 2 and 3. The first concerned Caterpillar's general agreement that 360 could sell equipment and retain the "equity". The second concerned the Senior Lenders' priority in respect of units 1, 2 and 3 by reason of Caterpillar's failure to perfect its security in units 2 and 3, and its failure to register a financing change statement in respect of unit 1. Consequently, Caterpillar's claim for unjust enrichment applied only to units 4, 7 and 8.

(c) The breach of trust relating to the sale proceeds from unit 4 constituted a Post-Filing Claim that was not compromised by the Plan. This conclusion rested on the trial judge's determination as to when the breach of trust occurred. The trial judge decided that in respect of units 7 and 8, it was at one of two dates: either when 360 received the proceeds and deposited them into its bank account without remitting the buyout amounts to Caterpillar (9 May 2001) or when the funds were no longer available to 360 to reduce its indebtedness to others. Although the trial judge favoured the first date, he found it unnecessary to decide the issue because in either case, the breach occurred before the Filing Date (28 June 2001). He therefore concluded that the claims in respect of units 7 and 8 were pre-filing claims that were compromised by the Plan. In contrast, because the proceeds from the sale of unit 4 were deposited into 360's overdrawn bank account on 15 August 2001, it constituted a Post-Filing Claim.

Issues

36 Caterpillar alleges that the trial judge erred:

(a) in law, in relation to Caterpillar's claim for payment in full as a Secured Creditor under the Plan, in finding that the date for determination of the realizable value of the sale proceeds of the Units was to be a date after the proceeds had been wrongfully used by 360 to reduce its own indebtedness.

(b) in law, in relation to Caterpillar's claim for a constructive trust over the sale proceeds of Units 1, 2 and 3, in finding that the priority of the general security held by 360's bankers was (a) relevant to a Post Filing Claim and (b) properly a factor to be considered in determining whether to declare the constructive trust.

(c) in law, in relation to Caterpillar's claim for damages for breach of the constructive trust declared by the court over the proceeds of sale of Units 7 and 8, in finding that the only acts relevant to the claim of breach of trust occurred before the Filing Date.

(d) in law, further in relation to Caterpillar's claim for damages for breach of the constructive trust declared by the court over the proceeds of sale of Units 7 and 8, in finding that it was the act of writing the cheques on the trust funds' bank account which constituted the breach of trust, rather than the actual withdrawal of funds.

37 Caterpillar's grounds of appeal are conveniently divided into two categories: those that relate to its claims as a Secured Creditor (ground (a)) and those that relate to its claims under constructive trust principles (grounds (b), (c) and (d)).

Discussion

Secured Creditor Claim

38 As I have noted, the trial judge found that Caterpillar was a Secured Creditor as defined by the Plan. Caterpillar agrees with this finding. Conversely, while 360 agrees with the final outcome, it takes issue with this finding.

39 In any event, Caterpillar submits that the Plan could have simply specified that the court determine the priorities of competing security interests prior to paying the Secured Creditors. Caterpillar contends that the Senior Lenders, by approving the Plan, agreed to forego priority battles and essentially allowed each Secured Creditor to be paid according to the Plan.

40 Caterpillar thus argues that priority issues have no place in *CCAA* proceedings. 360, on the other hand, argues that priority issues are central to this case.

41 At this point, it is instructive to consider the purpose of the *CCAA* regime. This Court in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (B.C. C.A.) at paras. 10 and 22 stated:

> [10] The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business.
>
> . . .
>
> [22] The C.C.A.A. was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became insolvent liquidation followed because that was the consequence of the only insolvency legislation which then existed — the *Bankruptcy Act* and the *Winding-up 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.

42 While it might be suggested that *CCAA* proceedings may require those with a financial stake in the company, including shareholders and creditors, to compromise some of their rights in order to sustain the business, it cannot be said that the priorities between those with a financial stake are meaningless. The right of creditors to realize on any security may be suspended pending the final approval of the court, but this does not render their potential priority nugatory. Priorities are always in the background and influence the decisions of those who vote on the plan.

43 In "Reorganizations under the Companies' Creditors Arrangement Act" (1947) 25 Canadian Bar Rev. 587 at 595-97, the learned author Stanley E. Edwards explains the necessity of considering priorities in *CCAA* proceedings:

> In order to make an equitable redistribution of the securities of a company and the other claims against it, it is important to classify the creditors and shareholders according to their contract rights. Most important will be their respective rights of participation in the distribution of the company's income while it is operating, and its assets on liquidation. Included also will be the power which secured creditors would have but for the C.C.A.A. to realize upon the property by foreclosure in priority to other claimants. I would suggest that the aspect of these rights to be first considered should be not their face or nominal value, but rather what they would in reality be worth if the company had been liquidated rather than reorganized. This would entail a valuation and estimate of what the assets

would bring at a public sale, or be worth to the secured creditors upon foreclosure. There can hardly be a dispute as to the right of each of the parties to receive under the proposal at least as much as he would have received if there had been no reorganization...

...The United States Supreme Court by adopting the absolute priority doctrine as a "fixed principle", has in effect compelled the full recognition in a plan of all of the former nominal participation rights of senior claimants in priority to any rights of junior creditors or stockholders. It has held that although the requirements of feasibility may preclude giving senior claimants the same type of participation as they had before, they may be compensated for giving up seniority or a high interest rate by giving them a larger face value of inferior securities or some other concession. This rule...may well necessitate the exclusion of some of the junior classes from any participation in the reorganized company...

In England, on the other hand, the courts will sanction any scheme if the formal statutory requirements have been satisfied and if the senior classes obtain at least what they would be entitled to on liquidation, regardless of how the increase in value resulting from the reorganization is distributed...

...it would seem to me that considerations of policy point to the desirability of adopting the American rule... [Emphasis added.]

44 According to Edwards (at 603), priorities are also relevant in the classification of creditors under the *CCAA*:

[T]he court should examine the nature of the claims of the creditors in order to classify them properly. For example, no two secured creditors should be grouped together unless their security is on the same or substantially the same property and in equal priority. Further divisions may be made on the basis of other legal preferences or according to whether the claim is liquidated or unliquidated, absolute or contingent. [Emphasis added.]

45 In *Stelco Inc., Re* (2005), 204 O.A.C. 205, 78 O.R. (3d) 241 (Ont. C.A.), the court articulated relevant principles in determining "commonality of interest" for *CCAA* classification purposes. The court stated as follows at para. 23:

In *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), Paperny J. nonetheless extracted a number of principles to be considered by the courts in dealing with the commonality of interest test. At para. 31 she said:

> In summary, the cases establish the following principles applicable to assessing commonality of interest:
>
> . . .
>
> 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
>
> . . .

46 The Ontario Court of Appeal's decision in *1078385 Ontario Ltd., Re* (2004), 206 O.A.C. 17, 16 C.B.R. (5th) 152 (Ont. C.A.) [*Bob-Lo Island*] suggests that secured creditors may assume a leadership role in a restructuring process that has traditionally been directed by debtor companies to the company's general benefit. Further, the decision appears to create an opportunity for secured creditors to use the *CCAA* as an efficacious shortcut to enforce their security. Ultimately, *Bob-Lo Island* represents the evolution of the role of secured creditors under the *CCAA*, and the use of the statute as a flexible and advantageous restructuring tool for secured creditors. The Ontario Court of Appeal, in dismissing a motion for leave to appeal a decision of the Ontario Superior Court of Justice, held that the fact that a plan of arrangement under the *CCAA* is put forth by a secured creditor, which plan vests all of the debtor company's assets into a non-arm's length purchaser and operates exclusively for the benefit of secured creditors, does not, in and of itself, negate the fairness and reasonableness of such a plan where it can be shown that, even outside of the plan, the assets of the debtor company will not generate any recovery for unsecured creditors. In response to the argument that the plan was a shortcut in the

realization of assets without regard to traditional means of enforcing security, the Superior Court noted at para. 125: "To a certain extent, that is true, but I think that is the nature of the CCAA" ((2004), 16 C.B.R. (5th) 144 (Ont. S.C.J.)).

47 As I have said, Caterpillar agrees with the trial judge's finding that it was a Secured Creditor as defined by the Plan. However, Caterpillar contends that the trial judge erred in finding that the date for determining realizable value was the Plan Filing Date (24 July 2002).

48 The dispute arises because, contrary to s. 3.3(g) of the Plan, the procedural order did not contain a mechanism for determining the realizable value of assets. The trial judge resolved the issue as follows at paras. 43-47:

> [43] The Plan does not provide any clear assistance by specifying the date on which the realizable value of secured assets should be determined. Clause (g) of section 3.3 refers to the realizable value of the assets "as determined pursuant to the Procedural Order", which, as mentioned above, does not contain a mechanism other than the proof of claim process. Section 3.4 provides that the value is to be "determined by agreement between the Canadian Companies and such Secured Creditors, or by Order of the Court".
>
> [44] It is my view that, in the absence of a specific date being identified, the effective date of the valuation of the assets should be the date on which the Plan was formerly [sic] issued (namely, the Plan Filing Date). As was stated at section 4.13 of The Interpretation of Contracts 2nd ed. (London: Sweet & Maxwell, 1997):
>
> > Since a contract must be interpreted as at the date when it was made, words must be given the meaning which they bore at that date ...
>
> In referring to the realizable value of the assets, the Plan must be taken to mean the current realizable value. It would not make sense for 360 to pay more for the asset than it was worth at the time 360 issued the Plan. Put in the context of the present circumstances, it would not make sense for 360 to agree to make payments under leases when it did not intend to use the leased equipment in its future operations.
>
> [45] If it had been the intention that the realizable value of assets was to be determined as of a date other than the current date, it would have been very easy to specify an earlier date. For example, the requirement in clause (g) of section 3.3 for the proper registration or perfection of the Charge was that it be "registered or perfected on the Filing Date". The very next phrase in clause (g) makes reference to the realizable value of the assets but does not contain the same words "on the Filing Date". The drafter's mind had been directed to the "Filing Date" when drafting clause (g) and the absence of those words to modify the phrase "the realizable value of such assets" suggests that it was not the intention to have the assets valued as at the Filing Date.
>
> [46] Support for this interpretation is found in the definition of "Equipment Lessor", which was defined to mean a Creditor holding a title interest in relation to equipment in the possession of the Canadian Companies at the Filing Date "which remains in the possession of the Canadian Companies on the Plan Filing Date". Caterpillar does not actually fall within this definition because the units were not in the possession of 360fiber at the Filing Date, but it is instructive of the Plan's treatment of equipment lessors generally.
>
> [47] The term "Equipment Lessor" was used in the definition of "General Creditor" ("... in the case of an Equipment Lessor, any arrears outstanding as at the Filing Date"). General Creditors were the creditors whose claims were compromised under the Plan. The Plan demonstrates that it was the intention to require 360 to make payments on leases only if it would be using the leased equipment in its future operations (but excluding arrears owing on the Filing Date, which would be treated as an unsecured or general claim). The manner in which the definition of "Equipment Lessor" was drafted suggests that the full amounts owing under leases of equipment no longer in the possession of 360 on the Plan Filing Date would be compromised under the Plan.

49 Caterpillar submits that since the drafters of the Plan omitted to articulate a mechanism for determining realizable value, the Plan itself should be of no use in making such determination. Ultimately, Caterpillar proposes that the proper date for valuation is the date on which the assets were "used" by 360 to reduce its indebtedness to others.

50 In my opinion, Caterpillar's arguments cannot succeed. In the absence of a specified date for calculating realizable value, the trial judge considered all other reasonable sources for determining that critical date. To suggest that the Plan should not be considered in making this determination is unreasonable. It is true that the Plan contemplated that the procedural order would specify a mechanism for determining realizable value. However, the fact that the expectation was never realized does not render the Plan barren of meaning in this regard.

51 Caterpillar's proposition — that the proper date for valuation of the assets is the date on which they were "used" by 360 contrary to the lease agreements or, if they were not "used" and hence still in existence, the date of the Plan (by which I assume Caterpillar to mean the Filing Date) — ignores the necessity of orderliness in *CCAA* proceedings, which the trial judge was obviously at pains to impose in the case at bar. It would make little practical sense to determine realizable value before the Plan had been authorized to be put to creditors unless, of course, the Plan or procedural order so specified. Further, the alternative date proposed by Caterpillar (i.e. when the assets were used by the debtor to reduce its indebtedness to others) would yield unnecessary complexity and uncertainty. When could it be said that assets were "used"? Even if one could define when an asset was so "used", this formula would result in different valuation dates depending on when each asset was used.

52 There can be no doubt that Caterpillar's security position was eroded between the Filing Date and the Plan Filing Date. However, Caterpillar had knowledge that 360 intended to sell Caterpillar's collateral. Conceivably, Caterpillar could have acted promptly to protect its position. It had sufficient opportunity to demand payment prior to the Filing Date. After the Filing Date, 360 was prohibited by the terms of the initial order to make any payments to creditors holding a pre-filing claim. Ultimately, Caterpillar's inaction contributed to the risk that materialized.

53 In these circumstances, I am not persuaded that the trial judge erred in finding that the proper date for determining the realizable value of the assets was the Plan Filing Date (24 July 2002). Accordingly, it is unnecessary to decide whether, as 360 contends, the trial judge was in error in concluding that Caterpillar was a Secured Creditor as defined by the Plan.

Constructive Trust Issues

Units 1, 2 and 3

54 First, Caterpillar contends that the trial judge erred in relation to its claim for a constructive trust over the sale proceeds of units 1, 2 and 3 in finding that the priority of the general security held by 360's bankers was relevant to a Post-Filing Claim and properly a factor to be considered in determining whether to declare a constructive trust.

55 The trial judge applied the well-known test for unjust enrichment articulated in *Becker v. Pettkus*, [1980] 2 S.C.R. 834, 34 N.R. 384 (S.C.C.) at para. 38. The test features three elements: first, an enrichment; second, a corresponding deprivation; and third, an absence of any juristic reason for the enrichment. 360 conceded that Caterpillar, in not receiving the sale proceeds from the units, suffered a deprivation. The trial judge found an enrichment by 360 in the form of a reduction in its indebtedness. However, as I have noted, the trial judge found two independent juristic reasons for the deprivation. First, Caterpillar agreed to 360's sale of the leased equipment and subsequent retention of the "equity". Second, the Senior Lenders enjoyed priority over Caterpillar in respect of units 1, 2 and 3 because of the failure of the latter to perfect its security over these units.

56 Caterpillar's argument rests on its assertion that constructive trust claims must be analyzed as Post-Filing Claims as defined by the Plan:

> ... any right or claim of any person against the Canadian Companies ... arising from or caused by, directly or indirectly, any action taken by the Canadian Companies from and after the Filing Date [28 June 2001].

57 However, this analysis ignores the essential question of when the claim to any constructive trust arose. There is no Post-Filing Claim if the right to assert the claim arose prior to the Filing Date. In my opinion, Caterpillar's argument is unsustainable because it rests on a logical fallacy. Caterpillar prematurely assumes the existence of a constructive trust. The proper approach is to determine whether a constructive trust arises *before* characterizing it as a Post-Filing Claim.

58 360 opposes the imposition of a common law constructive trust as being inconsistent with the priority provisions of the *PPSA*. In support of its contention, 360 relies on s. 68(1) of the *PPSA:*

> The principles of the common law, equity and the law merchant, except insofar as they are inconsistent with the provisions of this Act, supplement this Act and continue to apply. [Emphasis added.]

360 thus argues that Caterpillar is prevented from correcting its own defective registration and perfection in units 1, 2 and 3 by asserting a constructive trust.

59 I recognize that Caterpillar's loss did not, strictly speaking, arise from its failure to *register or perfect* its security. Rather, Caterpillar's loss was the product of its failure to *protect* its security upon receiving notice that 360 intended to sell the units. The leases merely permitted 360 to sell its *rights* to the units. Thus, the sales intended, and in fact carried out, by 360 constituted a blatant breach of the leases.

60 The trial judge addressed this issue at paras. 53 and 54:

> [53] The second reason proffered by counsel for 360 (as well as counsel for the Senior Lenders) relates to the criterion of an absence of juristic reason as well as the criterion of an enrichment. Counsel for 360 and the Senior Lenders relies upon the following passage from *Luscar Ltd. v. Pembina Resources Ltd.* (1994), 162 A.R. 35 (C.A.):
>
> > Where there exists a contract under which parties are governed, and one party gains by a breach of the same, that party is not truly enriched, because the breaching party takes that gain subject to its liability for breach of contract. If the other party does not sue within the time set out in the Limitations Act, then, without more, there is a juristic reason for the gain because the breaching party is entitled to rely on the intended limitation.
> >
> > (¶ 117)
>
> In my opinion, this passage does not apply to the present circumstances. 360fiber already had the contractual obligation to pay the amounts owing under the Lease Agreements prior to the sale of the Units. Its sale of the Units, and retention of the sale proceeds, was not subject to any consequential liability under the Lease Agreements. It was enriched without any new offsetting liability.
>
> [54] In addition, I do not believe that the sale of the Units by 360fiber was merely a breach of the Lease Agreements. It was prohibited by the terms of the Lease Agreements from selling its rights in any Unit, but it did more than simply sell its rights. It sold the Units themselves, including Caterpillar's ownership interests, as a result of an auctioneer's ability to convey title to purchasers. The sale of the Units constituted a wrong which cannot be properly characterized solely as a breach of contract. 360fiber did not have the right to sell the Units because Caterpillar owned them, not because the Lease Agreements prohibited the sale of the Units (what the Lease Agreements prohibited was the sale by 360fiber of its rights in the Units). It is true that I have found that Caterpillar gave a general consent to sales of its equipment by 360fiber. However, the consent was subject to the condition that Caterpillar would be paid the buyout amounts under each lease agreement, and this condition was never satisfied in relation to the Units.

61 The availability of a remedial constructive trust in the commercial context has been the subject of considerable academic and judicial debate: see e.g. *Ellingsen, Re* (2000), 142 B.C.A.C. 26, 190 D.L.R. (4th) 47 (B.C. C.A.); *Atlas Cabinets & Furniture Ltd. v. National Trust Co.* (1990), 45 B.C.L.R. (2d) 99, 68 D.L.R. (4th) 161 (B.C. C.A.); *British Columbia v. National Bank of Canada* (1994), 52 B.C.A.C. 180, [1995] 2 W.W.R. 305 (B.C. C.A.). In particular, the existence of a contractual relationship between the plaintiff and defendant may preclude the imposition of a constructive trust. The general principle is stated by David M. Paciocco in "The Remedial Constructive Trust: A Principled Basis for Priorities and over Creditors", (1989) 68 Canadian Bar Rev. 315 at 341-42:

> There is widespread agreement that a party who has accepted the role of a general creditor should be denied proprietary relief. The decision in *Sinclair v. Brougham* is often used to make the point. There the depositors of the bank entered into their transactions with the expectations that they would be unsecured creditors of the bank. Allowing them to trace therefore gave them proprietary protection which was never expected. Only an out of court settlement with the other general creditors of the bank and the condition imposed by the court that the depositors recognize the claims of the shareholders prevented this from producing an unwarranted priority. It has therefore been suggested that:
>
> > As a general principle, ... people who willingly choose to become unsecured creditors of an eventual bankrupt ought not to be given priority over other unsecured creditors through the extended use of the constructive trust remedy.
>
> There are two kinds of case where a claimant can be considered, every bit as much as the general creditors can, to have accepted the risk of the defendant's insolvency: where there are contractual dealings between the plaintiff and defendant which anticipate that the plaintiff will assume the status of a general creditor; and where the plaintiff's claim rests on a *quantum meruit* or *quantum valebat* basis in situations where there has been no reasonable expectation by the plaintiff of acquiring a proprietary interest.

62 The application of this principle to the circumstances at bar is far from straightforward. Nonetheless, it is clear that when Caterpillar entered into the leases, it intended to secure the obligations owed by 360 by retaining title to the units. Pursuant to the *PPSA*, Caterpillar could perfect its security by registration. The failure to register or perfect its security meant that, as between Caterpillar and any third parties, Caterpillar was a general creditor in respect of units 2 and 3. Although Caterpillar had negotiated with 360 to be a secured creditor, it ultimately failed to protect its status as a secured creditor under the *PPSA*. As such, Caterpillar must be taken to have accepted the risk posed by 360's eventual insolvency. In my view, Caterpillar should not be able to invoke constructive trust principles to alter its reduced creditor status.

63 The trial judge instead adopted the analysis of the Supreme Court of Canada in *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 237 D.L.R. (4th) 385 (S.C.C.) at paras. 44-46:

> [44] The parties and commentators have pointed out that there is no specific authority that settles this question. But recalling that this is an equitable remedy that will necessarily involve discretion and questions of fairness, I believe that some redefinition and reformulation is required. Consequently, in my view, the proper approach to the juristic reasons analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. By closing the list of categories that the plaintiff must canvas in order to show an absence of juristic reason, Smith's objection to the Canadian formulation of the test that it required proof of a negative is answered. The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra*), a disposition of law (*Pettkus*, *supra*), ... and other valid common law, equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.
>
> [45] The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a de facto burden of proof placed on the defendant to show the reason why the

enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

[46] As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstance of a case but which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments.

64 Under either analysis, Caterpillar appears to be employing the remedy of a constructive trust to vault its security position in respect of units 1, 2 and 3, contrary to the provisions of the *PPSA* and the general framework of the *CCAA*.

65 In any event, I am unable to say that the trial judge erred in his analysis. Caterpillar satisfied the initial burden of showing there was no established category of juristic reason to defeat its claim. However, the trial judge proceeded to find two other juristic reasons, one of which was Caterpillar's failure to perfect its interest and the Senior Lenders' ensuing priority over Caterpillar with respect to units 1, 2 and 3.

66 Further, I respectfully agree with the trial judge's alternative reason for refusing to declare a constructive trust in respect of units 1, 2 and 3 (at para.68):

[68] If I am mistaken and the priority of the Senior Lenders over the security interest of Caterpillar in Units 1, 2 and 3 is not a juristic reason to prevent the declaration of a constructive trust, the rights of the Senior Lenders must still be taken into account before a constructive trust is declared. Lambert J.A. said the following in the Ellingsen decision:

> A remedial constructive trust will be imposed only if it is required in order to do justice between the parties in circumstances where good commercial conscience determines that the enrichment has been unjust. But a remedial constructive trust is a discretionary remedy. It will not be imposed where an alternative, simpler remedy is available and effective. And it will not be imposed without taking into account the interests of others who may be affected by the granting of the remedy. In this case that would include other creditors of the bankrupt, (both secured creditors and general creditors, since the trust may defeat both), and any relevant third parties. (¶ 71)

If the priority of the Senior Lenders over Caterpillar is not a juristic reason and Caterpillar would have met the criteria of unjust enrichment in respect of Units 1, 2 and 3, I would exercise my discretion to decline to order a constructive trust over the proceeds from the sales of Unit 1, 2 and 3 as a result of the priority of the Senior Lenders over Caterpillar with respect to these proceeds.

67 Before leaving this ground of appeal, I note that while Caterpillar concedes its failure to file a name change under s. 51 of the *PPSA* for unit 1, it cites *Hewstan, Re* (1996), 42 C.B.R. (3d) 186, 12 P.P.S.A.C. (2d) 36 (B.C. S.C. [In Chambers]) at para. 31 to support its assertion that perfection is undisturbed.

68 Subsection 51(2) addresses the scenario in which a security interest is perfected by registration, but there is a subsequent change in the debtor's name and the secured party knows of the change of name. The subsection places an obligation on the secured party to either amend the registration by registering a financing change statement disclosing the new name of the debtor or perfect its security by taking possession of the collateral. One of these measures must be taken within the time specified.

69 The failure to comply with the requirement has different priority consequences depending on the type of interest in competition with the security interest. First, the security interest is subordinate to *any interest*, *other than a competing security interest*, arising after the expiry of 15 days from the date the secured party acquired knowledge as to the debtor's new name. Second, the security interest is subordinate to a security interest that is registered or perfected after the expiry of 15 days from the date the secured party acquired knowledge as to the new name of the debtor. Finally, the security interest is subordinate to a security interest that is registered or perfected after the secured party acquired knowledge of the new name of the debtor and before the section has been complied with. However, if the secured party complies with the section or takes possession of the collateral before the expiry of the aforementioned 15-day period, but after the competing security interest is registered or perfected, the perfected status of its security interest remains unaffected.

70 The underlying purpose of s. 51 is to preserve the integrity and utility of the registry when the debtor's name has changed. This change impacts the ability of a searching party to discover the existence of a security interest. Unless the secured party is obliged to amend its registration to reflect the debtor's name change, a search result obtained on the basis of the name of the person in possession or legal control of the property will fail to disclose the registration.

71 *Hewstan, Re* concerns the narrow issue of whether a trustee in bankruptcy qualifies as a person who has an "interest" in collateral. In contrast, the instant case does not deal with the issue of a trustee in bankruptcy's interest pursuant to s. 51(2)(c). It centers on s. 51(2)(d): the priority of Caterpillar in relation to that of a competing security interest. In *Hewstan, Re*, the chambers judge properly noted that s. 51(2) does not render a security interest "unperfected". Failure to file a notice of name change does not undermine the validity of registration of a security interest. It solely impacts priority. Application of s. 51(2) of the *PPSA* results in Caterpillar's perfected security interest with respect to Unit 1 being subordinate to the Senior Lenders' perfected security interest.

72 For the foregoing reasons, I am not persuaded that there is any merit in Caterpillar's second ground of appeal.

Units 7 and 8

73 As I have already noted, the trial judge declared constructive trusts in favour of Caterpillar over the proceeds of sale of units 4, 7 and 8, to the extent of the buyout amounts under the lease. The trial judge found that the breach of trust claim over the sale proceeds from unit 4 constituted a Post-Filing Claim that was not released by the Plan. The trial judge awarded Caterpillar damages in a sum equal to the buyout amount for unit 4. Counsel for 360 advised us that he did not have instructions to appeal that order, which appears to have a monetary value approximating $32,000.

74 However, the trial judge found that the breach of trust relating to the sale of units 7 and 8 was not a Post-Filing Claim. As such, it was compromised and released by the Plan. This finding hinged on the timing of the breach.

75 The trial judge found that the breach of trust occurred at one of two times: first, when 360 received the sale proceeds and deposited them into its account without remitting the buyout amounts to Caterpillar (9 May 2001); or second, when 360 could no longer use the sale proceeds to pay Caterpillar because 360 had used the funds for other purposes. The trial judge found that, under the second scenario, the breach occurred no later than 27 June 2001. The trial judge concluded that the breach did not occur when the bank account balance fell below the sale proceeds from units 7 and 8 (28 June 2001). Rather, it occurred when 360 made withdrawals or issued cheques on the account which resulted in the account entering an overdraft position. The cheques that were posted to the account on 28 June 2001 dated from 6 June 2001 to 25 June 2001. They were date-stamped by the drawee bank on 27 June 2001. The trial judge rejected Caterpillar's submission that 360's omission to place stop payments on the cheques constituted an independent breach of trust.

76 Caterpillar argues that the trial judge erred in finding that the only acts relevant to the breach occurred before the Filing Date (28 June 2001) and that the mere writing of a cheque would necessarily result in the payment of funds contrary to the trust. In furtherance of the latter assertion, Caterpillar maintains that it was open to 360 to issue a stop payment on the cheques or otherwise prevent the funds from being used prior to the Filing Date.

77 Both Caterpillar and 360 agree that the holding of funds without Caterpillar's authorization — specifically, 360's failure to remit the buyout amounts to Caterpillar — constitutes a breach of trust. 360 improperly treated the money as its own rather than that of Caterpillar's.

78 The crux of Caterpillar's argument is as follows. If the date of breach is 9 May 2001, Caterpillar's damages would be limited to the cost of wrongful holding; namely, interest or opportunity cost. Caterpillar acknowledges that a claim for those damages is compromised by the Plan.

79 However, Caterpillar emphasizes that its claim is for the entirety of the sale proceeds. It contends that only after the Filing Date (28 June 2001) did 360 render the sale proceeds unavailable to Caterpillar. Caterpillar identifies this later breach of trust as a Post-Filing Claim.

80 In my opinion, Caterpillar's arguments cannot succeed. Essentially, Caterpillar seeks to impose the date most favourable to its position in the *CCAA* reorganization. This is exemplified by the fact that Caterpillar concedes that 360's initial holding of the sale proceeds without remittance to Caterpillar constituted a breach of trust and yet it seeks to impose a subsequent (and in my opinion, completely uncertain) date for what it describes as a later breach of trust. In my view, this line of argument ignores the true nature of the breach. 360 was in breach from the moment it retained the sale proceeds without either remitting them to Caterpillar or Caterpillar's authorization. This breach continued until Caterpillar's claim was either satisfied or compromised by the Plan.

81 I agree with 360's submission that the *CCAA* does not accord a creditor wide discretion to characterize its claim as a means of elevating its status. Caterpillar, after acknowledging that there was a breach of trust prior to the Filing Date, cannot identify a post-Filing Date event — the actual withdrawal of trust funds — to convert its entire claim to a Post-Filing Claim.

82 In my view, it was the act of writing cheques and delivering them to the payee that constituted the breach of trust. That act is identifiable and unambiguous: it is the active commission of a wrongful act. In contrast, the date on which funds are withdrawn is uncertain: is it when the account is actually reduced by the amount of the trust funds or when the drawee bank irrevocably loses its right to return the cheque through the clearing process?

83 Wherever possible, the law should favour certainty. In my opinion, the trial judge did not err in fixing the date of the breach to be when the breach was being actively committed, as opposed to when it was allegedly being committed by omission.

Conclusion

84 For all of the above reasons, I would dismiss Caterpillar's appeal.

***Prowse J.A.*:**

I agree.

***Saunders J.A.*:**

I agree.

Appeal dismissed.

TAB 2

2007 CarswellOnt 7014
Ontario Superior Court of Justice

Collins & Aikman Automotive Canada Inc., Re

2007 CarswellOnt 7014, [2007] O.J. No. 4186, 161 A.C.W.S. (3d) 675, 37 C.B.R. (5th) 282, 63 C.C.P.B. 125

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 COLLINS & AIKMAN AUTOMOTIVE CANADA INC.

APPLICATION UNDER the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Spence J.

Heard: September 20, 26, 2007
Judgment: October 31, 2007
Docket: 07-CL-7105

Counsel: M.E. Bailey for Superintendent of Financial Services (Ontario)
K.T. Rosenberg, M.C. Starnino for United Steelworkers
C.E. Sinclair for National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW — Canada)
R.J. Chadwick for Ernst & Young Inc., as Monitor of Collins & Aikman Automotive Canada Inc.
A.J. Taylor, K.L. Mah for Collins & Aikman Automotive Canada Inc.
J.E. Dacks for JP Morgan Chase Bank NA
C.J. Hill for Chrysler LLC

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Motions to amend initial order — Insolvent company filed under Companies' Creditors Arrangement Act ("CCAA") — Company's customer became debtor in possession ("DIP") lender pursuant to funding agreement between creditors — Court issued initial order under CCAA — Para. 4 of initial order authorized company to retain further assistants if necessary — Para. 6 provided that company was "entitled but not required" to make special payments to employee pension plans ("special payments") — Para. 11 authorized company to terminate employees by agreement with other parties or, failing such agreement, to deal with consequences under CCAA — Para. 26 provided that monitor, by fulfilling obligations under initial order, would not be deemed to be employer of company's employees — Para. 29 immunized monitor from liability save for gross negligence or wilful misconduct — Some months after initial order was issued, certain paragraphs were challenged by Superintendent of Financial Services and unions representing company's employees — Superintendent and unions brought motions seeking various relief — Motions dismissed — Para. 4 did not provide that further hirings could breach collective agreements — If hirings did so, aggrieved parties could apparently seek relief under CCAA — Phrase "not required" in para. 6 did not give company carte blanche to withhold payments contemplated by initial order — Effect of para. 6 was to exempt company from making special payments otherwise required by pension benefits regime — If company failed to use funds available under DIP facility for purposes indicated in CCAA proceeding, that might found motion for relief — Even if "not required" provision abrogated pension plan statutory law, court had jurisdiction to do so — CCAA granted court jurisdiction to override express provincial statutory provision where doing so would contribute to carrying out protective function of CCAA — It was inappropriate for court to exercise its discretion under CCAA to delete "not required" provision, or to order company to make special

payments — This would be contrary to reasonable expectations of company and DIP lender — DIP lender had changed its position on basis of existing court orders — Amending special payment provisions could pressure DIP lender to increase funding or risk loss of continuing operations — There had been no objections regarding special payments at time of initial order — Union's position, that para. 11 of initial order should be made subject to applicable collective agreements and labour laws, was rejected — Para. 11 did not purport to abrogate collective agreement or labour laws — No reason was advanced why union could not withhold agreement to company's proposed exercise of para. 11, or pursue matter in court under CCAA — Para. 26 was not inconsistent with jurisdiction of board under Labour Relations Act ("LRA") to determine whether monitor was successor employer — Initial order did not purport to determine application of LRA — Application of para. 26 was limited to monitor's role under initial order — Court had jurisdiction to grant limitation of liability as set out in para. 29 — Wording in para. 29 was consistent with limitation of liability given to monitors under standard form model CCAA initial order.
Pensions --- Administration of pension plans — Valuation and funding of plans — Deficiency
Insolvent company filed under Companies' Creditors Arrangement Act ("CCAA") — Company's customer became debtor in possession ("DIP") lender pursuant to funding agreement between creditors — Court issued initial order under CCAA — Para. 6 provided that company was "entitled but not required" to make special payments to employee pension plans ("special payments") — Some months after initial order was issued, certain paragraphs were challenged by Superintendent of Financial Services and unions representing company's employees — Superintendent and unions brought motions seeking various relief — Motions dismissed — Phrase "not required" in para. 6 did not give company carte blanche to withhold payments contemplated by initial order — Effect of para. 6 was to exempt company from making special payments otherwise required by pension benefits regime — If company failed to use funds available under DIP facility for purposes indicated in CCAA proceeding, that might found motion for relief — Even if "not required" provision abrogated pension plan statutory law, court had jurisdiction to do so — CCAA granted court jurisdiction to override express provincial statutory provision where doing so would contribute to carrying out protective function of CCAA — It was inappropriate for court to exercise its discretion under CCAA to delete "not required" provision, or to order company to make special payments — This would be contrary to reasonable expectations of company and DIP lender — DIP lender had changed its position on basis of existing court orders — Amending special payment provisions could pressure DIP lender to increase funding or risk loss of continuing operations — There had been no objections regarding special payments at time of initial order.
Annotation

When Air Canada filed for bankruptcy protection under the *Companies' Creditors Arrangement Act* (the "CCAA") in 2003, there existed virtually no judicial guidance as to how issues surrounding its underfunded pension plans would be treated under the CCAA. But the spate of employer insolvencies and pension plan deficits in the four years since (Slater Steel, Stelco, United Air Lines, Ivaco, General Chemical, etc.) has resulted in many of the issues at the intersection of insolvency law and pension law having been litigated and, for now at least, resolved. *Collins & Aikman* is the latest decision to answer one of the questions as to how to deal with pension issues in a CCAA restructuring.

The issue in *Collins & Aikman* was the validity of the employer decision to suspend special payments (i.e. contributions to pay down pension plan solvency deficits) on the basis of a provision in the initial CCAA court order stating that the company could, but need not, make pension plan contributions while under CCAA protection. The suspension of the special payments (but not current service contributions, which have continued to be remitted) was a condition of the interim financing designed to keep the insolvent company afloat during its restructuring, the terms of which financing were approved by the court. Neither the Ontario pension regulator nor the union opposed the financing, but they subsequently challenged the suspension of the special payment remittances to the pension plans.

The Ontario Superior Court held that the regulator and union could not have their cake and eat it too, i.e. they could not give the company the benefit of the interim financing while not allowing it to meet a key condition for that financing. Thus the validity of the "pension contribution suspension" provision in the initial CCAA order, which has become a relatively standard feature of such orders over the past few years, has been upheld, to the general relief of employers, financial institutions, and many other classes of CCAA stakeholders.

However, the decision is not necessarily a blanket endorsement of such provisions. To begin with, it is unclear whether the decision would automatically have been the same had the suspension of special payments not been a prerequisite to the court-approved financing. Second, the court held out the possibility of the regulator and/or the union being able to challenge the continued validity of the suspension at future stages in the CCAA process; whether such future challenges might be successful is, of course, another matter entirely. And finally, the union has appealed the Superior Court decision to the Ontario Court of Appeal, so this decision will not be the last judicial word on the issue.

Gary Nachshen

***Spence J.*:**

1 Each of the three moving parties, the Superintendent of Financial Services, the USW and the CAW — Canada, seeks relief relating to the Initial Order made by this Court under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") on July 19, 2007 (the "Initial Order") with respect to Collins & Aikman Automotive Canada Inc. ("Automotive" or the "Applicant").

2 On July 19, 2007, Collins & Aikman Automotive Canada Inc. ("Automotive") filed for protection from its creditors pursuant to the CCAA. The Applicant is insolvent. It was clear at the time of the CCAA filing that Automotive would not be able to reorganize and the Court was informed by counsel to Automotive and the Monitor that this proceeding is effectively a liquidation. The Court is advised that the CCAA is being utilized by the Applicant to attempt to maximize the potential recovery for the benefit of all creditors by creating the opportunity to attempt to sell some or all of its remaining operating facilities on a going concern basis.

3 Chrysler LLC (previously known as DaimlerChrysler Company LLC) ("Chrysler") is Automotive's largest remaining customer. In order to provide Automotive with the stability to pursue the sale of its facilities, Automotive, Chrysler, the U.S. Debtors and JPMorgan Chase Bank, N.A. as Agent for the U.S. Debtors' pre-petition secured creditors negotiated a comprehensive funding agreement whereby Chrysler (the "DIP Lender") will fund the costs of this CCAA filing.

4 The relief sought by the moving parties concerns, *inter alia*, the pension plans of Automotive. The Superintendent advises that Automotive maintains seven pension plans which are registered in Ontario,

The Impugned Provisions of the Initial Order

Paragraph 4

5 Paragraph 4 of the Initial Order provides as follows:

> Applicants shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "Assistants") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

The USW is concerned that, as presently worded, paragraph 4 of the Initial Order is open to an interpretation that permits the Applicant to employ individuals in a manner inconsistent with the terms of the Collective Agreement, contrary to applicable labour legislation. In particular, paragraph 4 could be taken to authorize the unilateral contracting out of union positions. Accordingly, the USW proposes that the following text should be appended at the end of paragraph 4: ", provided that such further retainers are not in breach of any of its collective agreements."

6 The CAW supports the Superintendent and the USW with respect to their submissions in respect of the above provisions of the Order.

Paragraph 6

7 Paragraph 6 of the Initial Order provides as follows:

> THIS COURT ORDERS that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:
>
> > (a) all outstanding and future wages, salaries, employee benefits, contributions to pension plans, vacation pay, bonuses and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements...

8 The Superintendent objects to any provision that would be inconsistent with the Applicant being required to make any and all required employee contributions to its pension plans.

9 The USW objects to the foregoing provision of the Initial Order on the basis that Automotive appears to be interpreting that provision so as to amend the terms of their employment by staying Automotive's obligation to pay compensation accruing due to employees post filing, including, wages, benefits and special payments to the pension plan. Accordingly, the USW proposes that the words "but not required" be struck from paragraph 6.

Paragraph 11

10 Paragraph 11 of the Initial Order provides as follows:

> THIS COURT ORDERS that the Applicants shall, subject to such covenants as may be contained in the Definitive Documents (as hereinafter defined), have the right to:
>
> . . . . .
>
> b. Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon between the Applicants and such employee, or failing such agreement, to deal with the consequences thereof in any plan of arrangement or compromise filed by the Applicants under the CCAA (the "Plan");...
>
> d. Repudiate such of its arrangements or agreement of any nature whatsoever, whether oral or written, as the Applicants deem appropriate on such terms as may be agreed upon between the Applicants and such counter-parties, or failing such agreement, to deal with the consequences thereof in the Plan; ...

The USW is concerned that these provisions are open to an interpretation that permits Automotive to repudiate its collective agreements with the USW's members. Accordingly, the USW proposes that the following text be added at paragraph 11, following the phrase "(as hereinafter defined)":

> and any and all applicable collective agreements (including, without limitation, all employee benefit, pension and related agreements, compensation policies, and arrangements), and labour laws....

11 The Superintendent seeks an order directing the Applicant to make all required employer contributions to its Pension Plans in accordance with the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "PBA") and an order amending the Initial Order as is necessary to reflect this relief.

12 The CAW seeks an order compelling the Applicant to make the special payments due to the pension plans operated for the benefit of the CAW's members. The special payments that are referred to include the special payments that are provided for under s. 5(1)(b) and section 5(1)(e) of the Regulation under the PBA. These payments are required to be made to liquidate any unfunded liability in the plan by reason of a going concern deficiency and any insolvency deficiency based on actuarial valuation of the plan. The other special payments referred to are those dealt with in s. 31 of the Regulation. These payments are post wind-up special payments owing under s. 75 of the PBA to address a wind-up deficit. Section 31 states that annual special payments are to commence at the "effective date of wind up" and are equal

to "the amount required in the year to fund the employer's liabilities under section 75 of the [PBA] in equal payments, payable annually in advance, over not more than five years".

13 As stated in *Toronto Dominion Bank v. Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.) at paragraph 25, in the context of going concern special payments, special payments "may fluctuate depending upon the investment results of the pension fund and the employer's ongoing contributions, together with estimated demands on the fund by the beneficiaries" and other factors. The true position of the plan cannot, in fact, be known until the crystallization of all benefits when benefits are settled after a wind-up at which time "it will be known what are the assets in the fund and the liabilities to be set against such funds by those beneficiaries who are then established as being legally entitled to claim".

14 Accordingly, special payments are better understood as the payments which (in accordance with the PBA and Regulations and actuarial practice) have to be made to a pension plan now to meet the plan's benefit obligations which do not arise until some point in the future (either on retirement or termination for individual members or when benefits are settled in a plan wind up for the plan as a whole).

15 Likewise, post-wind-up special payments to address a wind up deficit are based on an actuarial estimate of the position of the plan as of the wind up date. Again, the actual liabilities of the pension plan are not determined until benefits are settled and the funds in the plan are used to actually purchase annuities from an insurance company (at then prevailing annuity rates) to provide the monthly pension benefit to the member.

16 The Applicant has indicated that monthly special payments for the Pension Plans are approximately $345,000 as of June 2007. The Superintendent is not in a position to confirm this amount precisely but advises that, owing to the funded position of the Plans it is clear that special payments are required for all the Pension Plans on the basis of the actuarial valuation reports last filed with the FSCO. The requirement to make special payments also applies to two of the Pension Plans which have been wound up, the Gananoque and Stratford Plans, although the special payment requirement arises on an annual rather than a monthly basis.

17 The factums of the USW and the CAW state that the most recently filed valuations for Automotive's various pension plans identify an aggregate wind-up deficiency of approximately $18.2 million.

Paragraph 26

18 Paragraph 26 provides as follows:

> THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof — or be deemed to have been or become an employer of any of the Applicant's employees.

The USW is concerned that this provision usurps the exclusive jurisdiction of the Labour Relations Board (the "Board" or the "OLRB") to determine, on a full factual record, whether someone is a successor employer. Accordingly, the USW proposes that the following text be deleted from paragraph 26: "or be deemed to have been or become an employer of any of the Applicant's employees"; and that the following words be added: ", provided that the foregoing is without prejudice to any rights pursuant to the *Labour Relations Act, 1995*, (Ontario)."

19 The CAW seeks the same order.

Paragraph 29

20 Paragraph 29 provides as follows:

> THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or

the carrying out of the provisions on this Order, save and except for any gross negligence or willful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

The USW is concerned that this provision provides the Monitor with a blanket immunity on a prospective basis, and that the court has no jurisdiction to provide this immunity and should not provide this immunity even if it did have such authority. Accordingly, the USW proposes that paragraph 29 be deleted and replaced with the following:

THIS COURT ORDERS that nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any other applicable legislation.

The CRO Order

21 On September 11, 2007, Automotive returned a motion for an order approving its engagement of Axis Consulting Group Inc. ("Axis") and Allan Rutman ("Rutman") as Chief Restructuring Officer of Automotive (the "CRO Approval Motion")

22 On September 11, 2007, this court made an order approving Automotive and Axis' engagement (the "CRO Order"), subject to a reservation of rights by the USW to challenge paragraph 4 of the CRO Order.

23 Paragraph 4 of the CRO Order is similar to paragraph 29 of the Automotive Initial Order and the USW objects to it for the same reason. That paragraph provides as follows:

THIS COURT ORDERS that the CRO shall not incur any liability or obligation as a result of the fulfillment of its duties, save and except for any liability or obligation arising from the gross negligence or willful misconduct of the CRO, and no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO and provided further that any liability of the CRO hereunder shall not in any event exceed the quantum of the fees and disbursements paid to or incurred by the CRO in connection herewith. This last limitation of liability will be effective up until + including Sept. 20/07 + thereafter as directed by the judge hearing the motion on Sept. 20/07.

24 The USW proposes that this paragraph be deleted and replaced with the following:

THIS COURT ORDERS that no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO.

Relevant Statutory and Regulatory Provisions

The Companies Creditors Arrangement Act

25 Section 11(1) of the CCAA provides as follows:

Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

26 Subsections 11(3) and (4) of the CCAA provide as follows:

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Other than initial application court orders —

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

27 Section 11(6) of the CCAA provides as follows:

Burden of Proof on Application —

(6) The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

28 Section 11.3 of the CCAA provides as follows:

11.3 No order made under section 11 shall have the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

The Pension Benefits Act

29 Section 55(2) of the PBA provides as follows:

An employer required to make contributions under a pension plan, or a person or entity required to make contributions under a pension plan on behalf of an employer, shall make the contributions in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times, ...

30 The General Regulation to the Act, R.R.O. 1990, Reg. 909, provides in part as follows:

4. (2) Subject to subsection (2.1), an employer who is required to make contributions under a pension plan...shall make payments to the pension fund or to an insurance company, as applicable, that are not less than the sum of,

(a) all contributions, including contributions in respect of any going concern unfunded liability and solvency deficiency and money withheld by payroll deduction or otherwise from an employee, that are received from employees as the employees' contributions to the pension plan;

(b) all contributions required to pay the normal cost;

(c) all special payments determined in accordance with section 5; and

(d) all special payments determined in accordance with sections 31, 32 and 35 and all payments determined in accordance with section 31.1.

5. (1) Except as otherwise provided in this section and in sections 4, 5.1 and 7, the special payments required to be made after the initial valuation date under clause 4 (2) (c) shall be not less than the sum of,

. . . . .

(b) with respect to any going concern unfunded liability not covered by clause (a), the special payments required to liquidate the liability, with interest at the going concern valuation interest rate, by equal monthly instalments over a period of fifteen years beginning on the valuation date of the report in which the going concern unfunded liability was determined;

. . . . .

(e) with respect to any solvency deficiency arising on or after the Regulation date, the special payments required to liquidate the solvency deficiency, with interest at the rates described in subsection (2), by equal monthly instalments over the period beginning on the valuation date of the report in which the solvency deficiency was determined and ending on the 31st day of December, 2002, or five years, whichever is longer.

The Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A (the "LRA")

31 Section 69 of the LRA provides in part as follows:

69. (1) In this section,

"business" includes a part or parts thereof; ("enterprise")

"sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings. ("vend", "vendu", "vente")

Successor employer

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

. . . . .

Power of Board to determine whether sale

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

32 Section 116 of the LRA provides as follows:

Board's orders not subject to review

116. No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, *quo warranto*, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

Jurisdiction of the Court under the Companies' Creditors Arrangement Act

33 In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, [1998] O.J. No. 3306 (Ont. Gen. Div. [Commercial List]), Blair J. adopted, at paragraph 46, the following passage from the decision of Farley J. in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31:

The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).

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. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)

[emphasis added]

34 In *Sulphur Corp. of Canada Ltd., Re* (2002), 35 C.B.R. (4th) 304 (Alta. Q.B.), Lovecchio J. considered the jurisdiction of the Court to make an order under s. 11 of the CCAA with provisions that conflicted with provisions of the *Builders Lien Act* of British Columbia (the "BLA"), a conflict which arose because of the grant under a CCAA order of a priority to the financing charge of a debtor in possession ("DIP financing") over all other creditors of the applicant company. Lovecchio J. decided that the Court has jurisdiction to grant a change under the CCAA to secure DIP financing which ranks in priority to a statutory lien under the BLA of British Columbia (paragraph 16).

35 After noting that, apart from the circumstances of the case, the lien under the BLA would have priority, Lovecchio J. provided the following analysis under the headings set out below in the following excerpt which addresses the jurisdiction of the Court in helpful detail and is therefore set out fully here:

The Paramountcy Argument and the Jurisdiction of the Courts

¶ 23 Sections 11(3) and 11(4) of the CCAA read as follows:

> 11(3) A Court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such a period as the Court deems necessary not exceeding 30 days, ...[staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].
>
> 11(4) A court may on application in respect of a company other than an initial application, make an order on such terms as it may impose, ...[staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].

¶ 24 It is clear that the power of the Court to create a charge to support a DIP financing is not mentioned. Are the words "such terms as it may impose" sufficient to give inherent jurisdiction a statutory cloak?

¶ 25 The facts at bar are similar to those that were before Associate Chief Justice Wachowich (as he then was) in *Re Hunters Trailer & Marine Ltd.* [See Note 3 below] In that case, Wachowich C.J.Q.B. granted Hunters an *ex parte*, 30 day stay of proceedings under the CCAA and, further, granted a DIP financing and Administrative Charge with a super-priority ranking over the claims of the other creditors.

Note 3: (2002), 94 Alta. L.R. (3d) 389.

¶ 26 In discussing the objective of the CCAA, Wachowich C.J.Q.B. stated the following at para. 15:

> The aim of the CCAA is to maintain the status quo while an insolvent company attempts to bring its creditors on side in terms of a plan of arrangement which will allow the company to remain in business to the mutual benefit of the company and its creditors...

At para 18:

> I agree with the statement made by Mackenzie J.A. in United Used Auto & Truck Parts Ltd., Re (2000), 16 C.B.R. (4th) 141 (BCCA), at 146 that: ...the CCAA's effectiveness in achieving its objectives is dependent on a broad and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern in the interim.

Later, at para.32:

> Having reviewed the jurisprudence on this issue, I am satisfied that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative charges, including the fees and disbursements of the professional advisors who guide a debtor company through the CCAA process. Hunters brought its initial CCAA application *ex parte* because it was insolvent and there was a threat of seizure by some of its major floor planners. If super-priority cannot be granted without the consent of secured creditors, the protection of the CCAA effectively would be denied a debtor company in many cases.

. . . . .

¶ 27 In addressing the Court's jurisdiction to grant an order, the Court of Appeal in *Luscar Ltd. v. Smoky River Coal Ltd.* [See Note 4 below] confirmed the conclusion that s. 11(4) confers broad powers on the Court to exercise a wide discretion to make an order "on such terms as it may impose". At p. 11, para 53 of the decision, Hunt J.A. for the Court wrote:

> These statements about the goals and operations of the CCAA support the view that the discretion under s. 11(4) should be interpreted widely.

Note 4: [1999] A.J. No. 185 (C.A.), online: (AJ).

¶ 28 As indicated by Wachowich C.J.Q.B., numerous decisions in Canada have supported the proposition that s. 11 provides the courts with broad and liberal power to be used to help achieve the overall objective of the CCAA. It is within this context that my initial Order and the June 19 Order were based.

¶ 29 Counsel for the Applicants referred to *Royal Oak Mines Inc., Re* [See Note 5 below] as an authority supporting their submission that the Courts cannot use inherent jurisdiction to override a provincial statute. ...

Note 5: (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div.).

¶ 30 In *Royal Oak*, Farley J. also relied on *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* [See Note 6 below], where the Supreme Court of Canada remarked that there is a limit to the inherent jurisdiction of superior courts and, in the circumstances of that particular case, the Court's inherent jurisdiction should not be applied to override an express statutory provision. At p. 480 the Court wrote the following:

> Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or a Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

Note 6: (1975), [1976] 2 S.C.R. 475..

¶ 31 *Baxter* may be distinguished from the case at hand since, in that particular case, the contest came down to the Court's inherent jurisdiction pursuant to s. 59 of the *Court of Queen's Bench Act* [See Note 7 below], a provincial statute which, the Supreme Court of Canada noted, was not intended to empower the Court to negate the unambiguous expression of the legislative will found in s. 11(1) of the *Mechanics' Liens Act* [See Note 8 below], also a provincial statute.

Note 7: R.S.M. 1970, c. C280.
Note 8: R.S.M. 1970, c. M80

¶ 32 ... In *Smoky*, Hunt J.A. used the words the exercise of discretion — a discretion she found to have been broad and one provided for in the statute.

¶ 33 It is clear that the Court's power to attach conditions was envisioned by Parliament. The intent of Parliament, through the enactment of the CCAA, was to help foster restructuring which, in turn, fosters the preservation and enhancement of the insolvent corporation's value.

¶ 34 In *Re United Used Auto & Truck Parts Ltd.* [See Note 9 below], Mackenzie J.A., of the Court of Appeal, wrote the following at p. 152, para. 29:

When, as here, the cash flow from operations is insufficient to assure payment and asset values exceeding secured charges are in doubt, granting a super-priority is the only practical means of securing payment. In such circumstances, if a super-priority cannot be granted without the consent of secured creditors, then those creditors would have an effective veto over CCAA relief. I do not think that Parliament intended that the objects of the Act could be indirectly frustrated by secured creditors.

Note 9: (2000), 16 C.B.R. (4th) 141 (BCCA).

¶ 35 Parliament's way of ensuring that the CCAA would have the necessary force to meet this objective was to entitle the Courts, pursuant to s. 11, to exercise its discretion and no specific limitations were placed on the exercise of that discretion. There is a logic to the lack of specificity as what is required to be done is often dictated at least in part by the particular circumstances of the case. Whether the Court should exercise that discretion is obviously a different matter and that will be discussed below.

¶ 36 For the foregoing reasons, I find that in the circumstances of this case, there is a federal statute versus a provincial statute conflict.

Paramountcy

¶ 37 Having established that the Court has a statutory basis to use its inherent jurisdiction in the exercise of a discretion granted under the CCAA, the next question is whether this jurisdiction can be used to override an express provincial statutory provision, in this case s. 32 of the BLA.

¶ 38 The case of *Pacific National Lease Holding Corp. v. Sun Life Trust Co.* [See Note 10 below] was raised by Sulphur's Counsel to draw an analogy to the paramountcy issue at bar. While the facts are not identical, the case involved a conflict between the Court's power pursuant to the federal CCAA and the Legal Professions Act of British Columbia. In that decision, the Court found that it is within the Court's jurisdiction, pursuant to the CCAA, to exercise broad "power and flexibility", and proceeded to comment on p. 6 that the CCAA "will prevail should a conflict arise between this and another federal or provincial statute". I agree with that conclusion and would apply it in this case.

Note 10: [1995] B.C.J. No. 1535 (C.A.)

36 More recently, the Court of Appeal, in its decision in its decision in *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.), considered the jurisdiction of the Court under s. 11 of the CCAA in connection with an order given under that section removing directors from the board of the applicant company. Paragraphs 31ff of the decision dealt first with the jurisdiction of the Court and then with the exercise of its discretion. The following passages from that decision are relevant with respect to the jurisdiction of the Court:

Jurisdiction

[31] The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the CCAA". He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.

[32] The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: *Babcock & Wilcox Canada Ltd. (Re)*, [2000] O.J. No. 786, 5 B.L.R. (3d) 75 (S.C.J.), at para. 11. See also, *Chef Ready Foods Ltd. v. Hong Kong Bank of Canada*, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 320 C.B.R.; *Re Lehndorff General Partners Ltd.*, [1993] O.J. No. 14, 17 C.B.R. (3d) 24 (Gen. Div.). [page17]Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see *Re Dylex Ltd.*, [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div. (Commercial List)), *Royal Oak Mines Inc. (Re)*, [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Gen. Div. (Commercial List); and *Westar Mining Ltd. (Re)*, [1992] B.C.J. No. 1360, 70 B.C.L.R. (2d) 6 (S.C.).

[33] It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

. . . . .

[35] ...[I]nherent jurisdiction does not operate where Parliament or the legislature has acted. As Farley J. noted in Royal Oak Mines, supra, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should [page18] not be brought into play" (para. 4). See also, *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, at p. 480 S.C.R.; *Richtree Inc.* (Re) (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251 (S.C.J.).

[36] In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in *Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*, [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (C.A.), at para. 46, that:

> ... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above [See Note 2 at the end of the document], rather than the integrity of their own process.

[37] As Jacob observes, in his article "The Inherent Jurisdiction of the Court", supra, at p. 25:

> The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

[38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however — difficult as it may be to draw — between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the company's process, on the other hand. The court simply supervises the latter [page19]process through its ability to stay, restrain or prohibit

proceedings against the company during the plan negotiation period "on such terms as it may impose" [See Note 3 at the end of the document]. Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

37 As to the exercise of the jurisdiction given by s. 11, the Court in *Stelco* said the following at paragraphs 43 and 44:

> [43] Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparas. 11(3)(a)--(c) and 11(4)(a)--(c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. ...
>
> [44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in Lehndorff, supra, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts.

38 The Court in *Stelco* went on to determine that it was not for the Court under s. 11 to usurp the role of the directors and management in conducting the restructuring efforts and found that there was no authority in s. 11 of the CCAA for the Court to interfere with the composition of a board of directors.

In the course of that analysis the Court stated as follows at paragraph 48:

> [48] There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative "gap" to fill. See Baxter Student *Housing Ltd. v. College Housing Cooperative Ltd.*, *supra*, at p. 480 S.C.R.; *Royal Oak Mines Inc. (Re)*, *supra*; and *Richtree Inc. (Re)*, *supra*.

39 It appears to me that in making the analysis set out in the above paragraphs and coming to the conclusion that it reached, the Court was addressing the need to ensure that the "terms" imposed by the Court under its s. 11 powers to do so are terms that are properly related to the jurisdiction given under s. 11 to the Court to grant stays and the purpose of that jurisdiction under the CCAA. In that regard, the Court did not consider that intervening in the composition of the internal management of the company contrary to the applicable laws in that regard was proper. This conclusion is perhaps best understood in the context of the earlier discussion in the decision of the nature of the jurisdiction of the Court under s. 11. In particular, the Court emphasized the role of the Court as a supervisory one which is exercised through its ability "to stay, restrain or prohibit proceedings against the company during the plan negotiation period" on such terms as the Court may impose (paragraph 38). It is not apparent how an order removing directors would be inherently or functionally related to the Court's role to provide a protection against legal proceedings which are potentially adverse to the facilitation of "the continuation of the corporation as a viable entity" (paragraph 36, in the quoted passage from the *Skeena* decision).

40 On this basis, the limitation expressed by the Court in *Stelco* is not to be understood as restricting the jurisdiction of the Court to make orders which carry out that protective function.

41 Similarly, but in a quite different fact situation, Lax J. of this Court, in her decision in *Richtree Inc., Re* (2005), 74 O.R. (3d) 174 (Ont. S.C.J. [Commercial List]) dismissed a motion to exempt the applicant company from certain filing requirements with regulatory authorities: see paragraphs 13 to 18 of the decision. In paragraph 18 of the decision, Lax J. said that the order that was sought had nothing to do with the restructuring process of the applicant company.

42 In view of the reasoning and the decisions in the above cases considered, the Court has a jurisdiction under the CCAA which, in the words of the decision in *Sulphur Corp. of Canada Ltd., Re*, *supra*, at paragraph 37, "can be used to override an express provincial statutory provision" where that would contribute to carrying out the protective function of the CCAA as reflected particularly in the provisions of s. 11 of the CCAA.

43 This analysis is developed further with regard to the special payments in the part of the text below that deals with the issue relating to paragraph 6 of the Initial Order.

The Context of the Initial Order and the CRO Order

44 On July 19, 2007, the Court issued the Initial Order authorizing, *inter alia*, Automotive to obtain and borrow under a credit facility (the "DIP Facility") from Chrysler as DIP Lender in order to finance certain expenditures contemplated by the cash flows that are approved by the DIP Lender and filed with the Court.

45 The Initial Order provided that the DIP Facility was to be on the terms and subject to the conditions set forth in the DIP Term Sheet and Commitment Letter between Automotive and the DIP Lender dated as of July 18, 2007 (the "Commitment Letter"), filed with the Court.

46 The Commitment Letter provides:

> The Borrower covenants as follows
>
> The Borrower shall not, without the Lender's prior written consent, make any material disbursement unless it is contemplated in the Initial cash flow, attached as Schedule "A" to this DIP Term Sheet and Commitment Letter (the "Initial Cash Flow") or any rolling cash flow approved by the Lender (collectively "Cash Flow Projections") and, for greater certainty, the Borrower shall not issue any cheques or make any disbursements until such point in time as the Lender has approved the same and confirmed sufficient funding of the same in accordance with the terms hereof[.]

47 The Initial Order also stated that rights of the DIP Lender under the Commitment Letter shall not be impaired in any way in Automotive's CCAA proceedings or by any provincial or federal statutes and that the DIP Lender shall not have any liability to any person whatsoever resulting from the breach by Automotive of any agreement caused by Automotive entering into the Commitment Letter.

48 The Initial Order provided that the DIP Lender was entitled to the benefit of the DIP Lender's Charge on all of the property of Automotive (except certain tax refunds).

49 The Affidavit of John Boken, dated July 19, 2007, sworn on behalf of Automotive and filed with the Court in connection with the application for the Initial Order (the "Boken Affidavit") stated the following at paragraph 46 with respect to the pension plans of Automotive:

> [Automotive] intends to continue to pay current service costs with respect to benefits accruing from the date of filing. The DIP Loan (as defined below), does not provide for the funding of any special payments.

50 In addition, the initial cash flow approved by Chrysler and filed with the Court on the application for the Initial Order clearly stated that special payments would not be made and that such payments were not included in the cash flow projections.

51 Automotive brought a motion to the Court on July 30, 2007 for, inter alia, an Order confirming the terms of the DIP Facility (the "DIP Approval Motion"). The DIP Approval Motion was made on notice to, among others, the USW and the Superintendent. The Boken Affidavit was again served in connection with the DIP Approval Motion. As noted above, the Boken Affidavit unequivocally indicated that special payments would not be made and were not permitted by the DIP Facility.

52 In addition, the Monitor filed its First Report with the Court at the return of the DIP Approval Motion and specifically noted that Automotive could not make any payments that were not in the cash flow forecast and that special pension payments were not provided for in the forecast. That point was reiterated in the notes to the cash flow forecast.

53 On July 30, 2007, the Court issued an Order confirming the terms of the DIP Facility (the "DIP Approval Order"). The DIP Approval Order provided:

> 3. THIS COURT ORDERS that the DIP Facility provided by DCC to the Applicant in the amount of Cdn.$13.6 million on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter between the Applicant and DCC dated as of July 18, 2007, all as set forth in the Initial Order, is hereby confirmed and approved.

54 Based on the First Report of the Monitor and the submissions of all counsel Justice Stinson granted the requested relief and approved the DIP Loan "on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter between the Applicant and the DIP Lender dated as of July 18, 2007, all as set forth in the Initial Order". As noted in Justice Stinson's endorsement in respect of the DIP Approval Order, Mr. Bailey on behalf of FSCO and Mr. Starnino on behalf of the USW requested that the Court "record their respective clients' reservation of rights in relation to the pension fund payments and other matters referenced in paragraphs 6(a), 11(b) and (d) of paragraph 26 of the [Initial] Order". Although the CAW did not attend the hearing on July 30, it did receive notice of Automotive's CCAA proceedings on July 23, 2007.

55 No party objected to the approval of the DIP Loan, or the terms and conditions set forth therein. No party appealed Justice Stinson's July 30 order approving the DIP Loan. The appeal period expired on August 20, 2007.

56 The DIP Approval Order was not opposed by the USW or the Superintendent, although they did appear at the DIP Approval Motion.

57 Automotive brought a motion to the Court on August 23, 2007 for an Order, inter alia, extending the stay of proceedings and increasing the amount of an amended DIP Facility. The motion was made on notice to the Unions and the Superintendent. The revised Cash Flow approved by Chrysler and filed with the Court (as a Schedule to the Monitor's Second Report) clearly stated that special payments would not be made and that such payments were not included in the cash flow projections.

58 On August 23, 2007, the Court issued an Order (the "August 23 Order") approving the Amended DIP Term Sheet and Commitment letter dated August 21, 2007 (the "Amended Commitment Letter"). The Amended Commitment Letter provides that Automotive shall not, without the DIP Lender's prior written consent, make any material disbursement unless it is contemplated in the cash flows approved by the DIP Lender. The Unions and the Superintendent did not oppose the August 23 Order, and they did not seek leave to appeal it.

59 The Boken Affidavit filed in support of the Initial Application indicated that:

(a) Automotive had no other realistic source of DIP funding to continue operations;

(b) the DIP Loan was the only basis on which funding was available to keep the potential for the preservation of some of the plants as going concerns; and

(c) the DIP Loan was being provided as a component of a complex multi-party agreement that represented a compromise of the rights of Chrysler, Automotive and the U.S. Debtors, which agreement was approved by the US Bankruptcy Court.

60 By Order of Justice Pepall dated September 11, 2007, Axis Consulting Group and Allan Rutman was appointed Chief Restructuring Officer ("CRO") of Automotive (the "CRO Order"). Paragraph 4 of that CRO Order states:

> THIS COURT ORDERS that the CRO shall not incur any liability or obligation as a result of the fulfilment of its duties, save and except for any liability or obligation arising from the gross negligence or wilful misconduct of the CRO, and no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO and provided further that any liability of the CRO hereunder shall not in any event exceed the quantum of the fees and disbursements paid to or incurred by the CRO in connection therewith. This last limitation on liability will be effective up until and including Sept. 20, 2007 and thereafter as ordered by the judge hearing the motion on Sept. 20, 2007.

61 The last sentence in paragraph 4 of the CRO Order was added by Justice Pepall in response to submissions by counsel that the issue of protections for the CRO were to be further addressed on this motion by the USW.

The Issues

Paragraph 4

62 The USW states its concern that the provision in paragraph 4 that allows the Applicant to retain further Assistants could be interpreted to allow hiring "in a manner inconsistent with the terms of the Collective Agreement, contrary to applicable labour legislation" (USW Factum, paragraph 43). How in particular that might come about is not explained. It is not suggested that the Applicant has acted or intends to act in such a manner.

63 Paragraph 4 does not provide that such hirings may be made in the manner that is the cause of concern. No basis was submitted for considering that such a result is implicit in paragraph 4.

64 Paragraph 4 is, as it is stated, consistent with the protective function of s. 11 because it effectively restrains proceedings that might otherwise be brought against the Applicant for making further hirings. It is conceivable in principle that hirings might be made in a way that would raise issues of the kind raised in *Richtree Inc., Re*, *supra*. In such circumstances, having regard to the approach taken by the Court in *Richtree*, the aggrieved parties would apparently be able to seeks appropriate relief from the Court as part of administrative or supervisory jurisdiction in respect of orders made by the Court under the CCAA. That would be an appropriate context in which to address the question of whether there is a conflict between the Collective Agreement and/or the LRA on the one hand and the CCAA and/or the Initial Order on the other. In the present circumstances, it is unnecessary to address the matter and there is no fact situation before the Court to allow it to be addressed properly.

Paragraph 6

65 The objection taken to the phrase "but not required" in paragraph 6 is that Automotive regards the phrase as staying its obligations to pay various kinds of post-filing employee compensation, including in particular special payments to the pension plan.

66 Under the DIP Approval Order, the Court approved the DIP Facility on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter dated July 18, 2007. As noted, the Commitment Letter

precludes Automotive from making distributions not contemplated in approved cash flows and the cash flow filed with the Court stated that special payments under the pension plans would not be made. These features link the DIP Approval Order to the paragraph 6 provision in the Initial Order that the specified kinds of payments are not required to be made. That is to say, the Initial Order and the DIP App4*o*roval Order are an integrated arrangement. The rationale given for this arrangement in the records is that Automotive will not be in a position to carry on business and will not have available funds without the DIP Facility and the terms on which the DIP Lender is prepared to commit to the DIP Facility are as stated.

67 Automotive states in its factum that it has continued to pay all wages and vacation pay during the course of this CCAA proceeding and intends to continue such payments and that the DIP Loan will, subject to certain conditions, provide advances to facilitate payment of statutory severance obligations.

68 The Initial Cash Flow provides for certain operating disbursements in respect of "Payroll, Payroll Taxes, Benefits, Severance, Other". The associated note states:

> The Forecast [Initial Cash Flow] assumes that payments are made for medical and health benefits and current service pension payments will be made while a plant is operating and then cease on the end of production date. The Forecast does not provide for the payment of any special pension payments as it is assumed these will be stayed in a CCAA filing.

69 The Court has approved the DIP Facility and, subject to this motion, the Initial Order. It is obvious that the DIP Facility and the Initial Order are integrally related. In consequence, if Automotive were to fail to use the funds available under the DIP Facility for the purposes that have been indicated for those funds in these CCAA proceedings, that would be a matter that might properly found a motion to the Court for relief. So the phrase "but not required" in paragraph 6 does not given Automotive a carte blanche to withhold contemplated payments, contrary to a suggestion that was made against the paragraph in the course of the hearing.

70 On the other hand, it is clear that the effect of the terms of the DIP Approval and paragraph 6 of the Initial Order is that Automotive, under the Order, is "not required" to make the special payments under its Pension Plans that would otherwise be required.

71 The requirement for the making of such special payments is a statutory requirement. The special payments are provided for in the pension benefits regime under the PBA and the related regulations, as set out in the relevant provisions excerpted above.

Jurisdiction under the CCAA re the Special Payments

72 The USW and the CAW submitted that the obligation under the pension benefits statutory regime to make special payments is an obligation under their respective collective agreements with Automotive. Those agreements require Automotive to maintain pension plans for members having certain specific features, principally relating to the amount of the pension to be earned and paid for the period of employment served by the employee. It was not shown that any provisions in the collective agreements do expressly require Automotive to comply with the statutory regime as to special payments. Rather, the submission seemed to be that because Automotive has an obligation under the Collective Agreement to maintain the pension plan and also has a statutory obligation in respect of pension plans it maintains to make certain special payments, that the contractual obligation impliedly includes the statutory obligations and therefore, any relief from the statutory obligation also constitutes relief from the contractual obligation under the Collective Agreement. Whenever it is argued, as here, that a term should be implied in a contract, the necessary question is why that is so and in this case, no answer is evident from the submissions. The implication was perhaps that it is self-evident but that may be debatable. The pension plan provisions in the collective agreements are addressed to the pension benefits that the plan is required to make available to the members and not to how that is to be done. On this basis, it would seem to be a stretch to say that just because a pension plan is required to conform to the statutory regime, the company

sponsoring the plan has impliedly agreed with the bargaining agent to do so. This would suggest that all that the company has agreed to do in the Collective Agreement is to maintain a plan that provides for the benefits contracted for in the collective bargain.

73 However, that analysis may be unduly technical for purposes of the issues on this motion. The commitment of Automotive in its collective agreement to maintain pension plans would given rise to a reasonable expectation that it would keep those plans in good standing in accordance with applicable regulatory requirements designed to ensure that the plans will be able to meet their payment obligations. Moreover, at least one of the pension plans contains a provision which requires the making of all payments required by the applicable statutes. So the better approach is probably to regard the maintenance of the special payments as effectively contemplated by the collective agreements.

74 Even so, this consideration would be relevant to the issue of the jurisdiction of the Court to make the impugned order only if this relationship to the collective agreements gives rise to jurisdictional considerations that are different from those that arise by reasons of the payments being required pursuant to the PBA.

75 As observed by the Supreme Court of Canada in its decision in *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 (S.C.C.) at paragraph 86, collective bargaining is a fundamental aspect of Canadian society, which has emerged as the most significant collective activity through which the freedom of association protected by s. 2(d) of the Charter is expressed in the labour context. Recognizing that workers have the right to bargain collectively reaffirms the values of dignity, personal autonomy, equality and democracy.

76 This fundamental process of collective bargaining is entrenched in the laws of Ontario by the LRA, which provides a comprehensive scheme for employment relations. Among other things, that statute directs that:

> (a) there shall only be one collective agreement in force between a trade union and an employer;
>
> (b) the trade union that is a party to the collective agreement is recognized as the exclusive bargaining agent of the employees in the bargaining unit defined therein;
>
> (c) the collective agreement is binding upon the employer and the employees;
>
> (d) the collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions or the statute without the consent of the Labour Board on the joint application of the parties;
>
> (e) a provision of a collective agreement may only be revised on the mutual consent of the parties;
>
> (f) no employer and no person acting on behalf of an employer shall interfere with the representation of employees by a trade union; and,
>
> (g) no employer shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

77 Based on these elements of the LRA, it appears that the employees cannot legally terminate their employment under their collective agreement before "it ceases to operate in accordance with its provisions or the LRA without consent of the O.L.R.B. on the joint application of the parties". The USW submits that therefore, the employees cannot legally terminate their services. However, whether this is so would depend first on whether the making of the Initial Order or its terms would allow the Collective Agreement to be terminated. No submissions were made that assist on this point.

78 Secondly, since the LRA provides that the Collective Agreement could be terminated with the consent of the Board, there is a question whether that consent could be obtained — a matter that was not canvassed in the submissions.

79 The above considerations relating to the LRA do not suggest that the relationship of the PBA requirements for special payments to the collective agreements should be considered to give those requirements any jurisdictional status for the issues in this case that would go beyond the implications that arise from the fact of those requirements being imposed pursuant to statute.

80 This result is not altered by the Court's recognition that collective bargaining is a fundamental aspect of Canadian society involving the exercise of the freedom of association protected by s. 2(d) of the *Charter*. It was not suggested that the Initial Order constitutes a breach of the *Charter* rights of the employees.

81 The Moving Parties rely upon the decision of Farley J. in *United Air Lines, Inc., Re* (2005), 45 C.C.P.B. 151 (Ont. S.C.J. [Commercial List]) as authority for the proposition that a CCAA debtor must in all circumstances continue to make special payments post-filing. *United Air Lines* involved a motion brought by UAL for an order authorizing it to cease making contributions to its Canadian pension plans. UAL applied for protection from its creditors pursuant to section 18.6 of the CCAA, whereby it sought recognition of a Chapter 11 proceeding in the United States. UAL had filed for bankruptcy protection in the United States in December 2002 and filed under section 18.6 of the CCAA in 2003. The motion was not brought until February 2005.

82 UAL was a large U.S. corporation that was attempting to restructure. It had an international workforce, including a small Canadian workforce. In its motion, it was seeking authority to cease making all contributions to its Canadian pension plans even though it continued to meet its pension funding commitments in all countries other than the United States and Canada. UAL's U.S. employees and retirees had the benefit of the protections provided by the Pension Benefits Guarantee Corporation, while the Canadian employees, as the beneficiaries of a federally regulated scheme, did not. UAL had not presented any evidence of its inability to make the pension payments.

83 After reviewing all of the facts, Farley J. summarized as follows at paragraph 7:

> As discussed above, the relative size of the Canadian problems *vis-a-vis* the U.S.A. problems is rather insignificant. It would not seem on the evidence before me that payment of funding obligations would in any way cause any particular stress or strain on the U.S. restructuring — given their relatively insignificant amounts in question. UAL had no qualms about making such payments in the other countries internationally. Additionally there is the issue of the U.S. situation having the benefit of the Pension Benefits Guarantee Corp. (as to which UAL would have paid premiums) but there being no such safety net in Canada on the federal level (and thus no previous premium obligation on UAL).

84 *United Air Lines* does not appear to stand for the proposition that all pension contributions, including special payments, must in all cases be paid by a CCAA debtor absent an agreement with its unions and FSCO. On the contrary, Farley J.'s decision states in paragraph 8 that it was made "on the basis of fairness and equity" after a consideration of the facts and circumstances existing in that case.

85 Based on the decision of the Court of appeal for Quebec in *Mine Jeffrey inc., Re*, [2003] Q.J. No. 264 (Que. C.A.), there is a reason to consider that the "not required" clause does not purport to abrogate the pension plan obligations. It authorizes the company not to make payments on account of its obligations during the currency of the Initial Order. Unpaid obligations would constitute debts of the company to be dealt with at the termination of its protection under the CCAA: see *Mine Jeffrey* paragraphs 60 to 62.

86 It was submitted that the text of the *Mine Jeffrey* decision at paragraph 57 shows that in that case there was no suspension of the special payments obligation in respect of the employees who continued to work in the post-filing period. The phrase in paragraph 57 that is relied on in this regard is that the monitor was authorized to suspend pension contributions "except for employees whose services are retained by the monitor". This phrase is stated in the text to be a translation. The text of the original version of the initial order in *Mine Jeffrey* is set out at paragraph 9 of the decision. Paragraph [22] of the order authorizes the monitor to suspend "contributions to pension plans made by employees other

than those kept by the monitor". At paragraphs 10 and 11 of the decision, the text makes clear that, in respect of the pension plan, the monitor advised that the payments that would continue to be paid were the current service payments, which are described as monthly remuneration to the employees to be paid to them by being paid to the plan. Nothing is said there about making any other payments to the plan. Paragraphs 68 and 70 express the Court's rejection of paragraph 16 of the Court's Order of November 29, 2006 which exempted the monitor from the collective agreements. However, paragraphs 54 and 55 of the decision deal with the suspension by the Court of payments to offset actuarial liability, which would seem to be payments in the nature of the special payments that are in issue in the present case. At paragraph 55 the Court gave its opinion that it was within the power of the Superior Court to suspend those payments. The Court of Appeal may have been making a distinction between the powers of the monitor and the Court.

87 Based on the analysis set out earlier in these reasons, even if it is correct to view the "not required" provision as abrogating provisions of pension plan statutory law, the Court has the jurisdiction under the CCAA to make an order under the CCAA which conflicts with, and overrides, provincial legislation. There is no apparent reason why this principle would not apply to an order made under the CCAA which conflicts with the PBA.

88 Reference was made to s. 11.3(a) of the CCAA, which provides that no order made under s. 11 is to have the effect of prohibiting a person from requiring payment for services provided after the order is made. The Applicant is paying the wages and the current service obligations under the pension plans of the employees who continue to be employed. The special payments do not relate exclusively to the continuing employees. It is not shown (and does not seem to be submitted) that the amounts that might be required under the special payments arise from or are in connection with the current service obligations to the plan (assuming those obligations are paid in due course). The most that can be said on the basis of the material now before the Court is that the fact that Automotive continues to operate with employment services being provided by Plan members may occasion some change in the amounts that were due and the payments that were required to be made as at the time of the CCAA filing, but what that amount might be and how, if at all, it could be attributed materially to the continuing service as opposed to other factors such as plan asset valuation is impossible to determine.

89 Accordingly, this point does not alter the conclusion that the Court has the jurisdiction to approve the "not required" clause, notwithstanding its effect in respect of the special payments.

Exercise of the Statutory Discretion under the CCAA

90 There is a separate question raised whether it is a proper exercise of the discretion of the court for it to approve the provision in question. That question must be addressed in the context discussed above.

91 The evidence before this Court is that Automotive is incapable of making the special payments. Automotive does not have the funds necessary to make the special payments. As at July 19, 2007, Automotive had no cash of its own. In the five-week period from July 19, 2007 to August 25, 2007, Automotive had negative cash flow from operations of approximately $5 million. It is forecast that in the four-week period from August 26, 2007 until September 22, 2007 Automotive will have negative cash flow of approximately an additional $12 million. Since filing, Automotive has been wholly dependent on the DIP Loan to fund all disbursements.

92 Two other important considerations are evident in the present case. First, for the reasons given above, the effective suspension of special payments is a feature of the integrated arrangement which was made available by Chrysler as the DIP Lender and which was the arrangement which enabled the company to continue in operation. So there was and is a very good reason for the Court to approve that arrangement.

93 Secondly, the moving parties each had a full opportunity to object to the approval of the DIP Facility and none of them did so, even though it was clear from the terms of the DIP Facility and the terms of the Initial Order that they are an integrated arrangement. Instead of objecting to the DIP Facility, they have allowed it to be approved and have objected only to the related provisions of the Initial Order. In proceeding this way, it appears they have avoided

facing the question whether if they opposed the DIP Approval Order for the reasons they now advance in respect of the special payments, the DIP Lender might have resisted their demands at the first moment, to the detriment of the continuing employment of members, and they now seek to raise the issue now that the DIP lender is in place and has been advancing funds, in circumstances where the only practical consequence could be to raise the question which would have appropriately been raised at the earlier stage.

94 Chrysler submitted that this conduct is a collateral attack on the DIP Approval Order and should not be countenanced by the Court.

95 The Initial Order was approved on July 19, 2007 with a provision in paragraph 3 providing for a further hearing on July 30, 2007 (the "Comeback Date") at which time the Initial Order could be supplemented or otherwise varied. On July 30, 2007 the Court ordered the approval of the DIP Facility. It ordered an extension of the Stay Period to August 24, 2007.

96 The Court did not make any order to supplement or vary the Initial Order in any other respects. Neither did it make any order to the contrary. Nor does it appear from the recitals in the DIP Approval Order that the Court was asked on that motion to deal with the Initial Order in other respects. Stinson J., in his endorsement of July 30, 2007 approving the issuance of the DIP Approval Order, recorded the requests on behalf of the Superintendent and the USW that he record their respective clients' reservation of rights in relation to the pension fund payment and other matters referenced in paragraphs 6(a), 11(b) and (d) and paragraph 26 of the Initial Order. Since this reservation was recorded at the same time as the DIP Approval Order was granted and without any order being granted at that time to deal with any variations to the Initial Order, this raises a question of whether it is fair to regard the motion now before the Court as a collateral attack on the DIP Approval Order.

97 It is important that, in the Initial Order at paragraph 34, the DIP Facility was ordered to be on the terms and conditions in the DIP Term Sheet and Commitment Letter dated as of July 18, 2007 which was approved in that paragraph subject to a further hearing on the Comeback Date. Covenant No. 1 in the DIP Term Sheet and Commitment Letter provides that the Borrower shall not without the Lender's prior written consent make any material disbursement unless it is contemplated in the initial cash flow or any subsequent cash flow approved by the Lender.

98 As noted earlier, on the motion to approve the Initial Order the Court had affidavit information from Automotive that the DIP Loan does not provide for the funding of any special payments, along with a copy of the cash flow which states that no provision is made for the payment of any special pension payments.

99 So, based on the above analysis, the Court, in the Initial Order, by reason of paragraph 34 (as to which no reservation of a right to object has been made or is now asserted), has ordered that the DIP Loan is not to be applied to special payments except with the consent of the DIP Lender.

100 The Superintendent seeks an order requiring the Applicant to pay the Special Payments. For the reasons given above, such an order would constitute a collateral attack on DIP Approval because the evidence is that the Applicant has no funds available to it other than the DIP Loan. Consequently, the order the Superintendent requests would effectively order the Applicant to use the DIP Loan for a purpose which, pursuant to paragraph 34 of the Initial Order, is not permitted.

101 Chrysler's agreement to act as DIP lender is based on the fact that the Applicant's supply is required to maintain Chrysler's own just-in-time vehicle manufacturing operations. The Superintendent submits that if Chrysler has concluded that it requires the output derived from the labour of the employees, then it is only fair and equitable that Chrysler bears the cost, in terms of remuneration to the employees including special payments to the Pension Plans, of that labour.

102 In the decision in *Ivaco Inc., Re* (2005), 47 C.C.P.B. 62 (Ont. S.C.J. [Commercial List]) at paragraph 4 (affirmed (2006), 275 D.L.R. (4th) 132 (Ont. C.A.), leave to appeal granted [2006] S.C.C.A. No. 490 (S.C.C.)) at the first instance, Farley J. characterized the nature of special payments, stating that "notwithstanding that past service contributions

could be characterized as functionally a pre-filing obligation, legally the obligation pursuant to the applicable pension legislation is a 'fresh' obligation".

103 The amount of the outstanding special payments in the present case appears to have been determined prior to the Initial Order based on information relating to the pre-filing period. It is not apparent that the continuation of the operations of the Applicant in the post-filing period has given rise to an increase in the amount of the special payments from the amount that would otherwise have been applicable by reason of the pre-filing experience. Consequently, it seems tendentious to characterize the outstanding special payments as the costs of operating in the post-filing period.

104 The Superintendent objects that the approach that has been taken by the Applicant in the present case has been done without the requisite negotiation with the Superintendent and the pension plan stakeholders. In the decision in *United Airlines Inc.*, *supra*, Farley J. cited the example of a case where the company obtained specific relief from the requirement to make special payments although current service costs were made. The Court, however, concluded that such an arrangement "is not a 'given right' of the company" and is to be achieved "on a consensual basis after negotiation" with the pension plan stakeholders.

105 If there had been an objection to paragraph 34 of the Initial Order, that might well have occasioned negotiations of this kind, but there was no such objection. As noted, if there had been, each side could have assessed its own interests *vis-à-vis* the position of the other and the extent to which it would take the risk of insisting on its position or instead seek a compromise. Instead, what has happened is that the DIP Facility has proceeded without objection and the DIP Lender has changed its position on the basis of the Court orders given to date and now, after it has done so, an effort is made to put it in a position where it has no choice but to increase its funding or risk the loss of the continuing operations. This might yield a negotiation but it would be a lopsided one by reason of the DIP Lender already having provided funding in accordance with the Court orders.

106 The USW contends that its submissions in respect of paragraph 6 of the Initial Order are not in conflict with paragraph 34 because they do not seek an order that the DIP Lender provide the funds that Automotive would require to make the special payments or that Automotive make the payments, but only that it not be ordered that Automotive is not required to make those payments.

107 Since the material before the Court is to the effect that Automotive had and has no funds and has no expectation of having funds available which could be used to make the special payments, other than the monies available under the DIP Facility, if the Court were now to countenance and make the amendment to paragraph 6 which the moving party seeks, the necessary practical consequence of that amendment would be to allow pressure to be put on the DIP Lender to increase its funding commitment to Automotive and consent to Automotive making the special payments, because Automotive would otherwise be potentially vulnerable to proceedings to force it to meet its payment obligations and there would inevitably be concerns about the consequences that could flow from default on its part. That situation would be contrary to the expectations which both Automotive and the DIP Lender would reasonably have been entitled to hold in respect of the Initial Order. It might well be different if the moving party had instead sought an order that the "not required" clause in paragraph 6 should be subject to a proviso that it would not apply to the extent that payment of such amounts could be funded out of monies other than from the DIP Facility. There is no alternative request for such a proviso, perhaps because no one expects it would be of any use.

108 So what remains is a request that the Court, in the exercise of its discretion under s. 11, should make an order that would be contrary to the reasonable expectations of the Applicant and the DIP Lender based on the steps already taken and the orders already granted under the CCAA in this proceeding. That would be unfair and it would not contribute to the fair application of the CCAA in this case or as a precedent for others.

109 Moreover, the failure of the moving parties to reserve in respect of and then dispute paragraph 34 of the Initial Order has the following unsatisfactory effect. If the moving parties had duly disputed paragraph 34 there would have been an opportunity for the Court to consider what would have been the two opposing positions on whether the DIP

terms proposed by the DIP Lender should be accepted. If that question had properly been put in issue, then there would also have been an opportunity for each side to consider whether it would seek to press its position or would compromise for the sake of the respective potential benefits to each side. No such opportunity would exists with the request that is now before the Court. So the request should not be granted.

110 For the reasons given above, there is no fair way at the present time to put the parties on a level playing field for negotiation about the special payments. For the reasons mentioned at other points above, it is desirable to ensure that there is an opportunity for such negotiation in CCAA circumstances, as an important means of achieving the most satisfactory arrangements for all concerned to the extent possible. With these considerations in mind, it is appropriate to take into account that the period of the application of the Initial Order was extended by Court order and will expire on the date set by the last such Order unless further extended. If a motion is made for a further extension of the Initial Order beyond its present expiry date, there would seem to be no basis in the above reasons to object to the legitimacy of interested parties raising an objection to paragraph 6 at that time, provided they are also prepared to object to paragraph 34.

Paragraph 11

111 The objection taken by the USW is that the provisions of s. 11 are open to an interpretation that would permit Automotive to repudiate its collective agreements with the USW's members.

112 Paragraph 11 is stated to be subject to covenants in the Definitive Documents as defined in the Initial Order. (They appear to be certain security documents.) The provision does not state that the right to terminate is subject only to such covenants. No mention is made in paragraph 11 of other obligations to which the Applicant may or may not be subject.

113 The USW seeks to have the rights provided for in clauses (b) and (d) of paragraph 11 made subject to all applicable collective agreements and labour laws. Those rights can only be exercised by agreement with the affected employees or other counterparty or under a plan filed under the CCAA, failing which the matters are to be left to be dealt with in any plan of arrangement filed by the Applicant under the CCAA. Nothing in the provision purports to abrogate any applicable collective agreement or labour laws. No reason was advanced why the authorized bargaining agent could not withhold agreement to any proposed exercise of clause (b) or (d) and if Automotive then sought to deal further with the matter pursuant to the CCAA there is no apparent reason why the matter could not be pursued against Automotive in court under the CCAA.

114 Reference is made to the discussion set out earlier with respect to the provision in paragraph 4 relating to further hirings. The comments made there are, with appropriate changes, applicable with respect to the issue relating to paragraph 11.

Paragraph 26

115 The USW and the CAW object to the part of paragraph 26 which provides that the monitor, by fulfilling its obligations under the Initial Order, shall not be deemed to have taken control of the business or be deemed to have "been or become an employer of any of the Applicant's employees." [The word "employees" does not appear in the text of the Order in certain of the materials, but it is obviously intended.]

116 The USW objects to the provision on the basis that the determination of whether the monitor is an employer is within the exclusive jurisdiction of the O.L.R.B. by reason of s. 69, s. 111 and s. 116 of the LRA. Section 69(2) of that Act provides that a person to whom an employer sells its business becomes the employer (the "successor employer") for the purposes specified in that section until the Board declares otherwise.

117 The Initial Order does not expressly purport to determine the application of s. 69(2) of the LRA, since it does not refer to that Act. The application of paragraph 26 is stated to be limited to the monitor in its limited role under the Initial Order, which leaves the Applicant in possession and control of the business and, therefore, as the employer .

This consideration has been regarded as determinative in finding such a provision to be acceptable: see the *Mine Jeffrey* decision at paragraph [76].

118 The discussion in *Mine Jeffrey ic., Re* about a provision of this kind did not address statutory provisions such as s. 69(2) of the LRA.

119 As worded, it is not apparent that paragraph 26 warrants the concern expressed by the USW. It seems reasonable to assume that if the monitor were to take action of a kind that would suggest that the monitor has started to act *de facto* as the employer, in breach of paragraph 26, a motion might be brought before the Court under the CCAA and/or to the Ontario Labour Relations Board and the matter would then be considered in the context of an actual fact situation rather than in the present abstract and ill-defined circumstances. No order to give effect to the objection of the USW and the CAW in respect of this feature of paragraph 26 is appropriate at the present time.

Paragraph 29

120 The USW objects that the immunity, or limitation of liability, provided to the monitor in the first sentence of paragraph 29 is not within the jurisdiction of the Court under the CCAA, or if it is, the granting of this immunity is not a proper exercise of the discretion of the Court. The impugned provision limits liability to gross negligence and willful misconduct.

121 There was no reservation of rights in the endorsement of Stinson J. of July 30, 2007 with respect to this paragraph.

122 The USW cites no authority that has been decided with respect to the CCAA in support of its contention that the limitation of liability is beyond the jurisdiction of the Court under the CCAA. In view of the stay jurisdiction of s. 11 of the CCAA and taking into account the "on such terms" jurisdiction under that section, it might seem that the better view is that the Court does have the jurisdiction to make such an order and that the only issue is whether the grant of limited liability of the kind specified is a proper exercise of the discretion of the Court.

123 The USW submits that other court decisions show that the Court does not have the jurisdiction to grant a limitation of liability to the monitor of the kind set out in paragraph 29.

124 In *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, [2006] 2 S.C.R. 123 (S.C.C.) ("*T.C.T. Logistics*"), the Supreme Court of Canada held that the "boiler plate" immunization of the receiver, though not uncommon in receivership orders, was invalid in the absence of "explicit statutory language" to authorize such an extreme measure:

> Flexibility is required to cure the problems in any particular bankruptcy. But guarding that flexibility with boiler plate immunizations that inoculate against the assertion of rights is beyond the therapeutic reach of the Bankruptcy and Insolvency Act.
>
> . . . . .
>
> As Major J. stated in *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 (CanLII), [2004] 1 S.C.R. 60, 2004 SCC 3:
>
> > ...explicit statutory language is required to divest persons of rights they otherwise enjoy at law... [S]o long as the doctrine of paramountcy is not triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights. [para. 43]

125 The USW also relies on s. 11.8(1) of the CCAA. Indeed, subsection 11.8(1) explicitly exempts a monitor from liability in respect of claims against the company which arise "before or upon the monitor's appointment":

> Notwithstanding anything in any federal or provincial law, where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees, the monitor is not by reason of

that fact personally liable in respect of any claim against the company or related to a requirement imposed on the company to pay an amount where the claim arose before or upon the monitor's appointment.

126 The decision in *TCT Logistics Inc.* did not deal with the CCAA. The monitor in that case had been appointed by the Court with a mandate to hire employees and carry on the business, but in the present case the monitor is restricted from hiring any employees and Automotive remains the employer of all of the unionized employees. The statements quoted from the *TCT Logistics Inc.* decision are made in the context of a consideration of the issue whether a bankruptcy court judge can determine successor rights issues relating to the LRA. The immunity given in that case was that no action could be taken against the interim receiver without the leave of the Court.

127 Section 11.8(1) deals with the situation where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees and it provides a blanket immunity against claims which arose before or upon the monitor's appointment. It is understandable that in the situation addressed in the section that the immunity would be limited to such claims and that it would be a blanket immunity in respect of such claims. The existence of s. 11.8(1) does not given rise to any implication as to what kind of limitation of liability would be reasonable in respect of a monitor with the limited powers given in the present case.

128 The specific wording in paragraph 29 of the Initial Order is consistent with the standard limitation of liability protections granted to monitors under the standard-form model CCAA Initial Order, which was authorized and approved by the Commercial List Users' Committee on September 12, 2006.

129 That is, of course, not determinative but it suggest that the clause has received serious favourable consideration from members of the bar in a context unrelated to particular party interests.

130 The monitor submitted in its factum a list of twelve recent CCAA proceedings in which orders have been granted with similar provisions to the limitation of liability in this case. This would seem to suggest that in those cases the clause limiting liability was not disputed or, if it was, the Court found the clause to be acceptable.

131 For these reasons, paragraph 29 is acceptable.

Paragraph 4 of the CRO Order

132 The USW advances the submissions made with respect to jurisdiction as regards the monitor based on *TCT Logistics Inc.* against the clause limiting the liability of the CRO.

133 Automotive does not have D&O insurance in place. The protection set out in paragraph 4 of the CRO Order can reasonably be regarded as a fundamental condition of Axis Consulting Group Inc. and Mr. Rutman's agreement to accept and continue as CRO. Automotive would probably be severely restricted in its ability to appoint a capable and experienced Chief Restructuring Officer without the ability to offer a limitation on potential liability.

134 The USW's claim that the Court does not have authority to grant this protection to the CRO is contrary to established practice. These protections are consistent with limitations of liability granted to Chief Restructuring Officers in other CCAA proceedings, and are consistent with the protections granted to Monitors under the standard-form CCAA Initial Order. The same or similar language was used in paragraph 19 of the Order of July 29, 2004 in the Stelco Inc. CCAA proceedings and in paragraph 3 of the Order of November 28, 2003 in the Ivaco Inc. CCAA proceeding, both granted by Farley J.

135 In *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, [2007] S.J. No. 154 (Sask. Q.B.) the Saskatchewan Court of Queen's Bench upheld a similar limitation of liability for the Chief Restructuring Officer of Bricore. In dismissing a motion to lift the stay against the Chief Restructuring Officer, Koch J. stated:

> The [CCAA] is intended to facilitate restructuring to serve the public interest. In many cases such as the present it is necessary for the Court to appoint officers whose expertise is required to fulfill its mandate. It is clearly in the

public interest that capable people be willing to accept such assignments. It is to be expected that such acceptance be contingent on protective provisions such as are included in the order of May 23, 2006, appointing Mr. Duval. It is important that the Court exercise caution in removing such restrictions; otherwise, the ability of the Court to obtain the assistance of needed experts will necessarily be impaired. Qualified professionals will be less willing to accept assignments absent the protection provisions in the appointing order.

136 The Saskatchewan Court of Appeal upheld the decision [2007 CarswellSask 324 (Sask. C.A.)].

137 The terms of the limitation of liability given to the CRO are similar to the limitation in the indemnity ordered in paragraph 21 of the Initial Order to be given by the Applicant to the directors and officers of the Applicant. The moving parties have not requested any amendment of that paragraph.

138 It is hard to imagine how a prospective CRO would be prepared to take on the responsibilities of that position in the context of a situation like the present one, fraught as it is with obvious conflicting interests on the part of the different parties involved and a background of action in the work place and litigation in court, without significant protection against liability.

139 Paragraph 4 of the CRO Order appears satisfactory for the above reasons.

Conclusion

140 For the reasons given above, the motions are dismissed.

141 Counsel may make written submissions as to costs if necessary.

Motions dismissed.

TAB 3

2009 CarswellOnt 4469
Ontario Superior Court of Justice [Commercial List]

Fraser Papers Inc., Re

2009 CarswellOnt 4469, 2009 C.E.B. & P.G.R. 8350 (headnote only), [2009] O.J. No. 3188, 179 A.C.W.S. (3d) 515, 55 C.B.R. (5th) 217, 76 C.C.P.B. 254

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO FRASER PAPERS INC., FPS CANADA INC., FRASER PAPERS HOLDINGS INC., FRASER TIMBER LTD., FRASER PAPERS LIMITED and FRASER N.H.LLC (collectively, the "Applicants")

Pepall J.

Judgment: July 16, 2009
Docket: CV-09-8241-OOCL

Counsel: M. Barrack, R. Thornton for Applicants
R. Chadwick, C. Costa for Monitor
P. Griffin for Directors
D. Chernos for Brookfield Asset Management Inc.
K. McEachern for CIT Business Credit Canada Inc.
T. Wallis for Régie des rentes du Québec
D. Wray, J. Kugler for Communications, Energy, and Paper Workers Union of Canada
C. Sinclair for United Steelworkers
J. Michaud for New Brunswick Regional Council of Carpenters, Millwrights and Allied Workers, Local 2540

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Companies entered into protection under Companies' Creditors Arrangement Act — Companies sponsored five defined benefit pension plans — Companies' accrued pension benefit obligations exceeded value of plan assets — Companies expected that they would be required to make special payments to fund pension deficits in amounts of $13.5 million in 2009 and $34.7 million in 2010 — Companies entered into DIP financing agreements which provided that companies were unable to pay special payments without lender's consent and payment of same constituted event of default — Companies brought motion to suspend special payments during stay period — Motion granted — Court had jurisdiction to make order staying requirement to make special payments — Special payments related to employment services provided prior to filing — Terms of pension plans and collective agreements would not be modified — Actuarial filings were current and relief requested was not premature — Failure to grant stay would jeopardize business and ability to restructure — Ability to operate was wholly dependent on provision of DIP financing and payment of special payments constituted DIP loan event of default.

Pensions --- Administration of pension plans — Valuation and funding of plans — Deficiency

Companies entered into protection under Companies' Creditors Arrangement Act — Companies sponsored five defined benefit pension plans — Companies' accrued pension benefit obligations exceeded value of plan assets — Companies expected that they would be required to make special payments to fund pension deficits in amounts of $13.5 million in 2009 and $34.7 million in 2010 — Companies entered into DIP financing agreements which provided that companies were unable to pay special payments without lender's consent and payment of same constituted event of default — Companies brought motion to suspend special payments during stay period — Motion granted — Court had jurisdiction to make

order staying requirement to make special payments — Special payments related to employment services provided prior to filing — Terms of pension plans and collective agreements would not be modified — Actuarial filings were current and relief requested was not premature — Failure to grant stay would jeopardize business and ability to restructure — Ability to operate was wholly dependent on provision of DIP financing and payment of special payments constituted DIP loan event of default.

***Pepall J.*:**

Relief Requested

1 The Fraser Group ("the Applicants") consists of a number of related companies that carry on an integrated specialty paper business with paper, pulp and lumber operations. For fiscal 2008, the Applicants had consolidated net sales of approximately $688.6 million and suffered a net loss of $71.9 million. For the four months ended May 2, 2009, the Applicants recorded a net loss of $22.1 million on consolidated net sales of $202.8 million. On June 18, 2009, Morawetz J. granted the Applicants protection from their creditors and a stay of proceedings pursuant to the *Companies' Creditors Arrangement Act* (the "Initial Order"). He adjourned the Applicants' request that the stay applied to special payments in respect of unfunded and going concern and solvency deficiencies with respect to certain pension plans. On June 18, 2009, the Applicants obtained recognition and provisional relief in an ancillary proceeding pursuant to Chapter 15 of the United States Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware.

2 This motion addresses the need for the Applicants to make past service contributions or special payments to fund any going concern unfunded liability or solvency deficiencies ("special payments") of certain pension plans during the stay period as that term is defined in the Initial Order. The Applicants seek to suspend those payments. Current service payments or normal cost contributions are not in issue. The Applicants are supported by the Monitor, PricewaterhouseCoopers Inc., the Directors and one of the DIP lenders, Brookfield Asset Management Inc. Brookfield also directly or indirectly owns 70.5% of the outstanding common shares of Fraser Papers Inc. The other DIP lender, CIT Business Credit Canada Inc., the Superintendent of Pensions for New Brunswick, the Minister of Business New Brunswick, and la Régie des rentes du Québec [1] are all unopposed to the relief requested. The Communications, Energy and Paper Workers Union of Canada and its local unions 4N, 6N, 29,189,894, and 2930 ("the CEP") who represent approximately 660 employees at facilities in New Brunswick and Quebec oppose the request. They are supported by the United Steelworkers and the New Brunswick Regional Council of Carpenters, Millwrights and Allied Workers, Local 2540.

3 On June 30, 2009, I granted the relief requested which was limited to special payments and ancillary relief with reasons to follow. These are the reasons in support of the order granted.

Facts

4 The Applicants sponsor five defined benefit pension plans in three jurisdictions: two in New Brunswick (an hourly and a salaried plan), two in Quebec (an hourly and a salaried plan) and one in the United States. 2297 retirees and 1412 active employees are members of the plans. The Applicants also sponsor one defined contribution plan in the U.S. with 2 active members and 7 retirees and three unfunded supplementary employee retirement plans ("SERPs"), one in Canada and two in the US. The Applicants' accrued pension benefit obligations in the five plans and the SERPs exceed the value of the plans assets by approximately $171.5 million as at December 31, 2008. This figure is based on information received by Fraser Papers Inc. from its actuaries for the purpose of preparing annual audited financial statements. The Applicants are not required to fund the U.S. defined contribution plan for the balance of 2009 and 2010.

5 Changes in global capital markets and borrowing rates have affected the funded status, funding requirements, and pension expense for the plans. Based on market conditions, regulatory filing requirements and preliminary estimates, the Applicants expect that they will be required to make special payments in the amount of $13.5 million in 2009 in respect

of the pension deficits with respect to the plans. This is in addition to the $3.3 million required to be paid in 2009 on account of normal cost contributions to the plans.

6 In 2010, the Applicants estimate that they will be required to pay approximately $34.7 million to fund the pension deficits and $5.1 million for normal cost contributions. The Applicants have no ability to pay the special payments or the combined 2010 funding obligations from cash flow generated by the business.

7 According to the Monitor, the Applicants are current with all their actuarial filings with the pension regulators. In 2008, actuarial valuations as at December 31, 2007 were filed with the New Brunswick regulator for the two plans in New Brunswick and an updated actuarial valuation as at December 31, 2006 for the Quebec salaried plan was filed in Quebec in April, 2008. Based on the latest filed actuarial valuations and the current 10 year extended amortization period with respect to the special payments, the monthly special payments in respect of pension deficits for the balance of 2009 amount to $4,693,302 and for 2010, $7,831,857. The next special payments were due on June 30, 2009 and amounted to $380,397. Based on estimates prepared by the Applicants' director of pension administration, a Certified General Accountant with 25 years experience, the Applicants anticipate that they will be required to increase their 2009 special payments by an additional $7.4 million in December, 2009 and in 2010 by an additional $24.6 million.

8 The term sheets in support of the DIP financing were finalized the evening of June 17, 2009, and the financing requirements were not marketed externally to other potential lenders given the nature of the industry and the willingness of the existing lenders to fund ongoing operations. On June 18, 2009, Morawetz J. [2009 CarswellOnt 3658 (Ont. S.C.J. [Commercial List])] approved certain DIP term sheets and financing up to $46 million, of which approximately $20 million has been authorized by the lenders. He authorized the Applicants to enter DIP financing agreements with CIT Business Credit Canada Inc. and Brookfield Asset Management Inc. Under the latter's agreement, the Applicants are unable to pay the special payments without the lender's prior written consent and payment of same constitutes an event of default. Absent DIP financing, the Applicants are unable to continue in business. The cash flow forecast contemplates payment of salaries, wages, vacation pay, and current pension funding obligations but not special payments.

9 The CEP is party to five collective agreements in New Brunswick, one of which expires on June 30, 2009, two in Quebec, and one in the U.S. They provide for pension benefits although in argument counsel did not address any particular provisions of them. Schedule "A" to these reasons sets forth the applicable statutory provisions that were attached to the factum of CEP.

Positions of the Parties

10 The Applicants state that the special payments are pre-filing unsecured debts with no special status and relate to employment services provided prior to filing. As in other cases, the Court should stay the obligation to pay. Failure to do so would jeopardize the entire business of the Applicants and would be contrary to the purpose behind the *CCAA* order - namely, to give the Applicants the opportunity to restructure for the benefit of all stakeholders. The CEP submits firstly that no special payments are currently required. Any such obligations will arise after the June 18, 2009 Initial Order and section 11.3 of the *CCAA* prohibits the suspension of claims resulting from obligations relating to services supplied after an Initial Order. Secondly, the special payments are grounded in the terms and conditions of CEP's collective agreements and they may not be unilaterally modified by the Applicants. Pursuant to section 11.3 of the *CCAA*, the members of CEP are entitled to the benefit of a plan provided for in the collective agreement. That is in accordance with applicable statutes. Thirdly, the relief requested by the Applicants is premature in that actuarial valuations have not been filed. Lastly, CEP submits that the DIP agreements are unreasonable.

Issues

11 The issues for me to address are whether I have jurisdiction to suspend the special payments and, if so, whether I should exercise that discretion and also grant ancillary relief.

Discussion

12 In recent years, a number of Canadian cases have addressed the interaction of employment and labour claims and the obligations of insolvent employers as they relate to pensions. In analyzing these cases and the issues before me, it is helpful to first examine general principles.

13 Employer pension contributions are described by M. Starnino, J-C Killey and C. P. Prophet in their article entitled "The Intersection of Labour and Restructuring Law in Ontario: A Survey of Current Law".

> In the case of a defined benefit plan, (i.e., a plan that promises to pay the beneficiaries of the plan a specific amount in retirement) the amount of the current service contribution is determined using actuarial estimations having regard to, among other things, the amount of the benefit to be provided, the demographics of the workforce and the anticipated returns generated by the investments in which the pension plan is invested.
>
> Second, if the pension plan is a defined benefit plan then an employer may be required to make additional contributions to the pension plan called "special payments". The obligation to make special payments arises where the original plan experience or investment performance differed from that assumed by the actuaries in order to provide the benefit promised to employees and the plan develops either a going concern unfunded liability or a solvency deficiency.
>
> A going concern unfunded liability arises when it appears, based on a periodic actuarial assessment of the plan, that the plan is insufficiently funded to pay the benefits that are or will become due, assuming that the pension plan continues indefinitely. Once a going concern unfunded liability is identified, the employer is required to make monthly special payments to fund the deficiency within fifteen years.
>
> A solvency deficiency arises when it appears, based upon a periodic actuarial assessment of the plan, that the plan's current assets are insufficient to meet the obligations that would be due if the employer immediately discontinued its business and the plan were wound up. In the case of a solvency deficiency, the employer is required to make special payments to fix the deficiency within a five year time frame. Pending amendments will extend this period to 10 years." [2]

Directors may be liable in the event of a failure by a company to make a payment to a pension fund.

14 The *CCAA* has been and is to be broadly interpreted: *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* [3] . This is in keeping with the purpose of the *CCAA*, namely to facilitate restructuring. The *Act* is designed to avoid the negative consequences of terminating business operations and to allow a company to carry on business. As noted by Professor Janis Sarra, "There is a public policy interest in allowing for a certain transition period to allow debtors to economically adjust in difficult markets in unsettled times." [4]

15 The *CCAA* does not directly address employment or labour claims. The power to stay claims against a debtor company is found in section 11 of the *CCAA.* Section 11.3 of the *Act* provides some limitation on the Court's discretion. It states:

> (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> > (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
> >
> > (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

In addition, the *Act* of course provides for the compromise of claims against a debtor company.

16 As to the treatment of special payments in bankruptcy and insolvency proceedings, as noted by Messrs. Starnini, Killey and Prophet, a trend has developed not to make special payments in the course of *CCAA* proceedings and such payments do not enjoy any priority in bankruptcy. [5]

17 Courts in both Ontario and Quebec have addressed the issue of special payments in the context of a *CCAA* proceeding and a debtor company that was party to a collective agreement. In *Collins & Aikman Automotive Canada Inc., Re* [6], Spence J. concluded that the Court had jurisdiction to permit the debtor to refrain from making special payments. Similarly, in *AbitibiBowater inc., Re* [2009 CarswellQue 4329 (C.S. Que.)]. [7], Mayrand J. determined that the Court had jurisdiction to authorize the suspension of Abitibi's obligation to finance the pension plan by suspending its special payments. She followed the decisions of *Mine Jeffrey inc., Re.* [8], *Papiers Gaspesia Inc.* [9], and *Collins & Aikman Automotive Canada Inc*. Like Spence J., she distinguished between rights that flow from a collective agreement and the performance of obligations to give effect to those rights. In that case, she determined that the past service contributions or special payments related to services provided prior to the Initial Order and therefore were not barred by section 11.3 of the *Act.*

18 In *Nortel Networks Corp., Re* [10], Morawetz J.'s decision did not address the issue of special payments but certain other employee and union claims. He noted that employee claims, whether they were put forth by the union or by former employees, are unsecured claims and do not have statutory priority. He observed that section 11.3 is an exception to the general stay provision and should be construed narrowly. "The CCAA contemplates that during the reorganization process, pre-filing debts are not paid, absent exceptional circumstances and services provided after the date of the Initial Order will be paid for the purpose of ensuring the continued supply of services....The triggering of the payment obligation may have arisen after the Initial Order but it does not follow that a service has been provided after the Initial Order. Section 11.3 contemplates, in my view some current activity by a service provider post-filing that gives rise to payment obligations post-filing....The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3. Rather, the key factor is whether the employee performed services after the date of the Initial Order." [11] Performance of services is the determining factor, not crystallization of the payment obligation.

19 Decisions of courts of co-ordinate jurisdiction are not binding but are highly persuasive and ought to be followed in the absence of strong reasons to the contrary: *R. v. Cameron* [12] and *Holmes v. Jarrett* [13]. This is in the interests of predictability, consistency, and stability in the administration of justice. This need is particularly evident in the current economic climate where companies and their stakeholders including employees and unions require time to restructure and stability in the law is an enabler in this regard. Until such time as an appellate court provides different guidance, it seems to me that this line of cases should be followed. I also note that neither la Regie des rentes du Quebec nor the Superintendent of Insurance for the Province of New Brunswick was opposed to the order requested by the Applicants.

20 Applying these cases, I conclude that I do have jurisdiction to make an order staying the requirement to make special payments. The evidence indicates that these payments relate to services provided in the period prior to the Initial Order and the collective agreements do not change this fact. In essence, the special payments are unsecured debts that relate to employment services provided prior to filing. Furthermore, I am not being asked to modify the terms of the pension plans or the collective agreements. The operative word is suspension, not extinction. In addition, the actuarial filings are current and the relief requested is not premature.

21 I must then consider whether having concluded that I have jurisdiction, I should exercise it as requested by the Applicants. Frankly, I do not consider either of the alternatives to be particularly appealing. On the one hand, one does

not wish to in any way jeopardize pensions. On the other hand, the Applicants have no ability to pay the special payments at this time. Their ability to operate is wholly dependent on the provision of DIP financing. Furthermore, payment of the special payments constitutes a DIP loan event of default. A bankruptcy would not produce a better result for the employees with respect to the special payments in that they do not receive priority in bankruptcy. Claims in this regard are unsecured. The relief requested by the Applicants, importantly in my view, does not extinguish or compromise or even permit the Applicants to compromise their obligations with respect to special payments. Indeed, the proposed order expressly provides that nothing in it shall be taken to extinguish or compromise the obligations of the Applicants, if any, regarding payments under the pension plans. [14] Failure to stay the obligation to pay the special payments would jeopardize the business of the Applicants and their ability to restructure. The opportunity to restructure is for the benefit of all stakeholders including the employees. That opportunity should be maintained.

22 As to the ancillary relief requested, it seems to me that it naturally flows from the aforesaid order. Given that I am ordering that the special payments need not be made during the stay period pending any further order of the Court, the Applicants and the officers and directors should not have any liability for failure to pay them in that same period. The latter should be encouraged to remain during the *CCAA* process so as to govern and assist with the restructuring effort and should be provided with protection without the need to have recourse to the Directors' Charge. I further understand that the provisions of the proposed order are similar to those granted by Farley J. in *Re Ivaco Inc*., by Campbell J. in *St. Marys Papers Ltd.* and most recently, by Mayrand J. in *Re AbitibiBowater*.

23 The other argument raised by CEP is that the terms of the DIP financing are unreasonable. Morawetz J. did expressly approve the DIP financing and the term sheets. No motion was brought to amend his order in that regard. Even if one disregards this procedural problem, the Monitor reported to the Court that, based on a comparison of the principal financial terms of the two DIP financing arrangements with a number of other DIP packages in the forestry, pulp and paper sector with respect to pricing, loan availability and certain security considerations, the financial terms of the DIP term sheets appeared to be both commercially reasonable and consistent with current market transactions. The Monitor specifically referred to the treatment accorded to the special payment obligations. I also observe that no evidence of any alternative DIP financing was advanced or even suggested.

24 For these reasons, the relief requested by the Applicants was granted. CEP requested that the Applicants pay its costs of this motion and made submissions to this effect in its factum. If they are unable to agree, the Applicants are to make brief written submissions on costs in response to the request by CEP. CEP is at liberty to file a reply if it so desires.

Schedule "A"

Industrial Relations Act, R.S.N.B. 1973, c. I-4

56(2) A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.

Pension Benefits Act, S.N.B. 1987, c. P-5.1

50(1) Subject to section 59, a pension fund is trust property for the benefit of the beneficiaries of the fund.

50(2) The beneficiaries of the pension fund are members, former members, and any other persons entitled to pensions, pension benefits, ancillary benefits or refunds under the plan.

51(1) If an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

51(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

51(3) An employer who is required by a pension plan to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions due and not paid into the pension fund.

51(4) If a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount equal to employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations.

51(5) The administrator of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsections (1), (3) and (4).

51(6) Subsections (1), (3) and (4) apply whether or not the money mentioned in those subsections is kept separate and apart from other money or property of the employer.

52 If the administrator of the pension plan is the employer and the employer is bankrupt or insolvent, the Superintendent may act as administrator or appoint an administrator of the plan.

53 The administrator may commence proceedings in a court of competent jurisdiction to obtain payment of contributions due under the pension plan, this Act and the regulations.

Labour Code, R.S.Q. c. C-27

67. A collective agreement shall be binding upon all the present or future employees contemplated by the certification.

The certified association and the employer shall make only one collective agreement with respect to the group of employees contemplated by the certification.

68. A collective agreement made by an employers' association shall be binding upon all employers who are members of such association and to whom it can apply, including those who subsequently become members thereof.

A collective agreement made by an association of school boards shall bind those only which have given it an exclusive mandate as provided in section 11.

Supplemental Pension Plans Act, R.S.Q. c. R-15.1

6. A pension plan is a contract under which retirement benefits are provided to the member, under given conditions and at a given age, the funding of which is ensured by contributions payable either by the employer only, or by both the employer and the member.

Every pension plan, with the exception of insured plans, shall have a pension fund into which, in particular, contributions and the income derived therefrom are paid. The pension fund shall constitute a trust patrimony appropriated mainly to the payment of the refunds and pension benefits to which the members and beneficiaries are entitled.

49. Until contributions and accrued interest are paid into the pension fund or to the insurer, they are deemed to be held in trust by the employer, whether or not the latter has kept them separate from his property.

Motion granted.

Footnotes

1 It reserves its rights to return to Court if necessary to address any issues relating to current service payments to be made.

2 2009, Ontario Bar Association, Continuing Legal Education

3 2008 CarswellOnt 4811 (Ont. C.A.).

4 "Rescue! The Companies' Creditors Arrangement Act"Toronto: Thomson Carswell, 2007 at p.9.

5 Supra, Note 2 at p.18 and 31.

6 2007 CarswellOnt 7014 (Ont. S.C.J.).

7 May 8, 2009 Decision of Quebec Superior Court

8 [2003] R.J.Q. 420 (C.A. Que.)

9 [2004] Cam:00 40296 (QC.S.C.)

10 June 18, 2009 Decision of Ontario Superior Court

11 Ibid at para.

12 [1984] O.J. No. 683 (Ont. Prov. Ct.).

13 [1993] O.J. No. 679 (Ont. Gen. Div.).

14 [1993] O.J. No. 679 (Ont. Gen. Div.).

TAB 4

CITATION: Re Nortel Networks Corporation et al, 2017 ONSC 700
COURT FILE NO.: 09-CL-7950
DATE: 20170130

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

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

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: Newbould J.

COUNSEL: *Benjamin Zarnett, Jay A. Carfagnini, Joseph Pasquariello and Christopher G. Armstrong*, for the Monitor

Jennifer Stam, for the Canadian Debtors

R. Paul Steep, for Morneau Sheppell and the Canadian Creditors Committee

Mark Ziegler and Barbara Walancik, representative counsel for the Canadian former employees and LTD beneficiaries

Barry E. Wadsworth, for active, retired and disabled employees represented by Unifor

Max Starnino, for the Pension Benefit Guarantee Fund

Matthew Urback, for the Canadian continuing employees

Scott Bomhof and Adam Slavens, for the U.S Debtors

R. Shayne Kukulowicz and M. Wunder, for the U.S. Unsecured Creditors' Committee

Michael E. Barrack and D.J. Miller, for the UKPC

Gavin H. Finlayson, for the Ad Hoc Bondholders Group

John Salmas, for Wilmington Trust, National Association, Trustee

Joseph Greg McAvoy, in person

Jennifer Holley, in person

HEARD: January 24, 2017

ENDORSEMENT

[1] On January 24, 2017, a joint hearing of this Court and the U.S. Bankruptcy Court for the District of Delaware was held to deal with motions for the sanctioning of plans of arrangement effecting a settlement by all major parties of the allocation dispute regarding the $7.3 billion held in escrow since the sale of the Nortel assets. At the conclusion of the hearing, I granted the motion of the Monitor to sanction the Canadian Debtors' Plan of Compromise and Arrangement (the "Plan") and to release the escrowed sale proceeds in accordance with the settlement, for reasons to follow[1]. These are my reasons.

Background

[2] The Canadian Nortel Debtors, along with the U.S. Nortel Debtors, EMEA Nortel Debtors, and certain of their respective key stakeholder groups were party to protracted litigation in the Canada and U.S. regarding the allocation of the $7.3 billion in sale proceeds (the "Sale Proceeds"). Following a 21-day cross-border trial, this Court and the U.S. Bankruptcy Court

[1] Judge Gross also sanctioned the U.S. plan of arrangement and signed at the hearing the necessary orders to effect the plan.

issued decisions with respect to the allocation of the sale proceeds in May 2015. The decision of this Court later became final when the Ontario Court of Appeal refused leave to appeal. The decision of Judge Gross in the U.S. Bankruptcy Court was appealed by the U.S. interests to the 3rd Circuit District Court. Mediation was directed by that Court.

[3] Following extensive negotiations, on October 12, 2016, the Canadian Debtors, Monitor, U.S. Debtors, EMEA Debtors, EMEA Non-filed Entities, Joint Administrators, NNSA Conflicts Administrator, French Liquidator, Bondholder Group, the members of the CCC, the UCC, the U.K. Pension Trustee, the PPF, the Joint Liquidators and the NNCC Bondholder Signatories executed the Settlement and Support Agreement. The Settlement and Support Agreement, among other things:

(a) contains the terms of settlement of the allocation dispute, including the payment of 57.1065% of the Sale Proceeds to the Canadian Debtors (being in excess of $4.1 billion), plus an additional amount of $35 million on account of the M&A Cost Reimbursement;

(b) resolves a number of significant claims against the Canadian Debtors, including the claims of the Crossover Bondholders, the UKPI and the Canadian Pension Claims;

(c) contemplates the substantive consolidation of the Canadian Debtors into the Canadian Estate;

(d) provides that the Canadian Estate will retain the value of its remaining assets, which means, among other things, the release to the Canadian Estate of approximately $237 million from the Canada Only Sales and additional amounts held on account of IP address sales;

(e) provides for the exchange of comprehensive releases among the Estates and the other parties to the Settlement and Support Agreement; and

(f) contains the framework for the development and implementation of coordinated plans of arrangement in Canada and the U.S., and a timeline for the approval and implementation thereof.

[4] The Plan provides for a comprehensive resolution of these CCAA Proceedings and implementation of the Settlement and Support Agreement and paves the way for distributions to creditors in a timely manner. The Plan provides for, among other things, the following:

(a) substantive consolidation of the Canadian Debtors into the Canadian Estate;

(b) the payment in full of certain Proven Priority Claims and other payments contemplated by the Plan;

(c) a compromise of all Affected Unsecured Claims in exchange for a *pro rata* distribution of the cash assets of the Canadian Estate available for distribution to Affected Unsecured Creditors, and the full and final release and discharge of all Affected Claims;

(d) the subordination of Equity Claims such that Equity Claimants and holders of Equity Interests will not receive a distribution or other recovery under the Plan;

(e) authorization for the Canadian Debtors and Monitor to direct the Escrow Agents to effect the allocation and distribution of the Sale Proceeds contemplated by the Settlement and Support Agreement and to otherwise implement the Settlement and Support Agreement, including the giving and receiving of the Settlement and Support Agreement Releases;

(f) release of all amounts held by NNL pursuant to the Canadian Only Sale Proceeds Orders or held as Unavailable Cash to the Canadian Estate;

(g) the establishment of certain reserves for the ongoing administration of the Canadian Estate and in respect of Unresolved Claims; and

(h) the release and discharge of all Affected Claims and Released Claims as against, among others, the Canadian Debtors, the Directors and Officers and the Monitor.

[5] On December 1, 2016, a meeting order was made which authorized the Monitor to call and hold a meeting of Affected Unsecured Creditors to consider and vote on the Plan. The Creditors' Meeting was held on January 17, 2017. The Plan was approved by an overwhelming majority of Affected Unsecured Creditors voting at the meeting in person or by proxy, with 99.97% in number and 99.24% in value voting to approve the Plan.

Analysis

[6] Section 6 of the CCAA provides for a plan to be sanctioned by a court if approved by a vote of creditor as required by that section. It provides, in part:

> 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 or 5, or either of those sections, agree to any compromise or arrangement either as proposed or 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; …

[7] The general requirements for Court approval of a CCAA plan are well established:

a. there must be strict compliance with all statutory requirements;

b. all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and

c. the plan must be fair and reasonable.

See *Canadian Airlines Corp, Re*, 2000 ABQB 442 at para. 60, leave to appeal refused 2000 ABCA 238, leave to appeal refused [2001] S.C.C.A. No. 60; *Olympia & York Developments Ltd. (Re)*,(1993), 17 C.B.R. (3d) 1; *Cline Mining Corp., Re*, 2015 ONSC 622 at para. 19.

[8] It is clear that there has been compliance with all statutory requirements and that nothing has been done or purported to be done which is not authorized by the CCAA. The meeting of creditors was properly called and held, a sufficient vote of creditors as required by section 6 of the CCAA was obtained and equity interests do not receive any payment under the Plan.

[9] Whether a plan is fair and reasonable is necessarily shaped by the unique circumstances of each case within the context of the CCAA. See *Canadian Airlines* at para. 94. I am satisfied that the Plan in this case is fair and reasonable for the following reasons:

(i) The Plan was a compromise reached among all of the parties after extensive negotiations led by a very experienced mediator.

(ii) The Plan received approval from 99.7% of the creditors. This overwhelming number of creditors cannot be ignored as they are the only persons affected by the Plan. There is no equity participation as there is no equity in Nortel. I agree with what Blair. J. (as he then was) said in *Olympia & York Developments Ltd. (Re)*;

> 36 One important measure of whether a plan is fair and reasonable is the parties' approval of the Plan, and the degree to which approval has been given.
>
> 37 As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspects of the Plan, descending into the negotiating arena and substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business

judgment of the participants. The parties themselves know best what is in their interests in those areas.

(iii) If the Plan is not sanctioned, the likely result will be further delays from litigation in the U.S. on the appeals from the allocation decision. Delays in payments to persons, whom Mr. Wadsworth aptly described as desperately needing the payments, would be very unfair.

(iv) Further litigation would add to the costs of the Nortel insolvency, costs which are already enormous, and take away amounts to be paid to the creditors, all of whom have approved the Plan.

(v) The Plan calls for payment to creditors on a *pari passu* basis, which is the bedrock of Canadian insolvency law.

(vi) The Plan calls for the substantive consolidation of the Canadian Debtors into a single estate. In this case, the consolidation is fair and reasonable. The Canadian Debtors were highly integrated and intertwined. Many obligations of a Canadian Debtor, including nearly $4 billion of bond debt, are guaranteed by another Canadian Debtor and the vast majority of claims filed against the Canadian Debtors by quantum have been asserted against two or more of the Canadian Debtors. Substantive consolidation eliminates the possibility of any further litigation regarding the specific dollar amount that could be allocated to each Canadian Debtor.

(vii) The releases in the Plan in favour of each of the Canadian Debtors, the directors and officers, the Monitor and the Monitor's legal counsel, each of whom have been integrally involved in the CCAA Proceedings, are fair and reasonable, are directly connected to the objectives of the Plan, and assist in bringing finality to these long running proceedings. These releases have been approved by the relevant parties.

Objecting long term disability claimants

[10] There are two LTD objectors being Mr. Greg McAvoy and Ms. Jennifer Holley. They are self-represented persons in this proceeding. They filed thoughtful submissions and made thoughtful oral presentations. They state that the Plan is unfair and unreasonable for the LTD Beneficiaries and have requested that $44 million be set aside and paid to the LTD Beneficiaries in full satisfaction of amounts owing to them.They raise *Charter* issues.

[11] While I have every sympathy for these objectors, as do all of the parties who appeared and spoke at the hearing, I am afraid that they have no basis to make the request that they are making.

[12] On July 30, 2009 a representation order ("LTD Rep Order") for disabled employees was made. Pursuant to the order an LTD representative, Ms. Susan Kennedy, was appointed as Representative of the LTD Beneficiaries in the CCAA proceedings, including, without limitation, for the purpose of settling or compromising claims by the LTD Beneficiaries in the CCAA proceedings. Pursuant to the LTD Rep Order, LTD Beneficiaries had the option to opt-out of representation by the LTD Rep within 30 days of mailing of notice of the LTD Rep Order to them in mid-2009. Neither of the LTD Objectors (or any other LTD Beneficiary) elected to opt out of representation by the LTD Rep pursuant to the terms of the LTD Rep Order and thus are bound by it and the actions of the LTD Rep.

[13] In 2010, certain of the Canadian Debtors, the Monitor, the Representatives (including the LTD Rep) and Representative Counsel entered into an Amended and Restated Settlement Agreement dated March 30, 2010 (the "Employee Settlement Agreement") which was approved by this Court in its Settlement Approval Order dated March 31, 2010.

[14] Pursuant to the Employee Settlement Agreement and the Settlement Approval Order:

(i) the Canadian Debtors agreed to continue paying LTD benefits to LTD Beneficiaries for the remainder of 2010;

(ii) the Canadian Debtors agreed to establish a CA$4.3 million fund pursuant to which CA$3,000 termination payments were made to former employees, including the LTD Objectors;

(iii) claims of LTD Beneficiaries were agreed to rank as ordinary unsecured claims on a *pari passu* basis with the claims of the ordinary unsecured creditors of the Canadian Debtors;

(iv) the Representatives (including the LTD Rep) agreed, on behalf of those they represent and on their own behalf, that in respect of any funding deficit in the HWT or any HWT related claims in these CCAA proceedings they would not advance, assert or make any claim that any HWT claims are entitled to any priority or preferential treatment over ordinary unsecured claims and that to the extent allowed against the Canadian Debtors, such HWT claims would rank as ordinary unsecured claims on a *pari passu* basis with the claims of the ordinary unsecured creditors of the Canadian Debtors;

(v) the Representatives (including the LTD Rep) agreed on their own behalf and on behalf of the Pension HWT Claimants (as defined in the Employee Settlement Agreement) that under no circumstances shall any CCAA plan be proposed or approved if, among other things, the Pension HWT Claimants and the other ordinary unsecured creditors of the Canadian Debtors do not receive the same *pari passu* treatment of their allowed ordinary unsecured claims against the Canadian Debtors pursuant to the Plan.

[15] Certain LTD Beneficiaries, including the individual LTD Objectors, unsuccessfully sought leave to appeal the Settlement Approval Order to the Ontario Court of Appeal. The Settlement Approval Order is no longer capable of appeal. Accordingly, the LTD Objectors are bound to the provision that their claims are to rank as unsecured claims that share *pari passu* with other unsecured claims against the Canadian Debtors, that any claim for priority treatment has been released, and that no plan could be proposed or approved if the LTD Beneficiaries and

other unsecured creditors did not receive the same *pari passu* treatment of their allowed claims pursuant to such plan.

[16] The LTD Objectors in their brief stated that they exercise their option to opt out of the LTD Rep Order. Unfortunately, they have no right to do so at this late stage.

[17] In making the Settlement Approval Order, Morawetz J. (as he then was) came to the conclusion that the settlement was fair and reasonable. He stated in *Nortel Networks Corp. (Re)* (2010), 66 C.B.R. (5th) 77:

> 40 The Amended and Restated Settlement Agreement is not perfect but, in my view, under the circumstances, it balances competing interests of all stakeholders and represents a fair and reasonable compromise, and accordingly, it is appropriate to approve same.

[18] That finding is binding of the LTD Objectors. However, they say that the adjustment that they request in order to make changes to the Plan requires a reconsideration of the Employee Settlement Agreement and the Settlement Approval Order. There is simply no legal basis seven years later to reconsider the matter. The grounds for reconsideration of a decision are narrow even when no order has been signed and taken out. See *Nortel Networks Corp., Re*, 2015 ONSC 4170 at paras. 3 – 6.

[19] In any event, I agree with the finding of Morawetz J. that the settlement was reasonable. The LTD Beneficiaries will receive the same *pari passu* treatment under the Plan as all other creditors. They are all treated equally, with each receiving exactly the same proportion of their entitlements. In insolvency, equal treatment premised on underlying legal entitlements is not unfair or unreasonable. To the contrary, it is a fundamental tenet of insolvency law.

[20] The LTD Objectors say that the Plan as it pertains to them is contrary to sections 7 and 15 of the *Charter*.

[21] It is argued by the LTD Rep that the *Charter* does not apply to the courts, reliance being placed on *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573 at paras. 34 and 36. In that case, the SCC declined to set aside an injunction on the basis that a court order does not constitute governmental action for the purposes of the *Charter* and stated that the judicial branch is not an element of governmental action for the purposes of the *Charter*. It said that the word "government" in section 32 of the *Charter* referred to the legislative, executive, and administrative branches of government.

[22] However, there are other cases in the SCC that say otherwise. In *R. v. Rahey*, [1987] 1 S.C.R. 588, the SCC held that an unreasonable delay by the trial judge in deciding on an application for a directed verdict by the accused at the close of the Crown's case had denied to the accused the section 11(b) right to be tried within a reasonable time, and stayed the proceedings. In *Rahey*, of the four judges who wrote opinions, only La Forest J. averted to the point of the *Charter* applying to a court. He stated:

> 95 …it seems obvious to me that the courts, as custodians of the principles enshrined in the *Charter*, must themselves be subject to *Charter* scrutiny in the administration of their duties. In my view, the fact that the delay in this case was caused by the judge himself makes it all the more unacceptable both to the accused and to society in general.

[23] In *British Columbia Government Employees' Union v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, the SCC refused to set aside an injunction ordered by the Chief Justice of British Columbia against picketing outside the court that had been made without notice to the union because although the injunction contravened the section 2(b) right to freedom of expression, it was justified by section 1. Chief Justice Dickson distinguished *Dolphin* as follows:

> 56 As a preliminary matter, one must consider whether the order issued by McEachern C.J.S.C. is, or is not, subject to *Charter* scrutiny. *RWDSU v. Dolphin Delivery*, [1986] 2 S.C.R. 573, holds that the *Charter* does apply to the common law, although not where the common law is invoked with reference to a purely private dispute. At issue here is the validity of a common law breach of criminal law and ultimately the authority of the court to punish for breaches of that law. The court is acting on its own motion and not at the instance of any private party.

> The motivation for the court's action is entirely "public" in nature, rather than "private". The criminal law is being applied to vindicate the rule of law and the fundamental freedoms protected by the *Charter*. At the same time, however, this branch of the criminal law, like any other, must comply with the fundamental standards established by the *Charter*.

[24] In dealing with these three decisions, Professor Hogg has stated that while it is impossible to reconcile the definition of "government" in *Dolphin* with the decisions in *Rahey* and *BCGEU*, the cases can be accommodated. See Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. supplemented Thomson: Carswell, 2007 at § 37-22. He states:

> The *ratio decidendi* of Dolphin Delivery must be that a court order, when issued as a resolution of a dispute between private parties, and when based on the common law, is not governmental action to which the *Charter* applies. And the reason for the decision is that a contrary decision would have the effect of applying the *Charter* to the relationships of private parties that s. 32 intends to exclude from *Charter* coverage. Where, however a court order is issued on the court's own motion for a public purpose (as in *BCGEU*), or in a proceeding to which government is a party (as in any criminal case, such as *Rahey*), or in a purely private proceeding that is governed by statute law, then the *Charter* will apply to the court order.

[25] In this case, the proceedings are being taken under the CCAA and the discretionary power of a court to sanction a plan is contained in section 6 of that statute. While it is not strictly necessary for me to decide whether the *Charter* applies to such an order in light of the view that I take of the section 7 and 15 rights asserted by the LTD Objectors, I accept that any order I make to sanction the Plan may be subject to the *Charter*.

[26] There is another issue, however, regarding the right of the LTD Objectors to raise a *Charter* challenge. They were represented by competent counsel in 2010 on the motion to approve the Employee Settlement Agreement. They did not raise any *Charter* challenge to that agreement before Morawetz J. or in the Court of Appeal on their application to appeal from the Settlement Approval Order made by Morawetz J. So far as the LTD benefits are concerned, the Plan merely contains the provisions for them in the Employee Settlement Agreement. Issue estoppel prevents the LTD Objectors from now raising a *Charter* challenge to those provisions.

[27] Section 7 of the *Charter* provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[28] What the LTD Objectors seek is to have the allocation proceeds re-allocated by providing that 100% of the claims of the LTD Beneficiaries will be paid from the Sale Proceeds at the expense of all other claimants. This involves their economic interests which are not protected by section 7 of the *Charter*. In *Siemens v. Manitoba (Attorney General),* [2003] 1 S.C.R 6 Justice Major for the Court stated:

> 45 The appellants also submitted that s. 16 of the VLT Act violates their right under s. 7 of the Charter to pursue a lawful occupation. Additionally, they submitted that it restricts their freedom of movement by preventing them from pursuing their chosen profession in a certain location, namely, the Town of Winkler. However, as a brief review of this Court's Charter jurisprudence makes clear, the rights asserted by the appellants do not fall within the meaning of s. 7. The right to life, liberty and security of the person encompasses fundamental life choices, not pure economic interests. As La Forest J. explained in *Godbout v. Longueuil (City),* [1997] 3 S.C.R. 844, at para. 66:
>
> > ... the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.
>
> More recently, *Blencoe v. British Columbia (Human Rights Commission),* [2000] 2 S.C.R. 307, 2000 SCC 44, concluded that the stigma suffered by Mr. Blencoe while awaiting trial of a human rights complaint against him, which hindered him from pursuing his chosen profession as a politician, did not implicate the rights under s. 7. See Bastarache J., at para. 86:
>
> > The prejudice to the respondent in this case ... is essentially confined to his personal hardship. He is not "employable" as a politician, he and his family have moved residences twice, his financial resources are depleted, and he has suffered physically and psychologically. However, the state has not interfered with the respondent and his family's ability to make essential life choices. To accept that the prejudice suffered by the respondent in this case amounts to

> state interference with his security of the person would be to stretch the meaning of this right.

[29] Professor Hogg in *Constitutional Law of Canada* at §47.9 makes clear that purely economic interests are not protected by section 7. He states:

> Section 7 protects "life, liberty and security of the person". The omission of property from s. 7 was a striking and deliberate departure from the constitutional texts that provided the models for s. 7. …
>
> The omission of property rights from s. 7 greatly reduces its scope. It means that s. 7 affords no guarantee of compensation or even of a fair procedure for the taking of property by government. It means that s. 7 affords no guarantee of fair treatment by courts, tribunals or officials with no power over the purely economic interests of individuals or corporations. It also requires, as have noticed in the earlier discussion of "liberty" and "security of the person", that those terms be interpreted as excluding economic liberty and economic security; otherwise property, having been shut out of the front door, would enter by the back.

[30] What is in play in this case are pure economic rights among the creditors of Nortel and the request of the LTD Objectors to be compensated by the other Nortel creditors. There is authority that a plan of compromise or arrangement is simply a contract between the debtor and its creditors. See *Olympia & York Developments Ltd. (Re)* at para. 74.

[31] Section 7 does not assist the LTD Objectors in their request for unequal treatment for unequal treatment.

[32] Section 15 of the *Charter* provides:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[33] In this case, it cannot be said that the LTD Objectors are being deprived of these section 15 rights because of discrimination based on physical disability. They are being treated like all creditors of Nortel. All unsecured creditors, be they bondholders, trade creditors, pensioners or LTD Beneficiaries, will receive the same *pari passu* treatment under the Plan. They are treated equally, with each receiving exactly the same proportion of their entitlements. In insolvency, equal treatment premised on underlying legal entitlements is not unfair or unreasonable. To the contrary, it is the fundamental tenet of insolvency law. Except for the two LTD Objectors, all other LTD Beneficiaries, in excess of 300 in number, accept this equal treatment.

[34] LTD Beneficiaries have been treated in the same manner as all similarly situated creditors, without discrimination. Pensioners, their beneficiaries, surviving spouses of deceased employees, Former Employees and LTD Beneficiaries are all unsecured creditors who are experiencing hardship due to lost income and benefits in the Nortel insolvency. All are disadvantaged to varying degrees, depending on personal circumstances and there is no basis for preferring one group above others. All have suffered losses in the Nortel insolvency. This was recognized by Justice Morawetz in 2010 when the Monitor applied for an order for distribution of the assets of the HWT (from which benefits were paid to beneficiaries, including the LTD Beneficiaries), on a *pari passu* basis. That was opposed by the LTD Objectors. In his decision of November 9, 2010 accepting the position of the Monitor at *Nortel Networks Corp., Re*, 2010 ONSC 5584, Justice Morawetz said:

> 110 As I have indicated above, there is no question that the impact of the shortfall in the HWT is significant. This was made clear in the written Record, as well as in the statements made by certain Dissenting LTD Beneficiaries at the hearing. However, the effects of the shortfall are not limited to the Dissenting LTD Beneficiaries and affect all LTD Beneficiaries and Pensioner Life claimants. The relative hardship for each claimant may differ, but, in my view, the allocation of the HWT corpus has to be based on entitlement and not on relative need.[2]

[2] Leave to appeal to the C of A denied 2011 ONCA 10; leave to appeal to the SCC [2011] S.C.C.A. No. 124.

[35] In the circumstances, I cannot find any breach of section 15 of the *Charter*.

Conclusion

[36] For the foregoing reasons, I have sanctioned the Plan and made an order authorizing and directing the release of the Sale Proceeds from the Escrow Accounts in the manner contemplated by the Settlement and Support Agreement.

"F.J.C. Newbould J."
Newbould J.

Date: January 30, 2017

TAB 5

2005 CarswellOnt 1078
Ontario Superior Court of Justice [Commercial List]

United Air Lines Inc., Re

2005 CarswellOnt 1078, 2005 C.E.B. & P.G.R. 8145 (headnote only), [2005] O.J. No. 1044, 137 A.C.W.S. (3d) 1097, 45 C.C.P.B. 151, 9 C.B.R. (5th) 159

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C. 36, as amended

In the Matter of United Air Lines, Inc. of the State of Delaware, in the United States of America and the other entities listed on Schedule "A"

Farley J.

Heard: February 10, 2005
Judgment: February 26, 2005
Docket: 03-CL-5003

Counsel: Scott A. Bomhof, Marc Lavigne for United Air Lines Inc.
Hugh M.B. O'Reilly for International Association of Machinists and Aerospace Workers ("IAMAW")
Barry Wadsworth for CAW-Canada
Ian Dick for Attorney General of Canada representing the Office of the Superintendent of Financial Institutions ("OSFI")

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Airline filed for protection under Companies' Creditors Arrangement Act — Airline was in intensive discussions/ negotiations in US with its American workforce unions and it was continuing to deal with its Chapter 11 proceedings filed in December 2002 — Airline had, in all countries except for US and Canada, kept up its pension-funding commitments because, under pension and legal structures of those other countries, it had no choice but to do so — Airline moved for order authorizing it to cease making contributions to its Canadian-funded pension plans — Motion dismissed — No evidence either that airline did not have sufficient funds to make pension-funding payments or that its arrangements were such that it could not make such payments — Canadian unions had not had opportunity to negotiate cessation of pension funding with airline — Payment of Canadian pension-funding obligations would not cause any particular stress or strain on US restructuring — Airline was ordered to make good on its pension contribution arrears unless otherwise agreed between its unions.

Pensions --- Payment of pension — Bankruptcy or insolvency of employer — General

Airline filed for protection under Companies' Creditors Arrangement Act — Airline was in intensive discussions/ negotiations in US with its American workforce unions and it was continuing to deal with its Chapter 11 proceedings filed in December 2002 — Airline had, in all countries except for US and Canada, kept up its pension-funding commitments because, under pension and legal structures of those other countries, it had no choice but to do so — Airline moved for order authorizing it to cease making contributions to its Canadian-funded pension plans — Motion dismissed — No evidence either that airline did not have sufficient funds to make pension funding payments or that its arrangements were such that it could not make such payments — Canadian unions had not had opportunity to negotiate cessation of pension funding with airline — Payment of Canadian pension-funding obligations would not cause any particular stress or strain on US restructuring — Airline was ordered to make good on its pension contribution arrears unless otherwise agreed between its unions.

***Farley J.*:**

1 United Air Lines, Inc. (UAL) moved for an order authorizing it to cease making contributions to its Canadian funded pension plans. It had originally brought on its motion on September 16, 2004 as to which there had been some advance preliminary discussion as to the "necessity" for it having to obtain some relief. The somewhat chaotic circumstances surrounding UAL and its insolvency proceedings in the U.S.A. and elsewhere in all probability contributed to its haste in bringing on the September motion and most certainly with respect to its method of giving notice to its two Canadian unions, the CAW and IAMAW, as well as OSFI. Given the exigencies of the circumstances, while unfortunate that there was not an appropriate length of and "proper" notice, one cannot be too critical of UAL as to providing something better. The CAW and OSFI attended at the September hearing; IAMAW did not in the relative confusion. There was then negotiated among UAL, CAW and OSFI a form of interim order granted by Pepall J. on September 16, 2004. This consent order, as is not uncommon with courtroom-drafted orders, is a little "awkward". It provided that pending the return of the motion, UAL could cease making pension plan funding payments notwithstanding the terms of any previous order or any direction of OSFI. I am of the view that, given that this motion was not brought back on until February 10, 2005, this shows that OSFI and the unions (IAMAW being cognizant of the September 16, 2004 order shortly thereafter) are quite understanding of the financial predicament in which UAL finds itself - and continues to find itself given a number of setbacks especially in its U.S. proceedings situation.

2 UAL as an airline has fallen on hard times. In this regard it is like a number of airlines worldwide both in recent times and at various stages in the past. The unions recognize that they have both long-term and short-term objectives in dealing with an employer - essentially they want a long term stable employer who is able to employ their workers at a fair wage and for this the company must remain in business and be competitive, but also in the short run, they do not wish to see a situation where commitments related to the employment arrangement are neglected. In the latter case, if matters take a turn for the worse, in this subject case, there would be relatively significant pension deficiencies (relative to the size of the Canadian workforce) which would be unsecured claims. In this regard "cash in the bank" is always better than an IOU. At the present time, UAL is no golden goose; indeed it is a rather bald bird (keeping in mind the taxation principle of plucking the squawking taxpayer) - but it is a bird which the unions have no interest in killing.

3 Allow me to observe a number of practical elements in this situation. UAL is in very intensive discussions/negotiations in the U.S.A. with its American workforce unions and it is continuing to deal with the morass its insolvency proceedings have become over the time since it commenced its Chapter 11 proceedings in December 2002. It has an international workforce, including that in Canada, of significantly less magnitude. It has in all countries except for the U.S.A. and Canada kept up its pension funding commitments because under the pension and legal structures of those other countries, it had no choice but to do so. UAL has it would seem devoted most of its time and energy to attempting to solve its U.S. based problems. It seems that it has taken the approach as to Canada, both in terms of the pension arrangements - but also with respect to discussions/negotiations as to concessions with its Canadian workforce (e.g. wage cuts or productivity improvement commitments), that this will and must await the outcome of the U.S. situation. On a functional basis, I do not criticize UAL for that approach. Indeed it may be the only practical one available to it. However, the unfortunate outcome of such an approach is that in essence Canada is ignored in the interim. This is contrary to the philosophy of our insolvency proceedings approach which encompasses and balances the many elements including labour relations and balances the competing aspects of those elements - the key to which as to the labour relations element is that the company and the unions actively engage in a dialogue to see if the particular difficulty(ies) may be worked out and the aims of each side be accommodated with some give and take on a rational basis.

4 UAL has not run out of money nor of liquidity, albeit that it must husband its available funds and liquidity in a very prudent manner. However, there is no evidence before me that UAL either (i) does not have sufficient funds to make the pension funding payments or (ii) that its DIP arrangements are such that it cannot make such payments (in this latter (ii) situation, neither is there any evidence that even if it were up against the ceiling of its DIP requirements, that an application was made to the DIP lenders for consent to make such payments).

5 In other situations where a company has been in dire circumstances, it is not uncommon for a union to consent to a deferral of pension funding in order to facilitate the *bona fide* restructuring efforts of an employer (eg. the USWA in Ivaco). However, this is achieved on a consensual basis after negotiation; it is not a "given right" of the company. In the present case, the CAW and IAMAW have attempted to engage UAL in such discussions, but while UAL attended a meeting, it said it could not make any commitment. As UAL put it in its factum when speaking *generally* of its situation in Canada vis-à-vis the U.S.A.:

> 36. United has also commenced discussions with representatives of its unionized workforce in Canada and OSFI with respect to United's Canadian labour issues and pension obligations. However, United has not been in a position to determine its course of action in Canada at this time given that its Chapter 11 emergence business plan, and any further cost cutting measures required thereunder, cannot be finalized until its substantial U.S. labour and pension issues are resolved.

As discussed above, fair enough, the tail cannot be expected to wag to dog. But the dog must appreciate that it has a tail.

6 Allow me to make a further observation as to the difference between Canada and the U.S.A. In the U.S.A., the parties are dealing under an umbrella which most significantly includes the Pension Benefits Guarantee Corp. which generally protects the workforce/pensioner side in an insolvency where there is a pension deficit. In Canada, in this federally regulated situation, there is no such backstop; the workforce/pensioners are naked. While I appreciate that as UAL points out, the pensioners in Canada continue to receive their pension cheques, that is as it should be. However, the result of that equation is that with all outflow from the fund and no inflow, it is not realistic to think that the investment income side will radically improve so that the pension deficit does not become larger with every pension cheque mailed, thereby weakening the pension fund to the detriment of future calls on it by existing pensioners and new pensioners upon retirement from the active workforce.

7 As discussed above, the relative size of the Canadian problems vis-à-vis the U.S.A. problems is rather insignificant. It would not seem on the evidence before me that payment of funding obligations would in any way cause any particular stress or strain on the U.S. restructuring - given their relatively insignificant amounts in question. UAL had no qualms about making such payments in the other countries internationally. Additionally there is the issue of the U.S. situation having the benefit of the Pension Benefits Guarantee Corp. (as to which UAL would have paid premiums) but there being no such safety net in Canada on the federal level (and thus no previous premium obligation on UAL).

8 In the end result on the basis of fairness and equity, I find no reason to excuse UAL from its obligation to fund its pension funding commitments in Canada and I therefore direct it to resume such funding.

9 I would also note that OSFI is at liberty to, if it feels it necessary, request a lift of stay so that it may issue a direction if it thinks that warranted (as opposed to the mere demand of September 3, 2004; the direction having a legal consequence).

10 I recognize that with the effluxion of time, the pension funding arrears have mounted up and therefore are greater than the interim payments at any one time which you would have in a pay as you go situation. It may therefore be desirable for UAL and its unions (with or without the assistance of OSFI) to have discussions about the mechanics of such payment regarding funding of arrears; including a schedule if necessary or desirable and the question of future obligation payments. However, recognizing the dog and its tail problem, it is conceivable that UAL would continue to conclude that it would not be practicably feasible to do so. Thus if no such arrangement is put in place by March 31, 2005, all arrears are to be paid up by April 1, 2005. I would note the definite difference between "suspend" and "cease".

11 What then of the s. 8(2) *Pension Benefits Standards Act*, R.S.C. 1985, c.32 (2nd Supp)? It provides as follows:

> 8(2) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in

liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

I agree with the submissions of UAL as set out in its factum at para. 85:

> 85. Also, United submits that there are a number of issues which raise doubts about the application of the deemed trust set out in subsection 8(2) of the PBSA to the current situation. In particular, subsection 8(2) states that a deemed trust arises where there is a "liquidation, assignment or bankruptcy" of an employer. None of the parties to this motion have provided any evidence that United (the employer) is in liquidation, has made an assignment or is in bankruptcy.

However, UAL should also keep in mind the provisions of s.8(1):

> 8(1) An employer shall ensure, with respect to its pension plan, that
>
> (a) the moneys in the pension fund,
>
> (b) an amount equal to the aggregate of the prescribed payments that have accrued to date, and
>
> (c) all
>
> (i) amounts deducted by the employer from members' remuneration, and
>
> (ii) other amounts due to the pension fund from the employer that have not been remitted to the pension fund
>
> are kept separate and apart from the employer's own moneys, and shall be deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits or refunds under the plan.

This of course may have fall out for officers and directors as to whom no stay protection is available.

12 In the end result, I dismiss the UAL motion to cease making contributions to its pension plans involving its Canadian workforce but rather to make good on its arrears unless otherwise agreed between its unions (who will have to keep in mind that UAL at some stage will come calling for concessions if it gets its U.S.A. house in order) and OSFI.

13 OSFI itself did not request a lift of stay vis-a-vis itself and so I do not find it appropriate to deal with the unions' request that I do so. OSFI is well able to speak for itself in this regard. It made no such motion; nor did it refer to same in its factum.

14 Orders accordingly (this endorsement also deals with the motions of the CAW and IAMAW).

15 All parties to this motion - UAL, the unions and OSFI - are labouring under the difficulties of fulfilling their valid legitimate mandates at a time where functionally there are pressing financial problems, compounded by UAL's being functionally distracted from Canada (and elsewhere) by the necessity of having to deal with its U.S.A. problems on a prioritized basis. I appreciate their difficulties. I would also wish to express my appreciation for the thorough and helpful submissions I received from counsel as they attempted to deal with their own clients' difficulties in dealing effectively with this situation on both a legal and functional basis.

Motion dismissed.

TAB 6

CITATION: U.S. Steel Canada Inc. (Re), 2015 ONSC 5990
COURT FILE NO.: CV-14-10695-00CL
DATE: 20150928

SUPERIOR COURT OF JUSTICE - 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 PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.

BEFORE: Mr. Justice H. Wilton-Siegel

COUNSEL: *A. Scotchmer* and *B. Walancik*, in their capacity as Representative Counsel on behalf of the non-unionized active employees and retirees, for the Applicants James Newton, Laurie Saunders and Robert Cernick

S. Kour and *R. Paul Steep*, for the Respondent U.S. Steel Canada Inc.

R. Sahni, for the Monitor Ernst & Young Inc.

HEARD: September 18, 2015

ENDORSEMENT

[1] On these motions, Representative Counsel for the non-USW active employees and retirees seeks an order directing U.S. Steel Canada Inc. ("USSC") to pay amounts to each of James Newton ("Newton"), Laurie Saunders ("Saunders") and Robert Cernick ("Cernick") (collectively, the "Applicants"), pursuant to severance agreements entered into between each of these individuals and USSC as described below. The amounts at issue on these motions total $184,485.

Background

[2] The following summarizes the undisputed facts concerning the termination of employment arrangements of each of the Applicants.

Newton and Saunders

[3] Each of Newton and Saunders were advised by USSC on February 5, 2014 that their employment would be terminated on February 5, 2016. Each was provided with, and signed back, a letter dated February 5, 2014 (respectively, the "Newton Severance Agreement" and the "Saunders Severance Agreement") that provided that each individual was "required to report to work, unless otherwise required by [USSC]," during the period from February 5, 2014 until February 5, 2016. Each Severance Agreement also stated that, if they remained employed and

actively at work on that date, they would be entitled to merit pay and performance bonuses in the ordinary course.

[4] The Newton Severance Agreement and the Saunders Severance Agreement further provided that:

> The Company may advise you prior to the end of the Notice Period, you are no longer required to report for work ("the End of the Working Notice Period"). Should that occur, your current salary shall continue to be paid as though you were continuing to report for work and subject to the same conditions as set out above but you will not be eligible to receive merit pay and performance bonuses, or a portion thereof.

[5] Subsequently, each of these Severance Agreements was amended by letters dated August 15, 2014 from USSC, which were executed in September 2014 by each of Newton and Saunders, which added the following provision:

> Further to your letter dated February 5, 2014, please accept this letter as confirmation of our discussions that should you elect to remain actively at work until December 31, 2014, the Company will agree to pay out fifty percent (50%) of the remaining work notice period as a lump sum retention bonus rather than having you continue to work the remainder of the notice period. This would equate to six and a half (6½) months base pay. All other terms and conditions of the original letter dated February 5, 2014 will remain in effect excluding the provisions of paragraph 1 "Financial Assistance" which are amended by this letter.
>
> If you elect to terminate your employment prior to December 31, 2014 or if you remain at work beyond the December 31, 2014 date, the terms and conditions of the original letter will remain in effect. ...

[6] Each of Newton and Saunders also signed a full and final release in favour of USSC after executing the amendments to their respective Severance Agreements.

[7] Each of Newton and Saunders worked for USSC until December 31, 2014 and retired on that date.

Cernick

[8] Cernick was advised by USSC on February 3, 2014 that his employment would be terminated on February 3, 2016. He was provided with, and signed back, a letter dated February 3, 2014, substantially in the same form as the Newton Severance Agreement and the Saunders Severance Agreement (the "Cernick Severance Agreement"). However, the Cernick Severance Agreement also contained an early retirement option in the following terms:

> Should you make an irrevocable application to retire in writing, and cease employment by reason of your retirement with your last day worked being

> within thirty (30) days of the date of this letter, you will receive 50% of the balance of the payments remaining in the Notice Period as a lump sum payment, less applicable statutory deductions.

Cernick did not accept this early retirement option. Cernick also signed a full and final release in favour of USSC on February 24, 2014.

[9] The Cernick Severance Agreement was subsequently amended as follows by a letter dated May 21, 2014, which Cernick executed on May 28, 2014, to provide for a retiring allowance:

> This letter confirms our discussion of May 16, 2014 in which I advised that you had the opportunity to replace/substitute the last 26 weeks of your working notice period with a lump sum cash payment equal to 26 weeks of base salary in the form of a retiring allowance less deductions required by law.
>
> If you elect to replace the last 26 weeks of working notice with the retiring allowance set out above, the following conditions apply.
>
> 1. You will not accrue credited service for pension purposes on or after August 5, 2015 [for the 26 weeks of your working notice period.] If applicable, there will be no contributions to the RRSP (Opportunity Plan) in the period on or after August 5, 2015.
>
> 2. You will not accrue vacation pay on or after August 5, 2015 [for the last 26 weeks of your working notice period.]
>
> 3. Your current coverage under the Company's health plan and dental plan and life insurance plan will cease on the date your working notice period ends by reason of your election to take a lump sum payment. In addition, you will not be eligible to receive merit pay and performance bonuses, or a portion thereof.
>
> 4. All other terms and conditions of your termination letter dated February 3, 2014 shall continue to apply with this letter as an addendum to that letter dated February 3, 2014.

[10] The Cernick Severance Agreement, as amended, therefore contemplated a period of working notice until August 5, 2015. However, on May 30, 2014, two days after he accepted the amendment to the Cernick Severance Agreement, Cernick was advised by his superior at USSC that USSC directed him to no longer report to work.

[11] USSC paid Cernick his monthly salary in accordance with the Cernick Severance Agreement to August 5, 2015.

[12] In this Endorsement, the Newton Severance Agreement, the Saunders Severance Agreement and the Cernick Severance Agreement are collectively referred to as the "Severance Agreements" and are individually referred to as a "Severance Agreement".

The Circumstances Giving Rise to this Proceeding

[13] USSC commenced legal proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") on September 16, 2014, by order of Morawetz R.S.J. (as subsequently amended, the "Initial Order").

[14] Section 13 of the Initial Order prohibits payments on account of pre-filing obligations:

> THIS COURT ORDERS that, except as specifically permitted or required herein, the Applicant is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicant to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

[15] Section 9 of the Initial Order also permits, but does not mandate, payment of certain employment-related amounts payable on or after the date of the Initial Order.

> THIS COURT ORDERS that the Applicant shall be entitled but not required, subject to the mandatory payment requirements in paragraph 11 below, to pay the following expenses whether incurred prior to, on or after the date of this Order:
>
> (a) all outstanding and future wages, salaries, employee benefits (including, without limitation, employee and retiree medical, dental and similar benefit plans or arrangements, employee assistance programs, and other retirement benefits and related contributions), compensation (including bonuses and salary continuation or other severance payments), vacation pay and expenses (including, without limitation, in respect of expenses charged by employees to corporate credit cards) payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangement; …

[16] On November 27, 2014, each of Newton and Saunders was advised by USSC that it did not intend to pay the lump sum retention bonuses contemplated by the Newton Severance Agreement, as amended, and the Saunders Severance Agreement, as amended, respectively. The parties dispute whether each of Newton and Saunders were advised that they could cancel their intended retirement on December 31, 2014 and continue working until February 5, 2016 if they wished to receive the salary contemplated in the original forms of the Newton Severance Agreement and the Saunders Severance Agreement. Given the determination below, this factual issue is not relevant. As mentioned, however, each of Newton and Saunders chose to retire at December 31, 2014. Each individual now seeks payment of the lump sum retention bonuses contemplated by their respective Severance Agreements, as amended.

[17] By letter dated April 8, 2014, USSC advised Cernick that the Monitor in these CCAA proceedings, Ernst & Young Inc., "had determined that [USSC] may not issue the lump sum

payments [sic] set out in the [Cernick Severance Agreement as amended]." Cernick has not been offered an opportunity to return to work for the remainder of his period of working notice, nor the opportunity to rescind the amendment to the Cernick Severance Agreement, both of which he says he would have accepted.

Analysis and Conclusion

[18] The Applicants make four arguments in support of their position that USSC is, or should be, required to pay the lump sum retention bonuses contemplated under the Severance Agreements. Given the determination below, it is only necessary to address their two principal arguments.

[19] First, the Applicants argue that s. 32 of the CCAA applies to the present circumstances. This submission proceeds on the basis: (1) that USSC's refusal to pay the lump sum retention bonuses under the Severance Agreements constitutes a "resiliation" or a "repudiation" of such agreements; and (2) that the acknowledged failure of USSC to comply with the provisions of s. 32 has the result that the lump sum retention bonuses are payable. In effect, the Applicants say that s. 32 is a mandatory provision in respect of the proposed termination of any agreement to which an insolvent corporation is a party.

[20] USSC says that it has not terminated the Severance Agreements. USSC says that, while payment of the lump sum retention bonuses might otherwise be permitted under paragraph 9 of the Initial Order, payment is prohibited by virtue of the provisions of paragraph 13(a), as the lump sum retention bonuses constitute amounts owing by USSC to creditors as of the date of the Initial Order. It says that the Applicants are entitled to submit a claim for such amounts in the claims process in this CCAA proceeding.

[21] The Applicants' argument assumes that non-performance of any provision of a contract for any reason whatsoever constitutes a "resiliation" or a "repudiation" of a contract requiring compliance with s. 32 of the CCAA to be effective. I think this interpretation of s. 32 implies a scope of operation that was not intended by Parliament.

[22] As Mongeon, J.C.S. noted in *Re Hart Stores Inc*. 2012 QCCS 1094, [2012] J.Q. no. 2469, at paras. 20 and 30, s. 32 is properly applicable only to contracts that are not otherwise terminable. In *Hart Stores*, Mongeon, J.C.S. found that s. 32 did not apply to oral employment contracts of indefinite duration that could be unilaterally terminated by the employer under ordinary rules of common law (in this case under the *Civil Code of Quebec*). In any event, given the determination below, it is not necessary to decide the motions on this basis, and I therefore decline to do so.

[23] The Applicants' alternative argument is that payment of the lump sum retention bonuses is not caught by paragraph 13 of the Initial Order, and that the Court should exercise its discretion under section 11 of the CCAA to order such payment on the grounds of fairness.

[24] The Applicants acknowledge that the lump sum payments fall within the language of "compensation (including bonuses and salary continuation or other severance payments)" for the purposes of paragraph 9 of the Initial Order. However, as mentioned, they submit that the

lump sum retention bonuses were accrued as contingent liabilities as of the date of the Initial Order and, as such, constituted amounts payable as of that date which are therefore caught by the language of paragraph 13(a) of the Initial Order. USSC also relies on certain decisions that have found that termination and severance payments are pre-filing obligations: in particular, see *Timminco Ltd*. (*Re*), 2012 ONSC 4471, [2012] O.J. No. 4008, at paras. 41-42, *Nortel Networks Corp., (Re)*, [2009 O.J. No. 2558 (S.C.) and *Windsor Machine & Stamping Ltd*., [2009] O.J. No. 3195, 179 A.C.W.S. (3d) 611 (S.C.).

[25] Implicit in this dispute is the issue of the proper characterization of the lump sum retention bonuses at issue. USSC characterizes these lump sum payments as "termination or severance payments", which they say were contingent liabilities or obligations at the date of the Initial Order. The Applicants characterize the lump sum retention bonuses as additional compensation for post-filing services. On balance, I think these payments are properly characterized as compensation for post-filing services which are not subject to the stay in paragraph 13(a) of the Initial Order for the following reasons.

[26] The Severance Agreements constituted an agreement between USSC and each of the Applicants for the payment of certain amounts to each of them for their agreement to make themselves available to USSC during the periods contemplated by their respective agreements. It is my understanding that USSC does not dispute this characterization of the Severance Agreements, at least insofar as it pertains to the monthly salary continuation payments made thereunder. Implicit in this characterization, however, is the fact that such monthly continuation payments were made for the provision of post-filing services by each of the Applicants.

[27] On these motions, USSC distinguishes between such monthly payments and the lump sum retention bonuses, treating the latter as termination or severance payments. I do not think that this is correct in the particular circumstances of this case. Regardless of the treatment of such payment for tax or other purposes, as between USSC and the Applicants I think such payments must be regarded as an additional payment for the provision of post-filing services, i.e., their availability to USSC. In each case, the lump sum retention bonus constitutes an acceleration and compromise of certain monthly salary continuation payments otherwise payable over a further twelve-month period of working notice for the continued provision of post-filing services. I do not think that such compromise, in the form of a lump sum payment, should change the fundamental nature of the payments. In addition, while it is not determinative of this issue, USSC itself referred to the payments in the letters amending the Newton Severance Agreement and the Saunders Severance Agreement as "lump sum retention bonuses", which is more reflective of compensation for post-agreement services than of termination or severance payments. While the Cernick Severance Agreement refers to the lump sum payment as a “retiring allowance”, I do not think this terminology, which appears to have a tax-related purpose, is of any significance for the present motions.

[28] I also do not think that the case law referred to by USSC, or the fact that such lump sum payments may have been treated as contingent liabilities by USSC at the time of the Initial Order, assists USSC.

[29] In *Nortel*, while the exact nature and timing of the payments at issue is not detailed in the decision, there is an important difference from the present circumstances. It is clear, both from the fact that the issue in *Nortel* pertained principally to the application of the *Employment Standards Act*, R.S.O. 1990, c. E.14, as well as from the language of paragraphs 67 and 86 of the decision, that the termination and severance payments at issue related to pre-filing services. This consideration grounded the decision of Morawetz J. (as he then was) that the termination payments were, in substance, pre-filing obligations of the debtor that were subject to a stay. In *Timminco*, it is clear from paragraph 43 of that decision that the applicant did not provide any post-filing services and that the payments at issue constituted classic termination and/or retirement benefits. Similarly, in *Canwest Global Communications Corp*., 2010 ONSC 1746, 321 D.L.R. (4d) 561 and *Windsor Machine*, the termination and severance pay obligations were also stated to be "for the most part based on services that were provided pre-filing": see *Canwest*, at para. 24, per Pepall J. (as she then was).

[30] Given this factual basis for the decisions in *Nortel*, *Timminco*, *Windsor Machine* and *Canwest*, I do not read any of these decisions as standing for the more general proposition that all termination or severance payments, whether arising before or after the date of commencement of proceedings under the CCAA, are to be treated as pre-filing obligations.

[31] I also do not find the argument that the lump sum retention bonuses constituted accrued liabilities at the date of the Initial Order to be persuasive. Even assuming that USSC did, in fact, accrue the payment obligations as contingent liabilities in its accounting records, for which there is no evidence before the Court, the fundamental reality is that the payment obligations were contingent upon the Applicants' performance of post-filing services. The obligation to pay the lump sum retention bonuses did not become absolute until the completion of performance of these services, that is, upon expiry of the relevant period of working notice.

[32] Accordingly, I conclude that paragraph 13(a) of the Initial Order does not mandate a stay of payment of the lump sum retention bonuses due under the Severance Agreements. In these circumstances, paragraph 9(a) of the Initial Order permits USSC to make such payments. As USSC has chosen not to make such payments, however, the Applicants seek an order of the Court requiring USSC to make such payments on the grounds that it would be fair and equitable to do so.

[33] In this regard, the basis for the Monitor's position when this issue first arose in or about November 2014 is important. The Court understands that there were approximately 175 additional former employees of USSC whose employment was terminated on or about February 5, 2014, and who did not accept, or were not offered, a lump sum retention bonus option in return for a shortened period of working notice. The Monitor considered that it would be unfair and inequitable to these other former employees for USSC to pay the lump sum retention bonuses under the Severance Agreements. The Monitor reasoned that, in the absence of a claims process and a crystallization of any claims of these other employees, there was a significant likelihood that the Applicants would obtain an unintended priority. This is an important consideration that was also present in *Timminco*.

[34] However, circumstances have changed since November 2014 as a result of the continuation of the working notice period for such other employees. As of the date of hearing of the present motions, it is the Court's understanding that such employees have continued to be paid their working notice to date and that, at most, a period of five months working notice remains to be paid to such other employees.

[35] The Applicants argue that it would be unfair to treat them differently from the other terminated employees of USSC merely because they opted for a lump-sum retention bonus while the other employees are being paid in respect of working notice arrangements. I am not persuaded that this fact alone would justify an order in their favour. However, I think that it would be fair to grant the order requested for such reason together with the additional facts that: (1) as of the date of hearing of these motions, there does not appear to be any issue of an unfair priority in favour of the Applicants if such an order were granted; and (2) the amounts are *de minimus* and accordingly payment will not affect the ability of USSC to propose a plan of arrangement or compromise. Even if USSC were to stop paying the remaining working notice period payments payable to the other terminated employees until February 2016, it would appear that, as of the date of the hearing of these motions, the Applicants and such other terminated employees will have received roughly equal amounts in respect of the termination of their employment after payment of the lump sum retention bonuses.

[36] I would also note that USSC raised the possibility that payment of the lump sum retention bonuses could breach the terms of a term sheet dated July 16, 2015 between USSC and Brookfield Capital Partners Ltd. ("Brookfield") (the "Current DIP Loan"). However, Brookfield did not appear on this motion or otherwise oppose the relief sought. In any event, for the reasons set out above, I do not think that the lump sum payments that are the subject of this motion constitute either payments in respect of pre-filing obligations or non-ordinary course payments. As such, I am of the opinion that payment of these amounts would not breach the terms of the Current DIP Loan.

[37] Based on the foregoing determinations, the Applicants are entitled to an order directing USSC to pay the lump sum retention bonuses contemplated by the Severance Agreements to the Applicants in the amounts set out in the Motion Record.

Wilton-Siegel J.

Date: September , 2015

TAB 7

1990 CarswellMan 206
Supreme Court of Canada

Reference re ss. 193 & 195.1(1)(c) of the Criminal Code

1990 CarswellMan 206, 1990 CarswellMan 378, [1990] 1 S.C.R. 1123, [1990] 4 W.W.R. 481, [1990] S.C.J. No. 52, 109 N.R. 81, 10 W.C.B. (2d) 191, 48 C.R.R. 1, 56 C.C.C. (3d) 65, 68 Man. R. (2d) 1, 77 C.R. (3d) 1, J.E. 90-907, EYB 1990-67183

REFERENCE RE CRIMINAL CODE, SECTIONS 193 AND 195.1(1)(c); GINDEN and BENNETT v. ATTORNEY GENERAL OF MANITOBA et al.

Dickson C.J.C., McIntyre, * Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

Heard: December 1 and 2, 1988
Judgment: May 31, 1990
Docket: No. 20581

Counsel: *J.J. Gindin, M.-J. Bennett* and *D. Phillips*, for appellants.
V.E. Toews and *D. J. Miller*, for respondent.
G.R. Garton, for Attorney General of Canada.
M. Bernstein, for Attorney General for Ontario.
G. Welsh, for Attorney General for Saskatchewan.
R.F. Taylor, for Attorney General for Alberta.
J.J. Arvay, Q.C., for Attorney General of British Columbia.
J.E. Magnet, for Canadian Organization for the Rights of Prostitutes.

Headnote

Criminal Law --- Constitutional issues in criminal law — Charter of Rights and Freedoms — Rights and freedoms — Freedom of expression

Criminal Law --- Public morals and disorderly conduct — Prostitution and related offences — Soliciting — Nature and elements of offence

Civil liberties and human rights — Freedom of expression/opinion — Section 193, now s. 210, of Criminal Code prohibiting keeping of common bawdy-houses — Section 193 not being inconsistent with s. 2(b) of Charter of Rights and Freedoms — Section 195.1(1)(c), now s. 213(1)(c), prohibiting communicating in public for purpose of prostitution — Section 195.1(1)(c) infringing s. 2(b) of Charter — Section 195.1(1)(c) attempting to reduce social nuisances associated with solicitation, and being justifiable as reasonable limit under s. 1 of Charter.

Civil liberties and human rights — Legal rights — Life, liberty and security — Section 193, now s. 210, of Criminal Code prohibiting keeping of common bawdy-houses — Section 195.1(1)(c), now s. 213(1)(c), prohibiting communicating in public for purpose of prostitution — Section 7 of Charter of Rights and Freedoms not protecting economic rights — Sections 193 and 195.1(1)(c), alone or in combination, not being inconsistent with s. 7 of Charter — Sections being sufficiently clear and not violating principles of fundamental justice.

Criminal law — Prostitution and related offences — Communicating in public for purposes of prostitution — Section 195.1(1)(c), now s. 213(1)(c), of Criminal Code prohibiting communicating in public for purpose of prostitution — Section 195.1(1)(c) not violating principles of fundamental justice and not infringing s. 7 of Charter of Rights and Freedoms — Section 195.1(1)(c) infringing s. 2(b) of Charter — Section attempting to reduce social nuisances associated with solicitation, and being justifiable as reasonable limit under s. 1 of Charter.

Criminal law — Prostitution and related offences — Keeping common bawdy-house — Section 193, now s. 210, of Criminal Code prohibiting keeping of common bawdy-house — Section 193 not infringing s. 2(b) or s. 7 of Charter of Rights and Freedoms.

Certain questions concerning the constitutionality of s. 193 [now s. 210] of the Criminal Code, prohibiting the keeping of a common bawdy-house, and s. 195.1(1)(*c*) [now s. 213(1)(*c*)], prohibiting solicitation for the purposes of prostitution in a public place, were referred to the Court of Appeal pursuant to the Manitoba Constitutional Questions Act. The Court of Appeal upheld the validity of the legislation. The appellants appealed.

Held:

Appeal dismissed.

Per Dickson C.J.C. (La Forest and Sopinka JJ. concurring)

Section 195.1(1)(*c*) represents a prima facie infringement of s. 2(*b*) of the Canadian Charter of Rights and Freedoms, while s. 193 does not. The scope of freedom of expression extends to communication for the purpose of engaging in prostitution.

The legislative objective of s. 195.1(1)(*c*) is to address solicitation in public places. To that end, the provision seeks to eradicate the various forms of social nuisance arising from the public display of the sale of sex. The eradication of the nuisance-related problems caused by street solicitation is a pressing and substantial concern, and constitutes a valid legislative aim.

A rational connection exists between the impugned legislation and the legislative objective. Because that objective extends to the general curtailment of visible solicitation for the purpose of prostitution, the legislation is not unduly intrusive. It meets the test of minimum impairment of the right to freedom of expression. Finally, the obtrusiveness linked to the enforcement of the provision, when weighed against the resulting decrease in the social nuisance associated with street solicitation, can be justified in accordance with s. 1 of the Charter.

Two components must be found to exist before a violation of s. 7 of the Charter can be found to exist. First, there must be a breach of one of the s. 7 interests of the individual. Second, the law that is responsible for that breach must be found to violate the principles of fundamental justice. With respect to the first component, there is an infringement of liberty, given the possibility of imprisonment contemplated by ss. 193 and 195.1(1)(*c*). As to the second component, the impugned provisions are not so vague as to violate the requirement that the criminal law be clear. The terms "prostitution", "keeps" a bawdy-house, "communicate" and "attempts to communicate" are not so vague, given the benefit of judicial interpretation, that their meaning is impossible to discern in advance. The legislative scheme embodied by ss. 193 and 195.1(1)(*c*) is not so unfair as to violate principles of fundamental justice. The fact that the sale of sex for money is not a criminal act does not mean that Parliament must refrain from using the criminal law to express society's disapprobation of street solicitation.

Per Lamer J.

A law that is impermissibly vague and that has as a potential sanction the deprivation of liberty of the person offends s. 7 of the Charter. The impugned provisions do have the potential to deprive an individual of liberty and security of the person upon conviction. However, courts have been able to give sensible meaning to the sections and have applied them without difficulty. In neither case can it be said that fair notice is not given to citizens. Further, the discretion of law enforcement officials is sufficiently limited by the explicit legislative standards set out in the sections. Therefore s. 193 and s. 195.1(1)(*c*) do not violate s. 7 of the Charter on the basis of impermissible vagueness.

Section 7 does not concern itself with economic rights. American cases suggesting that liberty under the Fourteenth Amendment includes liberty of contract do not apply to the interpretation of s. 7 of the Charter, due to differences in historical context and wording. The rights under s. 7 do not extend to the right to exercise a chosen profession. Neither s. 193 nor s. 195.1(1)(*c*) therefore restricts prostitutes' rights guaranteed by s. 7 of the Charter in not allowing them to exercise their chosen profession.

Section 2(*b*) of the Charter protects all content of expression, but not all forms of expression. The set of forms of expression that will not receive protection is narrow and includes direct attacks by violent means on the physical liberty and integrity of another person. Section 195.1(1)(*c*) restricts freedom of expression as guaranteed by s. 2(*b*) of the Charter, in that the section aims at prohibiting a particular content of expression and at prohibiting access to the message sought to be conveyed.

The legislative objectives of s. 195.1(1)(*c*) go beyond merely preventing the nuisance of traffic congestion and general street disorder. The section addresses pressing and substantial concerns, specifically: the curbing of nuisances caused by the public solicitation of prostitution; the curbing of related criminal activity; the curbing of the exposure of street solicitation to pedestrians and property owners; and the curbing of the exposure of a degrading, exploitive, sometimes dangerous activity to potentially vulnerable young people.

The scheme set out in s. 195.1 is rationally connected to the legislative objectives. The section impairs freedom of expression as little as possible in order to achieve the legislative objective, since the impairment is limited to communications made in public for the purpose of prostitution. When the serious social harm caused by public solicitation for the purpose of prostitution is weighed against the restriction on expression, the effect of s. 195.1(1)(*c*) is not disproportionate with its objectives. Therefore, s. 195.1(1)(*c*) is a limit that is reasonable and demonstrably justified in a free and democratic society under s. 1 of the Charter.

Per Wilson J. (dissenting) (L'Heureux-Dubé J., concurring)

Only s. 195.1(1)(*c*) limits freedoms of expression. Section 193 deals with keeping or being associated with a common bawdy-house, and places no constraints on communicative activity in relation to a common bawdy-house.

Section 195.1(1)(*c*) prohibits persons from engaging in expression that has an economic purpose. But economic choices are for the citizen to make, and s. 2(*b*) of the Charter protects the freedom of a person negotiating for a purchase to communicate with his or her vendor. Where the state is concerned about the harmful consequences flowing from communicative activity with an economic purpose, and where the content of communicative activity is proscribed, then the provision must be justified as a reasonable limit under s. 1 of the Charter if it is to be upheld.

The fundamental concern which s. 195.1(1)(*c*) attempts to address is the social nuisance arising from the public display of the sale of sex. The nuisance caused by street solicitation is a pressing and substantial concern. Section 195.1(1)(*c*) is rationally connected to the prevention of the nuisance. However, the section fails to meet the proportionality test. Section 195.1(1)(*c*) is not sufficiently tailored to the legislative objective advanced in its support, and constitutes a more serious impairment of the individual's freedom than the avowed legislative objective would warrant. Therefore the section cannot be justified under s. 1 of the Charter.

The legality of prostitution must be recognized in any s. 7 analysis. Parliament has chosen to regulate certain incidents of prostitution by means of the criminal law's power to deprive people of their "physical" liberty. This decision triggers the application of s. 7 of the Charter. The legislation must therefore accord with the principles of fundamental justice in order to survive the constitutional challenge.

A law which infringes the right to liberty under s. 7 in a way that also infringes another constitutionally-entrenched right (which infringement is not saved by s. 1) cannot be said to accord with the principles of fundamental justice. It must therefore be justified as a reasonable limit under s. 1 of the Charter. To imprison people for exercising their constitutionally-protected freedom of expression, even if they are exercising it for purposes of prostitution, is not a proportionate way of dealing with the public or social nuisance at which the legislation is aimed. Section 195.1(1)(*c*) violates s. 7 of the Charter and is not saved by s. 1.

While s. 193 infringes a person's right to liberty through the threat of imprisonment, absent the infringement of some other Charter guarantee, s. 193 does not violate a principle of fundamental justice, alone or in combination with s. 195.1(1)(*c*).

International conventions considered:

European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222

art. 7(1)

***Dickson C.J.C. (La Forest* and *Sopinka JJ.* concurring):**

1 I have had the advantage of reading the reasons of my colleagues Justice Lamer and Justice Wilson. I agree, for the reasons given by Wilson J., that s. 195.1(1)(*c*) [now s. 213(1)(*c*)] of the Criminal Code, R.S.C. 1970, c. C-34 [now R.S.C. 1985, c. C-46], represents a prima facie infringement of s. 2(*b*) of the Canadian Charter of Rights and Freedoms, while s. 193 [now s. 210] does not. In my view, the scope of freedom of expression does extend to the activity of communication for the purpose of engaging in prostitution. With respect, however, I disagree with the conclusion reached by Wilson J.

that this prima facie infringement is not justified as a reasonable limit under s. 1 of the Charter. On this issue I reach the same conclusion as Lamer J., but prefer to rest my conclusion on an analysis which differs from that of my colleague.

2 The first step in the analysis, established in *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 19 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87, to assess the justification pursuant to s. 1 for a Charter violation is to characterize the legislative objective of the impugned provision. Like Wilson J., I would characterize the legislative objective of s. 195.1(1)(*c*) in the following manner: the provision is meant to address solicitation in public places and, to that end, seeks to eradicate the various forms of social nuisance arising from the public display of the sale of sex. My colleague Lamer J. finds that s. 195.1(1)(*c*) is truly directed towards curbing the exposure of prostitution and related violence, drugs and crime to potentially vulnerable young people, and towards eliminating the victimization and economic disadvantage that prostitution, and especially street soliciting, represents for women. I do not share the view that the legislative objective can be characterized so broadly. In prohibiting sales of sexual services in public, the legislation does not attempt, at least in any direct manner, to address the exploitation, degradation and subordination of women that are part of the contemporary reality of prostitution. Rather, in my view, the legislation is aimed at taking solicitation for the purposes of prostitution off the streets and out of public view.

3 The Criminal Code provision subject to attack in these proceedings clearly responds to the concerns of home-owners, businesses, and the residents of urban neighbourhoods. Public solicitation for the purposes of prostitution is closely associated with street congestion and noise, oral harassment of non-participants and general detrimental effects on passers-by or bystanders, especially children. In my opinion, the eradication of the nuisance-related problems caused by street solicitation is a pressing and substantial concern. I find, therefore, that sending the message that street solicitation for the purposes of prostitution is not to be tolerated constitutes a valid legislative aim.

4 I turn now to the issue of proportionality. With respect to the question of rational connection between the impugned legislation and the prevention of the social nuisance associated with the public display of the sale of sex, I agree with Wilson J. that such a connection exists. The next step is to determine whether the means embodied in this legislation are appropriately tailored to meet the objective. Is it reasonable and justifiable to limit freedom of expression according to the terms of s. 195.1(1)(*c*) in order to eliminate street solicitation and the social nuisance which it creates? The answer to this question requires an analysis of whether the means impair the right as little as possible and of the effects and reasonableness of the limits imposed.

5 I start by considering the nature of the expression and the nature of the infringing legislation. Freedom of expression is fundamental to a democratic society. Parliament, through s. 195.1(1)(*c*) of the Criminal Code, has chosen to use the criminal justice system to prosecute individuals on the basis of the exercise of their freedom of expression. When a Charter freedom has been infringed by state action that takes the form of criminalization, the Crown bears the heavy burden of justifying that infringement. Yet the expressive activity, as with any infringed Charter right, should also be analyzed in the particular context of the case. Here, the activity to which the impugned legislation is directed is expression with an economic purpose. It can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression.

6 The legislation aims at restraining communication or attempts at communication for the purpose of engaging in prostitution. That communication must occur in "a public place or in any place open to public view". It is argued that the legislation is overbroad because it is not confined to places where there will *necessarily* be many people, or in fact *any* people, who will be offended by the activity. The objective of this provision, however, is not restricted to the control of actual disturbances or nuisances. It is broader, in the sense that it is directed at controlling, in general, the nuisance-related problems identified above that stem from street soliciting. Much street soliciting occurs in specified areas where the congregation of prostitutes and their customers amounts to a nuisance. In effect, the legislation discourages prostitutes and customers from concentrating their activities in any particular location. While it is the cumulative impact of individual transactions concentrated in a public area that effectively produces the social nuisance at which the legislation in part aims, Parliament can act only by focussing on individual transactions. The notion of nuisance in

connection with street soliciting extends beyond interference with the individual citizen to interference with the public at large, that is, with the environment represented by streets, public places and neighbouring premises.

7 The appellants' argument that the provision is too broad and therefore cannot be found to be appropriately tailored also focusses on the phrase "in any manner communicate or attempt to communicate". The communication in question cannot be read without the phrase "for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute", which follows and qualifies it. In my opinion, the definition of "communication" may be, and indeed is, very wide, but the need for flexibility on the part of Parliament in this regard must be taken into account. Certain acts or gestures in addition to certain words can reasonably be interpreted as attracting customers for the purposes of prostitution or as indicating a desire to procure the services of a prostitute. This provides the necessary delineation of the scope of the communication that may be criminalized by s. 195.1(1)(*c*). This court in *Hutt v. R.*, [1978] 2 S.C.R. 476, 1 C.R. (3d) 164, [1978] 2 W.W.R. 247, 38 C.C.C. (2d) 418, 82 D.L.R. (3d) 95, 19 N.R. 330 [B.C.], interpreted the meaning of solicitation in keeping with the purposes of the provision. In that case, the actions of a prostitute who had engaged in conversation regarding the sale of sexual services for a fee with an undercover police officer in his car were found not to constitute "solicitation". In a similar vein, the courts are capable of restricting the meaning of "communication" in this context by reference to the purpose of the impugned legislation.

8 Can effective yet less intrusive legislation be imagined? The means used to attain the objective of the legislation may well be broader than would be appropriate were actual street nuisance the only focus. However, as I find the objective to extend to the general curtailment of visible solicitation for the purposes of prostitution, it is my view that the legislation is not unduly intrusive.

9 It is legitimate to take into account the fact that earlier laws and considered alternatives were thought to be less effective than the legislation that is presently being challenged. When Parliament began its examination of the subject of street soliciting, it was presented with a spectrum of views and possible approaches by both the Fraser Committee and the Justice and Legal Affairs Committee. In making a choice to enact s. 195.1(1)(*c*) as it now reads, Parliament had to try to balance its decision to criminalize the nuisance aspects of street soliciting and its desire to take into account the policy arguments regarding the effects of criminalization of any aspect of prostitution. The legislative history of the present provision and, in general, of legislation directed to street solicitation is both long and complicated. The legislative scheme that was eventually implemented and has now been challenged need not be the "perfect" scheme that could be imagined by this court or any other court. Rather, it is sufficient if it is appropriately and carefully tailored in the context of the infringed right. I find that this legislation meets the test of minimum impairment of the right in question.

10 In this regard, I find my words in *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713 at 783, *(*sub nom. *R. v. Videoflicks Ltd.)* 55 C.R. (3d) 193, *(*sub nom. *Edwards Books & Art Ltd. v. R.; R. v. Nortown Foods Ltd.)* 30 C.C.C. (3d) 385, 35 D.L.R. (4th) 1, 28 C.R.R. 1, 87 C.L.L.C. 14,001, 19 O.A.C. 239, 71 N.R. 161, to be applicable:

> I should emphasize that it is not the role of this Court to devise legislation that is constitutionally valid, or to pass on the validity of schemes which are not directly before it or to consider what legislation might be the most desirable. The discussion of alternative legislative schemes that I have undertaken is directed to one end only, that is, to address the issue whether the existing scheme meets the requirements of the second limb of the test for the application of s. 1 of the *Charter* as set down in *Oakes*.

11 The final question to be answered under the *Oakes* test is whether the effects of the law so severely trench on a protected right that the legislative objective is outweighed by the infringement. I have already found that the objective of the legislation to which these intended effects are linked is of pressing and substantial importance in the free and democratic society that Canada represents. Because the impugned Criminal Code provision prohibits legitimate expression in the form of communication for the purposes of a commercial agreement exchanging sex for money, and therefore violates a protected right, the justification of that Charter infringement must be in keeping with the principles of a democratic society and the rights, freedoms and interests of its members. Here, the legislation limits the conditions under which communication between prostitutes and customers can take place. In thereby moving toward the eradication

of public communication with respect to prostitution, it addresses itself precisely to the objective it seeks to achieve. The curtailment of street solicitation is in keeping with the interests of many in our society for whom the nuisance-related aspects of solicitation constitute serious problems. I find that the obtrusiveness linked to the enforcement of the provision, when weighed against the resulting decrease in the social nuisance associated with street solicitation, can be justified in accordance with s. 1.

12 I wish to add here that other attempts at legislation in this area have failed for various reasons. This is not to say that the Crown can discharge its burden under s. 1 simply by saying that it is difficult to find a legislative solution in the area of prostitution and that the courts should therefore be ready to accept the enactment under challenge. Rather it is to point out that a legislative scheme aimed at street solicitation must be of a criminal law nature, after this court's decision in *Westendorp v. R.*, [1983] 1 S.C.R. 43, 32 C.R. (3d) 97, [1983] 2 W.W.R. 385, 23 Alta. L.R. (2d) 289, 20 M.P.L.R. 267, 2 C.C.C. (3d) 330, 144 D.L.R. (3d) 259, 41 A.R. 306, 46 N.R. 30. In that case, the city of Calgary enacted a by-law that prohibited the use of city streets by those approaching or being approached by others for the purpose of prostitution. Laskin C.J.C. for the court found the challenged by-law to be ultra vires as invading federal powers in relation to the criminal law. A province or municipality may not "translate a direct attack on prostitution into street control through reliance on public nuisance" (p. 53). Only Parliament can attack prostitution through the use of criminal measures, and legislation seeking to eradicate street solicitation cannot originate with the individual municipalities. The restriction on the activities of prostitutes effected by s. 195.1(1)(*c*) of the Criminal Code, at stake in these proceedings, must be assessed accordingly.

13 In conclusion, with respect to the s. 1 justification of the infringement of freedom of expression, I find that s. 195.1(1)(*c*) is valid legislation aimed at the curtailment of street solicitation. After taking into consideration the nature of the expression and the nature of the infringing legislation, and the issue of whether a free and democratic society can countenance legislation aimed at the social nuisance of street solicitation and at its eventual elimination, I conclude that the impugned provision is saved by s. 1.

14 I now turn to the question of whether ss. 193 and 195.1(1)(*c*), separately or in combination, infringe s. 7 of the Charter. There are two components of s. 7 that must be satisfied before finding a violation. First, there must be a breach of one of the s. 7 interests of the individual — life, liberty or security of the person. Second, the law that is responsible for that breach must be found to violate the principles of fundamental justice. With respect to the first component, there is a clear infringement of liberty in this case, given the possibility of imprisonment contemplated by the impugned provisions. Beyond this obvious violation, the appellants raise various arguments relating to an economic aspect of liberty that has been infringed. It is submitted that the impugned provisions infringe the liberty interest of street prostitutes in not allowing them to exercise their chosen profession, and their right to security of the person in not permitting them to exercise their profession in order to provide the basic necessities of life. In the context of these "economic" arguments, the challengers make repeated reference to the fact that prostitution per se is legal. They submit that restriction of a legal activity to the point where it becomes impossible to engage in that activity is contrary to the principles of fundamental justice.

15 With respect to the first component of s. 7, the strongest argument that can be made regarding an infringement of liberty derives from the fact that the legislation contemplates the possibility of imprisonment. Because this is the case, I find it unnecessary to address the question of whether s. 7 liberty is violated in another, "economic", way. I wish to add here that this case does not provide the appropriate forum for deciding whether "liberty" or "security of the person" could *ever* apply to any interest with an economic, commercial or property component.

16 Having found an infringement of liberty, I now move to the second component of s. 7 — that is, the question of whether the infringement is in accord with the principles of fundamental justice. I will divide my discussion of the principles of fundamental justice into two parts. First, I will briefly add my comments to those of my colleagues with respect to the argument that the provisions are void for vagueness and therefore do not comply with the principles of fundamental justice. Second, I will address the argument that I alluded to above — that is, that the fact that street solicitation is criminalized while prostitution per se remains legal contravenes the principles of fundamental justice.

17 I agree with Lamer J. that vagueness should be recognized as contrary to the principles of fundamental justice. Certainty in the criminal context where a person's liberty is at stake it is imperative that persons be capable of knowing in advance with a high degree of certainty what conduct is prohibited and what is not. It would be contrary to the basic principles of our legal system to allow individuals to be imprisoned for transgression of a vague law. Rather than repeat Lamer J.'s discussion of the void for vagueness doctrine, I restrict myself to the question of whether the impugned provisions raised in this appeal are so vague as to violate the requirement that the criminal law be clear. I find that the terms "prostitution", "keeps" a bawdy house, "communicate" and "attempts to communicate" are not so vague, given the benefit of judicial interpretation, that their meaning is impossible to discern in advance.

18 The second argument pertaining to the violation of the principles of fundamental justice rests on the fact that Parliament has chosen to control prostitution indirectly, through the criminalization of certain activities of those involved, instead of directly criminalizing prostitution itself. The principle of fundamental justice proffered in this regard is that it is impermissible for Parliament to send out conflicting messages whereby the criminal law says one thing but means another. Section 193 effectively prohibits the sale of sex in private settings, while s. 195.1(1)(*c*) makes it impossible to negotiate in public for the sale of sex. It is argued that this legislative scheme attaches the stigma of criminalization to a lawful activity (communication) directed at the achievement of another lawful activity (sale of sex). The question is whether, by creating a legal environment indirectly making it, in effect, impossible for a prostitute to sell sex, Parliament has offended the principles of fundamental justice.

19 While I recognize that Parliament has chosen a circuitous path, I find it difficult to say that Parliament *cannot* take this route. The issue is not whether the legislative scheme is frustrating or unwise, but whether the scheme offends the basic tenets of our legal system. The fact that the sale of sex for money is not a criminal act under Canadian law does not mean that Parliament must refrain from using the criminal law to express society's disapprobation of street solicitation. Unless or until this court is faced with the direct question of Parliament's competence to criminalize prostitution, it is difficult to say that Parliament cannot criminalize, and thereby indirectly control, some element of prostitution — that is, street solicitation. The principles of fundamental justice are not designed to ensure that the optimal legislation is enacted. I conclude that the legislative scheme embodied by ss. 193 and 195.1(1)(*c*) of the Criminal Code is not so unfair as to violate principles of fundamental justice.

20 Finally, having found that the infringement of freedom of expression effected by s. 195.1(1)(*c*) can be justified under s. 1, I need not consider Wilson J.'s argument with respect to the principles of fundamental justice and their relation to infringements of other Charter rights and freedoms.

21 I would dismiss the appeal [from [1987] 6 W.W.R. 289, 60 C.R. (3d) 216, 38 C.C.C. (3d) 408, 49 Man. R. (2d) 1] and answer the constitutional questions as follows:

> *Question 1.* Is Section 193 of the *Criminal Code* of Canada inconsistent with Section 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

> *Question 2*. Is Section 195.1(1)(*c*) of the *Criminal Code* of Canada inconsistent with Section 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

> *Question 3*. Is the combination of the legislative provisions contained in Sections 193 and 195.1(1)(*c*) of the *Criminal Code* of Canada inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

Question 4. Is Section 193 of the *Criminal Code* of Canada inconsistent with Section 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

Question 5. Is Section 195.1(1)(*c*) of the *Criminal Code* of Canada inconsistent with Section 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

Question 6. Is the combination of the legislative provisions contained in Sections 193 and 195.1(1)(*c*) of the *Criminal Code* of Canada inconsistent with Section 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

Question 7. If Section 193 or Section 195.1(1)(*c*) of the *Criminal Code* of Canada or a combination of both or any part thereof are inconsistent with either Section 7 or Section 2(*b*) of the *Canadian Charter of Rights and Freedoms*, to what extent, if any, can such limits on the rights and freedoms protected by Section 7 or Section 2(*b*) of the *Canadian Charter of Rights and Freedoms* be justified under Section 1 of the *Canadian Charter of Rights and Freedoms* and thereby be rendered not inconsistent with the *Constitution Act*, *1982*?

Answer: To the extent that s. 195.1(1)(*c*) of the *Criminal Code* is inconsistent with s. 2(*b*) of the *Charter*, it can be justified as a reasonable limit under s. 1 of the *Charter*.

***Lamer J.*:**

I. Introduction

22 On 14th January 1987 the Lieutenant-Governor in Council of Manitoba referred certain questions to the Court of Appeal of the province pursuant to the provisions of the Constitutional Questions Act, C.C.S.M., c. C180. The questions concern the constitutionality of ss. 193 [now s. 210] and 195.1(1)(*c*) [now s. 213(1)(*c*)] of the Criminal Code, R.S.C. 1970, c. C-34 [now R.S.C. 1985, c. C-46], in the light of ss. 2(*b*) and 7 of the Canadian Charter of Rights and Freedoms. The reference arose from a case, *R. v. Cunningham* (1986), 31 C.C.C. (3d) 223 (Man. Prov. Ct.), in which the trial judge held that s. 195.1(1)(*c*) of the Criminal Code was of no force and effect, as it was inconsistent with s. 7 of the Charter. The trial judge also made comments with respect to s. 193 of the Criminal Code and s. 2(*b*) of the Charter. The Court of Appeal upheld the validity of the legislation [[1987] 6 W.W.R. 289, 60 C.R. (3d) 216, 38 C.C.C. (3d) 408, 49 Man. R. (2d) 1], and it is from this decision that the appellants, contradictor at the reference in the Court of Appeal and the contradictor added by order of the Chief Justice of Manitoba, come to this court.

23 For purposes of convenience and ease of reference I set out the relevant legislation and constitutional provisions in this appeal. I refer to the numbering of the Code sections as they were at the time of the appeal. Section 193 of the Criminal Code provides:

Bawdy-houses

193. (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and is liable to imprisonment for two years.

(2) Every one who

(*a*) is an inmate of a common bawdy-house,

(*b*) is found, without lawful excuse, in a common bawdy-house, or

(*c*) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,

is guilty of an offence punishable on summary conviction.

Section 195.1 of the Criminal Code provides:

Offence in Relation to Prostitution

195.1 (1) Every person who in a public place or in any place open to public view

(*a*) stops or attempts to stop any motor vehicle,

(*b*) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or

(*c*) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person

for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

(2) In this section, "public place" includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.

Section 2(*b*) of the Charter reads:

2. Everyone has the following fundamental freedoms: ...

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication ...

Section 7 of the Charter reads:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 1 of the Charter reads:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 52(1) of the Constitution Act, 1982, reads:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

II. Judgment of the Manitoba Court of Appeal

Monnin C.J.M.

24 Monnin C.J.M. agreed with the decisions of Huband J.A., who dealt primarily with the questions concerning s. 2 of the Charter, and with Philp J.A., who dealt with the questions concerning s. 7 of the Charter. He added that he disagreed with the Nova Scotia Court of Appeal decision in *R. v. Skinner* (1987), 58 C.R. (3d) 137, 35 C.C.C. (3d) 203, 30 C.R.R.

338, 79 N.S.R. (2d) 8, 196 A.P.R. 8, and the Alberta Court of Appeal decision in *R. v. Jahelka* (1987), 58 C.R. (3d) 164, 54 Alta. L.R. (2d) 1, *(*sub nom. *R. v. Jahelka; R. v. Stagnitta)* 36 C.C.C. (3d) 105, 43 D.L.R. (4th) 111, 31 C.R.R. 331, 79 A.R. 44, wherein both courts concluded that s. 195.1(1)(*c*) restricted s. 2(*b*) of the Charter. He further added that if the provisions of the Criminal Code constituted infringements of rights and freedoms under the Charter then they were reasonable limits demonstrably justified in a free and democratic society.

Huband J.A.

25 Initially, Huband J.A. notes that the guarantee of free expression under the Charter is not absolute in nature (p. 413):

> Just because some words are written or spoken or suggested does not mean that one is exercising the right of free speech under the *Canadian Charter of Rights and Freedoms*. If a person, without provocation, shouts obscenities at another, it does not fall within the ambit of the Charter. Whether a crime or tort has been committed or not, the Charter right to free speech and free expression simply does not include such utterances.

In his view, the Charter protects the expression and dissemination of ideas. In examining the history of freedom of expression, Huband J.A. notes that, as it developed in the common law, the concept of free speech referred to the right to freedom in thought and speech on every conceivable subject, including political, social and religious subjects. In this regard he refers to the judgment of Rand J. in *Boucher v. R.*, [1951] S.C.R. 265, 11 C.R. 85, 99 C.C.C. 1, [1951] 2 D.L.R. 369 [Que.]. He further states that the Canadian Bill of Rights enshrined the concept of freedom of speech as it had developed in the common law. Similarly, according to Huband J.A., when freedom of expression was incorporated in the Charter no new definition was intended by the drafters. The word "expression" instead of "speech" was used to reflect that an individual can make a statement by actions as well as by words. Huband J.A. refers to this court's decision in *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, [1987] 1 W.W.R. 577, 9 B.C.L.R. (2d) 273, 38 C.C.L.T. 184, 87 C.L.L.C. 14,002, 33 D.L.R. (4th) 174, 25 C.R.R. 321, 71 N.R. 83, for confirmation of the view that not every statement or gesture is entitled to protection under the Charter. In this case Huband J.A. held that soliciting for the purposes of prostitution is not entitled to protection (at p. 413):

> ... when a prostitute propositions a customer, or *vice versa*, we are not dealing with the free expression of ideas, nor with the real or imagined factual data to support an idea. I think that Milton and Mill would have been astounded to hear that their disquisitions were being invoked to protect the business of whores and pimps. I confess my own astonishment.

26 On the question of whether ss. 193 and 195.1(1)(*c*) in combination restrain the lawful trade of prostitutes, Huband J.A. notes that prostitution in itself is not illegal. However, by restricting the places where soliciting and prostitution activities can take place, Parliament has imposed severe restrictions on prostitutes. He held that Parliament has the right to do this, and in doing so does not contravene s. 2(*c*) of the Charter. Further, he notes that he would find, in any event, that if these provisions did contravene the Charter then the contravention would be justified under s. 1 of the Charter.

Philp J.A.

27 The judgment of Philp J.A. addresses the issue of whether the impugned sections of the Criminal Code infringe the right of liberty guaranteed by s. 7 of the Charter. The appellant (contradictor added by order of the Chief Justice of Manitoba) had argued that s. 193 was "impermissibly vague" and therefore constituted a prima facie violation of the Charter. Philp J.A. held that the issue of the "overbreadth" of a statute is relevant only once it has been determined that the Charter has been breached and the court is considering the issue of the applicability of s. 1. It cannot be argued, according to Philp J.A., that because a statute is "overbroad" in its wording it contravenes the Charter. Further, he held that it cannot be argued that s. 193 is so vague that it offends s. 7 because a person would be liable to imprisonment without fair notice that his conduct was criminal. Courts have been using the rules of statutory construction to interpret s. 193 for many years, and it has never been found to be so vaguely worded as to be void for uncertainty (pp. 426-27):

I think s. 193 gives fair notice of the kind of conduct that is criminal; and the courts have been able to give sensible meaning to the words of the section. Nor can it be said that the section has placed wide discretion in the hands of the police authorities, or encouraged arbitrary and erratic arrests and convictions.

I entertain some doubt of the application of the "impermissibly vague" doctrine to Canadian constitutional law. In any event, I have concluded that s. 193 is not impermissibly vague, that it is not inconsistent with s. 7 of the Charter.

28 Philp J.A. next considered the issue of whether the guarantee of liberty under s. 7 protects economic rights and the right to work, and whether prostitution would be entitled to that protection. Following McIntyre J. in *Ref. re Pub. Service Employee Rel. Act (Alta.)*, [1987] 1 S.C.R. 313, [1987] 3 W.W.R. 577, 51 Alta. L.R. (2d) 97, 38 D.L.R. (4th) 161, *(*sub nom. *A.U.P.E. v. Alta. (A.G.))* 28 C.R.R. 305, 87 C.L.L.C. 14,021, 78 A.R. (sub nom. *Ref. re Compulsory Arb.*), 74 N.R. 99, he held that the Charter does not protect economic rights. He concluded, after a review of the provincial case law on the subject, that liberty under s. 7 of the Charter is concerned with the physical liberty of the person. Therefore, he held that the right to engage in prostitution is not protected under s. 7.

Twaddle J.A.

29 Twaddle J.A. agrees with the reasoning and results of Huband and Philp JJ.A. In regard to the applicability of s. 1 of the Charter, he states that this section applies only where limits are placed on rights and freedoms that are fundamental. In his opinion, no fundamental rights or freedoms are involved in this case.

Lyon J.A.

30 Lyon J.A. agrees with the reasoning and results of Monnin C.J.M. and Huband, Philp and Twaddle JJ.A.

III. Issues

31 The following constitutional questions were stated by order of the Chief Justice on 3rd March 1988:

1. Is Section 193 of the *Criminal Code* of Canada inconsistent with Section 7 of the *Canadian Charter of Rights and Freedoms*?

2. Is Section 195.1(1)(*c*) of the *Criminal Code* of Canada inconsistent with Section 7 of the *Canadian Charter of Rights and Freedoms*?

3. Is the combination of the legislative provisions contained in Section 193 and Section 195.1(1)(*c*) of the *Criminal Code* of Canada inconsistent with Section 7 of the *Canadian Charter of Rights and Freedoms*?

4. Is Section 193 of the *Criminal Code* of Canada inconsistent with Section 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

5. Is Section 195.1(1)(*c*) of the *Criminal Code* of Canada inconsistent with Section 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

6. Is the combination of the legislative provisions contained in Section 193 and Section 195.1(1)(*c*) of the *Criminal Code* of Canada inconsistent with Section 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

7. If Sections 193 and 195.1(1)(*c*) of the *Criminal Code* of Canada or a combination of both or any part thereof are inconsistent with either Section 7 or Section 2(*b*) of the *Canadian Charter of Rights and Freedoms*, to what extent, if any, can such limits on the rights and freedoms protected by Section 7 or Section 2(*b*) of the *Canadian Charter of Rights and Freedoms* be justified under Section 1 of the *Canadian Charter of Rights and Freedoms* and thereby rendered not inconsistent with the *Constitution Act, 1982*?

IV. Section 7 of the Charter

32 The first three issues in this reference require an examination of the scope of the rights guaranteed by s. 7. In the course of this examination, it falls to be determined whether the impugned legislation is constitutionally infirm on two separate grounds. First, is the legislation so vaguely worded that it is offensive to s. 7 of the Charter? The appellants submit that a law may be found inconsistent with s. 7 of the Charter where that law lacks clarity and precision such that it contains no discernible standards for the prescribed conduct and persons of common intelligence must necessarily guess as to its meaning. Second, does the impugned legislation, in suppressing the trade of prostitution, violate the right to life, liberty and security of the person in a manner that does not accord with the principles of fundamental justice? More specifically, the appellants submit that the suppression of prostitution violates an individual's right to liberty in the choice of a profession, and further violates the right to security of the person by preventing an individual from providing the basic necessities of life such as food, shelter and clothing.

V. "Void for Vagueness" and S. 7 of the Charter

33 The first ground of attack is essentially based on the "void for vagueness" doctrine, whose genesis and development is largely found in United States jurisprudence. I say "largely" found in the United States because there is some recognition of the concept in international law. I point, for instance, to art. 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, which reads:

> **Article 7**
>
> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

This article was invoked to challenge an amendment to a provision of the Danzig Penal Code, which read:

> Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling, shall be punished. If there is no penal law directly covering an act, it shall be punished under the law of which the fundamental conception applies most nearly to the said act.

The Permanent Court of International Justice, in the *Danzig Legislative Decrees Case*, Advisory Opinion of 4th December 1935, Series A/B No. 65, p. 41, said the following in respect of this legislation (at p. 53):

> ... under the new decrees ... a man may find himself placed on trial and punished for an act which the law did not enable him to know was an offence, because its criminality depends entirely upon the appreciation of the situation by the Public Prosecutor and by the judge. Accordingly, a system in which the criminal character of an act and the penalty attached to it will be known to the judge alone replaces a system in which this knowledge was equally open to both the judge and the accused.

There is no doubt, however, that the bulk of the jurisprudence in the area of "void for vagueness" lies in the United States, and therefore I propose to begin with a brief recapitulation of the American authorities, so as to provide a context for discussion of the doctrine's potential application in Canadian law. It should be noted at the outset that no specific or explicit constitutional provision exists in the Untied States prohibiting vague laws.

34 The Supreme Court of the United States has ruled that impermissibly vague laws are void in that they constitute a denial of due process of law. In *Connally v. Gen. Const. Co.*, 269 U.S. 385, 70 L. Ed. 322, 46 S. Ct. 126 (1926), Sutherland J. put it in the following terms at p. 391:

> ... a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

In *Cline v. Frink Dairy Co.*, 274 U.S. 445, 71 L. Ed. 1146, 47 S. Ct. 681 (1927), that "first essential of due process of law" was expressed as follows at p. 465:

> ... it will not do to hold an average man to the peril of an indictment for the unwise exercise of his ... knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result.

The principles expressed in these two citations are not new to our law. In fact, they are based on the ancient Latin maxim "nullum crimen sine lege, nulla poena sine lege" — that there can be no crime or punishment unless it is in accordance with law that is certain, unambiguous and not retroactive. The rationale underlying this principle is clear. It is essential in a free and democratic society that citizens are able, as far as is possible, to foresee the consequences of their conduct, in order that persons be given fair notice of what to avoid, and that the discretion of those entrusted with law enforcement is limited by clear and explicit legislative standards: see Professor L. Tribe, American Constitutional Law, 2nd ed. (1988), at p. 1033. This is especially important in the criminal law, where citizens are potentially liable to a deprivation of liberty if their conduct is in conflict with the law.

35 One of the leading cases dealing with impermissibly vague laws is *Papachristou v. Jacksonville (City)*, 405 U.S. 156, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972), wherein the Supreme Court of the United States invalidated a Florida vagrancy ordinance. Although it is lengthy, I find it appropriate to reproduce the ordinance [quoted at p. 156] in order to demonstrate the scope of the doctrine as understood by the United States Supreme Court:

> Jacksonville Ordinance Code §26-57 ...
>
> > Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offences.

36 Douglas J., speaking for the court, concluded that the ordinance was impermissibly vague on the following grounds, at p. 162:

> This ordinance is void for vagueness, both in the sense that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," ... and because it encourages arbitrary and erratic arrests and convictions. Thornhill v. Alabama, 310 U.S. 88; Herndon v. Lowry, 301 U.S. 242.
>
> Living under a rule of law entails various suppositions, one of which is that "(all persons) are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453.
>
> Lanzetta is one of a well-recognized group of cases insisting that the law give fair notice of the offending conduct.

The precise standards for evaluating vagueness were further developed and enunciated in *Grayned v. Rockford (City)*, 408 U.S. 104 at 108-109, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972):

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly .... Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

37 Before embarking on a review of the Canadian experience with the "void for vagueness" doctrine, I pause to note that the American jurisprudence distinguishes between vagueness and overbreadth. As Professor Tribe explains at p. 1033, although there is a parallel between the two concepts, "Vagueness is a constitutional vice conceptually distinct from overbreadth in that an overbroad law need lack neither clarity nor precision ..." A law that is overly broad sweeps within its ambit activities that are beyond the allowable area of state control, and in fact burdens conduct that is constitutionally protected. The proper approach to adopt in understanding the relationship between vagueness and overbreadth has been stated by Marshall J., speaking for the United States Supreme Court in *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 at 494-95, 71 L. Ed. 2d 362, 87 S. Ct. 408 (1982):

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications.

The relationship between vagueness and overbreadth in Canadian law has been expressly addressed in *R. v. Zundel* (1987), 58 O.R. (2d) 129, 56 C.R. (3d) 1, 31 C.C.C. (3d) 97, 35 D.L.R. (4th) 338, 29 C.R.R. 349, 18 O.A.C. 161 (C.A.), in a decision rendered "By the Court", at pp. 125-26:

> Vagueness and overbreadth are two concepts. They can be applied separately, or they may be closely interrelated. The intended effect of a statute may be perfectly clear and thus not vague, and yet its application may be overly broad. Alternatively, as an example of the two concepts being closely interrelated, the wording of a statute may be so vague that its effect is considered to be overbroad. Vagueness or overbreadth, for the purpose of determining the permissibly regulated area of conduct, and whether freedom of expression under s. 2(*b*) of the Charter has been breached, may be different from vagueness or overbreadth for the purpose of applying the criteria in *Oakes* as to the application of s. 1 of the Charter.

Further, the position in *Hoffman Estates* was adopted and followed by the Ontario Court of Appeal in *R. v. Morgentaler* (1985), 52 O.R. (2d) 353 at 387-88, 48 C.R. (3d) 1, 22 C.C.C. (3d) 353, 22 D.L.R. (4th) 641, 17 C.R.R. 223, 11 O.A.C. 81, reversed [1988] 1 S.C.R. 30, 63 O.R. (2d) 281, 62 C.R. (3d) 1, 37 C.C.C. (3d) 449, 44 D.L.R. (4th) 385, 31 C.R.R. 1, 26 O.A.C. 1, 82 N.R. 1.

38 It would seem to me that since the advent of the Charter the doctrine of vagueness or overbreadth has been the source of attack on laws on two grounds. First, a law that does not give fair notice to a person of the conduct that is contemplated as criminal is subject to a s. 7 challenge to the extent that such a law may deprive a person of liberty and security of the person in a manner that does not accord with the principles of fundamental justice. Clearly, it seems to me that, if a person is placed at risk of being deprived of his liberty when he has not been given fair notice that his conduct falls within the scope of the offence as defined by Parliament, then surely this would offend the principles of fundamental justice. Second, where a separate Charter right or freedom has been limited by legislation, the doctrine of vagueness or overbreadth may be considered in determining whether the limit is "prescribed by law" within the meaning of s. 1 of the Charter. In this regard I quote from the decision of Huges sen J. of the Federal Court of Appeal in *Luscher v. Can. (Dep. Min., Revenue Can., Customs & Excise)*, [1985] 1 F.C. 85 at 89-90, 45 C.R. (3d) 81, [1985] 1 C.T.C. 246, 9 C.E.R. 229, 17 D.L.R. (4th) 503, 15 C.R.R. 167, 57 N.R. 386:

> In my opinion, one of the first characteristics of a reasonable limit prescribed by law is that it should be expressed in terms sufficiently clear to permit a determination of where and what the limit is. A limit which is vague, ambiguous, uncertain, or subject to discretionary determination is, by that fact alone, an unreasonable limit. If a citizen cannot know with tolerable certainty the extent to which the exercise of a guaranteed freedom may be restrained, he is likely to be deterred from conduct which is, in fact, lawful and not prohibited. Uncertainty and vagueness are constitutional vices when they are used to restrain constitutionally protected rights and freedoms. While there can never be absolute certainty, a limitation of a guaranteed right must be such as to allow a very high degree of predictability to the legal consequences.

See also *Re Information Retailers Assn. of Metro. Toronto Inc. and Metro. Toronto (Mun.)* (1985), 52 O.R. (2d) 449, 32 M.P.L.R. 49, 22 D.L.R. (4th) 161, 10 O.A.C. 140 (C.A.), and *R. v. Robson*, 45 C.R. (3d) 68, [1988] 6 W.W.R. 519, 28 B.C.L.R. (2d) 8, 31 M.V.R. 220, 19 C.C.C. (3d) 137, 19 D.L.R. (4th) 112, 15 C.R.R. 236 (C.A.).

39 As I understand it, this appeal was argued on the basis that the impugned sections of the Criminal Code violate s. 7 of the Charter because they subject an individual to a deprivation of liberty and security of the person in the form of potential imprisonment and are allegedly impermissibly vague. Therefore I will proceed with my analysis on that basis. As I have stated above, in my view a law that is impermissibly vague and that has as a potential sanction the deprivation of liberty or security of the person offends s. 7 of the Charter. There is no dispute that the impugned sections have the potential to deprive one of liberty and security of the person upon conviction. What remains to be determined is whether the sections are impermissibly vague and thereby offend the principles of fundamental justice.

40 I begin by noting that the vagueness doctrine does not require that a law be absolutely certain; no law can meet that standard. I point to the introductory comments of the Law Reform Commission of Canada in respect of its draft Code (report 31, Recodifying Criminal Law (1987), at p. 2):

> It [the draft Code] is drafted in a straightforward manner, minimizing the use of technical terms and avoiding complex sentence structure and excessive detail. It speaks, as much as possible, in terms of general principles instead of needless specifics and *ad hoc* enumerations.

In addition, the role of the courts in giving meaning to legislative terms should not be overlooked when discussing the issue of vagueness. The Ontario Court of Appeal in *R. v. Morgentaler*, supra, said the following at p. 388 [O.R.]:

> In this case, however, from a reading of s. 251 with its exception, there is no difficulty in determining what is proscribed and what is permitted. It cannot be said that no sensible meaning can be given to the words of the section. Thus, it is for the courts to say what meaning the statute will bear.

Also, as the Ontario Court of Appeal has held in *R. v. LeBeau* (1988), 62 C.R. (3d) 157, 41 C.C.C. (3d) 163 at 173, *(*sub nom. *R. v. LeBeau; R. v. Lofthouse)* 25 O.A.C. 1, "the void for vagueness doctrine is not to be applied to the bare words of the statutory provision but, rather, to the provision as interpreted and applied in judicial decisions".

41 The fact that a particular legislative term is open to varying interpretations by the courts is not fatal. As Beetz J. observed in *R. v. Morgentaler* at p. 107 [S.C.R.]: "Flexibility and vagueness are not synonymous." Therefore the question at hand is whether the impugned sections of the Criminal Code can be or have been given sensible meanings by the courts. In other words, is the statute so pervasively vague that it permits a "standardless sweep", allowing law enforcement officials to pursue their personal predilections?: see *Smith v. Goguen*, 415 U.S. 566 at 575, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (1974), and *Kolender v. Lawson*, 461 U.S. 352 at 357-58, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983).

42 I begin with s. 193. There is not doubt that, standing alone, the words of the section are vulnerable to a charge that they are impermissibly vague. The section in essence makes it an offence for anyone to keep a common bawdy-house. But we are aided in the interpretation of the section by the definitions provided in s. 179 [now s. 197] of the Code. I here reproduce the pertinent definitions:

179. (1) In this Part ...

"common bawdy-house" means a place that is

(*a*) kept or occupied, or

(*b*) resorted to by one or more persons

for the purpose of prostitution or the practice of acts of indecency ...

"keeper" includes a person who

(*a*) is an owner or occupier of a place,

(*b*) assists or acts on behalf of an owner or occupier of a place,

(*c*) appears to be, or to assist or act on behalf of an owner or occupier of a place,

(*d*) has the care or management of a place, or

(*e*) uses a place permanently or temporarily, with or without the consent of the owner or occupier;

"place" includes any place, whether or not

(*a*) it is covered or enclosed,

(*b*) it is used permanently or temporarily, or

(*c*) any person has an exclusive right of user with respect to it;

"prostitute" means a person of either sex who engages in prostitution ...

The words and terms used in the section are not terms of art; rather, they are words of common usage that have been interpreted and applied by courts in the past. This, is my view, is indicative of the existence of an ascertainable standard of conduct, a standard that has been given sensible meaning by courts in a number of cases. I need only briefly refer to some of these decisions to reenforce this view.

43 In terms of what it means to be a "keeper" of a common bawdy-house, an element of participation in the wrongful use of the place is a minimum requirement: *R. v. Kerim*, [1963] S.C.R. 124, 39 C.R. 390, [1963] 1 C.C.C. 233 [Ont.], and *R. v. McLellan* (1980), 55 C.C.C. (2d) 543 (B.C.C.A.). As an example of what constitutes wrongful participation, I cite the decision of Martin J.A. in *R. v. Woszczyna; R. v. Soucy* (1983), 6 C.C.C. (3d) 221 (Ont. C.A.). In that case the court was presented with two appeals arising out of the same set of facts dealing with the operation of a steam-bath that was found to be a common bawdy-house. Martin J.A., speaking for the court, held that day-to-day participation in the conduct on the premises was not necessary. It was sufficient that the respondent participated in the management of the premises, that he received the proceeds from its operation, that he hired and paid the staff and other operating expenses from the proceeds of the business, and that he was aware of the activities being carried on in the premises: see *R. v. Woszczyna* at p. 226.

44 The meaning of "common bawdy-house" has been addressed on more than one occasion. In *Patterson v. R.*, [1968] S.C.R. 157, 3 C.R.N.S. 23, [1968] 2 C.C.C. 247, 67 D.L.R. (2d) 82 [Ont.], this court held that keeping a common bawdy-house required a frequent or habitual use of the premises for the purposes of prostitution. Proof of actual prostitution or intercourse is not necessary to make out the offence: see *R. v. Sorko*, [1969] 4 C.C.C. 241 (B.C.C.A.). In addition, the following are further examples of cases wherein what constitutes a common bawdy-house has been considered: *R.*

v. Laliberté; R. v. Lizotte (1973), 12 C.C.C. (2d) 109 (Que. C.A.); *R. v. McLellan*, supra; *R. v. Ikeda* (1978), 3 C.R. (3d) 382, 42 C.C.C. (2d) 195 (Ont. C.A.).

45 In terms of words and phrases like "prostitution" and "acts of indecency", I note that they have been given meaning by courts on many occasions, and I reiterate that these are largely terms of common usage. Prostitution, for example, has been defined as the offering by a person of his or her body for lewdness for payment in return: see *Lantay v. R.*, [1966] 1 O.R. 503, 47 C.R. 72, [1966] 3 C.C.C. 270 (C.A.), adopting the English position in *R. v. De Munck*, [1918] 1 K.B. 635 (C.C.A.). It seems to me that there is little dispute as to the basic definition of "prostitution", that being the exchange of sexual services by one person in return for payment by another. In respect of the term "indecency", it and variations of it are used in numerous other sections of the Criminal Code, including those pertaining to immoral, indecent or obscene performances, mailing obscene materials, indecent acts, public indecency and indecent exhibition. The appropriate test to apply in this area is the "community standard of tolerance", similar to the test used in obscenity cases, which this and other courts have interpreted and applied without insurmountable difficulty. Finally, I wish to make reference to a pre-Charter case dealing with s. 193 of the Code, *R. v. Hislop*, Ont. C.A., 22nd September 1980 (unreported) (summarized 5 W.C.B. 124). In dismissing the challenge to the offence of keeping a common bawdy-house, MacKinnon A.C.J.O. stated the following at p. 4 of the court's reasons:

> The words attacked have been in the Criminal Code since 1917 and have been interpreted and applied by our courts without difficulty for years. We do not think the words are vague, uncertain or arbitrary.

I can do no better than to agree with this statement. As I have stated, the interpretation of legislation has long been a task left to the courts. Through time, courts have developed rules of construction, especially in respect of laws regulating criminal conduct. In fact, in the area of penal statutes, that is, those creating offences, the rule is one of strict construction. In other words, if there is a difficulty in determining the meaning or scope of a word or phrase, and general principles of interpretation are unable to resolve the question, then courts will adopt the meaning favouring the accused: see P.-A. Côté, The Interpretation of Legislation in Canada (1984), at p. 381. Of course, the very nature of language will always mean that there will be a certain area of flexibility open to interpretation and judicial appreciation. This does not equate with impermissible vagueness. I conclude that s. 193 of the Criminal Code is not impermissibly vague, as courts have given and continue to give the words and phrases found therein sensible meaning. The requirements of fair notice and guarding against arbitrary enforcement have been met. Therefore, insofar as s. 193 is not impermissibly vague, there is no violation of s. 7 of the Charter.

46 With the background discussion of the "void for vagueness" doctrine already having been undertaken, the question of whether s. 195.1(1)(*c*) of the Code is impermissibly vague may be shortly dealt with. To recall briefly, this section makes it an offence to stop or attempt to stop any person or in any manner communicate or attempt to communicate with any person for the purpose of prostitution. In my view, although broad and far-reaching, the terms of the section are not vague. There is nothing about the language of the section that prevents a court from giving sensible meaning to its terms: see *R. v. Edwards* (1986), 32 C.C.C. (3d) 412 (B.C. Co. Ct.), and *R. v. McLean* (1986), 52 C.R. (3d) 262, 2 B.C.L.R. (2d) 232, *(*sub nom. *R. v. McLean; R. v. Tremayne)* 28 C.C.C. (3d) 176, 23 C.R.R. 301 (B.C.S.C.). In particular, the phrase "in any manner communicates", though very broad, clearly indicates to individuals that they must not by any means communicate for the purpose of prostitution or engaging the services of a prostitute. This type of all-inclusive language is not strange to the Criminal Code. I need only refer to the offence of fraud to make the point. Section 380(1) [of the 1985 Code] makes it an offence to defraud the public or any person by "deceit, falsehood or *other fraudulent means*" (emphasis added). Other examples could be given, but the point remains the same: a provision whose language is broad in scope, thereby criminalizing a wide range of activity, is not by that reason impermissibly vague. In fact, such a provision may make more clear what the targeted activity is and the circumstances in which it is prohibited. I pause to note that, while I do not believe the section is impermissibly vague, and therefore it does not violate s. 7 of the Charter for that reason, the issue of whether the section is overly broad may well be a consideration under a potential analysis pursuant to s. 1 of the Charter.

47 In summary, then, I conclude that neither s. 193 nor s. 195.1(1)(*c*) of the Criminal Code is in violation of s. 7 of the Charter on account that they are impermissibly vague. In neither case can it be said that fair notice is not given to citizens; courts have been able to give sensible meaning to the terms of the sections and have applied them without difficulty. Further, the discretion of law enforcement officials is sufficiently limited by the explicit legislative standards set out in the sections. Therefore, the appellants' first ground of attack of the impugned provisions under s. 7 of the Charter must fail. The second ground of attack involves a consideration of whether "liberty" under s. 7 includes within its scope the right to engage in an occupation and to carry on a business, more specifically in this case the trade of prostitution.

VI. Economic Liberty and S. 7 of the Charter

48 This case raises an important issue that has been recurring in our jurisprudence under the Charter. Simply stated, the issue centers on the scope of s. 7 of the Charter, more specifically the guarantees of life, liberty and security of the person. The appellants argue that the impugned provisions infringe prostitutes' right to liberty, in not allowing them to exercise their chosen profession, and their right to security of the person, in not permitting them to exercise their profession in order to provide the basic necessities of life. I should like to point out at the outset something that may seem obvious to some, or which may come as a surprise to others, but which in any event needs to be kept in mind throughout: prostitution is *not* illegal in Canada. We find ourselves in an anomalous, some would say bizarre, situation where almost everything related to prostitution has been regulated by the criminal law except the transaction itself. The appellants' argument, then, more precisely stated, is that, in criminalizing so many activities surrounding the act itself, Parliament has made prostitution de facto illegal if not de jure illegal.

49 I now turn to the issue of interpreting the meaning of the rights guaranteed by s. 7 of the Charter, more specifically the right to liberty and security of the person. The appellants in the case at bar rely on an expansive interpretation of the rights guaranteed by s. 7 to argue that carrying on a lawful occupation is protected by the right to liberty. As a basis for this view the following summary of the position taken by the English philosopher John Stuart Mill is relied upon (J. Symons, "Orwell's Prophecies: The Limits of Liberty and the Limits of Law" (1984), 9 Dalhousie L.J. 115, at p. 116):

> The only end for which society is warranted in infringing the liberty of action of any individual, he said, is self protection. Power should be exercised to prevent the individual from doing harm to others, but that is the only part of his conduct for which he should be answerable to society. In every other way he should have freedom.

Mill's approach was explicitly adopted by Wilson J. in *R. v. Jones*, [1986] 2 S.C.R. 284 at 318, [1986] 6 W.W.R. 577, 47 Alta. L.R. (2d) 97, 28 C.C.C. (3d) 513, 31 D.L.R. (4th) 569, 25 C.R.R. 63, 73 A.R. 133, 69 N.R. 241:

> I believe that the framers of the Constitution in guaranteeing "liberty" as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric — to be, in to-day's parlance, "his own person" and accountable as such. John Stuart Mill described it as "pursuing our own good in our own way".

For a further exposition of this view see the judgment of my colleague Madam Justice Wilson in *R. v. Morgentaler*, supra, at pp. 164-66.

50 Wilson J.'s position seems largely reflective of several leading American decisions that have dealt with the definition of "liberty" in the context of the Fourteenth Amendment to the United States Constitution. The relevant part of the amendment reads as follows:

> **Amendment XIV [1868]**
>
> ***Section 1.***

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

One of the earliest United States decisions interpreting what has become known as the "due process clause" of the Fourteenth Amendment is *Allgeyer v. Louisiana*, 165 U.S. 578, 41 L. Ed. 832, 17 S. Ct. 427 (1897). The Supreme Court held that a Louisiana statute that purported to regulate a contract formed between parties in Louisiana and New York was unconstitutional. Peckham J., speaking for the court, held that the Fourteenth Amendment protected liberty of contract, and more specifically stated the following at p. 589:

> The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

The case of *Meyer v. Nebraska*, 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625, 29 A.L.R. 1446 (1923), is of major significance because it was the first case that expanded the notion of liberty to include broader values beyond freedom from incarceration and liberty of contract. McReynolds J. said the following at p. 399:

> Without doubt, it [the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men.

For further examples of this broad approach to the definition of liberty, see also *Bolling v. Sharpe*, 347 U.S. 497, 98 L. Ed. 884, 74 S. Ct. 693 (1954), and *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972).

51 It should not be overlooked, however, that the American experience with "economic liberty" jurisprudence in particular has been controversial throughout its history. As I noted above, the case of *Allegyer v. Louisiana*, supra, was the first to define liberty as including the right to make contracts. But it is the decision in *Lochner v. New York*, 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539 (1905), that firmly established economic liberty as a constitutionally-protected interest. In that case a majority of the United States Supreme Court invalidated a New York law that set maximum hours of work for bakers because, at p. 57:

> There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.

Between *Lochner* and the start of the Depression, the United States Supreme Court invalidated many regulatory measures on the grounds that they intruded upon liberty of contract and property rights: see, for example, *Adair v. U.S.*, 208 U.S. 161, 52 L. Ed. 436, 28 S. Ct. 277, 13 Ann. Cas. 764 (1908); *Coppage v. Kansas*, 236 U.S. 1, 59 L. Ed. 441, 35 S. Ct. 240 (1915), invalidating legislation prohibiting employers from imposing "yellow-dog" contracts (a contract requiring employees to disavow union membership or affiliation as a condition of employment); and *Adkins v. D.C. Children's Hosp.*, 261 U.S. 525, 67 L. Ed. 785, 43 S. Ct. 394, 24 A.L.R. 1238 (1923), invalidating a minimum wage law in the District of Columbia.

52 The onset of the Depression and President Roosevelt's New Deal initiatives caused a confrontation between the notion of "economic liberty" and the needs of a modern regulatory state. Beginning in 1935, the United States

Supreme Court rendered a number of decisions invalidating New Deal legislation, one of the most significant being *Morehead v. New York*, 298 U.S. 587, 80 L. Ed. 1347, 56 S. Ct. 918, 103 A.L.R. 1445 (1936), a decision striking down state minimum wage legislation. What ensued was the so-called "Court Crisis", in which President Roosevelt proposed a court reorganization plan. The plan was never put into effect. Significantly, however, the court overruled its decisions in *Morehead* and *Adkins* in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330 (1937), and adopted a more deferential approach to cases of state regulation of "economic liberty". Indeed, in *U.S. v. Carolene Prod. Co.*, 304 U.S. 144, 82 L. Ed. 1234, 58 S. Ct. 778 (1938), the court espoused a deferential standard of review on questions of "economic liberty" with more active scrutiny where the state interferes with "civil" liberties: see pp. 152-53, especially the now famous "footnote 4". This attitude of deference in respect of "economic liberty" has been reiterated more recently, for example in *Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421 at 433, 96 L. Ed. 469, 72 S. Ct. 405 (1952), and *Ferguson v. Skrupa*, 372 U.S. 726 at 730-31, 10 L. Ed. 2d 93, 83 S. Ct. 1028, 95 A.L.R. 2d 1347 (1963). All of this is to emphasize the difficulties that the United States Supreme Court has faced in dealing with the concept of "economic liberty" as a constitutionally-protected freedom, and how much the American experience is linked to its particular historical and social context.

53 Along these lines, I pause to note that, in applying principles developed under a provision of the United States Constitution to cases arising under our Charter, the court must take into account differences in wording and historical foundations of the two documents. As Strayer J. observed in *Smith, Kline & French Laboratories Ltd. v. Can. (A.G.)*, [1986] 1 F.C. 274 at 314, 24 D.L.R. (4th) 321, 7 C.P.R. (3d) 145, 19 C.R.R. 233, 12 F.T.R. 81:

> ... it must be kept in mind that the historical background and social and economic context of the Fourteenth Amendment are distinctly American. Further it must be noted that in the Fourteenth Amendment "liberty" is combined with "property" which gives a different colouration to the former through the introduction of economic values as well as personal values. This is not the case in section 7 of the *Canadian Charter of Rights and Freedoms*.

With this in mind I now propose to examine the Canadian jurisprudence in the area of "economic liberty" and s. 7 of the *Charter*.

54 I begin by noting the words of the Chief Justice in *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713 at 785-86, 55 C.R. (3d) 193, *(*sub nom. *Edwards Books & Art Ltd. v. R.; R. v. Nortown Foods Ltd.)* 30 C.C.C. (3d) 385, 35 D.L.R. (4th) 1, 28 C.R.R. 1, 87 C.L.L.C. 14,001, 19 O.A.C. 239, 71 N.R. 161, reversing in part 48 O.R. (2d) 395 (sub nom. *R. v. Videoflicks Ltd.*), 34 R.P.R. 97, 15 C.C.C. (3d) 353, 14 D.L.R. (4th) 10, 9 C.R.R. 193, 5 O.A.C. 1:

> In my opinion "liberty" in s. 7 of the *Charter* is not synonymous with unconstrained freedom ...
>
> Whatever the precise contours of "liberty" in s. 7, I cannot accept that it extends to an unconstrained right to transact business whenever one wishes.

Much in the same vein other courts in this country have decided that "liberty" does not generally extend to commercial or economic interests. In *R.V.P. Ent. Ltd. v. B.C. (Min. of Consumer & Corp. Affairs)*, [1988] 4 W.W.R. 726, 25 B.C.L.R. (2d) 219, 32 Admin. L.R. 305, 50 D.L.R. (4th) 394, 41 C.R.R. 264, for example, the British Columbia Court of Appeal had to decide whether the right to continue to hold a liquor licence was a constitutionally-protected liberty interest. The court, Esson J.A. speaking for it, held that it was not, at pp. 732-33:

> It is enough to say that the licence here in question is an entirely economic interest and, as such, not one to which s. 7 has any application.

It should be noted that the court expressly stated that it was not deciding that s. 7 could not apply to any interest which has an economic, commercial or property component. Another case from British Columbia, *Whitbread v. Walley*, [1988] 5 W.W.R. 313, 26 B.C.L.R. (2d) 203, 51 D.L.R. (4th) 509 (C.A.), also dealt generally with the question of economic interests and s. 7 of the Charter. At issue in that case were two sections of the Canada Shipping Act that limited the liability of owners and crew members of ships. McLachlin J.A. (as she then was), speaking for the court, held at p. 213

that "purely economic claims are not within the purview of s. 7 of the *Charter*", although she did add the caution that she was not asserting that s. 7 could never include an interest with an economic component.

55 In Ontario, in the case of *R. v. Quesnel* (1985), 53 O.R. (2d) 338, 24 C.C.C. (3d) 78, 12 O.A.C. 165, Finlayson J.A. of the Court of Appeal dealt with the specific issue of the "right to work" in the following manner (at p. 346):

> Counsel submits ... that s. 7 of the Charter dealing with life, liberty and security of the person, provides a free standing right to work. Unfortunately for that argument, it has been authoritatively held in a number of cases that this section does not relate to employment: see *R. v. Videoflicks Ltd. et al.* (1984), 48 O.R. (2d) 395 at p. 433, 14 D.L.R. (4th) 10 at p. 48, 15 C.C.C. (3d) 353 at p. 391 (C.A.):
>
> > The concept of life, liberty and security of the person would appear to relate to one's physical or mental integrity and one's control over these, rather than some right to work whenever one wishes.

In Saskatchewan, the Court of Appeal of that province had occasion to deal with the issue of the "right to work" in *Re Bassett and Can.* (1987), 35 D.L.R. (4th) 537 at 567, 53 Sask. R. 81, Vancise J.A. speaking for the majority:

> The applicant contends that the respondent, by curtailing his right to prescribe controlled drugs, has violated his right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. There is no evidence in this case that the applicant has been so deprived. He submits that security of the person ought to encompass the right to pursue one's occupation or profession and not to be deprived thereof except in accordance with principles of fundamental justice. In order to give s. 7 that interpretation, security of the person must be interpreted to mean the economic capacity to satisfy basic human needs, that is, to earn a living. Nowhere in s. 7 is there reference to property rights and that omission is, in my opinion, significant ...

The British Columbia Court of Appeal has recently had yet another opportunity to deal with this issue, in *Wilson v. Medical Services Comm.*, [1989] 2 W.W.R. 1, 30 B.C.L.R. (2d) 1, 34 Admin. L.R. 235, 53 D.L.R. (4th) 171, 41 C.R.R. 276 . The case involved the province's Medical Service Act, which regulated the assignment of "practitioner numbers" entitling new doctors to bill the Medical Service Plan for services rendered. It is not necessary for our purposes to detail the specific regulations of the Act that were challenged. It is sufficient to note that some doctors were denied permanent practitioner numbers, thus denying them the opportunity to pursue their profession though licensed and qualified to do so. Further, other doctors were granted permanent practitioner numbers though with geographical restrictions. Of central importance is the court's detailed discussion of whether the right to liberty under s. 7 of the Charter encompasses the opportunity of a qualified and licensed doctor to practise medicine in British Columbia without restraint as to place, time or purpose.

56 The court, in a per curiam decision, held that "liberty" within the meaning of s. 7 is not confined to freedom from bodily restraint. It did go on to say the following about the scope of s. 7 (at p. 18):

> It does not, however, extend to protect property or pure economic rights. It may embrace individual freedom of movement, including the right to choose one's occupation and where to pursue it, subject to the right of the state to impose, in accordance with the principles of fundamental justice, legitimate and reasonable restrictions on the activities of individuals.

The court draws a distinction between the right to work, which it states is a purely economic question, and the right to pursue a livelihood or profession, which it characterizes as a matter concerning one's dignity and sense of self-worth. In this regard the court relies heavily on a passage from the reasons for judgment of the Chief Justice (dissenting) in *Ref. re Pub. Service Employee Rel. Act (Alta.)*, supra, at pp. 367-68 [S.C.R.]:

> It has been suggested that associational activity for the pursuit of economic ends should not be accorded constitutional protection. If by this it is meant that something as fundamental as a person's livelihood or dignity

> in the workplace is beyond the scope of constitutional protection, I cannot agree. If, on the other hand, it is meant that concerns of an exclusively pecuniary nature are excluded from such protection, such an argument would merit careful consideration. In the present case, however, we are concerned with interests which go far beyond those of a merely pecuniary nature.
>
> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self respect.

The court goes on to point out that, although the issue in the *Reference* dealt with s. 2(*d*) of the Charter, the statement of the Chief Justice emphasizes the reasons why the opportunity to work should be afforded constitutional protection as an aspect of liberty under s. 7 of the Charter, even when an economic component is involved.

57 In my view, it is not clear that the statement by the Chief Justice, quoted at length by the British Columbia Court of Appeal in *Wilson*, supra, is support for the view that s. 7 of the Charter protects a "right to pursue a livelihood or profession", as distinct from a "right to work", which is not protected. In the *Reference*, the issue was not whether there existed an independent right to work or to pursue a profession, but rather whether the freedom of association protected by s. 2(*d*) of the Charter included the freedom to form and join associations and the freedom to bargain collectively and to strike. It was the view of the Chief Justice that the right to bargain collectively and to strike was essential to the capacity of individuals to ensure equitable and humane working conditions. It was in that context that the Chief Justice spoke of the importance of work to a person's sense of dignity and self-worth. There is no doubt that the non-economic or non-pecuniary aspects of work cannot be denied, and are indeed important to a person's sense of identity, self-worth and emotional well-being. But it seems to me that the distinction sought to be drawn by the court between a right to work and a right to pursue a profession is, with respect, not one that aids in an understanding of the scope of "liberty" under s. 7 of the Charter.

58 Further, it is my view that work is not the only activity which contributes to a person's self-worth or emotional well-being. If liberty or security of the person under s. 7 of the Charter were defined in terms of attributes such as dignity, self-worth and emotional well-being, it seems that liberty under s. 7 would be all-inclusive. In such a state of affairs there would be serious reason to question the independent existence in the Charter of other rights and freedoms such as freedom of religion and conscience or freedom of expression.

59 In short, then, I find myself in agreement with the following statement of McIntyre J. in *Ref. re Pub. Service Employee Rel. Act (Alta.)*, supra, at p. 412 [S.C.R.]:

> It is also to be observed that the *Charter*, with the possible exception of s. 6(2)(*b*) (right to earn a livelihood in any province) and s. 6(4), does not concern itself with economic rights.

I therefore reject the application of the American line of cases that suggest that liberty under the Fourteenth Amendment includes liberty of contract. As I stated earlier, these cases have a specific historical context, a context that incorporated into the American jurisprudence certain laissez-faire principles that may not have a corresponding application to the interpretation of the Charter in the present day. There is also a significant difference in the wording of s. 7 and the Fourteenth Amendment. The American provision speaks specifically of a protection of property interests, while our framers did not choose to similarly protect property rights: see *Irwin Toy Ltd. v. Que. (A.G.)*, [1989] 1 S.C.R. 927 at 1003, 58 D.L.R. (4th) 577, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 24 Q.A.C. 2, 94 N.R. 167. This, then, is sufficient to dispose of this ground of appeal.

60 This court has until now, save for certain comments of my colleague Wilson J., taken an exclusionary approach to defining liberty and security of the person. While it is not essential to the disposition of this ground of appeal, I feel,

having regard to some of the pronouncements of Courts of Appeal on the subject, that I should to some extent disclose my views as to the nature of the liberty and security of the person s. 7 is protecting. I pause to point out that the comments that follow are not designed to provide a definitive or exhaustive statement of what interests are protected by s. 7, but rather to put in a more positive way what s. 7 *does* protect, as opposed to what it *does not* protect.

61 I note that the guarantees of life, liberty and security of the person are placed together with a set of provisions (ss. 8 to 14) which are mainly concerned with criminal and penal proceedings. More specifically, ss. 8 to 14 confer rights related to investigation, detention, adjudication and sanction in relation to offences. It is significant that the rights guaranteed by s. 7, as well as those guaranteed in ss. 8 to 14, are listed under the title "Legal Rights", or, in the French version, "Garanties juridiques". The use of the term "Legal Rights" suggests a distinctive set of rights different from the rights guaranteed by other sections of the Charter. In this regard I refer to the judgment of this court in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 502-503, *(*sub nom. *Ref. re S. 94(2) of Motor Vehicle Act)* 48 C.R. (3d) 289, [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 36 M.V.R. 240, 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, 18 C.R.R. 30, 63 N.R. 266:

> Sections 8 to 14 ... address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice ... They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in s. 7 ...
>
> To put matters in a different way, ss. 7 to 14 could have been fused into one section, with inserted between the words of s. 7 and the rest of those sections the oft utilised provision in our statutes, "and, without limiting the generality of the foregoing (s. 7) the following shall be deemed to be in violation of a person's rights under this section".

The *B.C. Motor Vehicle* reference certainly did not expound a full theory of how to interpret s. 7 of the Charter. It did, however, provide significant guidance in interpreting the nature of the rights guaranteed by that section. As well, I note that a similar interpretation of the significance of the term "Legal Rights" is adopted by Professor Eric Colvin in his article "Section Seven of the Canadian Charter of Rights and Freedoms" (1989), 68 Can. Bar Rev. 560, at pp. 573-74:

> In the context of the Charter, the term "legal rights" cannot simply mean rights which are recognized in law. All Charter rights would be legal rights in this sense. The use of the term to describe a sub-category of Charter rights suggests that the included rights are of a special kind, different from the rights respecting the substantive content of law which are conferred in some other parts of the Charter.

62 In my view we can obtain further insight into the nature of the interests protected by s. 7, namely, life, liberty and security of the person, by looking to the context in which they are found. I have already alluded to the placement of s. 7 in relation to ss. 8 to 14. It is also important to note that life, liberty and security of the person have a context within s. 7 itself. The state can deprive individuals of life, liberty and security of the person if it is done in accordance with the principles of fundamental justice. In my view, the principles of fundamental justice can provide an invaluable key to determining the nature of the life, the liberty and the security of the person referred to in s. 7. The principles of fundamental justice are principles that govern the justice system. They determine the means by which one may be brought before or within the justice system, and govern how one may be brought within the system and thereafter the conduct of judges and other actors once the individual is brought within it. Therefore the restrictions on liberty and security of the person that s. 7 is concerned with are those that occur as a result of an individual's interaction with the justice system, and its administration.

63 In the *B.C. Motor Vehicle* reference, for example, this court said the following in respect of defining the principles of fundamental justice, at p. 503 [S.C.R.]:

> Many have been developed over time as presumptions of the common law, others have found expression in the international conventions on human rights. All have been recognized as essential elements of *a system for the administration of justice* which is founded upon a belief in "the dignity and worth of the human person" ... and on the "rule of law" ...

> In other words, the principles of fundamental justice are to be found in the basic tenets of our *legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system*. [emphasis added]

This passage is, in my view, instructive of the kind of life, liberty and security of the person sought to be protected through the principles of fundamental justice. The interests protected by s. 7 are those that are properly and have been traditionally within the domain of the judiciary. Section 7, and more specifically ss. 8 to 14, protect individuals against the state when it invokes the judiciary to restrict a person's physical liberty through the use of punishment or detention, when it restricts security of the person, or when it restricts other liberties by employing the method of sanction and punishment traditionally within the judicial realm. This is not to say that s. 7 protects only an individual's physical liberty. It is significant that the section protects one's security of the person as well. As I stated in *Mills v. R.*, [1986] 1 S.C.R. 863 at 919-20, 52 C.R. (3d) 1, 26 C.C.C. (3d) 481, 29 D.L.R. (4th) 161, 21 C.R.R. 76, 16 O.A.C. 81, 67 N.R. 241:

> ... security of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" ... These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.

This court has since reiterated the view that stigmatization of an accused may deprive him of the rights guaranteed by s. 7, in *R. v. Vaillancourt*, [1987] 2 S.C.R. 636 at 651, 60 C.R. (3d) 289, 39 C.C.C. (3d) 118, 47 D.L.R. (4th) 399, 32 C.R.R. 18, 68 Nfld. & P.E.I.R. 281, 209 A.P.R. 281, 10 Q.A.C. 161, 81 N.R. 115 [Que.]. In addition, the Chief Justice in *R. v. Morgentaler*, supra, at p. 56, held that state interference with bodily integrity and serious state-imposed psychological stress could trigger a restriction of security of the person. In so doing he quoted with approval the statement of the Ontario Court of Appeal in *R. v. Videoflicks Ltd.*, supra, at p. 433 [O.R.], to the effect that the right to life, liberty and security of the person "would appear to relate to one's physical or mental integrity *and one's control over these*" (emphasis added).

64 The common thread that runs throughout s. 7 and ss. 8 to 14, however, is the involvement of the judicial branch as guardian of the justice system. As examples we need only look briefly to ss. 8 to 14. Section 8 protects individuals against unreasonable search or seizure. In that context, it is an independent arbiter, namely, a member of the judiciary, who usually decides whether the state interest in searching outweighs the individual's right of privacy. Sections 9 and 10 involve protections in respect of detention, arrest and imprisonment. One of the central principles to be found in these rights is that of habeas corpus, the traditional writ requiring that a person be brought before a judge to investigate and determine the lawfulness of his detention. Sections 11 to 14 involve the proceedings in criminal and penal matters, including notice of the offence charged, the actual trial proceedings and protection against cruel or unusual punishment.

65 I hasten to point out that this is not to say that s. 7 is therefore limited only to purely criminal or penal matters. Professor Colvin takes note of this as well in his article at p. 584, when he argues that s. 7 need not be confined to the sphere of criminal or regulatory law:

> It is to be expected that criminal law will provide many of the cases on section 7, because criminal sanctions are potent instruments for depriving persons of liberty and security. The association with criminal law led the Supreme Court of Canada in *Morgentaler* to raise the question of whether the role of section 7 might be confined to this sphere. There are, however, other ways in which governmental action can deprive a person of liberty and security.
>
> Some of the other ways in which governmental action can deprive a person of liberty or security are close to the model of criminal law. For example, the civil processes for restraining a mentally disordered person or isolating a contagious person should be subject to review under section 7.

I would add that, if certain legislation permits the confinement of mentally ill persons by a government agency without a hearing, then it seems to me that, in addition to s. 7, ss. 9 and 10(*c*) could be engaged. Similarly, if a person, as a condition of a probation order, were ordered to refrain from operating his business or to refrain from associating with certain

persons, where failure to comply would bring him within s. 666 [now s. 740] of the [1970] Code, then s. 7 may be engaged. In this regard I also refer to s. 116 [now s. 127] of the [1970] Code, which creates an offence for disobeying a court order. What is at stake in these examples is the kind of liberty and security of the person the state typically empowers judges and courts to restrict. In other words, the confinement of individuals against their will, or the restriction of control over their own minds and bodies, are precisely the kinds of activities that fall within the domain of the judiciary as guardian of the justice system. By contrast, once we move beyond the "judicial domain", we are into the realm of general public policy, where the principles of fundamental justice as they have been developed, primarily through the common law, are significantly irrelevant. In the area of public policy what is at issue are political interests, pressures and values that no doubt are of social significance but which are not "essential elements of a system for the administration of justice", and hence are not principles of fundamental justice within the meaning of s. 7. The courts must not, because of the nature of the institution, be involved in the realm of pure public policy; that is the exclusive role of the properly-elected representatives, the legislators. To expand the scope of s. 7 too widely would be to infringe upon that role.

66 I do recognize, however, that the increasing role of administrative law in our modern society has provided the state with an avenue to regulate and control a myriad of activities and areas that affect individuals: for example, to name but a few, communications, consumer protection, energy, environmental management, financial markets and institutions, food production and distribution, health and safety, human rights, labour-management relations, liquor, occupational licensing, social welfare and transportation. As a result, this area of law has developed its own régime of common and statutory law dealing with procedural and substantive fairness. The extent to which s. 7 of the Charter can be invoked in the realm of administrative law, its implications for administrative procedures and its relationship to the common law rules of natural justice and the duty of fairness are not before this court, and it is preferable to develop that jurisprudence on an ongoing, case-by-case basis. What is clear, however, is that the state in certain circumstances has created bodies, such as parole boards and mental health review tribunals, that assume control over decisions affecting an individual's *liberty and security of the person*. Those are areas, because they involve the restriction to an individual's *physical liberty and security of the person*, where the judiciary has always had a role to play as guardian of the administration of the justice system. There are also situations in which the state restricts other privileges, or, broadly termed, "liberties", in the guise of regulation, but uses punitive measures in cases of non-compliance. In such situations the state is in effect punishing individuals, in the classic sense of the word, for non-compliance with a law or regulation. In all these cases, in my view, the liberty and security of the person interests protected by s. 7 would be restricted, and one would then have to determine if the restriction was in accordance with the principles of fundamental justice. By contrast, as I have stated, there is the realm of general public policy, dealing with broader social, political and moral issues which are much better resolved in the political or legislative forum and not in the courts.

67 In this respect, Professor Colvin describes the proper judicial role as follows in his article at p. 575:

> Any claims which the judiciary can make to an "inherent domain" must be claims about means rather than ends. The judiciary should have some special expertise in matters of institutional process. The judiciary may also have certain limited powers to review governmental decisions of social policy. There is, however, no constitutional basis within the Western democratic tradition for the judiciary to claim any area of substantive policy-making as its exclusive preserve.

Put shortly, I am of the view that s. 7 is implicated when the state, by resorting to the justice system, restricts an individual's physical liberty in *any circumstances*. Section 7 is also implicated when the state restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity. Finally, s. 7 is implicated when the state, either directly or through its agents, restricts certain privileges or liberties by using the threat of punishment in cases of non-compliance.

68 Although this may appear to be a limited reading of s. 7, it is my view that it is neither wise nor necessary to subsume all other rights in the Charter within s. 7. A full and generous interpretation of the Charter that extends the full benefit of its protection to individuals can be achieved without the incorporation of other rights and freedoms within s. 7.

69 This interpretation of s. 7 is compatible with an expansive view of liberty and security of the person, but as well, and in my view perhaps more importantly, it does not derogate from what I said regarding the scope of the principles of fundamental justice in the *B.C. Motor Vehicle* reference, supra, at p. 501 [S.C.R.]:

> As a qualifier, the phrase serves to establish the parameters of the interests but it cannot be interpreted so narrowly as to frustrate or stultify them. For the narrower the meaning given to "principles of fundamental justice" the greater will be the possibility that individuals may be deprived of these most basic rights. This latter result is to be avoided given that the rights involved are as fundamental as those which pertain to the life, liberty and security of the person, the deprivation of which "has the most severe consequences upon an individual" (*R. v. Cadeddu* (1982), 40 O.R. (2d) 128 (H.C.), at p. 139).

70 Indeed, in some cases this interpretation of s. 7 may afford the individual greater protection, since a restriction on rights and freedoms other than s. 7 must go to s. 1, where the state is obliged to demonstrate that the restriction is reasonable and justified. By contrast, s. 7 is, in a manner of speaking, "permissive". In other words, the section allows the state to deprive an individual of life, liberty and security of the person as long as it abides by the principles of fundamental justice. It is important to note that the onus is on the person bringing the challenge to demonstrate not only the restriction of the rights but also that the state has not abided by the principles of fundamental justice. In my view, then, it is desirable to maintain a conceptual distinction between the rights guaranteed by s. 7 and the other freedoms in the Charter. This is not to say that "liberty" as a value underlying the Charter does not permeate the document in a broader, more general sense, especially as it relates to the maintenance of Canada as a "free and democratic society". In this regard I refer to the often-quoted statement of the Chief Justice in *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 19 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

71 Therefore, for the reasons I have stated above, the appellants' arguments in respect of the right to liberty and security of the person must fail. The rights under s. 7 do not extend to the right to exercise their chosen profession. Neither s. 193 nor s. 195.1(1)(*c*) therefore restricts the rights guaranteed by s. 7 of the Charter in the manner claimed by the appellants. I reach this conclusion based on a reading of the cases decided by this and other courts dealing with s. 7 and "economic liberty", and on a reading of the text of the Charter.

72 To summarize, then, both grounds of attack by the appellants based on s. 7 of the Charter are unsuccessful: the impugned provisions are not void for vagueness and they do not infringe the right to liberty or security of the person in the manner claimed by the appellants. Therefore the first three constitutional questions as stated by the Chief Justice should be answered in the negative.

VII. Freedom of Expression

73 The next three constitutional questions once again raise the vexing problem of defining the scope of freedom of expression as guaranteed by s. 2(*b*) of the Charter. This court has had occasion to discuss at length the rationales for protecting expression in *R.W.D.S.U. v. Dolphin Delivery Ltd.*, supra, and more recently in *Irwin Toy*, supra, and *Ford v. Que. (A.G.)*, [1988] 2 S.C.R. 712, 10 C.H.R.R. D/5559, 54 D.L.R. (4th) 577, 36 C.R.R. 1, *(*sub nom. *Chaussure Brown's Inc. v. Que. (A.G.))* 19 Q.A.C. 69, 90 N.R. 84, and *Devine v. Que. (A.G.)*, [1988] 2 S.C.R. 790, 10 C.H.R.R. D/5610, 55 D.L.R. (4th) 641, 36 C.R.R. 64, 19 Q.A.C. 33, 90 N.R. 48. It is not necessary for the purposes of this appeal to repeat

much of that discussion, but it would be helpful to briefly review and perhaps expand upon the analytical framework that has been developed.

74 The first step in any Charter analysis is to determine the scope of the right or freedom at issue. That step must be taken before deciding whether there is a restriction on the guarantee. In other words, the question to be asked is: "Does the activity pursued properly fall within 'freedom of expression'?". This first step has been described, in reference to the narrower concept of freedom of speech, in the following terms by Frederick Schauer in Free Speech: A Philosophical Enquiry (1982), at p. 91:

> We are attempting to identify those things that one is free (or at least more free) to do when a Free Speech Principle is accepted. What activities justify an appeal to the concept of freedom of speech? These activities are clearly something less than the totality of human conduct and ... something more than merely moving one's tongue, mouth and vocal chords to make linguistic noises.

In *Irwin Toy*, supra, this court held that "expression" has both a content and a form, and that the two are often connected. Further, the court asserted that an activity is expressive if it conveys or attempts to convey a meaning; its meaning is its content. Activities cannot be excluded from the scope of guaranteed freedom of expression on the basis of the content or meaning conveyed. In this regard reference was made by this court in *Irwin Toy* at p. 968 to the following underlying rationale for protecting freedom of expression:

> ... to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is ... "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.

Therefore I am of the view that s. 2(*b*) of the Charter protects all content of expression irrespective of the meaning or message sought to be conveyed.

75 The content of expression is conveyed through an infinite variety of forms, including the written or spoken word, the arts and physical gestures or acts. While the guarantee of free expression protects all content, all forms are not, however, similarly protected. In *Irwin Toy*, the court stated that it was not necessary in that case to delineate when and on what basis a form of expression chosen to convey a meaning falls outside the sphere of the guarantee. While that statement applies with equal force to this appeal, I nevertheless think it is appropriate at this stage of Charter jurisprudence to make some additional comments.

76 As I have stated, form and content are often connected. In some instances they are inextricably linked. One such example is language. In my view the choice of the language through which one communicates is central to one's freedom of expression. The choice of language is more than a utilitarian decision; language is, indeed, an expression of one's culture and often of one's sense of dignity and self-worth. Language is, shortly put, both content and form. I can do no better than to quote the following statement of this court in *Ford*, supra, at p. 748:

> Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression.

77 Art may be yet another example of where form and content intersect. Is it really possible to conceive, for instance, of the content of a piece of music, a painting, a dance, a play or a film without reference to the manner or form in which it is presented? It seems to me that, just as language colours the content of writing or speech, artistic forms colour and indeed help to define the product of artistic expression. As with language, art is in many ways an expression of cultural identity, and in many cases is an expression of one's identity with a particular set of thoughts, beliefs, opinions and emotions. That expression may be either solely of inherent value, in that it adds to one's sense of fulfillment, personal identity and individuality independent of any effect it may have on a potential audience, or it may be based on a desire to

communicate certain thoughts and feelings to others. I am of the view, therefore, that art and language are two examples where content and form are inextricably linked, and as a result both merit protection under s. 2(*b*) of the Charter.

78 There are forms of expression, however, that can be kept distinct from the content which they seek to convey, and which may be excluded from the scope of s. 2(*b*) of the Charter. In *Dolphin Delivery*, supra, this court held that freedom of expression would not extend to protect threats of violence or acts of violence. In *Irwin Toy*, supra, at p. 970, this court reinforced that view when it stated that "a murderer or a rapist cannot invoke freedom of expression in justification of the form of expression he has chosen". These forms that have not received protection under s. 2(*b*) seem to share the feature that they have been criminalized by Parliament. I wish to clearly state that the mere fact that Parliament has decided to criminalize an activity does not render it beyond the scope of s. 2(*b*) of the Charter. There are many offences in the Criminal Code, R.S.C. 1985, c. C-46, that may have an "expressive" dimension to them, or, to put it otherwise, whose actus reus may consist either in whole or in part of speech or other form of expression. I provide the following lengthy but still incomplete list to illustrate my point: s. 21(1)(*b*) and (*c*) (parties to an offence), s. 22 (counselling a party), s. 51 (intimidating Parliament), s. 53 (inciting mutiny), s. 59 (sedition/seditious libel), s. 63 (unlawful assembly), s. 83 (promoting a prize fight), s. 113 (false statement to procure a firearms certificate), s. 131 (perjury), s. 136 (giving contradictory evidence), s. 140 (public mischief), s. 143 (advertising reward and immunity), s. 163 (corrupting morals), s. 168 (mailing obscene matter), s. 175 (causing a disturbance), s. 241 (counselling suicide), s. 264.1 (uttering threats), s. 296 (blasphemous libel), s. 301 (defamatory libel), s. 318 (advocating genocide), s. 319 (hate literature), s. 380 (fraud), s. 408 (passing off), s. 423 (intimidation), s. 464 (counselling an offence not committed), s. 465 (conspiracy). There are also sections dealing with non-publication orders in respect of various judicial proceedings such as show-cause hearings, preliminary hearings and voir dires.

79 Most if not all of these listed offences can be categorized into the following areas: offences against the public order, offences related to falsehood, offences against the person and reputation, offences against the administration of law and justice, and offences related to public morals and disorderly conduct. In my view it would be unwise and overly restrictive to a priori exclude from the protection of s. 2(*b*) of the Charter activities solely because they have been made the subject of criminal offences. In this regard I am in agreement with the following statement of Watt J. in *R. v. Smith* (1988), 44 C.C.C. (3d) 385 at 436 (Ont. H.C.):

> The mere fact of a prohibition against or a restriction upon expression with penal consequences is not dispositive of the constitutional issue. Neither is the fact that the external circumstances or *actus reus* of the offence consist, in whole or in part, of speech or other mode of expression, determinative of the challenge. The nature and extent of the prohibition or restriction must, in each case, be examined to determine constitutional admissibility. Of critical importance in many instances is the purpose underlying the provision in issue.

And at p. 453:

> ... the boundaries of the regulated area ought not to be too expansively defined, thereby to draw or confine within them substantially the whole of the criminal prohibitions of or restrictions upon speech or other modes of expression. To so determine has the ineluctable effect of reducing, not only the scope of the unregulated area, but equally, the reach of the fundamental freedom itself.

80 Without settling the matter conclusively, I am of the view that, at the very least, a law that makes it an offence to convey a meaning or message, however distasteful or unpopular, through a *traditional* form of expression like the written or spoken word or art must be viewed as a restriction on freedom of expression, and must be justified, if possible, by s. 1 of the Charter. This method is consistent with the broad, inclusive approach to the protected sphere of freedom of expression that this court has explicitly adopted. By the same token, however, it allows for the exclusion of a narrow set of forms of activities from the scope of s. 2(*b*).

81 Obviously, almost all human activity combines expressive and physical elements. For example, sitting down expresses a desire not to be standing. Even silence, the apparent antithesis of expression, can be expressive, in the sense that a moment's silence on 11th November conveys a meaning. This court in *Irwin Toy*, supra, put it thus at p. 969:

> It might be difficult to characterize certain day-to-day tasks, like parking a car, as having expressive content. To bring such activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning. For example, an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource. If that person could demonstrate that his activity did in fact have expressive content, he would, at this stage, be within the protected sphere and the s. 2(*b*) challenge would proceed.

It may appear that this approach would open the door for a murderer or a rapist, for example, to argue that his activity should be protected under s. 2(*b*) of the Charter because it seeks to convey a meaning or message. A political assassination is a good example. But, as I have already noted, this court has rejected the view that such activity is constitutionally protected. In my view these forms of expression, if they can be called that, are unlike the traditional forms of writing, speaking and art, to name a few. The unprotected forms involve direct acts of violence and often involve direct attacks on the physical integrity and liberty of another. It is not without significance that most, if not all, of these violent forms of expression have been criminalized by Parliament. I pause to reiterate that criminalization is not the acid test of whether the activity is protected by s. 2(*b*). Where what has been criminalized is the conveyance of a message, however distasteful or unpopular, which is conveyed in a non-violent form of expression, then it is protected by s. 2(*b*), and the onus then shifts to the state to justify the restriction on freedom of expression. Without deciding the merits of each individual case, it may be that a number of our Criminal Code offences that aim at restricting the content or form of expression may have to bear the scrutiny of a s. 1 analysis.

82 I wish to underscore that delineating a principled approach to interpreting the scope of such fundamental freedoms as expression is an extremely difficult and delicate task. This court must be sensitive to the imperative of interpreting the rights guaranteed to individuals by the Charter broadly and generously so as to ensure that our citizens receive the full benefit of the Charter's protection. At the same time the court must be mindful of the concerns of the community as a whole as expressed by our legislators. This court has, correctly, in my view, opted for a broad, inclusive approach to defining the scope of s. 2(*b*) of the Charter. Exactly what forms of expression will be excluded from s. 2(*b*) protection is an open question that will be settled on an ongoing basis by this court as it deals with future cases. It is sufficient to here reiterate that *all content of expression is protected, while the set of forms that will not receive protection is narrow and includes direct attacks by violent means on the physical liberty and integrity of another person*.

83 With this general background in mind I would now like to set out in summary form the method of analysis that has been developed for freedom of expression cases:

1. The first step: Is the activity within the sphere of conduct protected by freedom of expression?

84 In short, this step involves an assessment of two questions. The first is: Does the activity have expressive content? If the activity conveys or attempts to convey a meaning, then of course it has expressive content and is therefore protected under s. 2(*b*) of the Charter. If it does not have this expressive content, then it is not protected, and the inquiry ends at this stage.

85 The second question is: Even if the activity has expressive content, is the form through which the content is conveyed protected by s. 2(*b*) of the Charter? Most forms of expression are protected, and the mere fact that a form has been criminalized does not take it beyond the reach of Charter protection. If, however, expressive content is conveyed through a violent form that directly attacks the physical liberty and integrity of another person, such as murder or sexual assault, then it is not protected by s. 2(*b*).

2. The second step: Is the purpose or effect of the government action to restrict freedom of expression?

86 Once it has been determined that the activity falls within the protected sphere of freedom of expression, it next must be decided whether the purpose or effect of the impugned governmental action was to control attempts to convey meaning through that activity. If the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of freedom of expression. If the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits freedom of expression. In the latter case the governmental action would be restricting a form of expression tied to content, as, for example, would a rule against handing out pamphlets, even if the restriction purports to control litter. In sum, if the government's purpose is to restrict attempts to convey a meaning, there has been a limitation by law of s. 2(*b*) and a s. 1 analysis is required to determine if the law is inconsistent with the provisions of the Constitution.

87 In the case where the government's purpose was not to control or restrict attempts to convey a meaning, the court must still determine if the effect of the government action restricts freedom of expression. In such a case the burden is on the plaintiff to demonstrate that the effect occurred. In doing so this court has held in *Irwin Toy*, supra, at pp. 976-77, that the plaintiff must state the claim with reference to the following principles and values underlying the freedom: (1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment, not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. In demonstrating that the effect of a government's action was to restrict freedom of expression, a plaintiff would have to show how the activity promotes at least one of these values. I hasten to reiterate that the precise articulation of what kinds of activities promote these values is a matter for judicial appreciation, to be developed on an ongoing basis. If the effect of the government action does restrict one's freedom of expression, then a recourse to a s. 1 analysis is necessary.

VIII. Application to the Case at Bar

88 There is no question, in my view, that the purpose of s. 195.1(1)(*c*) of the Criminal Code is to restrict a particular range of content of expression in the name of certain state objectives. The section prohibits the communication of, or the attempt to communicate, a commercial message to any member of the public. This court has already stated that commercial expression is protected by s. 2(*b*) of the Charter. As we stated in *Ford*, supra, at pp. 766-67:

> Given the earlier pronouncements of this Court to the effect that the rights and freedoms guaranteed in the Canadian *Charter* should be given a large and liberal interpretation, there is no sound basis on which commercial expression can be excluded from the protection of s. 2(*b*) of the *Charter*.

This view was reiterated in *Irwin Toy*, supra. The impugned section of the Code aims at restricting commercial expression in perhaps its purest form. The section prohibits the communication by one person to another, in public, of information relating to the exchange of certain services for money. The prohibition is not just a "time, place or manner" restriction. Rather, it aims specifically at content. The prohibited communication relates to a particular message sought to be conveyed, namely, the communication for the purpose of engaging in prostitution. Most often this type of communication involves an offer and an acceptance. The offer is in respect of certain sexual services and the acceptance occurs when a price has been agreed upon for the service. It should be noted, in addition, that the act for which the communication takes place, namely, the exchange of sexual services for money, is not itself illegal. There is no question, therefore, of forming a contract for an unlawful purpose. Moreover, it seems apparent from the substantial body of material filed in respect of a potential s. 1 analysis that the purported mischief at which the provision aims is the harm caused by the message itself. Furthermore, this provision not only restricts freedom of expression directly by restricting the content of expression, but also restricts access by others to the message being conveyed by prohibiting the one attempting to convey the message from doing so. Therefore, I conclude that s. 195.1(1)(*c*) of the Code restricts freedom of expression as guaranteed by s. 2(*b*) of the Charter, in that the section aims at prohibiting a particular content of expression and at prohibiting access to the message sought to be conveyed.

89 In respect of s. 193 of the Code, I understand the argument of the contradictor added by the order of the Chief Justice of Manitoba to be as follows. He submits that s. 2(*b*) of the Charter is violated by the *combination* of ss. 193 and 195.1(1)(*c*) because the effect of s. 193 is to make it illegal to carry on the trade of prostitution at a fixed location. The only option for the prostitute is to seek out and solicit clients in public, which is made illegal by s. 195.1(1)(*c*). In sum, then, there does not seem to be an independent attack on s. 193. In view of the position I have taken on the question of whether s. 195.1(1)(*c*) restricts freedom of expression, there is no need to rely on the role of s. 193 to reach the conclusion that a freedom under the Charter has been restricted. Therefore, since s. 195.1(1)(*c*) restricts freedom of expression, it falls to be justified, if possible, under s. 1 of the Charter.

IX. Section 1 Analysis

90 Freedom of expression under s. 2(*b*) of the Charter is guaranteed as a fundamental freedom. Its importance and its value are surely beyond question, and have been recognized by this court long before the adoption of the Charter. I refer, for example, to the words of Rand J. in *Switzman v. Elbling*, [1957] S.C.R. 285 at 306, 117 C.C.C. 129, 7 D.L.R. (2d) 337 [Que.], where he stated that freedom of expression was "little less vital to man's mind and spirit than breathing is to his physical existence". It must be recognized, however, that, despite the singular importance of freedom of expression, it is subject to limitations under s. 1 of the Charter. The procedure to be followed when the state is attempting to justify a limit on a right or freedom under s. 1 has been well established by this court in a number of cases, the pivotal one being *R. v. Oakes*, supra. In order to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two criteria must be established. First, the legislative objective which the measures responsible for a limit on a Charter right or freedom are designed to serve must be of sufficient importance to warrant overriding a constitutionally-protected right or freedom. The objective must be pressing and substantial before it can be characterized as sufficiently important to justify the restriction on the right or freedom. Second, once a sufficiently important objective is established, the party seeking to invoke s. 1 must show that the means chosen are reasonable and demonstrably justified in a free and democratic society. This involves a "proportionality test". In this part of the test, courts balance the interests of society with those of individuals and groups. There are three important components to the proportionality test: (1) the measures adopted must be rationally connected to the achievement of the objective in question — they must not be arbitrary, unfair or based on irrational considerations; (2) the means chosen, even if rationally connected to the objective, must impair as little as possible the right and freedom in question; and (3) there must be a proportionality between the effects of the measures responsible for limiting the Charter right or freedom and the objective which has been identified as being pressing and substantial. In respect of the last component of the test, Dickson C.J.C. stated in *Oakes* at p. 140 that: "The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."

The legislative objective

91 Both the appellants concede in their factums that s. 195.1(1)(*c*) as a whole attempts to address a substantial and pressing societal concern, specifically, the mischief caused by street soliciting. In my view, however, it is necessary for the application of s. 1 of the Charter to this case to outline in some depth exactly what mischief the legislation aims at. This is necessary to properly measure the means adopted by the legislators against the objective at which they aim.

92 To fully appreciate the purposes underlying the impugned section, it would be helpful to first review the recent history of prostitution legis lation. As I have noted above, prostitution itself is not a crime in Canada. Our legislators have instead chosen to attack prostitution indirectly. The Criminal Code contains many prohibitions relating to the act of taking money in return for sexual services. Among the offences that relate to prostitution are the bawdy-house provisions, the procuring and pimping provisions, as well as other more general offences that indirectly have an impact on prostitution-related activities, for example provisions such as disturbing the peace. In my view, these laws indicate that, while on the face of the legislation the act of prostitution is not illegal, our legislators are indeed aiming at eradicating the practice. This rather odd situation, wherein almost everything related to prostitution has been criminalized save the act itself, gives one reason to ponder why Parliament has not taken the logical step of criminalizing the act of prostitution.

Many theories have been offered as a response to this question, but it seems to me that one possible answer is that, as a carry-over of the Victorian Age, if the act itself had been made criminal, the gentleman customer of a prostitute would have been also guilty as a party to the offence. That situation has now been rectified, in that the section reaches out to the customers of prostitutes, although the act itself is still not illegal.

93 At one point in our history, specifically between the years 1869 and 1972, our legislation made prostitution a "status offence". This was accomplished through the use of vagrancy laws such as the one that appeared in the Criminal Code, R.S.C. 1970, c. C-34, s. 175(1)(*c*):

> (*c*) being a common prostitute or night walker is found in a public place and does not, when required, give a good account of herself ...

That provision was repealed by the Criminal Law Amendment Act, S.C. 1972, c. 13, s. 12, and was replaced by a law based on the concept of "solicitation". The new s. 195.1 [now s. 213] made it a summary conviction offence to solicit any person in a public place for the purpose of prostitution. Courts differed on the interpretation of the term "solicit" until this court's decision in *Hutt v. R.*, [1978] 2 S.C.R. 476, 1 C.R. (3d) 164, [1978] 2 W.W.R. 247, 38 C.C.C. (2d) 418, 82 D.L.R. (3d) 95, 19 N.R. 330 [B.C.]. In that case Spence J., speaking for the majority, held at p. 482 that, in order to be seen as a crime, "soliciting" had to be "pressing or persistent". In support of this conclusion Spence J. had occasion to pass comment on the purpose underlying this section of the Code, at p. 484:

> Section 195.1 is enacted in Part V which is entitled "DISORDERLY HOUSES, GAMING AND BETTING". Offences in reference to all three of these subject-matters are offences which do contribute to public inconvenience or unrest and ... Parliament was indicating that what it desired to prohibit was a contribution to public inconvenience or unrest.

In light of this decision, law enforcement officials indicated that the control of street prostitution was made very difficult, if not impossible. In 1983, the federal government established the Special Committee on Pornography and Prostitution, hereinafter referred to as "the Fraser Committee", to study the problem of street prostitution and to report to the Minister of Justice. The Fraser Committee reported its findings [Pornography and Prostitution in Canada] in 1985, and concluded that prostitution was a social problem that required both legal and social reforms. The committee recommended that s. 195.1 be repealed, and that the nuisance aspect of street prostitution be dealt with via amendments to the sections of the Code in respect of disorderly conduct. The legislative response came in the form of Bill C-49 [now An Act to amend the Criminal Code (Prostitution), R.S.C. 1985, c. 51 (1st Supp.)], which was passed in December 1985 and which established the current provision of the Code that is under constitutional scrutiny in the case at bar.

94 One of the primary objectives of s. 195.1(1)(*c*) is to curb the nuisances caused by the public or "street" solicitation of prostitutes and their customers. These nuisances include impediments to pedestrian and vehicular traffic, as well as the general confusion and congestion that is accompanied by an increase in related criminal activity, such as possession of and trafficking in drugs, violence and pimping. The nuisance aspect of the law as it relates to traffic problems is not, however, its only objective. There are many activities that are carried on that cause nuisance in the form of obstructing pedestrian and vehicular traffic. In this case, however, we are dealing with a particular form of activity that brings with it other associated criminal activity, and which, as the Ontario Advisory Council on the Status of Women states, is at its most basic level a form of slavery. In a brief prepared in 1984, entitled Pornography and Prostitution, the advisory council had the following to say in respect to prostitution:

> There is a real victim in prostitution — the prostitute herself. All women, children and adolescents are harmed by prostitution ... Prostitution functions as a form of violence against women and young persons. It is certainly a blatant form of exploitation and abuse of power ... Prostitution is related to the traditional dominance of men over women. The various expressions of this dominance include a concept of women as property and the belief that the sexual needs of men are the only sexual desires to be given serious consideration. Prostitution is a symptom of the victimization and subordination of women and of their economic disadvantage.

95 I note that, while prostitution is an activity in which both men and women participate, the data indicates that women overwhelmingly outnumber men as sellers of sexual services. In my view part of the legislative objective in enacting s. 195.1(1)(*c*) is to give law enforcement officials a way of controlling prostitution that occurs in the "street", as it were. It is in the street that many prostitutes begin the trade as young runaways from home. The streets provide an environment for pimps and procurers to attract adults (usually, as the data shows, women) and adolescents into the trade by befriending them and often offering them short term affection and economic assistance. Quite often it is the young who are most desirable to pimps, as they bring in the most money and are the easiest to control. This leads ultimately to a relationship of dependency, which is often reinforced by the pimp getting the prostitute addicted to drugs, which are used to exercise control over the prostitute. In that process the pimp's control over the prostitute is such that physical violence and in some cases brutality is not uncommon. Prostitution, in short, becomes an activity that is degrading to the individual dignity of the prostitute and which is a vehicle for pimps and customers to exploit the disadvantaged position of women in our society. In this regard the impugned section aims at minimizing the public exposure of this degradation, especially to young runaways who seek refuge in the streets of major urban centres, and to those who are exposed to prostitution as a result of the location of their homes and schools in areas frequented by prostitutes and who may be initially attracted to the "glamorous" lifestyle as it is described to them by the pimps. Further, it is not just the exposure to potential entrants into the trade that is of concern to the legislators. An additional aspect of the objective of minimizing public exposure of prostitution is the fact that many persons who are not interested in prostitution are often propositioned, either as prostitutes or as prospective customers.

96 In sum, then, I find that the legislative objectives of the section go beyond merely preventing the nuisance of traffic congestion and general street disorder. There is the additional objective of minimizing the public exposure of an activity that is degrading to women, with the hope that potential entrants in the trade can be deflected at an early stage, and to restrict the blight that is associated with public solicitation for the purposes of prostitution.

97 Much evidence has been filed in this appeal to support the legislative objectives that I have briefly outlined above. I find especially instructive the materials filed and referred to by the Attorney General for Ontario, who intervened in this matter, which include minutes from the Legislative Committee on Bill C-49, various working papers prepared by the Department of Justice, sociological material on the demographics of prostitution, and viva voce evidence given before Provincial Judge Bernhard in the case of *R. v. Smith*, supra, the Ontario case dealing with s. 195.1(1)(*c*) of the Code. Therefore, as conceded by the appellants, I find that s. 195.1(1)(*c*) of the Code does address pressing and substantial concerns, specifically the curbing of nuisances caused by the public solicitation of prostitution, the curbing of related criminal activity such as the possession of and trafficking in drugs, violence and pimping, the curbing of the exposure of street solicitation to uninterested pedestrians and property owners and the curbing of the exposure to potentially vulnerable and impressionable young people of what is in many respects a degrading, exploitive and in some cases dangerous activity.

Proportionality test

1. Rational Connection

98 The first component of the proportionality test demands that the measures adopted must be carefully designed to achieve the legislative objective; they ought not to be arbitrary, unfair or based on irrational considerations. There must, in other words, be a link or nexus, based on and in accordance with reason, between the measures enacted and the legislative objective. In my view, the scheme set out in s. 195.1 of the Code is rationally connected to the objectives of curbing nuisances and related criminal activities associated with public solicitation of prostitution. Parliament has sought, by criminalizing certain conduct that produces the nuisances and mischief noted above, to reduce or limit the mischief thereby created. Regulating or prohibiting the cause is at least one method of controlling its effects. A piece of legislation that proceeds upon such a premise does, in my view, exhibit a rational connection between the measures and the objective. I do pause to note, however, that the appellants correctly point out that the act of soliciting by a single prostitute or customer may not by itself produce a nuisance. But this argument, with respect, misses the point that the

legislation is designed to prevent the congregation of prostitutes and customers in the streets. It is the cumulative effect of this congregation that produces the nuisance and blight, and, as such, each act of soliciting contributes to the mischief. Therefore I am of the view that s. 195.1(1)(*c*) is rationally connected to the legislative objective.

2. The Limit Should Impair As Little As Possible

99 In order to comply with the second component of the proportionality test, the means chosen to achieve the objective should impair as little as possible the right or freedom in issue. This court has recognized, however, that courts should not substitute a judicial opinion for a legislative one in respect of where to draw a precise line as to what is a reasonable limit. As the Chief Justice stated in *R. v. Edwards Books & Art Ltd.*, supra, at p. 783:

> ... it is not the role of this Court to devise legislation that is constitutionally valid, or to pass on the validity of schemes which are not directly before it, or to consider what legislation might be the most desirable.

100 The current version of s. 195.1 was passed by Parliament after the proclamation of the Charter. During the lengthy consideration of how to deal with the problem of street solicitation, it is apparent from the record that various alternatives were explored, and certainly Charter considerations were adverted to and raised: see, for example, c. 3 of the Fraser Committee report and the debates in the House of Commons and before the legislative committee in respect of Bill C-49. What is at issue, then, is whether there is some reasonable alternative scheme which would allow the government to achieve its objective with fewer detrimental effects on the freedom: *Edwards Books & Art*, supra, per Dickson C.J.C. at pp. 772-73. This is a reminder that the legislator should be given adequate scope to address, in a practical way, the pressing and substantial objectives facing it.

101 I note at the outset that street solicitation in the context of prostitution is a criminal law matter. Attempts by provincial governments and municipalities to deal with the problem have been found to be constitutionally infirm: for example, see this court's decision in *Westendorp v. R.*, [1983] 1 S.C.R. 43, 32 C.R. (3d) 97, [1983] 2 W.W.R. 385, 23 Alta. L.R. (2d) 289, 20 M.P.L.R. 267, 2 C.C.C. (3d) 330, 144 D.L.R. (3d) 259, 41 A.R. 306, 46 N.R. 30. Therefore, if legislation is to be used to address the problem, it would, from a division of powers perspective, have to come from the federal government in its capacity to legislate in the area of criminal law.

102 A determination of the degree of the impairment by the section of the freedom in question is not a purely theoretical exercise. The assessment of the impairment should have regard for the nature of the incursion and the context in which it takes place. In terms of s. 195.1(1)(*c*), there is not a complete impairment of freedom of expression. There is no doubt that the section applies to all forms of communication. It is, however, limited to those forms used in a public place or a place open to public view. The impairment is additionally restricted by subject matter: only communications made for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute are prohibited. The appellants have submitted that the section is not proportionate to the legislative objective because it is too broad. In this regard I wish to adopt the reasoning of Kerans J.A. of the Alberta Court of Appeal in *R. v. Jahelka*, supra, at pp. 115-16, a case that also dealt with the constitutionality of s. 195.1(1)(*c*):

> It was also argued for the respondents that the reach of the legislation is overly broad in that it strikes at any communication for the purposes of prostitution, and not just a communication between a prostitute and a prospective customer. It is said, for example, that two friends can be guilty under the section if one asks the other where a prostitute might be found ...
>
> In my view, the respondents are guilty of putting an exaggerated interpretation on a law in order to subject it to constitutional attack. The purpose of this legislation is acknowledged. It is not to prohibit talk about prostitution. It is to proscribe street-hawking by prostitutes and their customers. In my view, the proper interpretation of this criminal statute is that it applies only to a communication from a common prostitute to a member of the public with a view to her or his prostitution or alternatively, by a member of the public to another, whom he or she thinks to be a common prostitute, for the purpose of engaging his or her sexual services. I agree with Alberta that the adoption

> of the words "for the purpose of obtaining the services of a prostitute" was employed for no purpose other than that both customers and prostitutes be guilty and to avoid the pitfalls attached to a word like "offer". So understood, the provision is not overly broad.

Shortly stated, then, the impairment of freedom of expression is limited by place and purpose. It is only when the communication occurs in a context wherein the proscribed place and purpose coincide that the section becomes engaged and the freedom correspondingly is impaired. Communications for the purpose of prostitution that take place other than in public do not fall within the section, and communications in public that are not, strictly speaking, for the purpose of engaging the services of a prostitute are similarly not within the proscription. This link between place and purpose in the legislation is reflective of the tailoring of the means used to the legislative objective of preventing the mischief that is produced by the public solicitation of sexual services. The focus placed by the section on communications in public for the purpose of prostitution reaches the precise activity from which the harm aimed at flows. In this regard I quote from the Sixteenth Report of the Criminal Law Revi sion Committee in the United Kingdom, entitled Prostitution in the Street (1984), at p. 4:

> What the law should be concerned with are offers, whether made by men or women, in circumstances which can cause a nuisance. We say "*can* cause a nuisance" because an act of soliciting by a single prostitute or kerb crawler does not necessarily amount to a nuisance; but when prostitutes and clients congregate in numbers, as commonly occurs, there is no doubt that this does amount to a nuisance. In this sense every act of soliciting has in it the potential for causing a nuisance ...
>
> But if the law is made too Draconian or enforced insensitively or women who are not prostitutes are mistakenly arrested and charged as such the public may regard the law as a danger to personal liberty. In our opinion the law should be directed against the prostitutes who ply their trade in the streets and against men who cause nuisance in the course of looking for prostitutes or who cause fear when soliciting for sexual purposes.

In my view, then, the section at issue does impair freedom of expression as little as reasonably possible in order to achieve the legislative objective. Parliament was faced with a myriad of views and options from which to choose in respect of dealing with the problem of street solicitation for the purpose of prostitution. The role of this court is not to second-guess the wisdom of policy choices made by our legislators. Prostitution, and specifically the solicitation for the purpose thereof, is an especially contentious and at times morally laden issue, requiring the weighing of competing political pressures. The issue of this court to determine is not whether Parliament has weighed those pressures and interests wisely, but rather whether the limit they have imposed on a Charter right or freedom is reasonable and justified. Parliament chose to enact s. 195.1 to deal with what was clearly viewed as a pressing and substantial social problem. It has done so in a way that is rationally connected to the legislative objective, and furthermore in a way that has specific regard for the place and purpose of the communication, thereby demonstrating a concern for limiting the impairment of expression to that which is minimally necessary to achieve the objective. Therefore, I conclude that s. 195.1(1)(*c*) satisfies the first two components of the proportionality test under s. 1 of the Charter.

3. Proportionality Between Effects and Objective

103 The final element to be satisfied under the s. 1 analysis requires that there be a proportionality between the effects of the measures which limit the Charter right or freedom and the objective or purpose that animates the legislation. The more severe the damaging effects of the measure, the more important the underlying objective must be in order to be constitutionally justified. If the effects of the measure on individuals or groups are wholly out of proportion with the legislative objective, the limitation cannot be one that is reasonable and demonstrably justified in a free and democratic society.

104 The section at issue seeks only to prevent the congregation of prostitutes and their customers in public, in the interests of avoiding the creation of public nuisance and limiting the exposure of prostitution and related activities such as pimping to uninterested individuals, and specifically to young people who may be attracted to the lure of juvenile

prostitution, an activity that is in effect degrading and exploitive. Prostitution itself is not proscribed, nor is its solicitation in private. In addition it cannot be said that Canada's response to the problem is out of step with international responses. In fact, the Fraser Committee noted in its review of foreign legislation that some jurisdictions, specifically the United States, have adopted régimes that are Draconian by our standards: see c. 38 of the Fraser Committee report.

105 In assessing the proportionality between the effects of a measure and the objective, a further criterion to consider is "the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society": *R. v. Oakes*, supra, at pp. 139-40. In *Oakes* the Chief Justice noted the essential elements of a free and democratic society at p. 136:

> ... respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

I conclude, in view that the extent of the restriction on freedom of expression is limited to place and purpose, that the impact on these integral principles of a free and democratic society is minimal. There is no doubt, as I have noted previously, that freedom of expression is of primary importance to our free and democratic society. It is precisely for that reason that this court has adopted a liberal and generous interpretation of the scope of s. 2(*b*) of the Charter. It is also the case, however, that, in weighing the serious social harms caused by public solicitation for the purpose of prostitution against the restriction on expression, I find that the challenged section is not disproportionate with its effects. In addition, it should be noted that concerns about the wisdom or effectiveness of the section have been taken into account by Parliament. The Act that amended the Criminal Code to enact the current s. 195.1 includes within it s. 2, which mandates that a comprehensive review of the provisions is to be undertaken by a committee of the House of Commons three years from the date of enactment, with a report on the review to be tabled in the House of Commons, including a statement of any changes the committee recommends: see S.C. 1985, c. 50 [now R.S.C. 1985, c. 51 (1st Supp.)], s. 2. In summary, then, when one weighs the nature of the legislative objective against the extent of the restriction on the freedom in question, there is no disproportionality.

X. Conclusion in Respect of S. 1

106 Section 195.1(1)(*c*) of the Criminal Code is designed to achieve an objective of sufficient importance that warrants overriding a constitutionally-protected freedom. In addition, the means chosen by Parliament are rationally connected to the objective, impair the freedom as little as possible, and are in proportion to the objective. Therefore, s. 195.1(1)(*c*) is a limit that is reasonable and demonstrably justified in a free and democratic society, and the last constitutional question should be answered accordingly.

107 I would dismiss the appeal and answer the constitutional questions as follows:

> *Question 1*. Is Section 193 of the *Criminal Code* of Canada inconsistent with Section 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

> *Question 2*. Is Section 195.1(1)(*c*) of the *Criminal Code* of Canada inconsistent with Section 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

> *Question 3*. Is the combination of the legislative provisions contained in Section 193 and Section 195.1(1)(*c*) of the *Criminal Code* of Canada inconsistent with Section 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

Question 4. Is Section 193 of the *Criminal Code* of Canada inconsistent with Section 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: This question does not have to be answered.

Question 5. Is Section 195.1(1)(*c*) of the *Criminal Code* of Canada inconsistent with Section 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

Question 6. Is the combination of the legislative provisions contained in Section 193 and Section 195.1(1)(*c*) of the *Criminal Code* of Canada inconsistent with Section 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: No, except to the extent that s. 195.1(1)(*c*) of the Criminal Code restricts s. 2(*b*) of the Charter.

Question 7. If Sections 193 and 195.1(1)(*c*) of the *Criminal Code* of Canada or a combination of both or any part thereof are inconsistent with either Section 7 or Section 2(*b*) of the *Canadian Charter of Rights and Freedoms*, to what extent, if any, can such limits on the rights and freedoms protected by Section 7 or Section 2(*b*) of the *Canadian Charter of Rights and Freedoms* be justified under Section 1 of the *Canadian Charter of Rights and Freedoms* and thereby rendered not inconsistent with the *Constitution Act, 1982*?

Answer: To the extent that s. 195.1(1)(*c*) restricts s. 2(*b*) of the Charter, it is a reasonable and demonstrably justified limit under s. 1 of the Charter.

***Wilson J.* (dissenting) (*L'Heureux-Dubé J.* concurring):**

108 I have had the benefit of the reasons of my colleague Justice Lamer. I propose to approach the issues in a different order. I will deal first with the question whether s. 193 [now s. 210] or s. 195.1(1)(*c*) [now s. 213(1)(*c*)] of the Criminal Code, R.S.C. 1970, c. C-34 [now R.S.C. 1985, c. C-46], or a combination of both violates s. 2(*b*) of the Canadian Charter of Rights and Freedoms and, if so, whether either one or a combination of both can be justified under s. 1 as a reasonable limit or limits on s. 2(*b*), and thereafter with the question whether either or a combination of both of these sections violates s. 7 of the Charter and, if so, whether either one or a combination of both can be justified under s. 1 as a reasonable limit or limits on s. 7.

109 For ease of reference I reproduce here the two provisions of the Criminal Code (as they were numbered at the time of the appeal [from [1987] 6 W.W.R. 289, 60 C.R. (3d) 216, 38 C.C.C. (3d) 408, 49 Man. R. (2d) 1]) that are under attack:

> 193. (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and is liable to imprisonment for two years.
>
> (2) Every one who
>
> (*a*) is an inmate of a common bawdy-house,
>
> (*b*) is found, without lawful excuse, in a common bawdy-house, or
>
> (*c*) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,
>
> is guilty of an offence punishable on summary conviction.
>
> 195.1 (1) Every person who in a public place or in any place open to public view

(*a*) stops or attempts to stop any motor vehicle,

(*b*) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or

(*c*) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person

for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

(2) In this section, "public place" includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.

While I have reproduced the whole of s. 195.1 in order to provide the context of the section, it is important to note that only para. (*c*) of s. 195.1(1) is actually under attack.

1. Sections 193 and 195.1(1)(c) of the Code and S. 2(b) of the Charter

110

(i) Section 2(b) of the Charter

111 My colleague Justice Lamer has reviewed some of this court's observations in *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, [1987] 1 W.W.R. 577, 9 B.C.L.R. (2d) 273, 38 C.C.L.T. 184, 87 C.L.L.C. 14,002, 33 D.L.R. (4th) 174, 25 C.R.R. 321, 71 N.R. 83, *Ford v. Que. (A.G.)*, [1988] 2 S.C.R. 712, 10 C.H.R.R. D/5559, 54 D.L.R. (4th) 577, 36 C.R.R. 1, *(*sub nom. *Chaussure Brown's Inc. v. Que. (A.G.))* 19 Q.A.C. 69, 90 N.R. 84, *Devine v. Que. (A.G.)*, [1988] 2 S.C.R. 790, 10 C.H.R.R. D/5610, 55 D.L.R. (4th) 641, 36 C.R.R. 64, 19 Q.A.C. 33, 90 N.R. 48, and *Irwin Toy Ltd. v. Que. (A.G.)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 24 Q.A.C. 2, 94 N.R. 167 , concerning the underlying rationale for the protection of freedom of expression in s. 2(*b*) of the Charter. I agree with him that these cases stand for the proposition that activities cannot be excluded from the scope of the guarantee on the basis of the content or meaning conveyed. I do not find it necessary, however, to decide in this case which forms of expression, if any, or which types of message, if any, do *not* fall under the protection of s. 2(*b*). I confine myself to the form and content which is before us and the question whether or not it is protected.

112 This court stated in *Ford* at p. 764:

> The post-*Charter* jurisprudence of this Court has indicated that the guarantee of freedom of expression in s. 2(*b*) of the *Charter* is not to be confined to political expression. In holding in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, that secondary picketing was a form of expression within the meaning of s. 2(*b*) the Court recognized that the constitutional guarantee of freedom of expression extended to expression that could not be characterized as political expression in the traditional sense but, if anything, was in the nature of expression having an economic purpose.

The court went on the stress that, given "the earlier pronouncements of this Court to the effect that the rights and freedoms guaranteed in the Canadian *Charter* should be given a large and liberal interpretation, there is no sound basis on which commercial expression can be excluded from the protection of s. 2(*b*) of the *Charter*": see *Ford* at pp. 766-67.

113 In *Irwin Toy* this court recapitulated what it had said in *Ford* and *Devine*, and stated at p. 974:

> If the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government's purpose is to restrict a

form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression.

114 I believe we see in this case a good example of the government's attempt to deal with the harmful consequences of expressive activity, not by dealing directly with those consequences, but by placing constraints on the meaning sought to be conveyed by the expressive activity. Rather than dealing directly with the variety of harmful consequences which the Attorney General of Canada and others submit ultimately flow from the communicative act, s. 195.1(1)(*c*) prohibits the communicative act itself in the hope that this will put an end to such consequences. To paraphrase this court's observations in *Irwin Toy*, this is not a case in which the government has sought to control the physical consequences of certain human activity regardless of the meaning being conveyed. Rather, this is a case where the government's purpose is to restrict the content of expression by singling out meanings that are not to be conveyed, in the hope that this will deal with the physical consequences emanating from expressive activity that carries the prohibited meaning.

115 This approach has obvious weaknesses. Section 195.1(1)(*c*) does not make clear the harmful consequences that it is designed to control. Nor does it limit the range of instances in which the expressive activity will be prohibited by requiring a link between the expressive activity and the harmful consequences. More precisely, s. 195.1(1)(*c*) does not require that the Crown show that the expressive act in a given case is in fact likely to lead to undesired consequences such as noise or traffic congestion. Instead, the provision prohibits *all* communicative acts for the purpose of engaging in prostitution or obtaining the sexual services of a prostitute that take place in public, regardless of whether a given communicative act gives rise to harmful consequences or not.

116 The provision prohibits persons from engaging in expression that has an economic purpose. But economic choices are, in my view, for the citizen to make (provided that they are legally open to him or her) and, whether the citizen is negotiating for the purchase of a Van Gogh or a sexual encounter, s. 2(*b*) of the Charter protects that person's freedom to communicate with his or her vendor. Where the state is concerned about the harmful consequences that flow from communicative activity with an economic purpose, and where, rather than addressing those consequences directly, the content of communicative activity is proscribed, then the provision must, in my view, be justified as a reasonable limit under s. 1 of the Charter if it is to be upheld.

117 With respect to s. 193 of the Code, I do not see how the provision can be said to infringe the guarantee of freedom of expression either on its own or in combination with s.195.1(1)(*c*). In my view, only s. 195.1(1)(*c*) limits freedom of expression. Section 193 deals with keeping or being associated with a common bawdy-house, and places no constraints on communicative activity in relation to a common bawdy-house. I do not believe that "expression" as used in s. 2(*b*) of the Charter is so broad as to capture activities such as keeping a common bawdy-house.

(ii) Parliament's objective in passing s. 195.1(1)(c)

118 The parties and interveners in this appeal and the related appeals in *R. v. Stagnitta*, S.C.C., No. 20497, 31st May 1990 (not yet reported) [Alta.], and *R. v. Skinner*, S.C.C., No. 20428, 31st May 1990 (not yet reported) [N.S.], made a number of submissions with respect to the legislative objective underlying s. 195.1 in general and s. 195.1(1)(*c*) in particular. These may be grouped into three categories of gradually widening scope.

(1) Nuisance in the Streets

119 The appellant Stagnitta and the respondent Skinner give s. 195.1(1)(*c*) its narrowest interpretation. They submit that the objective underlying the legislation is the protection of the public's right to the unobstructed use of the streets and sidewalks. They do, however, acknowledge that the legislation may also be designed to prevent citizens from being disrupted in their enjoyment of public residential areas by activities incidental to street soliciting.

(2) Social Nuisance

120 In the overwhelming majority of submissions made to the court it was claimed that the objective of the legislation was the control of a "social" nuisance. The Attorney General of Canada submitted that s. 195.1 as a whole was designed, not just to deal with the interference by prostitutes and their customers with the citizens' use of public places, but also to address the secondary effects of street soliciting. These secondary effects, which were in his view the primary motivation for the legislation, included "all night noise, traffic congestion, trespass, reduced property values and other adverse consequences". The specific focus of s. 195.1(1)(*c*), on the other hand, was to deal with the "precise activity from which all the harm flows", namely, street solicitation. The appellants and the respondent in this appeal are all in substantial agreement with this submission, although they obviously differ with respect to whether the impugned provision is an acceptable way in which to achieve the stated objective.

121 The Attorneys General for Alberta and Saskatchewan cover similar ground. They agree that "The objective of s. 195.1(1) of the *Criminal Code* is to deal with the problem of bartering for sexual services in public places", and they point to a list of "harms" which they say the legislation seeks to prevent — the harassment of women, street congestion, noise, decreased property values, adverse effects on businesses, increased incidents of violence, and the impact of street soliciting on children who cannot avoid seeing what goes on.

122 The Attorney General of British Columbia also submits that s. 195.1(1)(*c*) is specifically designed to deal with the harms caused by the "act of the prostitute in conveying his or her message". The provision seeks to prevent neighbourhoods lapsing into "total disintegration". The Attorney General of Nova Scotia states that Parliament wished to protect the public from "impeded pedestrian and vehicular traffic, the indignity of being propositioned, exposure of children to the vices of adults, viewing the actions and hearing the communications related to prostitution in 'a public place' ".

123 I think it important to emphasize, however, that those whose submissions fall into this broader category of "social" nuisance do not claim that the aim of the legislation is to prohibit prostitution. Rather, they submit that it seeks to prohibit sales of sexual services from taking place in the public domain. The Attorney General of Manitoba, the respondent in this appeal, notes that the legislation does not purport to prevent prostitution-related activities in circumstances where no public nuisance is created. The Attorney General of Canada states that "Parliament did not seek to suppress solicitation, but only to remove it from the public areas where it was creating the obvious harm". The Attorney General of Nova Scotia acknowledges that prostitution is not a criminal offence and that "s. 195.1(1)(*c*) is not intended to eradicate prostitution but focuses on the undesirability of bringing prostitution into the public forum". Hence the characterization of the legislative objective as a "social" rather than a strictly legal nuisance.

(3) Prostitution-Related Activities

124 The Attorney General for Ontario goes further than any other Attorney General who presented submissions in this appeal and in *Stagnitta* and *Skinner*, both supra. He submits that s. 195.1 is designed to deal with a much wider array of problems associated with prostitution, including violence, drug addiction, crime and juvenile prostitution. While he agrees that the legislation is aimed at many of the aspects of public nuisance discussed by his colleagues, he points out that the legislation is also directed to drug addiction and juvenile prostitution because of the risk that young children who are exposed to street soliciting will be drawn into the world of drugs and prostitution.

125 Which characterization of Parliament's objective seems most accurate? Lamer J. appears to have been persuaded by the position taken by the Attorney General for Ontario. He concludes that the legislation is an attack on prostitution, albeit an indirect one, and that part of the legislative objective sought to be achieved through s. 195.1(1)(*c*) was to give law enforcement officials a way of controlling prostitution in the streets. He points out [at p. 539] that: "The streets provide an environment for pimps and procurers to attract adults (usually, as the data shows, women) and adolescents into the trade by befriending them and often offering them short term affection and economic assistance." He agrees with the Attorney General for Ontario's submission that it is the young who are most desirable to pimps, as they bring in the most money and are the easiest to control. Young girls become dependent on pimps and are often manipulated through the use

of drugs. Physical violence may result. My colleague concludes that prostitution is degrading to the individual dignity of the prostitute and a vehicle for pimps and customers to exploit the disadvantaged position of women in our society. Thus Lamer J. finds that the legislature's objective goes beyond preventing congestion in the streets and sidewalks; it has the additional objective of restricting the entry of young girls into an activity that is degrading to women and is associated with drugs, crime and physical abuse.

126 While I do not disagree with my colleague that prostitution is, for the reasons he gives, a degrading way for women to earn a living, I cannot agree with his conclusion that s. 195.1(1)(*c*) of the Code attempts to address that problem. With the exception of the Attorney General for Ontario, the parties and interveners in this appeal and in *Skinner* and *Stagnitta* were unanimously of the view that the legislation does not seek to deal with prostitution per se but is directed only at the public or social nuisance aspect of the sale of sexual services in public. Indeed, the Attorneys General of Canada, Nova Scotia and Manitoba went out of their way to emphasize that s. 195.1(1) does not prohibit prostitution, which remains a perfectly legal activity. It does not even prohibit solicitation; it only prohibits solicitation in public places. In my view, the wording of s. 195.1(1) in general and s. 195.1(1)(*c*) in particular supports that view.

127 But, if the legislative objective was not to criminalize prostitution per se, which of the narrower objectives did Parliament have in mind? In my view, it is once again important to look at the wording of the im pugned section. While s. 195.1(1)(*a*) and (*b*) refers to activities that "stop any motor vehicle" or that impede "the free flow of pedestrian or vehicular traffic", s. 195.1(1)(*c*) refers not just to stopping persons (although it does include that) but to communicating or attempting to communicate with persons. Accordingly, activities caught by s. 195.1(1)(*c*) need not result in the kinds of problems addressed in ss. 195.1(1)(*a*) and (*b*). It was not alleged, for example, in either *Stagnitta* or *Skinner* that the accused's activities had impeded traffic or led to congestion. The accused were simply charged with communicating in a public place for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute. While the circumstances in which charges are laid under the section are obviously not determinative of the objective sought to be achieved by the legislation, they do reveal how the law enforcement agencies are interpreting and applying it. They clearly interpreted s. 195.1(1)(*c*) in *Stagnitta* and *Skinner* as intended to do more than keep the streets and sidewalks free of congestion. In my view, they were not mistaken in this regard. Indeed, this is why s. 195.1(1)(*c*) was considered a necessary addition to s. 195.1(1)(*a*) and (*b*). The difficulty, however, is to determine just how much more the impugned provision was intended to catch.

128 I have concluded that the submissions made to the court by the majority of counsel are correct and that the fundamental concern attempted to be addressed in s. 195.1(1)(*c*) is the social nuisance arising from the public display of the sale of sex. I believe this is clear from the requirement that the communication or attempted communication be for the purchase or sale of sexual services and that such communication occur in a public place or in a place open to public view. Parliament's concern, I believe, goes beyond street or sidewalk congestion, which is dealt with in paras. (*a*) and (*b*). The legislature clearly believes that public sensitivities are offended by the sight of prostitutes negotiating openly for the sale of their bodies and customers negotiating, perhaps somewhat less openly, for their purchase. The reality, in other words, is accepted and permitted. Neither prostitution nor solicitation is made illegal. But the high visibility of these activities is offensive and has harmful effects on those compelled to witness it, especially children. This being the legislative approach to prostitution, it forecloses, in my view, any suggestion that in s. 195.1(1)(*c*) Parliament intended to stamp out all the ills and vices that my colleague sees as flowing from prostitution. The provision addresses only one narrow aspect of prostitution, namely, solicitation in public places.

129 Given, then, that s. 195.1(1)(*c*) infringes upon freedom of expression under s. 2(*b*) of the Charter and that the legislative objective in passing it is the one we have identified, does the provision constitute a reasonable limit on the freedom which is justifiable in a free and democratic society? Does it, in other words, meet the tests laid down by this court in *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 19 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87?

(iii) Section 1 of the Charter

130 None of the counsel appearing before us on this appeal seriously argued that the nuisance caused by street solicitation, at least in the major centres of population in the country, was not a pressing and substantial concern. Indeed, most acknowledged it to be so, and I agree. The first test in *Oakes* is therefore met.

131 The next question under *Oakes* is whether s. 195.1(1)(*c*) is rationally connected to the prevention of the nuisance. I believe it is. The logical way to prevent the public display of the sale of sex and any harmful consequences that flow from it is through the twofold step of prohibiting the prostitute from soliciting prospective customers in places open to public view and prohibiting the customer from propositioning the prostitute likewise in places open to public view. If communication for this purpose or attempts to communicate for this purpose are criminalized, it must surely be a powerful deterrent to those engaging in such conduct.

132 But is the legislation proportionate to the objective sought to be achieved? To answer this we must direct our attention to the scope of the legislation.

133 On 9th September 1985, when the present s. 195.1 was introduced in the House of Commons, the then Minister of Justice stated (Debates of the House of Commons (1985), vol. 5, p. 6374):

> The legislation does not attempt to deal with all of the problems that prostitution creates or with the problems of prostitution generally, which of course is the sale of sexual favours or sexual services for pay. *It only purports to deal with one aspect of the problems that prostitution can create, which is the nuisance to others created by street soliciting not only by the prostitute but by the customers of the prostitute*. [emphasis added]

The Attorney General of Canada, adverting to the minister's statement, submitted that the purpose of s. 195.1 was to prevent prostitutes and their customers from congregating and concentrating their activities in any particular location. He pointed out that prostitutes go where they can expect to find customers and customers go where they can expect to find prostitutes, and the more widely such an area becomes known for what it is the more it will attract prostitutes and customers and the more nuisance will be created. The problem, in other words, feeds upon itself.

134 The Attorney General of Canada described the legislation as "time and place regulation" and emphasized that many trades and businesses are subject to government regulation in the public interest. He argued that the net effect of the legislation is merely to remove the transaction of the business of prostitution from public places. It is no different, he submitted, from regulating the conditions under which other businesses must operate. The Attorney General further submitted that no business enterprise should be free to pre-empt a public place for its own commercial gain without regard to the nuisance it may create for the surrounding community. The Attorney General submitted (rather surprisingly, I think, in light of the impact of s. 193 of the Criminal Code on attempts to engage in prostitution from private premises) that one of the purposes of s. 195.1 is to diffuse the activities associated with prostitution and ensure that prostitutes, like retailers and consumers, conduct their activities on private premises and in a way which will avoid the creation of a nuisance to others.

135 I believe, with respect, that the Attorney General has overlooked a number of significant aspects of the impugned legislation which go directly to the question of its proportionality. The first is that it criminalizes communication or attempted communication for the prohibited purpose in any public place or place open to public view. "Public place" is then expanded in subs. (2) to include any place to which the public have access as of right or by invitation, express or implied. In other words, the prohibition is not confined to places where there will necessarily be lots of people to be offended or inconvenienced by it. The prohibited communication may be taking place in a secluded area of a park where there is no one to see or hear it. It will still be a criminal offence under the section. Such a broad prohibition as to the locale of the communication would seem to go far beyond a genuine concern over the nuisance caused by street solicitation in Canada's major centres of population. It enables the police to arrest citizens who are disturbing no one solely because they are engaged in communicative acts concerning something not prohibited by the Code. It is not reasonable, in my

view, to prohibit *all* expressive activity conveying a certain meaning that takes place in public simply because in *some* circumstances and in *some* areas that activity *may* give rise to a public or social nuisance.

136 I note also the broad scope of the phrase "in any manner communicates or attempts to communicate". It would seem to encompass every conceivable method of human expression. Indeed, it may not be necessary for the prostitute to say anything at all in order to be found to be "communicating" or "attempting to communicate" for the purpose of prostitution. The proverbial nod or wink may be enough. Perhaps more serious, a hapless citizen may be picked up for soliciting when he or she has nothing more pressing in mind than hailing a taxi! While it is true that he or she may subsequently be let go as lacking the necessary intent for the offence, the experience of being arrested is not something the ordinary citizen would welcome. Some definitional limits would appear to be desirable in any activity labelled as criminal.

137 Directly relevant to the issue of proportionality, it seems to me, is the fact already referred to that under para. (*c*) no nuisance or adverse impact of any kind on other people need be shown, or even be shown to be a possibility, in order that the offence be complete. Yet communicating or attempting to communicate with someone in a public place with respect to the sale of sexual services does not automatically create a nuisance, any more than communicating or attempting to communicate with someone on the sidewalk to promote a candidate for municipal election. Moreover, as already mentioned, prostitution is itself a perfectly legal activity, and the avowed objective of the legislature was not to make it illegal, but only, as the Minister of Justice emphasized at the time, to deal with the nuisance created by street solicitation. It seems to me that to render criminal the communicative acts of persons engaged in a lawful activity which is not shown to be harming anybody cannot be justified by the legislative objective advanced in its support. The impugned provision is not sufficiently tailored to that objective and constitutes a more serious impairment of the individual's freedom than the avowed legislative objective would warrant. Section 195.1(1)(*c*) therefore fails to meet the proportionality test in *Oakes*, supra.

2. Sections 193 and 195.1(1)(c) of the Code and S. 7 of the Charter

138

(i) Section 7 of the Charter

139 I turn now to consider whether ss. 193 and 195.1(1)(*c*), either in dividually or in combination, violate s. 7 of the Charter.

140 My colleague Lamer J. approaches the s. 7 issue in this appeal as raising a question of "economic" liberty. With the greatest respect, I believe it is neither appropriate nor necessary, in order to trigger the application of s. 7, to characterize the impugned legislation in this way. As Lamer J. points out in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 515, *(*sub nom. *Ref. re S. 94(2) of Motor Vehicle Act)* 48 C.R. (3d) 289, [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 36 M.V.R. 240, 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, 18 C.R.R. 30, 63 N.R. 266:

> Obviously, imprisonment (including probation orders) deprives persons of their liberty. An offence has that potential as of the moment it is open to the judge to impose imprisonment.

My s. 7 analysis proceeds therefore from a recognition of the uniquely punitive aspect of the legislative scheme governing prostitution under ss. 193 and 195.1 of the Criminal Code, i.e., that it can result in the deprivation of "physical" liberty. Like Lamer J., I take as my point of departure the ineluctable fact that the sale of sex for money is not a criminal act under Canadian law. It is not enough, however, simply to state that. We have to consider its implications.

141 In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 63 O.R. (2d) 281, 62 C.R. (3d) 1, 37 C.C.C. (3d) 449, 44 D.L.R. (4th) 385, 31 C.R.R. 1, 26 O.A.C. 1, 82 N.R. 1, the Chief Justice (Lamer J. concurring) made the following remarks at p. 70 about regulation by means of the criminal law as distinct from regulation by other means:

> The criminal law is a very special form of governmental regulation, for it seeks to express our society's collective disapprobation of certain acts and omissions. When a defence is provided, especially a specifically-tailored defence to a particular charge, it is because the legislator has determined that the disapprobation of society is not warranted when the conditions of the defence are met.

In my opinion, it is equally true that where the legislature has *not* criminalized a certain activity it is because the legislator has determined that this uniquely coercive and punitive method of expressing society's collective disapprobation of that activity is not warranted in the circumstances.

142 While it is an undeniable fact that many people find the idea of exchanging sex for money offensive and immoral, it is also a fact that many types of conduct which are subject to widespread disapproval and allegations of immorality have not been criminalized. Indeed, one can think of a number of reasons why selling sex has not been made a criminal offence. First, as Lamer J. notes in his s. 1 analysis of the legislative objective underlying s. 195.1(1)(*c*), more often than not the real "victim" of prostitution is the prostitute himself or herself. Sending prostitutes to prison for their conduct may therefore have been viewed by legislators as an unsuitable response to the phenomenon. Or the legislators may have realized that they could not send the female prostitute to prison while letting the male customer go, and been reluctant for that reason to make prostitution a criminal offence. Another explanation may be a reluctance on the part of legislators to criminalize a transaction which normally occurs in private between consenting adults. Yet another possibility is that the legislature simply recognized that prostitution is the oldest trade in the world and is clearly meeting a social need. Whatever the reasons may be, the persistent resistance to outright criminalization of the act of prostitution cannot be treated as inconsequential.

143 I mention these possible reasons for the continuing legality of prostitution not for the purpose of endorsing any particular theory but rather to emphasize that the legality of prostitution must be recognized in any s. 7 analysis and must be respected regardless of one's personal views on the subject. As long as the act of selling sex is lawful, it seems to me that this court cannot impute to it the collective disapprobation reserved for criminal offences. We cannot treat as a crime that which the legislature has deliberately refrained from making a crime.

144 Nevertheless, the legislature has chosen to place serious constraints on the circumstances in which prostitution may take place and has decided that, where someone attempts to engage in prostitution in those prohibited circumstances, the Criminal Code's penalties are appropriate. In other words, Parliament has chosen to regulate certain incidents of prostitution by means of the criminal law's power to deprive people of their "physical" liberty. In my view, it is this decision which triggers the application of s. 7 of the Charter.

145 In the case at bar conviction under ss. 193 or 195.1 may result in a deprivation of the liberty of the person. The convicted prostitute faces a possible prison sentence as well as the stigma of being labelled a criminal. The legislation permitting this result must therefore accord with the principles of fundamental justice if it is to survive the constitutional challenge.

(ii) The principles of fundamental justice

146 In *Re B.C. Motor Vehicle*, supra, Lamer J. stated at p. 499 [S.C.R.]:

> The task of the Court is not to choose between substantive or procedural content *per se* but to secure for persons "the full benefit of the *Charter's* protection" (Dickson J. (as he then was) in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344), under s. 7, while avoiding adjudication of the merits of public policy. This can only be accomplished by a purposive analysis and the articulation (to use the words in *Curr v. The Queen*, [1972] S.C.R. 889, at p. 899) of "objective and manageable standards" for the operation of the section within such a framework.

He went on to caution against an unduly narrow interpretation of the term "principles of fundamental justice". He observed that "the narrower the meaning given to 'principles of fundamental justice' the greater will be the possibility that

individuals may be deprived of these most basic rights". This latter result was to be avoided, given that the rights to life, liberty and security of the person were fundamental and that their deprivation would have the "most severe consequences upon an individual": see *B.C. Motor Vehicle* at p. 501 [S.C.R.]. Lamer J. concluded at p. 513 [S.C.R.]:

> Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system, as it evolves.
>
> *Consequently, those words cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s. 7.* [emphasis added]

147 I agree that a purposive approach to the principles of fundamental justice is appropriate. I also agree that it follows from that proposition that one should not adopt a restrictive approach to the term and that one should avoid comprehensive definitions of the term which might place unnecessary and undesirable constraints upon the court in the future. Moreover, I see no need to attempt in this appeal to define the term "principles of fundamental justice". I agree with Lamer J. that the content of these words "will take on concrete meaning as the courts address alleged violations of s. 7". Their content should be determined contextually on a case-by-case basis. I prefer therefore to limit my inquiry to the question whether the case before us gives rise to an infringement of liberty which violates a principle of fundamental justice.

148 Ms. Bennett submits that ss. 193 and 195.1(1)(*c*), both singly and together, violate s. 7 because they are too vague. While legislative provisions that are so vague as to be unintelligible to the citizen may well fail to accord with the principle of fundamental justice that requires persons to be given clear notice of that which is prohibited, in my view neither s. 193 nor s. 195.1(1)(*c*), read on their own or together, is so vague as to violate the requirement that the criminal law be clear. It is true that this court has been called upon to interpret some of the terms used in these sections: see, for example, this court's discussion of the term "common bawdy-house" in *R. v. Cohen*, [1939] S.C.R. 212, 71 C.C.C. 142, [1939] 1 D.L.R. 396 [Ont.], and in *Patterson v. R.*, [1968] S.C.R. 157, 3 C.R.N.S. 23, [1968] 2 C.C.C. 247, 67 D.L.R. (2d) 82 [Ont.]. This does not mean, however, that the legislation is so vague as to fail to accord with fundamental justice. The courts are regularly called upon to resolve ambiguities in legislation, but this does not necessarily make such legislation vulnerable to constitutional attack.

149 In my view, the language of s. 195.1(1)(*c*) prohibits communication for the purposes of engaging in prostitution or of obtaining the sexual services of a prostitute. While I have previously noted that the wording of the provision may lead police officers to detain people on the mistaken assumption that they were communicating for the prohibited purposes, this does not mean that the section does not send a clear message to the citizen that communicating for those purposes is prohibited. Similarly, the fact that s. 193 does not itemize every situation that falls within the ambit of the prohibition against keeping a common bawdy-house does not mean that citizens reading the provision will not know that they risk criminal sanctions if they are operating or found on premises used for the purpose of exchanging sex for money. Finally, while the combination of s. 193 and s. 195.1(1)(*c*) may seriously constrain the prostitute in the way in which he or she is able to carry on business, and may even make it difficult for the prostitute to know what avenues are left open to him or her, this does not necessarily mean that the provisions themselves, either individually or together, are not clear.

150 It is my view, however, that an infringement of a person's right to liberty cannot be said to accord with the principles of fundamental justice where the conduct alleged to constitute the infringement violates another Charter guarantee. My colleague Lamer J. observed in *Re B.C. Motor Vehicle*, supra, at p. 503 [S.C.R.]:

> In other words, the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system.

While the Charter reflects a number of principles which have traditionally been part of our legal system, it also gives specific constitutional protection to other principles which are now an integral part of our legal system. These are just as much, if not more so, "basic tenets of our legal system" and required to be protected by the judiciary. This court emphasized in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155, *(*sub nom. *Can. (Dir. of Investigation & Research, Combines Investigation Branch) v. Southam Inc.)* 41 C.R. (3d) 97, [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 27 B.L.R. 297, 84 D.T.C. 6467, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 2 C.P.R. (3d) 1, 9 C.R.R. 355, 55 A.R. 291, 55 N.R. 241, that "[The] judiciary is the guardian of the constitution", and in *Oakes*, supra, at p. 135, Dickson C.J.C. expressed agreement with the proposition stated in *Singh v. Can. (Min. of Employment & Immigration); Thandi v. Can. (Min. of Employment & Immigration); Mann v. Can. (Min. of Employment & Immigration)*, [1985] 1 S.C.R. 177 at 218, 12 Admin. L.R. 137, 17 D.L.R. (4th) 422, 14 C.R.R. 13, 58 N.R. 1 [Fed.], that:

> ... it is important to remember that the courts are conducting this inquiry [under s. 1] in light of a commitment to uphold the rights and freedoms set out in the other sections of the *Charter*.

The rights guaranteed in the Charter "do not", to quote Justice Lamer, "lie in the realm of general public policy". They are the laws of the land. Indeed, this court pointed out in its very first Charter case, *Law Soc. of Upper Can. v. Skapinker*, [1984] 1 S.C.R. 357 at 366, 11 C.C.C. (3d) 481, 9 D.L.R. (4th) 161, 8 C.R.R. 193, 3 O.A.C. 321, 53 N.R. 169, that the Charter "is part of the fabric of Canadian law. Indeed, it 'is the supreme law of Canada' ..."

151 In my view, it follows from these propositions that a law that infringes the right to liberty under s. 7 in a way that also infringes another constitutionally-entrenched right (which infringement is not saved by s. 1) cannot be said to accord with the principles of fundamental justice. It must therefore be justified as a reasonable limit under s. 1 of the Charter.

152 I have already concluded that s. 195.1(1)(*c*) violates s. 2(*b*) of the Charter because it violates the Charter's guarantee of the right to freedom of expression, and that it is not saved by s. 1. But s. 195.1(1)(*c*) also infringes a person's right to liberty by providing that those who commu nicate for the prohibited purposes may be sent to prison. In my view, a person cannot be sent to prison for exercising his or her constitutionally-protected right to freedom of expression. This is clearly not in accordance with the principles of fundamental justice.

153 I noted in discussing s. 2(*b*) that s. 193, either on its own or in combination with s. 195.1(1)(*c*), does not violate a person's right to freedom of expression. While s. 193 infringes a person's right to liberty through the threat of imprisonment, absent the infringement of some other Charter guarantee, this particular deprivation of liberty does not, in my view, violate a principle of fundamental justice. Nor are s. 193 and s. 195.1(1)(*c*) so intimately linked as to be part of a single legislative scheme enabling one to say that because part of the scheme violates a principle of fundamental justice the whole scheme violates that principle. I conclude, therefore, that no principle of fundamental justice is violated by s. 193 or the combination of ss. 193 and 195.1(1)(*c*).

(iii) Section 1 of the Charter

154 Where a legislative provision violates more than one section of the Charter, as I have found to be the case with s. 195.1(1)(*c*) of the Criminal Code, it may not be possible to provide a single answer to the question whether the legislation constitutes a reasonable limit justifiable under s. 1 of the Charter. This is because the nature of the justification will depend at least in part on the right which is being limited. Thus, in some instances legislation may limit one Charter right in a way that can be justified under s. 1 and at the same time limit another Charter right in a way that cannot be justified under s. 1. I make this point simply to emphasize that one cannot assume that the basis of justification under s. 1 will be the same in both instances. It is not enough, in other words, for the government to justify a breach of one Charter guarantee under s. 1. It must justify the breach of the other Charter guarantee as well.

155 In this case the respondent and each of the Attorneys General made the same submissions in support of s. 195.1(1)(*c*) as a reasonable limit on s. 7 as they made in its support as a reasonable limit on s. 2(*b*).

156 I agree that their submissions as to the existence of a pressing and substantial concern and as to the rational connection between that concern and the impugned legislation are equally valid in relation to the infringement of the s. 7 right. The test of proportionality may, however, be different.

157 The question in relation to the s. 2(*b*) infringement was whether it was reasonable and justifiable to limit freedom of expression in the broad terms of s. 195.1(1)(*c*) in order to deal with the nuisance caused by street solicitation. I concluded that it was not. The section was too broad. The question in relation to the s. 7 infringement, it seems to me, is whether it is reasonable and justifiable to deprive citizens of their liberty through imprisonment in order to deal with the nuisance caused by street solicitation. Again I conclude that it is not. It seems to me that, where communication is a lawful (and indeed a constitutionally-protected) activity and prostitution is also a lawful activity, the legislative response of imprisonment is far too drastic. I indicated elsewhere my view that an infringement of liberty which violates the principles of fundamental justice must be very difficult, if not impossible, to justify as a reasonable limit under s. 1. My colleague Lamer J. suggests in *Re B.C. Motor Vehicle*, supra, at p. 518 [S.C.R.], that it may be possible "in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like".

158 Be that as it may, it seems to me that to imprison people for exercising their constitutionally-protected freedom of expression, even if they are exercising it for purposes of prostitution (which is not itself prohibited), is not a proportionate way of dealing with the public or social nuisance at which the legislation is aimed. I conclude, therefore, that s. 195.1(1)(*c*) violates s. 7 of the Charter and is not saved by s. 1.

3. Disposition of the Appeal

159 I would allow the appeal in part and answer the constitutional questions set out in the Order of the Chief Justice as follows:

> *Question 1*. Is Section 193 of the *Criminal Code* of Canada inconsistent with Section 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

> *Question 2*. Is Section 195.1(1)(*c*) of the *Criminal Code* of Canada inconsistent with Section 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

> *Question 3*. Is the combination of the legislative provisions contained in Section 193 and Section 195.1(1)(*c*) of the *Criminal Code* of Canada inconsistent with Section 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

> *Question 4*. Is Section 193 of the *Criminal Code* of Canada inconsistent with Section 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

> *Question 5*. Is Section 195.1(1)(*c*) of the *Criminal Code* of Canada inconsistent with Section 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

> *Question 6*. Is the combination of the legislative provisions contained in Section 193 and Section 195.1(1)(*c*) of the *Criminal Code* of Canada inconsistent with Section 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

> *Question 7*. If Section 193 or Section 195.1(1)(*c*) of the *Criminal Code* of Canada or a combination of both or any part thereof are inconsistent with either Section 7 or Section 2(*b*) of the *Canadian Charter of Rights and Freedoms*, to what extent, if any, can such limits on the rights and freedoms protected by Section 7 or Section 2(*b*) of the *Canadian Charter of Rights and Freedoms* be justified under Section 1 of the *Canadian Charter of Rights and Freedoms* and thereby be rendered not inconsistent with the *Constitution Act, 1982*?

Answer: Section 195.1(1)(*c*) of the Criminal Code of Canada, to the extent it is inconsistent with both s. 2(*b*) and s. 7 of the Charter, cannot be justified under s. 1 of the Canadian Charter and is therefore inconsistent with the Constitution Act, 1982.

Appeal dismissed.

Footnotes

* McIntyre J. took no part in the judgment.

TAB 8

1987 CarswellAlta 705
Supreme Court of Canada

Reference re Public Service Employee Relations Act (Alberta)

1987 CarswellAlta 580, 1987 CarswellAlta 705, [1987] 1 S.C.R. 313, [1987] 3 W.W.R. 577, [1987] D.L.Q. 225, [1987] S.C.J. No. 10, 28 C.R.R. 305, 38 D.L.R. (4th) 161, 4 A.C.W.S. (3d) 138, 51 Alta. L.R. (2d) 97, 74 N.R. 99, 78 A.R. 1, 87 C.L.L.C. 14,021, J.E. 87-505, EYB 1987-66907

ALBERTA UNION OF PROVINCIAL EMPLOYEES et al. v. ATTORNEY GENERAL OF ALBERTA et al.

Dickson C.J.C., Beetz, McIntyre, Chouinard [*] , Wilson, Le Dain and La Forest JJ.

Heard: June 27 and 28, 1985
Judgment: April 9, 1987
Docket: No. 19234

Counsel: *T.J. Christian* , for appellant the Alberta Union of Provincial Employees.
S. Greckol and *J. Ross* , for appellant the Canadian Union of Public Employees.
B. Chivers , for appellant the Alberta International Firefighters Association.
R.A. McLennan, Q.C., N. Steed and *B.R. Burrows* , for respondent.
V.E. Toews and *V.J. Matthews Lemieux* , for intervener the Attorney General of Manitoba.
E.A. Bowie, Q.C. , for intervener the Attorney General of Canada.
B. Wright, Q.C. , and *J. Cavarzan, Q.C.* , for intervener the Attorney General for Ontario.
R.-A. Forest and *G. Grenier* , for intervener the Attorney General of Quebec.
A. Scott and *R. Endres* , for intervener the Attorney General of Nova Scotia.
E.R.A. Edwards, Q.C. , for intervener the Attorney General of British Columbia.
R.C. Thompson , for intervener the Attorney General of Prince Edward Island.
M.C. Crane and *B.G. Welsh* , for intervener the Attorney General for Saskatchewan.
D.E. Fry , for intervener the Attorney General of Newfoundland.

Headnote

Provincial legislation prohibiting strikes not infringing freedom of association guaranteed by Canadian Charter of Rights and Freedoms.

Provincial legislation prohibiting strikes not infringing freedom of association.

Provincial legislation prohibiting strikes not infringing freedom of association.

Certain questions were referred to the Alberta Court of Appeal by the Lieutenant Governor in Council concerning the validity of the Alberta Public Service Employee Relations Act, the Labour Relations Act and the Police Officers Collective Bargaining Act. The questions were to determine the following issues: (1) whether specific legislative provisions prohibiting lockouts and strikes in the public service and imposing compulsory arbitration in that service were inconsistent with the Charter; (2) whether legislation which required an arbitrator acting under the legislation to consider certain factors in making the arbitration award was inconsistent with the Charter; and (3) whether the Charter limited the right of the Crown to exclude certain specified classes of its employees from collective bargaining units. The Court of Appeal answered the first question in the negative and did not answer the remaining questions. The appellants appealed.

Held:

Appeal dismissed.

Per Le Dain J. (Beetz and La Forest JJ. concurring):

The constitutional guarantee of freedom of association in s. 2(*d*) of the Charter does not include, in the case of a trade union, a guarantee of the right to bargain collectively and the right to strike. The freedom of association must apply to a wide range of associations, with a wide range of activities, pursuing a wide range of objects. It is from this perspective that the meaning of the guarantee must be considered and not solely with regard to the perceived requirements of trade unions. The rights to bargain collectively and to strike are not fundamental rights or freedoms, but are the creation of legislation involving a balance of competing interests in an area which the courts have recognized as requiring specialized expertise. It is not appropriate to substitute the judgment of the court for that of the legislature by constitutionalizing in general and abstract terms rights which the legislature has found necessary to define in various ways according to the particular field of labour relations involved.

Per McIntyre J.:

Section 2(*d*) of the Charter does not give constitutional protection to the right of a trade to strike as an incident of collective bargaining. Al though the freedom of association advances group interests and cannot be exercised alone, it is a freedom belonging to the individual and not the group. By merely combining together, individuals cannot create an entity which has greater constitutional rights and freedoms than they possess as individuals. However, collective bargaining is a group concern, and if the right to do so is not found in the Charter for the individual, it cannot be implied for the group merely by the fact of association.

The right of freedom of association addresses the principle that an individual is entitled to do in concert with others that which the individual may lawfully do alone, but individuals have no right to do in concert what is unlawful when done individually. Interpretations of s. 2(*d*) which postulate that the freedom of association protects all activities essential to the lawful goals of an association, or all activities carried out in association, subject only to s. 1, are unacceptable as they would accord greater constitutional rights to members of an association than to non-members. Accordingly, the freedom of association comes into play when the state has permitted an individual to engage in an activity yet forbids a group from doing so. It follows that if the activity is not one which is independently protected under the Charter, it will receive protection under s. 2(*d*) only if it is an activity which is permitted by law to an individual. The right to strike is not such an activity. First, it cannot be said that the cessation of work by an individual during the currency of his contract of employment is lawful. Although the courts will not specifically enforce a contract of service, an employee is nonetheless bound by the contract and may be liable in damages for its unlawful breach. Second, a strike conducted in accordance with modern labour legislation is not regarded as either a breach of contract or a termination of employment and is not analogous to the cessation of work by an individual employee.

As well, with the possible exceptions of s. 6(2)(*b*) and s. 6(4), the Charter does not concern itself with economic rights. As unions are overwhelmingly concerned with the economic interests of their members it would run counter to the overall structure and approach of the Charter to accord special constitutional rights to unions by implication. Although questions of collective bargaining and the right to strike were discussed in the deliberations of the Special Joint Committee of the Senate and of the House of Commons on the Constitution, no resolution for the right to strike was proposed. Although the constitutions of other countries specifically guarantee the rights of unions, the Charter does not. The omission of similar provisions in the Charter, given its inattention to economic and property rights, speaks strongly against any implication of a right to strike.

Moreover, the right to strike accorded by legislation is of relatively recent vintage and it cannot be said that it has become so much a part of our social and historical traditions that it has acquired the status of an immutable, fundamental right embedded in our traditions and our political and social philosophy. Accordingly, there is no basis for implying a constitutional right to strike in the absence of a specific provision in the Charter, even assuming s. 2(*d*) protects collective activities fundamental to our culture and traditions and which by common assent are deserving of protection.

Finally, there are sound reasons of social policy against implying a constitutional right to strike. Labour law is based upon a political and economic compromise between organized labour and its employers, and the balance between those two forces is delicate and important. Labour policy is developing, and to imply a constitutional protection for a right to strike would curtail the process of evolution necessary to meet changing circumstances. Accordingly, at this stage of the development of the Charter the right should not be given a constitutional status which would impair its future development by the legislature. Labour relations disputes frequently involve more than legal questions, and to constitutionalize a particular feature of labour relations by entrenching a right to strike would make the extent of the

right to strike a matter of law and much of the value of specialized labour tribunals would be lost. As well, an inquiry under s. 1 of the Charter would be necessary, raising issues which do not admit of clearly correct answers and which are better left to the legislature.

As the Charter does not guarantee a particular form of dispute resolution as a substitute for the right to strike, the provisions of the legislation dealing with the conduct of arbitration were not inconsistent with the Charter.

Per Dickson C.J.C. (dissenting) (Wilson J. concurring):

Although s. 2(*d*) of the Charter guarantees the liberty of persons to be in association or belong to organizations, the guarantee extends beyond a mere concern for associational status to give effective protection to the interests to which the constitutional guarantee is directed. The purpose of the guarantee is to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature. Although s. 2(*d*) normally embraces the liberty to do collectively that which one is permitted to do as an individual, this is only a useful test, as there are circumstances where there is no reasonable analogy involving individuals for the associational activity and, indeed, there is no individual analogy to a strike.

In the labour relations context, the freedom of association includes the freedom to bargain collectively and to strike. The freedom is most essential where the individual is liable to be prejudiced by the action of some larger and more powerful entity, like the government or an employer. Work is one of the most fundamental aspects of a person's life, and the role of association has always been vital as a means of protecting the essential needs and interests of individual working people by overcoming their vulnerability to the strengths of their employers. Even assuming that freedom of association does not extend to protecting associational activity for the pursuit of purely monetary ends, collective bargaining protects important employee interests which are not merely pecuniary. The capacity to bargain collectively has long been recognized as one of the integral and primary functions of associations of working people, and closely related, at least in our existing industrial relations context, is the freedom to strike. Accordingly, effective constitutional protection of the associational interests of employees in the collective bargaining process requires concomitant protection of their freedom to withdraw their services, subject to s. 1 of the Charter. Here, the legislation was aimed at foreclosing a particular collective activity because of its associational nature, as the very nature of a strike is to influence an employer by joint action which would be ineffective if carried out by an individual. Accordingly, the provisions in the legislation infringed the guarantee of freedom of association as they directly abridged the freedom of employees to strike.

Although the provisions were prescribed by law, they were not reasonable and demonstrably justified within s. 1 of the Charter. The mere fact of government employment is not a sufficient reason under s. 1 for limiting freedom of association by prohibiting the freedom to strike. The protection of services which are truly essential is a legislative objective of sufficient importance for the purposes of s. 1. The essentiality of police officers and fire-fighters was obvious and self-evident and rationally connected to this objective. However, it was not self-evident that the services of all hospital and public service employees were truly essential and, in the absence of appropriate evidence, prohibiting the right to strike for all such employees was too drastic a measure for achieving the object of protecting essential services. Nor, in the absence of evidence, could it be said that collective bargaining and strike activity in the public sector would have or cause undue political pressure on government. Accordingly, the provisions of the Public Services Act and the provisions of the Labour Relations Act, insofar as they pertained to all hospital employees, were too broad to be justified under s. 1.

As well, legislative prohibition of freedom to strike must be accompanied by a fair and effective mechanism for dispute resolution by a third party if the legislation is to impair the freedom as little as possible so as to be justified under s. 1 of the Charter. Here the provisions of the three Acts did not provide a fair and effective scheme: they excluded certain matters from arbitration and did not provide a right to refer a dispute to arbitration but instead placed a discretionary power in a minister or an administrative board. Accordingly, the limit on freedom of association in the legislation was not justified under s. 1 of the Charter.

***Dickson C.J.C.* (dissenting) (*Wilson J.* concurring):**

1 This appeal concerns the interpretation of "freedom of association" as guaranteed in s. 2(*d*) of the Canadian Charter of Rights and Freedoms in the labour relations context. The central issues raised are (1) whether legislation enacted by the province of Alberta prohibiting strikes infringes s. 2(*d*) of the Charter; and (2) if so, whether and under what

circumstances legislative limits on the freedom of association are reasonable and demonstrably justified in a free and democratic society for the purposes of s. 1 of the Charter.

I

2

The Reference — Constitutional Questions

3 The Lieutenant Governor in Council of the province of Alberta referred certain questions to the Court of Appeal of Alberta for an advisory opinion pursuant to s. 27(1) of the Judicature Act, R.S.A. 1980, c. J-1:

> 1. Are the provisions of the *Public Service Employee Relations Act* that provide compulsory arbitration as a mechanism for resolution of disputes and prohibit the use of lockouts and strikes, in particular, sections 49, 50, 93 and 94 thereof, inconsistent with the *Constitution Act, 1982* , and if so, in what particular or particulars, and to what extent?
>
> 2. Are the provisions of the *Labour Relations Act* that provide compulsory arbitration as a mechanism for resolution of disputes and prohibit the use of lockouts and strikes, in particular, sections 117.1, 117.2 and 117.3 thereof, inconsistent with the *Constitution Act, 1982* , and if so, in what particular or particulars, and to what extent?
>
> 3. Are the provisions of the *Police Officers Collective Bargaining Act* that provide for compulsory arbitration as a mechanism for the resolution of disputes and prohibit the use of lockouts and strikes, in particular, sec tions 3, 9, and 10 thereof, inconsistent with the *Constitution Act, 1982* , and if so, in what particular or particulars, and to what extent?
>
> 4. Are the provisions of the *Public Service Employee Relations Act* that relate to the conduct of arbitration, in particular sections 48 and 55 thereof, inconsistent with the *Constitution Act, 1982* , and if so, in what particular or particulars, and to what extent?
>
> 5. Are the provisions of the *Labour Relations Act* that relate to the conduct of arbitration, in particular section 117.8 thereof, inconsistent with the *Constitution Act, 1982* , and if so, in what particular or particulars, and to what extent?
>
> 6. Are the provisions of the *Police Officers Collective Bargaining Act* that relate to the conduct of arbitration, in particular sections 2(2) and 15 thereof, inconsistent with the *Constitution Act, 1982* , and if so, in what particular or particulars, and to what extent?
>
> 7. Does the *Constitution Act, 1982* , limit the right of the Crown to exclude any one or more of the following classes of its employees from units for collective bargaining:
>
> > a) an employee who exercises managerial functions;
> >
> > b) an employee who is employed in a confidential capacity in matters relating to labour relations;
> >
> > c) an employee who is employed in a capacity that is essential to the effective functioning of the Legislature, the Executive or the Judiciary;
> >
> > d) an employee whose interests as a member of a unit for collective bargaining could conflict with his duties as an employee?

4 A majority of the Court of Appeal of Alberta answered QQ. 1 to 3 in the negative and did not answer the remaining questions: [1985] 2 W.W.R. 289, 35 Alta. L.R. (2d) 124, 85 C.L.L.C. 14,027, *(*sub nom. *Ref. re Compulsory Arb.)* 57 A.R. 268 . The Alberta Union of Provincial Employees, the Canadian Union of Public Employees and the Alberta International Fire Fighters Association appealed to this court. The Attorney General of Manitoba intervened in support

of the appellants. The Attorney General of Canada and Attorneys General of each of the other provinces except New Brunswick intervened in support of the Attorney General of Alberta.

II

5

Relevant Statutory and Constitutional Provisions

6 The provisions in question in the Public Service Employee Relations Act, R.S.A. 1980, c. P-33, as amended by S.A. 1983, c. 34 and c. 96 (hereafter "Public Service Act"), apply to public service employees in Alberta; in the Labour Relations Act, R.S.A. 1980 (Supp.), c. L-1.1, as amended by S.A. 1983, c. 34, to firefighters and hospital employees; and in the Police Officers Collective Bargaining Act, S.A. 1983, c. P-12.05 (hereafter "Police Officers Act"), to police officers.

7 Constitutional QQ. 1, 2 and 3 of this Reference concern the constitutionality of prohibiting the use of strikes and replacing them with compulsory arbitration.

8 The scheme of each statute is similar. Though the definition of "strike" varies slightly between the Acts, it is common to all that a strike is a cessation of work, a refusal to work or a refusal to continue to work by two or more persons acting in combination or in concert or in accordance with a common understanding: see Public Service Act, s. 1(*q*); Labour Relations Act, s. 1(*u*); Police Officers Act, s. 1(*m*). Each of the Acts prohibits strikes and makes it an offence to strike or promote a strike: see Public Service Act, ss. 93 and 95; Labour Relations Act, ss. 117.1(2), 117.1(4) and 155; Police Officers Act, ss. 3(1) and 46.

9 Each of the statutes includes an arbitration scheme for resolving disputes which arise in the collective bargaining process. If a dispute cannot be resolved, either the employer or the bargaining agent or both may request that an arbitration board be established: Public Service Act, s. 49; Labour Relations Act, s. 117.2; Police Officers Act, s. 9.

10 In the Public Service Act, upon request for the establishment of an arbitration board, the Public Service Employees Relations Board may direct the parties to continue collective bargaining, appoint a mediator or establish an arbitration board depending on its view of the circumstances: s. 50. Under the Labour Relations Act, s. 117.3, and the Police Officers Act, s. 10, the minister, on receipt of a request for the establishment of an arbitration board, may (1) direct the parties to continue collective bargaining and may prescribe the procedure or conditions under which collective bargaining is to take place if he or she considers it appropriate, or (2) if satisfied that the dispute is appropriate to refer to an arbitration board, establish an arbitration board.

11 The provisions at issue in QQ. 4, 5, and 6 of this Reference relate primarily to the arbitrability of certain items and the factors appropriate for consideration by an arbitration board.

12 In the Public Service Act, ss. 48 and 55 provide:

> 48(1) An arbitration board may only consider, and an arbitral award may only deal with, those matters that may be included in a collective agreement.
>
> (2) Notwithstanding subsection (1), none of the following matters may be referred to an arbitration board and provisions in respect of the following matters shall not be contained in the arbitral award of an arbitration board:
>
> (*a*) the organization of work, the assignment of duties and the determination of the number of employees of an employer;
>
> (*b*) the systems of job evaluation and the allocation of individual jobs and positions within the systems;
>
> (*c*) selection, appointment, promotion, training or transfer;

(*d*) pensions.

55 To ensure that wages and benefits are fair and reasonable to the employees and employer and are in the best interest of the public, the arbitration board

(*a*) shall consider, for the period with respect to which the award will apply, the following:

(i) wages and benefits in private and public and unionized and non-unionized employment;

(ii) the continuity and stability of private and public employment, including

(A) employment levels and incidence of layoffs,

(B) incidence of employment at less than normal working hours, and

(C) opportunity for employment;

(iii) any fiscal policies that may be declared from time to time in writing by the Provincial Treasurer for the purposes of this Act;

and

(*b*) may consider, for the period with respect to which the award will apply, the following:

(i) the terms and conditions of employment in similar occupations outside the employer's employment taking into account any geographic, industrial or other variations that the board considers relevant;

(ii) the need to maintain appropriate relationships in terms and conditions of employment between different classification levels within an occupation and between occupations in the employer's employment;

(iii) the need to establish terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered;

(iv) any other factor that it considers relevant to the matter in dispute.

13 Section 117.8 of the Labour Relations Act is identical to s. 55 of the Public Service Act except insofar as it refers to a "compulsory arbitration board" rather than an "arbitration board".

14 Section 15 of the Police Officers Act is also identical to s. 55 of the Public Service Act except insofar as it refers to an "interest arbitration board" rather than an "arbitration board".

15 Question 6 of this Reference refers to s. 2(2) of the Police Officers Act. This section is unique. A similar provision does not appear in any of the other Acts. Section 2 reads:

2(1) All police officers, except the chief constable and deputy chief constables, have the right

(*a*) to be members of a police association and to participate in its lawful activities, and

(*b*) to bargain collectively with the municipality to which they are appointed through a bargaining agent,

except that no police officer shall remain or become a member of a trade union or of an organization that is affiliated, directly or indirectly, with a trade union.

(2) Notwithstanding subsection (1), if an application by a local authority within the meaning of the *Special Forces Pension Act* to bring its police officers under that Act has been granted, there shall be no right to bargain collectively for pension benefits.

16 Question 7 does not specifically refer to the legislation under review. It is concerned, in a general way, with categories of exclusion from units for collective bargaining, and if it is to be answered, it must be answered in the abstract.

17 The following provisions of the Canadian Charter of Rights and Freedoms are relevant to this appeal.

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(*c*) freedom of peaceful assembly; and

(*d*) *freedom of association* . [emphasis added]

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

III

18

Judgment of the Alberta Court of Appeal

19 The majority of the Court of Appeal of Alberta (Kerans J.A., McGillivray C.J.A., D.C. McDonald J. (ad hoc) and Stevenson J.A. concurring) answered QQ. 1 to 3 of the Reference in the negative, held that no answer was necessary for QQ. 4 to 6, and that Q. 7 could not be answered. Belzil J.A., dissenting in part, answered the first six questions in the negative and Q. 7 in the affirmative.

20 Mr. Justice Kerans characterized the ultimate question posed in the Reference as whether the imposition of compulsory arbitration in place of strikes and lockouts has interfered with the freedom of association of the workers involved. He held it did not. According to the majority, the provisions of the Charter must be interpreted in a broad and liberal manner, consistent with the prescriptions of *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, *(*sub nom. *Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.)* [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 41 C.R. (3d) 97, 27 B.L.R. 297, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 2 C.P.R. (3d) 1, 84 D.T.C. 6467, 9 C.R.R. 355, 55 A.R. 291, 55 N.R. 241 , and in defining a Charter right the court need not concern itself with the difficulties that may arise if the right is absolute. Such concerns are more properly dealt with under s. 33 or s. 1 of the Charter. Interpretation should not, however, be extreme or extravagant.

21 Applying these principles to the present Reference, the majority concluded that statutory restrictions on strike activity were not an infringement of s. 2(*d*) of the Charter. Kerans J.A. wrote that a measure of restraint should be exercised in Charter interpretation; courts should not interpret freedom of association as providing Charter protection to "all actions by all groups to carry out all group purposes" [p. 302]. Moreover, the majority was not persuaded that the prohibition of strikes did in fact limit the freedom of association of public sector employees.

22 Mr. Justice Kerans went on to consider the argument that the "right to organize should be extended ... to include the right to strike in order to give validity to the right of workers to organize for their mutual benefit" [p. 310]. For the purposes of the appeal, Kerans J.A. left open the validity of this proposition, but held that even if it were the appropriate

legal standard, the imposition of compulsory arbitration had not been proved in fact to have been detrimental to the vitality of the unions in question. Thus, according to Kerans J.A., the legislative schemes did not interfere with meaningful and effective collective bargaining.

23 The majority declined to answer QQ. 4 to 6 since the negative answer provided for QQ. 1 to 3 made it unnecessary to consider the adequacy of the particular statutory arbitration schemes as a replacement for strike action. The majority held that Q. 7 could not be answered in the abstract because any answer would be dependent on the facts of each particular case.

24 Mr. Justice Belzil, in separate reasons, answered the first three questions in a similar way to the majority but came to his answers by a different route. According to him, freedom of association in the Charter means that " 'two or more persons may in concert with each other do what they please *provided they do not harm others* or transgress such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society' " [p. 321]. He characterized strike activity as "the ultimate weapon of coercion of labour" in the collective bargaining process and found it "unthinkable that a charter for the equal protection of the rights and freedoms of all citizens should guarantee to one citizen an inviolable right to harm another, or enlarge the freedom of one citizen to the detriment of the freedom of the other" [p. 322]. Accordingly, he found the right to strike to be outside the ambit of the Charter and answered QQ. 1 through 3 in the negative.

25 According to Belzil J.A., QQ. 4 to 6 were also to be answered in the negative since in his view the Charter did not impose any restriction on the legislature in specifying what an arbitrator shall or may consider in compulsory arbitration. Belzil J.A. answered Q. 7 in the affirmative. According to him [p. 325]:

> Since collective bargaining by itself, and without resort to strike action, does not cause harm to anyone, any limit on the right of any of the persons in any of the classes mentioned in ss. (a), (b), (c), and (d) of Q. 7 to associate with others in units for collective bargaining is on its face an infringement of the freedom of association guaranteed to each of them by the Charter, unless the limit is justified under s. 1.

Thus, in Mr. Justice Belzil's view, collective bargaining is within the domain of the Charter though strike activity is not.

IV

26

Freedom of Association and S. 2(d) of the Charter

27 Freedom of association is the freedom to combine together for the pursuit of common purposes or the advancement of common causes. It is one of the fundamental freedoms guaranteed by the Charter, a sine qua non of any free and democratic society, protecting individuals from the vulnerability of isolation and ensuring the potential of effective participation in society. In every area of human endeavour and throughout history individuals have formed associations for the pursuit of common interests and aspirations. Through association individuals are able to ensure that they have a voice in shaping the circumstances integral to their needs, rights and freedoms.

28 Freedom of association is the cornerstone of modern labour relations. Historically, workers have combined to overcome the inherent inequalities of bargaining power in the employment relationship and to protect themselves from unfair, unsafe or exploitative working conditions. As the United States Supreme Court stated in *Nat. Lab. Rel. Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 at 33, 81 L. Ed. 893 (1937):

> Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment ...

The "necessities of the situation" go beyond, of course, the fairness of wages and remunerative concerns, and extend to matters such as health and safety in the workplace, hours of work, sexual equality and other aspects of work fundamental to the dignity and personal liberty of employees.

29 The question in the present case is to what extent freedom of association, as guaranteed by s. 2(*d*) of the Canadian Charter of Rights and Freedoms, protects the freedom of workers to *act* in concert, and to bargain and withdraw their services collectively.

1. The Authorities

30 Four important jurisprudential sources warrant review. First, an extensive jurisprudence has developed in Canada on the scope of constitutional protection of freedom of association. Second, the Judicial Committee of the Privy Council has addressed the issue. Third, there are a number of United States cases on freedom of association, some of which have been decided in respect to labour relations. And, fourth, freedom of association in the labour relations context has received considerable attention under international law. It is instructive to examine the Privy Council case on freedom of association before reviewing the Canadian jurisprudence because the former has been a point of departure for many of the decisions in Canadian courts under s. 2(*d*) of the Charter, and is relied upon heavily by the respondent.

31 In assessing the relevant authorities, it is important to keep three considerations in mind. First, are trade unions accorded any constitutional protection at all?

32 Second, what approach is taken to the nature of freedom of association? More specifically, has the relevant tribunal adopted what I shall refer to as a "constitutive" definition of freedom of association whereby freedom of association entails simply the freedom to com bine together but does not extend to the freedom to engage in the activities for which the association was formed? Alternatively, has a wider definition been adopted to the effect that freedom of association embodies both the freedom to join together *and* the freedom to pursue collective activities? In this appeal, the respondent adopts the former view while the appellants adopt the latter.

33 Third, if the wider definition is adopted, what is the scope of activities protected? Not all activities in pursuit of a collective purpose are constitutionally shielded simply by virtue of the fact that they are done in association. The constitutional principle informing the appropriate scope of freedom of association, therefore, must be examined to uncover the limitations imposed in different jurisdictions on associational freedom.

(i) The Judicial Committee of the Privy Council

34 The leading case from the Privy Council is *Collymore v. A.G.*, [1970] A.C. 538, [1970] 2 W.L.R. 233, *(*sub nom. *Collymore v. A.G. Trinidad & Tobago)* [1969] 2 All E.R. 1207 . The issue in *Collymore* was whether the Industrial Stabilisation Act 1965 of Trinidad and Tobago offended freedom of association as guaranteed by the Constitution of Trinidad and Tobago. Section 1 of the Constitution provides:

> It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex, the following human rights and fundamental freedoms, namely ...
>
> (*j*) freedom of association and assembly ...

Section 2, insofar as it is relevant, states:

> Subject to the provisions of sections 3, 4 and 5 of this Constitution, no law shall abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared ...

Under s. 4, Parliament may pass special laws during a public emergency, and under s. 5 Parliament may enact laws which conflict with ss. 1 and 2, subject to certain specified safeguards.

35 Section 34 of the Industrial Stabilisation Act 1965 prohibited workers from participating in a strike in connection with any trade dispute unless, the dispute having been reported to the Minister of Labour, the minister has not referred it to the Industrial Court set up under the Act. The appellants were employees of Texaco Trinidad, Inc. and members of the Oilfield Workers' Trade Union. They sought a declaration in the High Court of Trinidad that the Act was ultra vires the Parliament of Trinidad and Tobago on the ground that it was inconsistent with the constitutional guarantee of freedom of association. Their application was denied.

36 The appellants appealed to the Court of Appeal and the appeal was dismissed: *Collymore v. A.G.* (1967), 12 W.I.R. 5 . Upon an extensive review of the history of legal regulation of strikes, Wooding C.J. articulated a limited definition of freedom of association (at p. 15):

> In my judgment, then, freedom of association means no more than freedom to enter into consensual arrangements to promote the common interest objects of the associating group. The objects may be any of many. They may be religious or social, political or philosophical, economic or professional, educational or cultural, sporting or charitable. But the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the peace, order and good government of the country ... what is or is not inimical to the peace, order and good government of the country is not for the courts to decide.

37 Similarly, Phillips J.A. found " 'this right' [to strike], if it may properly be so called, is something that is in its nature very different from the well-known basic rights or liberties of the subject which derive in England from the 'common law' ..." (p. 29) and a "logical distinction falls clearly to be drawn between freedom of association strictly so called and freedom to engage in any particular activity of an association" (p. 31). Fraser J.A. held that whether freedom of association included the right to strike depended on whether it was a common law right. He found it was not (p. 48):

> The right to indulge in a concerted stoppage of work which alone can constitute a strike is no more than a statutorily implied exemption from criminal and civil consequences limited in scope to action taken in furtherance or contemplation of a trade dispute.

38 On appeal to the Privy Council, Lord Donovan, speaking for the court, agreed with Wooding C.J. that freedom of association does not embody the freedom to pursue the objects of an association and cited with approval the passage quoted above. Accordingly, the appeal was dismissed.

39 While the *Collymore* case provides a relevant perspective on the meaning of freedom of association, its applicability to the Charter is undermined by the different nature of the constitutional documents. The Constitution of Trinidad and Tobago is more similar in character and function to the Canadian Bill of Rights than to the Charter, accepting, as it does, a "frozen rights" approach. It recognizes and declares pre-existing rights and freedoms and is not a source of new constitutional protections. It is for this reason that the courts in *Collymore* were so concerned with ascertaining whether or not the freedom to strike existed at common law prior to the introduction of statutory reform. As elaborated below, the Charter ushers in a new era in the protection of fundamental freedoms. We need not ground protection for freedom of association in pre-existing freedoms.

(ii) Canadian Case Law

40 Canadian jurisprudence on the nature and scope of freedom of association is divided. On the one hand, the British Columbia Court of Appeal and the Federal Court of Appeal have endorsed a constitutive definition of freedom of association, concluding that collective bargaining and strike activity are not protected by freedom of association. This approach accords with the *Collymore* case. On the other hand, the Ontario Divisional Court and the Saskatchewan

Court of Appeal have adopted broader definitions, holding that freedom of association includes the freedom to pursue common purposes and to engage in collective activities, and is not merely the freedom to form and join associations.

41 In the British Columbia case, *Dolphin Delivery Ltd. v. R.W.D.S.U., Loc. 580*, [1984] 3 W.W.R. 481, 52 B.C.L.R. 1, 10 D.L.R. (4th) 198, 84 C.L.L.C. 14,036 (C.A.) , the issue was whether an interlocutory injunction enjoining picketing by the respondent was in breach of the Charter's guarantees of freedom of expression and freedom of association. The case was appealed to this court but only on the freedom of expression issue: [1986] 2 S.C.R. 573, [1987] 1 W.W.R. 577, 9 B.C.L.R. (2d) 273, 38 C.C.L.T. 184, 33 D.L.R. (4th) 174, 87 C.L.L.C. 14,002, 71 N.R. 83 . On the freedom of association issue the majority of the Court of Appeal (Esson and Taggart JJ.A.), relying on the *Collymore* case, held that "freedom to associate carries with it no constitutional protection of the purposes of the association, or means of achieving those purposes" (p. 209). Esson J.A. stated (pp. 207-208):

> The freedom [of association] is that of the individual (*i.e.* , in the words of s. 2, of "everyone"). It is the freedom to unite, to combine, to enter into union, to create and maintain an organization of persons with a common purpose. One of the classes of association guaranteed by s. 2 is undoubtedly the trade union. Everyone has the right to join a trade union and to pursue, with the other members, the collective interests of the membership. It does not follow that the Charter guarantees the objects and purposes of the union, or the means by which those can be achieved.

The majority concluded that the Charter's guarantee of freedom of association does not affect laws which limit or control picketing.

42 *Dolphin Delivery* and *Collymore* were followed by the Federal Court of Appeal in *P.S.A.C. v. R.*, [1984] 2 F.C. 889, 11 D.L.R. (4th) 387, 84 C.L.L.C. 14,054, 11 C.R.R. 97, 55 N.R. 285 (hereinafter "*P.S.A.C.* ") (on appeal to this court, reasons released concurrently). The decision of the Court of Appeal is summarized in detail in this court's reasons in the case. In brief, the Court of Appeal decided that the Public Sector Compensation Restraint Act, S.C. 1980-81-82-83, c. 122, deprived public servants of the right to bargain collectively but that, in doing so, it did not impinge on the Charter's guarantee of freedom of association. According to Mahoney J. (with whom Hugessen J. concurred) at p. 895:

> The right of freedom of association guaranteed by the Charter is the right to enter into consensual arrangements. It protects neither the objects of the association nor the means of attaining those objects.
>
> ... I do not think it desirable to attempt to catalogue the rights and immunities inherent in a trade union's guaranteed freedom of association. Clearly, collective bargaining is, or should be, the primary means by which organized labour expects to attain its principal object: the economic betterment of its membership. However fundamental, it remains a means and, as such, the right to bargain collectively is not guaranteed by paragraph 2(*d*) of the Charter, which guarantees freedom of association.

Marceau J. agreed with Mahoney J. and his reliance on *Dolphin Delivery* and added (p. 897): "I fail to see on the basis of which rule of construction, however liberal it may be, one can be able to give to the words 'freedom of association' a meaning broad enough to include the right to strike."

43 The trial divisions of a number of provinces have adopted the reasoning in *Collymore, Dolphin Delivery* and *P.S.A.C.* in interpreting s. 2(*d*) of the Charter: see *N.A.P.E. v. Nfld.* (1985), 14 C.R.R. 193, 85 C.L.L.C. 14,020, 53 Nfld. & P.E.I.R. 1, 156 A.P.R. 1 (T.D.) ; *Prime v. Man. Lab. Bd.* ; *Mrs. K's Food Prod. Ltd. v. U.F.C.W.* (1983), 3 D.L.R. (4th) 74, 25 Man. R. (2d) 85 (Q.B.) , reversed on other grounds *(*sub nom. *Mrs. K's Food Prod. Ltd. v. U.F.C.W.)* 8 D.L.R. (4th) 641, 28 Man. R. (2d) 234 (C.A.) ; *Halifax Police Officers & NCO's Assn. v. Halifax* (1984), 11 C.R.R. 358, 64 N.S.R. (2d) 638, 143 A.P.R. 638 (T.D.) .

44 In contrast to these decisions are the Ontario and Saskatchewan cases. *S.E.I.U., Loc. 204 v. Broadway Manor Nursing Home* (1983), 44 O.R. (2d) 392, 83 C.L.L.C. 16,019, 4 D.L.R. (4th) 231, 10 C.R.R. 37 (hereinafter "*Broadway Manor* "), concerned an application for judicial review before the Divisional Court of the Ontario High Court of Justice raising the issue of the validity of the Inflation Restraint Act, S.O. 1982, c. 55. The Labour Relations Board had

interpreted s. 13 of that Act as continuing in force, beyond the normal date of termination, collective agreements of public sector employees. Galligan J. disposed of the application on the ground that the Labour Relations Board misconstrued the Act, though he addressed the question whether s. 13 infringed freedom of association "in deference to the substantial argument presented on it, and in view of the fact that my interpretation of s. 13 may not be accepted by others" (p. 406). O'Leary and Smith JJ. were of the view that the board had correctly interpreted the Act, and disposed of the application on the Charter issue.

45 The Divisional Court was unanimous in rejecting the view of freedom of association embodied in *Collymore* . All three judges were of the view that the guarantee of freedom of association in s. 2(*d*) of the Charter extended to the activities of associations, and was not limited merely to the joining and formation of associations. Galligan J. explicitly rejected the interpretation of freedom of association in *Collymore* as inconsistent with "a large and liberal construction" (p. 409). He stated at p. 409:

> But I think that freedom of association if it is to be a meaningful freedom must include freedom to engage in conduct which is reasonably consonant with the lawful objects of an association. And I think a lawful object is any object which is not prohibited by law ...
>
> The purpose of an association of workers in a union is clear — it is to advance their common interests. If they are not free to take such lawful steps that they see as reasonable to advance those interests, including bargaining and striking, then as a practical matter their association is a barren and useless thing. I cannot imagine that the Charter was ever intended to guarantee the freedom of association without also guaranteeing the freedom to do that for which the association is intended. I have no hesitation in concluding that in guaranteeing workers' freedom of association the Charter also guarantees at the very least their freedom to organize, to choose their own union, to bargain and to strike.

O'Leary J. said at p. 445:

> But is the right to strike included in the expression "freedom of association"? The ability to strike, in the absence of some kind of binding conciliation or arbitration, is the only substantial economic weapon available to employees. The right to organize and bargain collectively is only an illusion if the right to strike does not go with it. The main reason that the right to organize and bargain collectively is assured employees is that they may effectively bargain with their employer. To take away an employee's ability to strike so seriously detracts from the benefits of the right to organize and bargain collectively as to make those rights virtually meaningless. If the right to organize and bargain collectively is to have significant value then the right to strike must also be a right included in the expression "freedom of association", and I conclude that it is.

According to Smith J., at p. 463: "The freedom to associate as used in the Charter, not being on its face a limited one, includes the freedom to organize, to bargain collectively and, as a necessary corollary, to strike."

46 The *Broadway Manor* case was recently cited with apparent approval by a different panel of the Ontario Divisional Court (Southey, Griffiths and Saunders JJ.) for the proposition that freedom of association includes the right to bargain collectively: *Chung v. A.C.T.W.U.* (1986), 54 O.R. (2d) 650, 27 D.L.R. (4th) 247, 86 C.L.L.C. 14,036, 15 O.A.C. 138 (Div. Ct.) .

47 In *R.W.D.S.U., Loc. 544, 496, 635 & 955 v. Sask.*, [1985] 5 W.W.R. 97, 19 D.L.R. (4th) 609, 85 C.L.L.C. 14,054, 21 C.R.R. 286, 39 Sask. R. 193 (hereinafter "the *Dairy Workers* case"), a majority of the Saskatchewan Court of Appeal rejected the interpretation of freedom of association in *Collymore, Dolphin Delivery* and *P.S.A.C.* , and came to conclusions similar to those of the Divisional Court in *Broadway Manor* . The *Dairy Workers* case is on appeal to this court and reasons are being released concurrently.

48 The issue was whether the Dairy Workers (Maintenance of Operations) Act, S.S. 1983-84, c. D-1.1 (Bill 44), which prohibited strikes and lockouts in the dairy industry for a certain period, violated s. 2(*d*) of the Charter. The majority

found it did (Bayda C.J.S. and Cameron J.A.), Brownridge J.A. dissenting. Both members of the majority emphasized the necessary connection between associating for the purpose of collective bargaining and the freedom to bargain collectively and strike. Chief Justice Bayda rejected in strong terms the reasoning in *Collymore* (pp. 624-26) and concluded that (1) freedom of association is the freedom of an individual "to perform in association without governmental interference any act that he is free to perform alone", and (2) "Where an act by definition is incapable of individual performance, [an individual] is free to perform the act in association provided the mental component of the act is not to inflict harm" (p. 620). Since an employee is free as an individual to refuse to work, refusal to work by employees in concert is protected by freedom of association. With regard to the second element of freedom of association, the mental element of a strike is to compel an employer to agree to terms and conditions of employment, not to inflict injury. Therefore, a person is free to associate in this manner and accordingly the prohibition of strike activity in the Act violated freedom of association.

49 Cameron J.A. reached the same conclusion. It was his opinion that, though the weight of authority suggested strike activity was not protected by s. 2(*d*) of the Charter, "the emerging framework of principle governing Charter interpretation rather points to its inclusion, especially if we are to be faithful to the call to give these rights and freedoms a '*generous* interpretation ... suitable to give to individuals the *full measure* ' of them" (p. 645). He stated that, if freedom of association protected freedom to form trade unions for the purpose of bargaining, then it must protect freedom to bargain collectively and to strike (pp. 643-44, 647). On this ground Cameron J.A. found freedom of association was abridged by the Act.

50 Mr. Justice Brownridge, dissenting, followed the British Columbia Court of Appeal's decision in *Dolphin Delivery* and accordingly held that freedom of association did not protect strike activities.

51 More recently, in *Black v. Law Soc. of Alta.*, [1986] 3 W.W.R. 590, 44 Alta. L.R. (2d) 1, 20 Admin. L.R. 140, 27 D.L.R. (4th) 527, 20 C.R.R. 117, 68 A.R. 259 (C.A.) (application for leave to appeal to this court granted 12th June 1986, [1986] 1 S.C.R. x, 44 Alta. L.R. (2d) lv, 22 C.R.R. 192n, 72 A.R. 240, 69 N.R. 319), Mr. Justice Kerans has provided further clarification of his approach to freedom of association. This case did not involve a trade union, but rather the associational freedom of lawyers attempting to create an interprovincial law firm. Kerans J.A. adopted the following interpretation (at p. 612):

> ... the special status given to the freedom of association in Canada reflects our tradition about the importance for a free and democratic society of non-governmental organization. In my view, the freedom includes the freedom to associate with others in exercise of Charter-protected rights and also those other rights which — in Canada — are thought so fundamental as not to need formal expression: to marry, for example, or to establish a home and family, pursue an education or gain a livelihood.

In upholding the freedom of lawyers to pursue a livelihood through association under s. 2(*d*), Kerans J.A. emphasized that the pursuit of a livelihood has been accepted as "an appropriate and vital human ambition", that the relationship was between two humans and that it was not "merely commercial". Thus, according to Kerans J.A., the activities of association warrant constitutional protection if they are related to fundamental human rights and needs.

(iii) United States Jurisprudence

52 To understand the United States case law on the freedom of association, one must be aware of the special nature of the constitutional protection of that freedom. Two features, in particular, distinguish the United States Bill of Rights from the Canadian Charter vis-à-vis freedom of association.

53 First, freedom of association is not explicitly protected in the United States Constitution, as it is in the Charter. Instead, it has been implied by the judiciary as a necessary derivative of the First Amendment's protection of freedom of speech, "the right of the people peaceably to assemble," and freedom to petition: see, e.g., *Healy v. James*, 408 U.S. 169, 33 L. Ed. 2d 266, 92 S. Ct. 2338 (1972); *Baird v. State Bar of Arizona*, 401 U.S. 1, 27 L. Ed. 2d 639, 91 S. Ct. 702 (1971); *N.A.A.C.P. v. Button*, 371 U.S. 415, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963); *Louisiana v. N.A.A.C.P.*, 366 U.S. 293,

6 L. Ed. 2d 301, 81 S. Ct. 1333 (1961); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958). The general principle, as developed in the First Amendment jurisprudence of the Supreme Court, is that of freedom "to engage in association for the advancement of beliefs and ideas": *N.A.A.C.P. v. Alabama* , at p. 460. The limited associational purposes protected in the United States are therefore faithful to the derivation of freedom of association from the particular rights and freedoms delineated in the First Amendment.

54 A second important difference between the United States Constitution and the Charter is the absence, in the former, of a provision such as s. 1. The balancing of the protection of rights and freedoms with the larger interests of the community, therefore, must be done in the context of defining the right or freedom itself. Whereas a Canadian court could endorse constitutional protection for strike activity, for example, under s. 2(*d*) of the Charter and yet still uphold certain limits on the freedom to strike under s. 1, this approach is not open to courts in the United States. Accordingly, one would expect a more limited approach to the delineation of the freedom itself. It is with these two caveats in mind that we turn to an appraisal of the United States position.

55 In the context of this appeal, it is important to note that the United States case law supports in general an approach to the implied freedom of association that protects the activities as well as the formation of an association. As Professor Tribe states in American Constitutional Law (1978), at p. 703, the First Amendment protects "the concerted pursuit of ends that would represent fundamental rights in the context of purely individual activity".

56 Similarly, in *Healy v. James* the court emphasized the need to protect the integral activities of an association as a necessary component of freedom of association. In that case the court held that denial by a state college of official recognition to a group of students who wished to form a local chapter of Students for a Democratic Society (S.D.S.) violated First Amendment protection of freedom of association. In coming to its decision, the court stated at pp. 181-82:

> ... the organization's ability to participate in the intellectual give and take of campus debate, *and to pursue its stated purposes* , is limited by denial of access to the customary media of communications with the administration, faculty members, and other students. [emphasis added]

Denial of official recognition made it impossible for the organization to engage in the activities necessary to fulfil its purposes and, accordingly, the denial was unconstitutional.

57 Trade unions have also been afforded protection by the First Amendment. Courts have held that the First Amendment includes the "right to organize collectively and to select representatives for the purposes of engaging in collective bargaining": *United Fed. of Postal Clerks v. Blount*, 325 F. Supp. 879 at 833 (D.C.D.C., 1971), affirmed 404 U.S. 802, 30 L. Ed. 2d 38, 92 S. Ct. 80 (1971); *Thomas v. Collins*, 323 U.S. 516, 89 L. Ed. 430 (1945); *N.L.R.B. v. Jones & Laughlin Steel Corp.* , supra; *U.A.W. v. Wis. Employment Rel. Bd.*, 336 U.S. 245, 93 L. Ed. 651 (1949). This right has been deemed "fundamental" by the Supreme Court: *N.L.R.B. v. Jones & Laughlin Steel Corp.* The First Amendment also protects the activities of trade unions in respect of securing legal representation for their members: *U.M.W. v. Ill. State Bar Assn.*, 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967); *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 12 L. Ed. 2d 89, 84 S. Ct. 1113 (1964).

58 Although trade unions and some of their integral activities are considered by the courts to fall within the protection of the First Amendment, freedom to strike does not appear to be unequivocally protected. As the United States Supreme Court stated in *U.A.W. v. Wis. Employment Rel. Bd.* , at p. 259:

> The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for the lawful purposes of collective bargaining ...

In a similar vein, in *United Fed. of Postal Clerks v. Blount* , constitutional protection for the right of public employees to strike was rejected. In so doing, the court acknowledged the importance of strikes in the private sector as a means of equalizing bargaining power, but felt that this rationale did not extend to public employees given their potential ability to influence political decisions through strike action.

59 In my view, these decisions illustrate an internal balancing of the implied freedom of association with the public interest at the point of definition of the freedom itself. The cases in which a line was drawn to exclude strike activity from the scope of constitutionally protected associational activities are indicative of the strength of the countervail ing concerns (i.e., the public interest) which would find recognition under the Charter in s. 1 rather than in defining the scope of s. 2(*d*). When this balancing phenomenon is considered in conjunction with the implied or derivative status of freedom of association, the hesitation of courts to extend freedom of association to include the right to strike in the public sector is understandable.

60 In summary, my understanding of the United States authorities on freedom of association and its application in the context of labour relations is this: Freedom of association is implicitly guaranteed by the First Amendment and protects the concerted pursuit of ends which are explicitly protected by the First Amendment, namely speech, assembly and petition; in the trade union context, the First Amendment's freedom of association protects the right to organize and select representatives for collective bargaining; it also protects the activities of trade unions in respect of securing legal representation for their members; nevertheless, freedom to strike in the public sector is not protected by the implied freedom of association in the First Amendment.

(iv) International Law

61 International law provides a fertile source of insight into the nature and scope of the freedom of association of workers. Since the close of the Second World War, the protection of the fundamental rights and freedoms of groups and individuals has become a matter of international concern. A body of treaties (or conventions) and customary norms now constitutes an international law of human rights under which the nations of the world have undertaken to adhere to the standards and principles necessary for ensuring freedom, dignity and social justice for their citizens. The Charter conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. The various sources of international human rights law — declarations, covenants, conventions, judicial and quasi-judical decisions of international tribunals, customary norms — must, in my opinion, be relevant and persuasive sources for interpretation of the Charter's provisions.

62 In particular, the similarity between the policies and provisions of the Charter and those of international human rights documents attaches considerable relevance to interpretations of those documents by adjudicative bodies, in much the same way that decisions of the United States courts under the Bill of Rights, or decisions of the courts of other jurisdictions are relevant and may be persuasive. The relevance of these documents in Charter interpretation extends beyond the standards developed by adjudicative bodies under the documents to the documents themselves. As the Canadian judiciary approaches the often general and open textured language of the Charter, "the more detailed textual provisions of the treaties may aid in supplying content to such imprecise concepts as the right to life, freedom of association, and even the right to counsel": Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982), 4 Supreme Court L.R. 287, at p. 293.

63 Furthermore, Canada is a party to a number of international human rights conventions which contain provisions similar or identical to those in the Charter. Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the Charter. The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in Charter interpretation. As this court stated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 85 C.L.L.C. 14,023, 13 C.R.R. 64, 60 A.R. 161, 58 N.R. 81 , interpretation of the Charter must be "aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection." The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of "the full benefit of the *Charter's* protection". I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

64 In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada's international obligations under human rights conventions.

(a) The United Nations Covenants on Human Rights

65 In an effort to make more specific the broad principles agreed to under the United Nations Universal Declaration on Human Rights, 1948, two human rights covenants were adopted unanimously by the United Nations General Assembly on 16th December 1966: the U.N. International Covenant on Economic, Social and Cultural Rights, 1966, G.A. Res. 2200 A (XXI), and the United Nations International Covenant on Civil and Political Rights, ibid. Canada acceded to both covenants on 19th May 1976 and they came into effect on 19th August 1976. Prior to accession the federal government obtained the agreement of the provinces, all of whom undertook to take measures for implementation of the covenants in their respective jurisdictions: see generally, International Covenant on Economic, Social and Cultural Rights: Report of Canada on Articles 10 to 12 of the Covenant (1982), at pp. 1-8.

66 Both of the covenants contain explicit provisions relating to freedom of association and trade unions. Article 8 of the United Nations International Covenant on Economic, Social and Cultural Rights provides the following:

> **Article 8**
>
> 1. The States Parties to the present Covenant undertake to ensure:
>
> *a* The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
>
> *b* The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
>
> *c* The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
>
> *d* The right to strike, provided that it is exercised in conformity with the laws of the particular country.
>
> 2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.
>
> 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

67 Article 8(1)(*c*) extends protection to trade union activities by protecting their right "to function freely". Moreover, explicit reference to strike activity is found in art. 8(1)(*d*). According to it, Canada has undertaken internationally to ensure "The right to strike, provided that it is exercised in conformity with the laws of the particular country." This qualification that the right must be exercised in conformity with domestic law does not, in my view, allow for legislative abrogation of the right though it would appear to allow for regulation of the right: see *Re A.U.P.E. and R. in Right of Alta.* (1980), 120 D.L.R. (3d) 590 at 597 (Alta. Q.B.) . Article 8(2) provides that the rights in art. 8 can be restricted in respect of members of the armed forces, police, or those involved in the administration of the state. This provision, however, is subject to the non-derogation clause, art. 8(3).

68 The relevant provisions of the United Nations International Covenant on Civil and Political Rights are found in art. 22 of that document. They are as follows:

> **Article 22**
>
> 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
>
> 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
>
> 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice the guarantees provided for in that Convention.

Article 22 provides for "freedom of association with others, including the right to form and join trade unions for the protection of [the individual's] interests". Restrictions are justified in certain circumstances under art. 22(2). The third section of art. 22, like art. 8(3) of the International Covenant on Economic, Social and Cultural Rights, makes it clear that the article is not to be interpreted as authorizing legislative measures that would prejudice the guarantees of International Labour Organization Convention 87, to which I shall now turn.

(b) International Labour Organization (I.L.O.) Convention 87

69 As a specialized agency of the United Nations, with representatives of labour, management and government, the I.L.O. is concerned with safeguarding fair and humane conditions of employment. In the present appeal, it is important to consider the Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organise, 68 U.N.T.S. 17 (1948), which was ratified by Canada in 1972 and came into force on 23rd March 1972. As of 31st December 1984, 97 states had ratified it. The relevant provisions of Convention 87 include the following:

> **Part 1 Freedom of Association**
>
> ***Article 1***
>
> Each Member of the International Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions.
>
> ***Article 2***
>
> Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.
>
> ***Article 3***
>
> 1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
>
> 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.
>
> ***Article 4***

Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

Article 5

Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

Article 6

The provisions of articles 2, 3 and 4 hereof apply to federations and confederations of workers' and employers' organisations.

Article 7

The acquisition of legal personality by workers' and employers' organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of articles 2, 3 and 4 hereof.

Article 8

1. In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.

2. The law of the land shall not be such as to impair, nor shall it be so applied to impair, the guarantees provided for in this Convention.

Article 9

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

2. In accordance with the principle set forth in paragraph 8 of article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

Article 10

In this Convention the term "organisation" means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.

Part II Protection of the Right to Organise

Article 11

Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

70 These provisions have been interpreted by various I.L.O. bodies including the Committee on Freedom of Association, established by the Governing Body in 1950-51 to examine complaints of violations of trade union rights, the Committee of Experts, which assesses government reports on the application of I.L.O. standards and conventions in

member states, and commissions of inquiry, appointed by the Governing Body to investigate particular complaints of non-compliance by member states: see generally Valticos, International Labour Law (1979).

71 Interpretations of conventions are only authoritative under the I.L.O. constitution if rendered by the International Court of Justice (and tribunals under art. 37(2) in lieu thereof) or, it would appear, by commissions of inquiry where the dispute is not referred to the court: see Osieke, "The Exercise of the Judicial Function with Respect to the International Labour Organization" (1974-75), 47 Brit. Ybk. of Int. L. 315. The decisions of the Committee on Freedom of Association and the Committee of Experts are not binding though, as Forde points out, the former "comprise the cornerstone of the international law on trade union freedom and collective bargaining": "The European Convention on Human Rights and Labor Law" (1983), 31 Am. J. Comp. L. 301, at p. 302.

72 The general principle to emerge from interpretations of Convention 87 by these decision-making bodies is that freedom to form and organize unions, even in the public sector, must include freedom to pursue the essential activities of unions, such as collective bargaining and strikes, subject to reasonable limits. A commission of inquiry, ap pointed to investigate a complaint against Greece, held that strike activity is implicitly protected by Convention 87: Official Bulletin of the I.L.O.: Special Supplement, vol. 54, No. 2 (1971). The Committee of Experts has reached the same conclusion in its deliberations, pointing out that prohibitions on the right to strike may, unless certain conditions are met, violate Convention 87 (at p. 66):

> In the opinion of the Committee, the principle whereby the right to strike may be limited or prohibited in the public service or in essential services, whether public, semi-public or private, would become meaningless if the legislation defined the public service or essential services too broadly. As the Committee has already mentioned in previous general surveys, the prohibition should be confined to public servants acting in their capacity as agents of the public authority or to services whose interruption would endanger the life, personal safety or health of the whole or part of the population. Moreover, if strikes are restricted or prohibited in the public service or in essential services, appropriate guarantees must be afforded to protect workers who are thus denied one of the essential means of defending their occupational interests. Restrictions should be offset by adequate impartial and speedy conciliation and arbitration procedures, in which the parties concerned can take part at every stage and in which the awards should in all cases be binding on both parties. Such awards, once rendered, should be rapidly and fully implemented.

(Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations, Report III (Pt. 4B), I.L.O., Geneva (1983).)

73 These same principles are manifest in the reports of the Freedom of Association Committee of the Governing Body. In a recent summary of principles established by the Freedom of Association Committee in its decisions, the following paragraphs appear:

> 416. A general prohibition of strikes seriously limits the means available to trade unions to further and defend the interests of their members (Article 10 of Convention No. 87) and the right to organise their activities (Article 3).
>
> 417. Where legislation directly or indirectly places an absolute prohibition on strikes the Committee has endorsed the opinion of the Committee of Experts on the Application of Conventions and Recommendations that such a prohibition may constitute an important restriction of the potential activities of trade unions, which would not be in conformity with the generally recognised principles of freedom of association.
>
> 386. Referring to its recommendation that restrictions on the right to strike would be acceptable if accompanied by conciliation and arbitration procedures, the committee has made it clear that this recommendation does not refer to the absolute prohibition of the right to strike but to the restriction of that right in essential services or in the public service, in relation to which adequate guarantees should be provided to safeguard the workers' interests.

> 387. The substitution by legislative means of compulsory arbitration for the right to strike as a means of resolving labour disputes can only be justified in respect of essential services in the strict sense of the term (i.e. those services whose interruption would endanger the life, personal safety or health of the whole or part of the population).

(Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the I.L.O., 3rd. ed. (1985).)

74 These principles were recently applied in relation to a number of complaints originating in Canada, in particular, in Alberta, Ontario and Newfoundland. A number of the provisions impugned as being in violation of Convention 87 are the subject of this Reference. It is helpful, in the present context, to look at the Freedom of Association Committee's conclusions and recommendations on the provisions relating to prohibitions on strike activity. These conclusions and recommendations were approved unanimously by the I.L.O.'s Governing Body.

75 The complaint (Case 1247) was launched by the Canadian Labour Congress on behalf of the Alberta Union of Provincial Employees against the Government of Canada (Alberta). In discussing s. 93 of the Public Service Act, which bans strike activity of provincial government employees, the committee summarized the principles applicable to complaints about infringements of Convention 87 as follows (I.L.O. Official Bulletin, vol. LXVIII, Series B, No. 3 (1985), pp. 34-35):

> 131. The Committee recalls that it has been called to examine the strike ban in a previous case submitted against the Government of Canada/Alberta (Case No. 893, most recently examined in the 204th Report, paras. 121 to 134, approved by the Governing Body at its 214th Session (November 1980)). In that case the Committee recalled that the right to strike, recognised as deriving from Article 3 of the Convention, is an essential means by which workers may defend their occupational interests. It also recalled that, if limitations on strike action are to be applied by legislation, a distinction should be made between publicly-owned undertakings which are genuinely essential, i.e. those which supply services whose interruption would endanger the life, personal safety or health of the whole or part of the population, and those which are not essential in the strict sense of the term. The Governing Body, on the Committee's recommendation, drew the attention of the Government to this principle and suggested to the Government that it consider the possibility of introducing an amendment to the Public Service Employee Relations Act in order to confine the prohibition of strikes to services which are essential in the strict sense of the term. In the present case, the Committee would again draw attention to its previous conclusions on section 93 of the Act.

The committee reached similar conclusions in respect of s. 117.1 of the Labour Relations Act (I.L.O. Bulletin, vol. LXVIII, Series B., No. 3 (1985), p. 35.):

> 132. Linked to this question of restrictions on the right to strike is one of the specific written allegations, namely that an amendment contained in Bill 44 to section 117.1 of the Labour Relations Act prohibits the right to strike of all hospital employees. The committee notes that this broad exclusion covers kitchen help, janitors, gardeners, etc. but that the Government told the representative of the Director-General that only small groups were affected by section 117.1 and that this question was, in any event, being challenged in the Alberta Court of Appeal and the Canadian Supreme Court. Given that this provision is not sufficiently specific as regards the important qualification of "essential employee", the Committee refers to the principle set out in the above paragraph concerning circumstances in which recourse to strike action may be prohibited. It requests the Government to re-examine section 117.1 so as to confine the prohibition of strikes to services which are essential in the strict sense of the term.

(c) Summary of International Law

76 The most salient feature of the human rights documents discussed above in the context of this case is the close relationship in each of them between the concept of freedom of association and the organization and activities of labour unions. As a party to these human rights documents, Canada is cognizant of the importance of freedom of association to trade unionism, and has undertaken as a binding international obligation to protect to some extent the

associational freedoms of workers within Canada. Both of the U.N. human rights covenants contain explicit protection of the formation and activities of trade unions subject to reasonable limits. Moreover, there is a clear consensus amongst the I.L.O. adjudicative bodies that Convention 87 goes beyond merely protecting the formation of labour unions and provides protection of their essential activities — that is, of collective bargaining and the freedom to strike.

2. The Meaning of S. 2(d)

77 At the outset, it should be noted that, contrary to submissions by the respondent and some of the interveners in support, the purpose of s. 2 of the Charter must extend beyond merely protecting rights which already existed at the time of the Charter's entrenchment. This point was made clear in *Big M Drug Mart Ltd.* In that case the appellant submitted that "freedom of religion" in the Charter had the same meaning as that given it by this court under the Canadian Bill of Rights in *Robertson v. R.*, [1963] S.C.R. 651, 41 C.R. 392, [1964] 1 C.C.C. 1, 41 D.L.R. (2d) 485 [Ont.]. The court rejected this argument (pp. 342-44):

> The basis of the majority's interpretation in *Robertson and Rosetanni, supra* , is the fact that the language of the *Canadian Bill of Rights* is merely declaratory: by s. 1 of the *Canadian Bill of Rights* , certain existing freedoms are "recognized and declared", including freedom of religion ...
>
> It is not necessary to reopen the issue of the meaning of freedom of religion under the *Canadian Bill of Rights* , because whatever the situation under that document, it is certain that the *Canadian Charter of Rights and Freedoms* does not simply "recognize and declare" existing rights as they were circumscribed by legislation current at the time of the *Charter's* entrenchment. The language of the *Charter* is imperative. It avoids any reference to existing or continuing rights ...
>
> I agree with the submission of the respondent that the *Charter* is intended to set a standard upon which *present as well as future* legislation is to be tested. Therefore the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the *Charter* .

It is clear from *Big M Drug Mart Ltd.* that the meaning of a provision of the Charter is not to be determined solely on the basis of pre-existing rights or freedoms. In the present appeal, therefore, whether or not a right or freedom to strike existed prior to the Charter, by virtue of the common law or otherwise, is not determinative of the meaning of s. 2(*d*) of the Charter.

78 Similarly, the scope of the Charter's provisions is not to be confined by the fact of legislative regulation in a particular subject area. In argument, counsel for the respondent seemed to suggest that if freedom of association were interpreted to include strike activity, this would "constitutionalize" a statutory right. His argument appeared to be premised on the proposition that, because the "right to strike" was a subject of legislative regulation prior to the Charter's entrenchment, it followed that strike activity could not be a matter for constitutional protection after entrenchment of the Charter. While it may be true that the Charter was not framed for the purpose of guaranteeing rights conferred by legislative enactment, the view that certain rights and freedoms cannot be protected by the Charter's provisions because they are the subject of statutory regulation is premised on a fundamental misconception about the nature of judicial review under a written constitution.

79 The Constitution is supreme law. Its provisions are not to be circumscribed by what the legislature has done in the past but, rather, the activities of the legislature — past, present and future — must be consistent with the principles set down in the Constitution. As stated in *Ref. re Man. Language Rights*, [1985] 1 S.C.R. 721 at 745, *(*sub nom. *Ref. re Language Rights under S. 23 of Man. Act, 1870, and S. 133 of Constitution Act, 1867)* [1985] 4 W.W.R. 385, 19 D.L.R. (4th) 1, 35 Man. R. (2d) 83, 59 N.R. 321 :

> The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government.

It is, as s. 52 of the *Constitution Act, 1982* declares, the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it.

80 This is not to say, however, that the legislative regulation of collective bargaining and strikes is entirely irrelevant to the manner in which a constitutional freedom to strike may be given effect in particular circumstances: see, on this point, my reasons in the *Dairy Workers* case, released concurrently. But the present case does not involve a challenge to the general labour law of Alberta which permits strike activity, subject to regulation. This appeal concerns the substitution of an entirely different mechanism for resolving labour disputes for particular employees, and one which does not merely regulate the freedom to strike but abrogates it entirely.

81 One further preliminary consideration deserves mention. Section 2 of the Charter protects fundamental "freedoms" as opposed to "rights". Although these two terms are sometimes used interchangeably, a conceptual distinction between the two is often drawn. "Rights" are said to impose a corresponding duty or obligation on another party to ensure the protection of the right in question whereas "freedoms" are said to involve simply an absence of interference or constraint. This conceptual approach to the nature of "freedoms" may be too narrow since it fails to acknowledge situations where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms (e.g., regulations limiting the monopolization of the press may be required to ensure freedom of expression and freedom of the press). Nonetheless, for the purposes of this appeal, we need not determine whether "freedom" may impose affirmative duties on the state, because we are faced with a situation where overt government action in the form of legislation is alleged to interfere with the exercise of freedom of association. We are not concerned in this case with any request for affirmative state action.

82 A wide variety of alternative interpretations of freedom of association has been advanced in the jurisprudence summarized above and in argument before this court.

83 At one extreme is a purely constitutive definition whereby freedom of association entails only a freedom to belong to or form an association. On this view, the constitutional guarantee does not extend beyond protecting the individual's *status* as a member of an association. It would not protect his or her associational *actions* .

84 In the trade union context, then, a constitutive definition would find a prima facie violation of s. 2(*d*) of the Charter in legislation such as s. 2(1) of the Police Officers Act, which prohibits membership in any organization affiliated with a trade union. But it could find no violation of s. 2(*d*) in respect of legislation which prohibited a concerted refusal to work. Indeed, a wide variety of trade union activities, ranging from the organization of social activities for its members, to the establishment of union pension plans, to the discussion of collective bargaining strategy, could be prohibited by the state without infringing s. 2(*d*).

85 The essentially formal nature of a constitutive approach to freedom of association is equally apparent when one considers other types of associational activity in our society. While the constitutive approach might find a possible violation of s. 2(*d*) in a legislative enactment which prohibited marriage for certain classes of people, it would hold inoffensive an enactment which precluded the same people from engaging in the activities integral to a marriage, such as cohabiting and raising children together. If freedom of association only protects the joining together of persons for common purposes, but not the pursuit of the very activities for which the association was formed, then the freedom is indeed legalistic, ungenerous, indeed vapid.

86 In my view, while it is unquestionable that s. 2(*d*), at a minimum, guarantees the liberty of persons to *be* in association or belong to an organization, it must extend beyond a concern for associational status to give effective protection to the interests to which the constitutional guarantee is directed. In this respect, it is important to consider the purposive approach to constitutional interpretation mandated by this court in *R. v. Big M Drug Mart Ltd.* at p. 344:

> This Court has already, in some measure set out the basic approach to be taken in interpreting the *Charter* . In *Hunter v. Southam Inc.* ... this Court expressed the view that the proper approach to the definition of the rights and

freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the *purpose* of such a guarantee; *it was to be understood, in other words, in the light of the interests it was meant to protect* .

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter* . *The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection* . At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker* ... il lustrates, be placed in its proper linguistic, philosophic and historical contexts. [citations omitted; emphasis added]

87 A second approach, the derivative approach, prevalent in the United States, embodies a somewhat more generous definition of freedom of association than the formal, constitutive approach. In the Canadian context, it is suggested by some that associational action which relates specifically to one of the other freedoms enumerated in s. 2 is constitutionally protected, but other associational activity is not.

88 I am unable, however, to accept that freedom of association should be interpreted so restrictively. Section 2(*d*) of the Charter provides an explicit and independent guarantee of freedom of association. In this respect it stands in marked contrast to the First Amendment to the American Constitution. The derivative approach would, in my view, largely make surplusage of s. 2(*d*). The associational or collective dimensions of s. 2(*a*) and (*b*) have already been recognized by this court in *R. v. Big M Drug Mart Ltd.* without resort to s. 2(*d*). The associational aspect of s. 2(*c*) clearly finds adequate protection in the very expression of a freedom of peaceful assembly. What is to be learnt from the United States jurisprudence is not that freedom of association must be restricted to associational activities involving independent constitutional rights but, rather, that the express conferral of a freedom of association is unnecessary if all that is intended is to give effect to the collective enjoyment of other individual freedoms.

89 I am also unimpressed with the argument that the inclusion of s. 2(*d*) with freedoms of a "political" nature requires a narrow or restrictive interpretation of freedom of association. I am unable to regard s. 2 as embodying purely political freedoms. Paragraph (*a*), which protects freedom of conscience and religion, is quite clearly not exclusively political in nature. It would, moreover, be unsatisfactory to overlook our Constitution's history of giving special recognition to collectivities or communities of interest other than the government and political parties. Sections 93 and 133 of the Constitution Act, 1867, and ss. 16-24, 25, 27 and 29 of the Charter, dealing variously with denominational schools, language rights, aboriginal rights and our multicultural heritage, implicitly embody an awareness of the importance of various collectivities in the pursuit of educational, linguistic, cultural and social as well as political ends. Just as the individual is incapable of resisting political domination without the support of persons with similar values, so too is he or she, in isolation, incapable of resisting domination, over the long term, in many other aspects of life.

90 Freedom of association is protected in s. 2(*d*) under the rubric of "fundamental" freedoms. In my view, the "fundamental" nature of freedom of association relates to the central importance to the individual of his or her interaction with fellow human beings. The purpose of the constitutional guarantee of freedom of association is, I believe, to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends. In the famous words of Alexis de Tocqueville in Democracy in America, vol. 1, P. Bradley ed. (1945), at p. 196:

The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears ...

> almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

As social beings, our freedom to act with others is a primary condition of community life, human progress and civilized society. Through association, individuals have been able to participate in determining and controlling the immediate circumstances of their lives and the rules, mores and principles which govern the communities in which they live. As John Stuart Mill stated, "if public spirit, generous sentiments, or true justice and equality are desired, association, not isolation, of interests, is the school in which these excellences are nurtured" (Principles of Political Economy, Appleton (1893), vol. 2, at p. 352).

91 Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict. Emerson, "Freedom of Association and Freedom of Expression" (1964), 74 Yale L.J. 1, at p. 1, states that:

> More and more the individual, in order to realize his own capacities or to stand up to the institutionalized forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives.

92 What freedom of association seeks to protect is not associational activities qua particular activities, but the freedom of individuals to interact with, support and be supported by their fellow humans in the varied activities in which they choose to engage. But this is not an unlimited constitutional licence for all group activity. The mere fact that an activity is capable of being carried out by several people together, as well as individually, does not mean that the activity acquires constitutional protection from legislative prohibition or regulation.

93 I believe that Chief Justice Bayda was right in holding that s. 2(*d*) normally embraces the liberty to do collectively that which one is permitted to do as an individual, a proposition which one American writer, Reena Raggi, perceives to be the cornerstone of freedom of association: "An Independent Right to Freedom of Association" (1977), 12 Harv. C.R.-C.L.L. Rev. 1, at p. 15):

> The basic principle for which recognition will be sought in the formulation of an independent constitutional right of association is that whatever action a person can pursue as an individual, freedom of association must ensure he can pursue with others. Only such a principle assures man that, in his struggle to be independent of government control, he will not be crippled simply because on occasion he strives to achieve that independence with the help of others.

However, it is not in my view correct to regard this proposition as the exclusive touchstone for determining the presence or absence of a violation of s. 2(*d*). Certainly, if a legislature permits an individual to enjoy an activity which it forecloses to a collectivity, it may properly be inferred that the legislature intended to prohibit the collective activity because of its collective or associational aspect. Conversely, one may infer from a legislative proscription which applies equally to individuals and groups that the purpose of the legislation was a bona fide prohibition of a particular activity because of detrimental qualities inhering in the activity (e.g., criminal conduct), and not merely because of the fact that the activity might sometimes be done in association. The proposition articulated by Chief Justice Bayda is therefore a useful test of legislative purpose in some circumstances. There will, however, be occasions when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights. This is precisely the situation in this case. There is no individual equivalent to a strike. The refusal to work by one individual does not parallel a collective refusal to work. The latter is *qualitatively* rather than quantitatively different. The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature.

94 I wish to refer to one further concern. It has been suggested that associational activity for the pursuit of economic ends should not be accorded constitutional protection. If by this it is meant that something as fundamental as a person's livelihood or dignity in the workplace is beyond the scope of constitutional protection, I cannot agree. If, on the other hand, it is meant that concerns of an exclusively pecuniary nature are excluded from such protection, such an argument would merit careful consideration. In the present case, however, we are concerned with interests which go far beyond those of a merely pecuniary nature.

95 Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect. In exploring the personal meaning of employment, Professor D.M. Beatty, in his article "Labour is not a Commodity" in Reiter and Swan (eds.), Studies in Contract Law (1980), has described it as follows, at p. 324:

> As a vehicle which admits a person to the status of a contributing, productive, member of society, employment is seen as providing recognition of the individual's being engaged in something worthwhile. It gives the individual a sense of significance. By realizing our capabilities and contributing in ways society determines to be useful, employment comes to represent the means by which most members of our community can lay claim to an equal right of respect and of concern from others. It is this institution through which most of us secure much of our self-respect and self-esteem.

96 The role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. The capacity to bargain collectively has long been recognized as one of the integral and primary functions of associations of working people. While trade unions also fulfil other important social, political and charitable functions, collective bargaining remains vital to the capacity of individual employees to participate in ensuring fair wages, health and safety protections and equitable and humane working conditions. As Professor Paul Weiler explains in Reconcilable Differences: New Directions in Canadian Labour Law (1980), at p. 31:

> An apt way of putting it is to say that good collective bargaining tries to subject the employment relationship and the work environment to the "rule of law". Many theorists of industrial relations believe that this func tion of protecting the employee from the abuse of managerial power, thereby enhancing the dignity of the worker as a person, is the primary value of collective bargaining, one which entitles the institution to positive encouragement from the law.

97 Professor Weiler goes on to characterize collective bargaining as "intrinsically valuable as an experience in self-government" (p. 33), and writes at p. 32:

> ... collective bargaining is the most significant occasion upon which most of these workers ever participate in making social decisions about matters that are salient to their daily lives. That is the essence of collective bargaining.

A similar rationale for endorsing collective bargaining was advanced in the Woods Task Force Report on Canadian Industrial Relations (1968), at p. 96:

> One of the most cherished hopes of those who originally championed the concept of collective bargaining was that it would introduce into the work place some of the basic features of the political democracy that was becoming the hallmark of most of the western world. Traditionally referred to as industrial democracy, it can be described as the substitution of the rule of law for the rule of men in the work place.

98 Closely related to collective bargaining, at least in our existing industrial relations context, is the freedom to strike. Professor Carrothers, Collective Bargaining Law in Canada, 1st ed. (1965), describes the requisites of an effective system of collective bargaining as follows at pp. 3-4:

> What are the requirements of an effective system of collective bargaining? From the point of view of employees, such a system requires that they be free to engage in three kinds of activity: to form themselves into associations, to engage employers in bargaining with the associations, and to invoke meaningful economic sanctions in support of the bargaining.

99 The Woods Task Force Report at p. 129 identifies the work stoppage as the essential ingredient in collective bargaining:

> Strikes and lockouts are an indispensable part of the Canadian industrial relations system and are likely to remain so in our present socio-economic-political society.

At p. 138 the Report continues:

> Collective bargaining is the mechanism through which labour and management seek to accommodate their differences, frequently without strife, sometimes through it, and occasionally without success. As imperfect an instrument as it may be, there is no viable substitute in a free society.

At p. 175 the Report notes that the acceptance of collective bargaining carries with it a recognition of the right to invoke the economic sanction of the strike. And at p. 176 it is said, "the strike has become a part of the whole democratic system".

100 The importance to collective bargaining of the ultimate threat of a strike has also been recognized in the cases. Lord Wright noted in *Crofter Hand Woven Harris Tweed Co. v. Veitch*, [1942] A.C. 435, [1942] 1 All E.R. 142 at 158 -59 (H.L.), "The right of workmen to strike is an essential element in the principle of collective bargaining." As the editors of Kahn-Freund's Labour and the Law, 3rd ed. (1983), point out in respect of this comment: "If the workers could not, in the last resort, collectively refuse to work, they could not bargain collectively" (at p. 292). See also *Broadway Manor; Dairy Workers* case; *Blount* , per Wright J. The necessity and lawfulness of strikes has also been acknowledged by this court: *Perrault v. Gauthier* (1898), 28 S.C.R. 241 at 256 [Que.]; *C.P.R. v. Zambri*, [1962] S.C.R. 609 at 618 and 621, 34 D.L.R. (2d) 654 [Ont.].

101 I am satisfied, in sum, that whether or not freedom of association generally extends to protecting associational activity for the pursuit of exclusively pecuniary ends — a question on which I express no opinion — collective bargaining protects important employee interests which cannot be characterized as merely pecuniary in nature. Under our existing system of industrial relations, effective constitutional protection of the associational interests of employees in the collective bargaining process requires concomitant protection of their freedom to withdraw collectively their services, subject to s. 1 of the Charter.

3. Application to the Alberta Legislation

102 All three enactments prohibit strikes and, as earlier stated, define a strike as a cessation of work or refusal to work by two or more persons acting in combination or in concert or in accordance with a common understanding. What is precluded is a collective refusal to work at the conclusion of a collective agreement. There can be no doubt that the legislation is aimed at foreclosing a particular collective activity because of its associational nature. The very nature of a strike, and its raison d'être, is to influence an employer by joint action which would be ineffective if it were carried out by an individual. Professor Harry Arthurs refers, correctly in my respectful opinion, to the "notion of collective action" as "the critical factor" in the definition of "strike": "The Right to Strike in Ontario and the Common Law Provinces of Canada" (1967), Proceedings of the Fourth International Symposium on Comparative Law, University of Ottawa, at p. 187. It is precisely the individual's interest in joining and acting with others to maximize his or her potential that is protected by s. 2(*d*) of the Charter.

103 Section 93 of the Public Service Act reads as follows:

> 93(1) No person or trade union shall cause or attempt to cause a strike by the persons to whom this Act applies.

(2) No person to whom this Act applies shall strike or consent to a strike.

Section 117.1(2) of the Labour Relations Act states:

(2) No employee to whom this Division applies shall strike.

Section 3(1) of the Police Officers Act provides:

3(1) Notwithstanding section 2, no police officer, bargaining agent or person acting on behalf of a bargaining agent shall strike, cause a strike or threaten to cause a strike.

These provisions directly abridge the freedom of employees to strike and thereby infringe the guarantee of freedom of association in s. 2(*d*) of the Charter.

V

104

Section 1

105 The respondent submits that even if any of the legislative provisions at issue in this appeal violates freedom of association as guaranteed by s. 2(*d*) of the Charter, it can be upheld under s. 1 of the Charter. For ease of reference I repeat s. 1:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

No question arises as to whether the limits on strike activity and collective bargaining in the legislation in question are "prescribed by law", as the legislation is duly enacted by a properly constituted legislature.

106 It is necessary, however, to determine whether the limits imposed by the provisions in question are "reasonable" and "demonstrably justified in a free and democratic society". Previous cases in this court have established a number of principles for a s. 1 inquiry. In making a determination under s. 1, a court must be cognizant of an important contextual factor: the application of s. 1 arises in the context of a violation of a constitutionally guaranteed right or freedom. Madame Justice Wilson expressed this principle in *Singh v. Min. of Employment & Immigration*, [1985] 1 S.C.R. 177 at 218, 12 Admin. L.R. 137, 17 D.L.R. (4th) 422, 14 C.R.R. 13, 58 N.R. 1 [Fed.]:

It seems to me that it is important to bear in mind that the rights and freedoms set out in the *Charter* are fundamental to the political structure of Canada and are guaranteed by the *Charter* as part of the supreme law of our nation. I think that in determining whether a particular limitation is a reasonable limit prescribed by law which can be "demonstrably justified in a free and democratic society" it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the *Charter* .

The onus of demonstrating that a limit on a right or freedom should be upheld under s. 1 is on the party seeking to uphold the limit. The standard of proof is the preponderance of probabilities and, as a general rule, evidence is required to meet this standard: see *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 19 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87 , and authorities therein.

107 The constituent elements of any s. 1 inquiry are as follows. First, the legislative objective, in pursuit of which the measures in question are implemented, must be sufficiently significant to warrant overriding a constitutionally guaranteed right: it must be related to "concerns which are pressing and substantial in a free and democratic society". Second, the means chosen to advance such an objective must be reasonable and demonstrably justified in a free and democratic society. This requirement of proportionality of means to ends normally has three aspects: a) there must be a

rational connection between the measures and the objective they are to serve; b) the measures should impair as little as possible the right or freedom in question; and c) the deleterious effects of the measures must be justifiable in light of the objective which they are to serve. See *Oakes* and authorities cited therein.

108 As I understand the respondent's submissions, there are two objectives which the legislation in issue in this Reference is designed to achieve: 1) protection of essential services and 2) protection of government from political pressure through strike action. The question is whether either or both of these are "of sufficient importance to warrant overriding a constitutionally guaranteed right or freedom" (*Big M Drug Mart Ltd.* [p. 352]) or, in other words, whether they relate to "pressing and substantial concerns" (*Oakes* [pp. 138-39]). The proportionality of the measures in relation to the objectives must then be assessed.

109 I observe at the outset that the analysis below is limited to assessing the justifications advanced by the province for its legislative action. It is the actual objectives of the Alberta legislature and not some other legitimate but hypothetical objectives for passing the particular statutes in question that must be scrutinized. It may be that other rationales will be advanced in future cases. The court has not been asked, in this case, to determine whether economic harm to third parties can justify the abrogation of the freedom to strike. Nor has it been asked to determine whether a universally applicable substitute for the confrontational strike/lockout paradigm of present-day industrial relations would be acceptable. It might be that some alternative scheme, be it a novel one of worker participation in employer decisions through ownership or otherwise, or a more familiar one, such as arbitration, would be acceptable. The Constitution does not freeze into place an existing formula of industrial relations.

1. The Protection of Essential Services

110 The protection of services which are truly essential is in my view a legislative objective of sufficient importance for the purpose of s. 1 of the Charter. It is, however, necessary to define "essential services" in a manner consistent with the justificatory standards set out in s. 1. The logic of s. 1 in the present circumstances requires that an essential service be one the interruption of which would threaten serious harm to the general public or to a part of the population. In the context of an argument relating to harm of a non-economic nature I find the decisions of the Freedom of Association Committee of the I.L.O. to be helpful and persuasive. These decisions have consistently defined an essential service as a service "whose interruption would endanger the life, personal safety or health of the whole or part of the population": Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the I.L.O., above, para. 387. In my view, and without attempting an exhaustive list, persons essential to the maintenance and administration of the rule of law and national security would also be included within the ambit of essential services. Mere inconvenience to members of the public does not fall within the ambit of the essential services justification for abrogating the freedom to strike.

111 Having decided that the protection of essential services is an objective of sufficient importance, it is necessary for the respondent to demonstrate proportionality between the measures adopted and the objective. Four classes of employees are covered by the Acts: public service employees (Public Service Act); firefighters and employees of employers who operate approved hospitals under the Hospitals Act (Labour Relations Act); and police officers (Police Officers Act). The government must, as a first step, prove, on a balance of probabilities, that these employees are "essential"; otherwise the abrogation of their freedom to strike would be over-inclusive and unjustified under s. 1.

112 Counsel for the Attorney General of Alberta did not adduce any evidence on this point. He submitted only that essential services must not be interrupted and that, though some of the employees covered by the Acts are not essential, "they are so closely linked to those providing essential services as to make it reasonable that they should be treated in the same way". In *Oakes* , this court acknowledged that the extent of evidentiary submissions required under s. 1 would vary according to the nature of the case (p. 138):

> Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing

> the limit ... I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.

113 The essentiality of police officers and firefighters is, in my view, obvious and self-evident, and does not have to be proven by evidence. Interruption in police protection and firefighting would clearly endanger life, personal safety and health. Therefore, I believe the legislature's decision to prevent such interruptions is rationally connected to the objective of protecting essential services.

114 The situation with respect to employees of employers who operate approved hospitals under the Hospitals Act is quite different. Prohibiting the right to strike across the board in hospital employment is too drastic a measure for achieving the object of protecting essential services. It is neither obvious nor self-evident that *all* bargaining units in hospitals represent workers who provide essential services, or that those who do not provide essential services are "so closely linked" to those who do as to justify similar treatment. As pointed out above, the Freedom of Association Committee of the I.L.O. expressed concern about the over-inclusiveness of s. 117.1 of the Labour Relations Act:

> The committee notes that this broad exclusion covers kitchen help, janitors, gardeners, etc. ... Given that this provision is not sufficiently specific as regards the important qualification of "essential employee", the Committee refers to the principle ... concerning circumstances in which recourse to strike action may be prohibited. It requests the Government to re-examine section 117.1 so as to confine the prohibition of strikes to services which are essential in the strict sense of the term.

115 Counsel for the Attorney General has not provided any evidence or information from which it can be concluded on a preponderance of probabilities that services will be interrupted whenever strike activity is undertaken by any of the bargaining units in a hospital. While it may be obvious or self-evident that strikes by certain hospital employees, such as nurses or doctors, would be inimical to the hospital's ability to dispense proper health care, the same cannot be said for all hospital workers without some evidentiary basis. For this reason, I do not believe it can be maintained that the employees covered by s. 117.1 of the Labour Relations Act are all "essential". The provision is too wide to be justified as relating to essential services for the purpose of s. 1.

116 The Public Service Act is, in my opinion, a victim of the same defect. The Act applies to employees who are employed by employers described in s. 1(*o*):

> (*o*) "employer" means
>
> (i) the Crown in right of Alberta, or
>
> (ii) a corporation, commission, board, council or other body, all or a majority of whose members or directors
>
> (A) are designated by an Act of the Legislature,
>
> (B) can be appointed or designated either by the Lieutenant Governor in Council or by a Minister of the Crown in right of Alberta or partly by the Lieutenant Governor in Council and partly by a Minister of the Crown in right of Alberta, whether the power of appointment or designation is exercised or not or is only partially exercised, or
>
> (C) are in part designated by an Act of the Legislature and in part can be appointed or designated either by the Lieutenant Governor in Council or by a Minister of the Crown in right of Alberta or partly by the Lieutenant Governor in Council and partly by a Minister of the Crown in right of Alberta, whether the power of appointment or designation is exercised or not or is only partially exercised.

To deny all the employees covered by this provision the freedom to strike is, in my view, too drastic a means for securing the purpose of protecting essential services. It is neither obvious nor self-evident that all the employees covered by the Public Service Act perform essential services. No evidence was adduced by counsel for the Attorney General on this point. The onus upon the Government of Alberta has not, in my view, been satisfied. To conclude, the limit on freedom

of association of public servants imposed by the abrogation of the right to strike in the Public Service Act is not justified under s. 1 of the Charter on the basis of the essential services argument.

2. Protection of the Government from Political Pressure Argument

117 As mentioned above, the respondent advances a second argument for justification under s. 1, namely, that the legislation is necessary to protect the government from the political pressure of strike action by its employees. In other words, even if public servants are not truly essential, the fact they are employees of the government is sufficient reason for denying them the freedom to strike. I do not find this argument convincing. The respondent has not submitted any evidence from which it can be concluded that collective bargaining and strike activity in the public sector have caused or will cause undue political pressure on government. Indeed, all across Canada, collective bargaining and freedom to strike have played an important role in public sector labour relations. A survey of Public Service Collective Bargaining Legislation in Canada, prepared by the Alberta Department of Labour and filed by the respondent in the Court of Appeal, indicates that Nova Scotia and Ontario are the only other jurisdictions in Canada which purport to impose a blanket prohibition on public sector strikes. In commenting on the introduction of a full-scale collective bargaining scheme at the federal level in the 1960s, Professor Harry Arthurs states in "Collective Bargaining in the Public Service of Canada: Bold Experiment or Act of Folly" (1969), 67 Mich. L. Rev. 971, at p. 974:

> ... one potentially formidable obstacle to federal recognition of the collective bargaining rights of public employees was simply not present in Canada in the mid-1960s. The traditional belief — or myth — that collective bargaining is somehow intrinsically incompatible with the dignity and functions of a sovereign state had been subverted by years of practical experience with labor relations on the private sector model in governmental and quasi-governmental employment.

118 Furthermore, academic debate on the question of sovereignty has occurred primarily in the United States, where a fundamentally different constitutional system prevails: see, for example, Harry H. Wellington and Ralph K. Winter Jr., "The Limits of Collective Bargaining in Public Employment" (1969), 78 Yale L.J. 1107; W.B. Cunningham, "Public Employment, Collective Bargaining and the Conventional Wisdom: Canada and U.S.A." (1966), 21 Ind. Rel. 406. A number of the academic authorities cited by the respondent in fact support collective bargaining and freedom to strike in the public sector: see, for example, Morley Gunderson (ed.), Collective Bargaining in the Essential and Public Service Sectors (1975), at p. viii. I find difficult the conclusion that all strike activity by government employees would exert undue political pressure on the government. The dissenting words of Chief Justice Roberts of the Rhode Island Supreme Court at pp. 448-49 in *Sch. Ctee. of Westerly v. Westerly Teachers Assn.*, 299 A. 2d 441 (1973), are helpful in this respect:

> ... I cannot agree that every strike by public employees necessarily threatens the public welfare and governmental paralysis ... The fact is that in many instances strikes by private employees pose the far more serious threat to the public interest than would many of those engaged in by public employees ... In short, it appears to me that to deny all public employees the right to strike because they are employed in the public sector would be arbitrary and unreasonable.

119 In my opinion, the fact of government employment is not a sufficient reason for the purpose of s. 1 for limiting freedom of associa tion through legislative prohibition of freedom to strike. It has not been shown that all public service employees have a substantial bargaining advantage on account of their employer's governmental status. Nor has it been shown that any political pressure exerted on the government during strikes is of an unusual or peculiarly detrimental nature.

3. Arbitration as a Substitute for Freedom to Strike

120 As noted above, the provisions relating to police officers and firefighters meet the first test of proportionality: there is a rational connection between prohibiting freedom to strike in these services and the legislative objective of protecting essential services. It is helpful to consider, therefore, whether the measures adopted impair as little as possible

the freedom of association of those affected. Clearly, if the freedom to strike were denied and no effective and fair means for resolving bargaining disputes were put in its place, employees would be denied any input at all in ensuring fair and decent working conditions, and labour relations law would be skewed entirely to the advantage of the employer. It is for this reason that legislative prohibition of freedom to strike must be accompanied by a mechanism for dispute resolution by a third party. I agree with the Alberta International Firefighters Association at p. 22 of its factum that "it is generally accepted that employers and employees should be on an equal footing in terms of their positions in strike situations or at compulsory arbitration where the right to strike is withdrawn". The purpose of such a mechanism is to ensure that the loss in bargaining power through legislative prohibition of strikes is balanced by access to a system which is capable of resolving in a fair, effective and expeditious manner disputes which arise between employees and employers.

121 As noted above, the purpose of the prohibitions of strike activity of police officers and firefighters is to prevent interruptions in essential services. If prohibition of strikes is to be the least drastic means of achieving this purpose it must, in my view, be accompanied by adequate guarantees for safeguarding workers' interests. Any system of conciliation or arbitration must be fair and effective or, in the words of the I.L.O. Committee on Freedom of Association "adequate, impartial and speedy ... in which the parties can take part at every stage": Case No. 1247, I.L.O. Official Bulletin, vol. LXVIII, Series B., No. 3 (1985), p. 36.

122 The contentious issues in respect to the legislative provisions concerning arbitration are as follows:

(i) they require the arbitrator to consider certain items;

(ii) they limit the arbitrability of certain items; and

(iii) they place discretion in the hands of a minister or agency of the government to decide whether or not a dispute will go to arbitration.

I will deal with each of these in turn.

(i) The Arbitrator Must Consider Certain Items

123 Under the Public Service Act, the Labour Relations Act and the Police Officers Act arbitrators are required to consider (i) the fiscal policies of the government as declared by the Provincial Treasurer in writing (s. 55(*a*)(iii) of the Public Service Act, s. 117.8(*a*)(iii) of the Labour Relations Act and s. 15(*a*)(iii) of the Police Officers Act); and (ii) wages and benefits in private and public unionized and non-unionized employment (s. 55(*a*)(i) of the Public Service Act, s. 117.8(*a*)(i) of the Labour Relations Act and s. 15(*a*)(i) of the Police Officers Act). Counsel for the appellant Alberta International Firefighters Association, submits that these provisions offend the obligation of the government to provide fair and adequate safeguards for employees as a substitute for the freedom to strike. The respondent submits that it is not unreasonable for the government to desire that the matters listed be considered by arbitration tribunals. The question, however, is not the desirability or lack thereof of arbitration tribunals considering the enumerated factors but, rather, whether requiring arbitrators to consider these matters detracts from the fairness and effectiveness of the arbitration procedure.

124 The appellants submit that the sections of the Public Service Act, the Labour Relations Act and the Police Officers Act which require government fiscal policy to be taken into account favour the government employer and, thereby, compromise the fairness of the arbitration system. I disagree. In my view the fiscal policy of the government is a measure of the employer's ability to pay, and there is nothing improper in requiring the arbitrator to consider it. The arbitrator is not bound by the statute to take the stated fiscal policy as the conclusive measure of the employer's ability to pay, and it would be open to the unions to make submissions requesting that the arbitrator depart from the fiscal policy.

125 Turning to s. 55(*a*)(i) of the Public Service Act, s. 117.8(*a*)(i) of the Labour Relations Act and s. 15(*a*)(i) of the Police Officers Act, which require that arbitrators consider the wages and benefits of private and public unionized and non-unionized employees, I do not believe these sections compromise the adequacy of the arbitration system.

As Professor Swan has stated (in The Search for Meaningful Criteria in Interest Arbitration, Reprint Series No. 41, Industrial Relations Centre, Queen's University (1978)) at p. 11: "Fairness remains an essentially relative concept, and it therefore depends directly upon the identification of fair comparisons if it is to be meaningful". Under ss. 55(*a*)(i), 117.8(*a*)(i) and 15(*a*)(i) the arbitrator is required to consider, presumably for the sake of comparison, the wages of unionized, non-unionized, public sector and private sector employees. The appellant, Alberta International Firefighters Association, implies that ss. 55(*a*)(i), 117.8(*a*)(i) and 15(*a*)(i) mandate an unfair comparison; one that "is bound to result in lowering the wages of the unionized employees". I do not agree. A requirement to establish as broad a comparative base as possible does not, in my view, compromise the fairness of the arbitration, or disadvantage the employees concerned.

(ii) Limiting the Arbitrability of Certain Items

126 Section 48(2) of the Public Service Act establishes that certain matters cannot be referred to arbitration or contained in an arbitral award. These matters are generally arbitrable in other labour relations contexts, as is implied by the fact that s. 48(2) operates notwithstanding s. 48(1). Section 2(2) of the Police Officers Act denies, under certain circumstances, the right of police officers to bargain collectively for pension benefits. Counsel for the Attorney General submits these provisions satisfy s. 1 of the Charter on the grounds that: 1) the matters referred to in s. 48(2)(*a*), (*b*) and (*c*) are traditionally not the subject of collective agreements because they must be under the absolute control of management; 2) pension benefits are the subject of other legislation and cannot, therefore, be bargainable or set by arbitration; and 3) the subjects referred to in s. 48 of the Public Service Act are not of obvious vital concern to the employee. Counsel for the Alberta Union of Provincial Employees points out that the matters covered by s. 48 of the Public Service Act (and s. 2(2) of the Police Officers Act) are common and usual subjects of arbitration or strike activity in labour relations. As well, counsel rejects the respondent's assertion that the enumerated matters are not ones important to the employees as a collectivity. The Public Service Employee Relations Board, in a number of recent decisions on the arbitrability of items under s. 48(2) of the Act, has held that matters such as the scheduling of normal hours of work and equal pay for work of equal value are not arbitrable under the Act: *A.U.P.E. v. R. in Right of Alta.* , unreported, 24th November 1982; *A.U.P.E. v. R. in Right of Alta.* , unreported, 12th November 1982.

127 As noted above, an arbitration system must be fair and effective if it is to be adequate in restoring to employees the bargaining power they are denied through prohibition of strike activity. In my opinion, the exclusion of these subjects from the arbitration process compromises the effectiveness of the process as a means of ensuring equal bargaining power in the absence of freedom to strike. Serious doubt is cast upon the fairness and effectiveness of an arbitration scheme where matters which would normally be bargainable are excluded from arbitration. "Given that without some binding mechanism for dispute resolution, meaningful collective bargaining is very unlikely, it seems more reasonable to ensure that the scope of arbitrability is as wide as the scope of bargainability if the bargaining process is to work at all": Swan, "Safety Belt or Strait-Jacket? Restrictions on the Scope of Public Sector Collective Bargaining", in Essays in Collective Bargaining and Industrial Democracy [England and Lermer eds. (1983)], 20, at p. 36.

128 It may be necessary in some circumstances for a government employer to maintain absolute control over aspects of employment through exclusion of certain subjects from arbitration. The presumption, however, must be against such exclusion to ensure the effectiveness of an arbitration scheme as a substitute for freedom to strike is not compromised. In the present case, the government has not satisfied the onus upon it to demonstrate such necessity.

(iii) The Absence of a Right to go to Arbitration

129 None of the arbitration schemes in the Acts in question in this Reference provides a right to refer a dispute to arbitration. Rather, a discretionary power is placed in a minister or an administrative board to establish an arbitration board if deemed appropriate: see above, s. 50 of the Public Service Act, s. 117.3 of the Labour Relations Act, and s. 10 of the Police Officers Act. Under s. 50 of the Public Service Act the Public Service Employee Relations Board can direct the parties to continue collective bargaining or appoint a mediator instead of establishing an arbitration board. Under s. 117.3 of the Labour Relations Act and s. 10 of the Police Officers Act the minister can direct the parties to continue collective bargaining and can prescribe the procedures or conditions under which it is to take place.

130 The respondent makes no submissions in respect of these provisions. In the absence of argument or evidence demonstrative of why such government involvement is necessary in the arbitration process, I believe the legal capacity of a minister or administrative board to determine when and under what circumstances a dispute is to reach arbitration compromises the fairness and effectiveness of compulsory arbitration as a substitute for the freedom to strike. In effect, under the Labour Relations Act and Police Officers Act the employer — i.e., the executive branch of government — has absolute authority to determine at what point a dispute should go to arbitration. Such authority considerably undermines the balance of power between employer and employee which the arbitration scheme is designed to promote. Under previous legislation either party had an absolute right to remit the matter to an arbitration board. In the present legislation they do not, and counsel for the respondent has not provided any reasons for this alteration. The discretionary power of a minister or administrative board to determine whether or not a dispute goes to arbitration is, in my view, an unjustified compromise of the effectiveness of the arbitration procedure in promoting equality of bargaining power between the parties.

4. Conclusions Regarding S. 1

131 The analysis under s. 1 can be summarized as follows:

132 1. The limit on freedom of association as guaranteed by s. 2(*d*) of the Charter imposed by s. 93 of the Public Service Act is not justified under s. 1 of the Charter. It is over-inclusive in respect of those to whom it applies, and the Act's arbitration system is not an adequate replacement for the employees' freedom to strike.

133 2. The limit on freedom of association as guaranteed by s. 2(*d*) of the Charter imposed by s. 117.1 of the Labour Relations Act is not justified under s. 1 of the Charter. It is over-inclusive in its application to hospital employees, and the Act's arbitration system is not an adequate replacement for the employees' freedom to strike.

134 3. The limit on freedom of association as guaranteed by s. 2(*d*) of the Charter imposed by s. 3 of the Police Officers Act is not justified under s. 1 of the Charter. The Act's arbitration system is not an adequate replacement for the employees' freedom to strike.

VI

135

Conclusion

136 The constitutional questions should be answered as follows:

> 1. Are the provisions of the *Public Service Employee Relations Act* that provide compulsory arbitration as a mechanism for resolution of disputes and prohibit the use of lockouts and strikes, in particular, sections 49, 50, 93 and 94 thereof, inconsistent with the *Constitution Act, 1982* , and if so, in what particular or particulars, and to what extent?

Answer: Section 93 limits freedom of association as guaranteed in s. 2(*d*) of the Charter. This limit is not justified under s. 1 of the Charter because the Act is over-inclusive in its application to employees whose services are not essential, and because the arbitration scheme envisaged in ss. 48, 49, 50 and 55 is not an adequate replacement for the freedom to strike.

137 Sections 49 and 50 do not themselves limit freedom of association. However, the absence of a right to refer a dispute to arbitration, which flows from these sections, contributes to the inadequacy of the arbitration scheme as a replacement for the freedom to strike, and therefore to the failure of s. 93 to be justified under s. 1 of the Charter.

138 Section 94 does not violate s. 2(*d*) of the Charter as it is not directed at associational activity.

2. Are the provisions of the *Labour Relations Act* that provide compulsory arbitration as a mechanism for resolution of disputes and prohibit the use of lockouts and strikes, in particular, section 117.1, 117.2 and 117.3 thereof, inconsistent with the *Constitution Act, 1982* , and if so, in what particular or particulars, and to what extent?

Answer: Section 117.1(2) limits freedom of association as guaranteed in s. 2(*d*) of the Charter. This limit is not justified under s. 1 of the Charter because, insofar as it pertains to all hospital employees under s. 117.1(1)(*b*), the Act is over-inclusive in its application to employees whose services are not essential, and because the arbitration scheme envisaged in ss. 117.2, 117.3 and 117.8 is not an adequate replacement for the freedom to strike.

139 Sections 117.2 and 117.3 do not themselves limit freedom of association. However, the absence of a right to refer a dispute to arbitration, which flows from these sections, contributes to the inadequacy of the arbitration scheme as a replacement for the freedom to strike, and therefore to the failure of s. 117.1(2) to be justified under s. 1.

140 If the arbitration scheme were adequate, s. 117.1(2) would be justifiable as a reasonable limitation on the freedom of association of the firefighters described in s. 117(1)(*a*).

3. Are the provisions of the *Police Officers Collective Bargaining Act* that provide for compulsory arbitration as a mechanism for the resolution of disputes and prohibit the use of lockouts and strikes, in particular, sections 3, 9, and 10 thereof, inconsistent with the *Constitution Act, 1982* , and if so, in what particular or particulars, and to what extent?

Answer: Section 3(1) limits freedom of association as guaranteed in s. 2(*d*) of the Charter. This limit is not justified under s. 1 of the Charter because the arbitration scheme envisaged in ss. 9, 10 and 15 is not an adequate replacement for the freedom to strike.

141 Sections 9 and 10 do not themselves limit freedom of association. However, the absence of a right to refer a dispute to arbitration, which flows from these sections, contributes to the inadequacy of the arbitration scheme as a replacement for the freedom to strike and, therefore, to the failure of s. 3(1) to be justified under s. 1 of the Charter.

142 If the arbitration scheme were adequate, s. 3(1) would be justifiable as a reasonable limitation on the freedom of association of police officers.

4. Are the provisions of the *Public Service Employee Relations Act* that relate to the conduct of arbitration, in particular sections 48 and 55 thereof, inconsistent with the *Constitution Act, 1982* , and if so, in what particular or particulars, and to what extent?

Answer: Those provisions do not themselves violate freedom of association. However, s. 48(2) by unreasonably limiting the subject matter of arbitration contributes to the inadequacy of the arbitration system put in place of the freedom to strike and therefore to the failure of the limitation on freedom of association in s. 93 to be justified under s. 1 of the Charter. Section 55 neither violates freedom of association nor contributes to the inadequacy of the arbitration scheme.

5. Are the provisions of the *Labour Relations Act* , that relate to the conduct of arbitration, in particular section 117.8 thereof, inconsistent with the *Constitution Act, 1982* , and if so, in what particular or particulars, and to what extent?

Answer: Section 117.8 does not violate freedom of association. Nor does it contribute to the inadequacy of the arbitration system contained in the Act.

6. Are the provisions of the *Police Officers Collective Bargaining Act* that relate to the conduct of arbitration, in particular sections 2(2) and 15 thereof, inconsistent with the *Constitution Act, 1982* , and if so, in what particular or particulars, and to what extent?

Answer: Section 2(2) limits freedom of association as guaranteed in s. 2(*d*) of the Charter by prohibiting collective bargaining. This limit is not justified under s. 1 of the Charter.

143 Section 15 does not violate freedom of association. Nor does it contribute to the inadequacy of the arbitration system contained in the Act.

> 7. Does the *Constitution Act, 1982* , limit the right of the Crown to exclude any one or more of the following classes of its employees from units for collective bargaining:
>
> (a) an employee who exercises managerial functions;
>
> (b) an employee who is employed in a confidential capacity in matters relating to labour relations;
>
> (c) an employee who is employed in a capacity that is essential to the effective functioning of the Legislature, the Executive or the Judiciary;
>
> (d) an employee whose interests as a member of a unit for collective bargaining could conflict with his duties as an employee?

144 The court, on a Reference procedure, need not answer a question that is too vague to admit of a satisfactory answer: see, e.g., *McEvoy v. A.G.N.B.*, [1983] 1 S.C.R. 704 at 707-15, 4 C.C.C. (3d) 289, 148 D.L.R. (3d) 25, 46 N.B.R. (2d) 219, 121 A.P.R. 219, 48 N.R. 228 , and cases cited therein. Accordingly, I agree with Kerans J.A., speaking for the majority in the Court of Appeal:

> It remains only to deal with the question, if we can, in abstract terms. In that regard, I detected little or no disagreement amongst counsel. On the one hand, it seemed self-evident to counsel that a law which forbids somebody to join a union which, in the absence of that law, he could join, limits his freedom of association even in a limited sense because it limits his freedom of expression. On the other hand, the categories mentioned in the question seem to strive to describe employees who, because of the nature of their work, would have a very direct, significant and immediate conflict between duties owed to fellow members of the unit (assuming that the unit organization demands some measure of solidarity) and the special duties owed to the employer. There was no serious argument offered against the proposition that an exclusion is justified in a free and democratic society if it could be demonstrated that there is a significant conflict of duty on the part of the employees, because, I suppose, the collective-bargaining system as we know otherwise could not work. But, even this statement requires a review of that system under s. 1 which no intervenant undertook or expressed any interest in our undertaking. The real dispute seems to be whether in fact there is, for a given employee under the categories in the legislation, a significant conflict of duty. That, of course, is a fact-issue which we cannot decide, nor are we asked to. In the end, it is impossible to offer any meaningful answer to the question and respectfully I decline to offer any further answer.

Question 7 should not be answered.

145 The appeal should be allowed.

***McIntyre J.* :**

146 I have read the reasons for judgment prepared in this appeal by the Chief Justice. He has set out in convenient form the facts involved, the constitutional questions referred to the Alberta Court of Appeal by the Lieutenant Governor in Council of the province of Alberta and the relevant statutory and constitutional provisions bearing on the matters raised. He has in addition sum marized the judgments rendered in the Alberta Court of Appeal, [1985] 2 W.W.R. 289, 35 Alta. L.R. (2d) 124, 16 D.L.R. (4th) 359, 85 C.L.L.C. 14,027, 57 A.R. 268 . It will not be necessary for me to deal further with those matters.

147 The question raised in this appeal, stated in its simplest terms, is whether the Canadian Charter of Rights and Freedoms gives constitutional protection to the right of a trade union to strike as an incident to collective bargaining. The issue is not whether strike action is an important activity, nor whether it should be protected at law. The importance of strikes in our present system of labour relations is beyond question and each provincial legislature and the federal Parliament has enacted legislation which recognizes a general right to strike. The question for resolution in this appeal is whether such a right is guaranteed by the Charter. If this right is found in the Charter, a subsidiary question must be addressed: is the legislation in issue nevertheless "demonstrably justified" under s. 1 of the Charter? Since it is my conclusion that the Charter does not guarantee the right to strike, I do not consider this subsidiary question.

148 The appellants do not contend that the right to strike is specifically mentioned in the Charter. The sole basis of their submission is that this right is a necessary incident to the exercise by a trade union of the freedom of association guaranteed by s. 2(*d*) of the Charter. The resolution of this appeal turns then on the meaning of freedom of association in the Charter.

Freedom of Association and S. 2(d) of the Charter

149 Freedom of association is one of the most fundamental rights in a free society. The freedom to mingle, live and work with others gives meaning and value to the lives of individuals and makes organized society possible. The value of freedom of association as a unifying and liberating force can be seen in the fact that historically the conqueror, seeking to control foreign peoples, invariably strikes first at freedom of association in order to eliminate effective opposition. Meetings are forbidden, curfews are enforced, trade and commerce is suppressed and rigid controls are imposed to isolate and thus debilitate the individual. Conversely, with the restoration of national sovereignty the democratic state moves at once to remove restrictions on freedom of association.

150 It is clear that the importance of freedom of association was recognized by Canadian law prior to the Charter. It is equally clear that prior to the Charter a provincial legislature or Parliament acting within its jurisdiction could regulate and control strikes and collective bargaining. The Charter has reaffirmed the historical importance of freedom of association and guaranteed it as an independent right. The courts must now define the range or scope of this right and its relation to other rights, both those grounded in the Charter and those existing at law without Charter protection.

151 In approaching this task, it must be recognized that the Charter should receive a broad and generous construction consistent with its general purpose: see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155, *(* sub nom. *Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.)* [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 41 C.R. (3d) 97, 27 B.L.R. 297, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 2 C.P.R. (3d) 1, 84 D.T.C. 6467, 9 C.R.R. 355, 55 A.R. 291, 55 N.R. 241 . In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 85 C.L.L.C. 14,023, 13 C.R.R. 64, 60 A.R. 161, 58 N.R. 81 , this court dealt in some detail with the considerations which should govern an inquiry into the meaning of the rights and freedoms guaranteed by the Charter. At p. 344, the Chief Justice, speaking for the majority, said:

> This Court has already, in some measure, set out the basic approach to be taken in interpreting the *Charter* . In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 , this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter* . The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at

fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection. *At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this Court's decision in Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts* . [emphasis added]

152 It follows that while a liberal and not overly legalistic approach should be taken to constitutional interpretation, the Charter should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of the Charter, as of all constitutional documents, is constrained by the lan guage, structure and history of the constitutional text, by constitutional tradition and by the history, traditions and underlying philosophies of our society.

The Value of Freedom of Association

153 The starting point of the process of interpretation is an inquiry into the purpose or value of the right at issue. While freedom of association like most other fundamental rights has no single purpose or value, at its core rests a rather simple proposition: the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others. "Man, as Aristotle observed, is a 'social animal, formed by nature for living with others', associating with his fellows both to satisfy his desire for social intercourse and to realize common purposes": L.J. MacFarlane, The Theory and Practice of Human Rights (1985), p. 82. This thought was echoed in the familiar words of Alexis de Tocqueville (Democracy in America, ed. P. Bradley (1945), vol. 1, p. 196):

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

154 The increasing complexity of modern society, which has diminished the power of the individual to act alone, has greatly increased the importance of freedom of association. In the words of Professor T.I. Emerson, "Freedom of Association and Freedom of Expression" (1964), 74 Yale L.J. 1, p. 1:

> Freedom of association has always been a vital feature of American society. In modern times it has assumed even greater importance. More and more the individual, in order to realize his own capacities or to stand up to the institutionalized forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives.

A similar point was made by C. Wilfred Jenks, a former Director General of the I.L.O. (Human Rights and International Labour Standards (1960), p. 49):

> In an age of interdependence and large-scale organisation, in which the individual counts for so little unless he acts in co-operation with his fellows, freedom of association has become the cornerstone of civil liberties and social and economic rights alike. It has long been the bulwark of religious freedom and political liberty; it has increasingly become a necessary condition of economic and social freedom for the ordinary citizen.

155 Our society supports a multiplicity of organized groups, clubs and associations which further many different objectives, religious, political, educational, scientific, recreational and charitable. This exercise of freedom of association serves more than the individual interest, advances more than the individual cause; it promotes general social goals. Of particular importance is the indispensable role played by freedom of association in the functioning of democracy. Paul Cavalluzzo said, in "Freedom of Association and the Right to Bargain Collectively" in Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms (1986), Weiler and Elliot eds., at pp. 199-200:

> Secondly, it [freedom of association] is an effective check on state action and power. In many ways freedom of association is the most important fundamental freedom because it is the one human right which clearly distinguishes a totalitarian state from a democratic one. In a totalitarian system, the state cannot tolerate group activity because of the powerful check it might have on state power.

Associations serve to educate their members in the operation of democratic institutions. As Tocqueville noted, above, vol. II, at p. 116:

> [Individuals] cannot belong to these associations for any length of time without finding out how order is maintained among a large number of men and by what contrivance they are made to advance, harmoniously and methodically, to the same object. Thus they learn to surrender their own will to that of all the rest and to make their own exertions subordinate to the common impulse, things which it is not less necessary to know in civil than in political associations. Political associations may therefore be considered as large free schools, where all the members of the community go to learn the general theory of association.

Associations also make possible the effective expression of political views and thus influence the formation of governmental and social policy. As Professor G. Abernathy observed in The Right of Assembly and Association (1961), at p. 242:

> ... probably the most obvious service rendered by the institution of association is influencing governmental policy. Concerted action or pressure on governmental agencies has a far greater chance of success than does the sporadic pressure of numerous individuals acting separately.

Freedom of association then serves the interest of the individual, strengthens the general social order and supports the healthy functioning of democratic government.

156 In considering the constitutional position of freedom of association, it must be recognized that while it advances many group interests and, of course, cannot be exercised alone, it is nonetheless a freedom belonging to the individual and not to the group formed through its exercise. While some provisions in the Constitution involve groups, such as s. 93 of the Constitution Act, 1867, protecting denominational schools, and s. 25 of the Charter referring to existing aboriginal rights, the remaining rights and freedoms are individual rights; they are not concerned with the group as distinct from its members. The group or organization is simply a device adopted by individuals to achieve a fuller realization of individual rights and aspirations. People, by merely combining together, cannot create an entity which has greater constitutional rights and freedoms than they, as individuals, possess. Freedom of association cannot therefore vest independent rights in the group.

157 Many of the scholarly writers on this subject have recognized and stated this proposition. Clyde W. Summers in "Freedom of Association and Compulsory Unionism in Sweden and the United States" (1964), 112 U. Pa. L. Rev. 647, at p. 647, said:

> Although commonly asserted by the organization, freedom of association is not simply a collective right vested in the organization for its benefit. *Freedom of association is an individual right vested in the individual to enable him to enlarge his personal freedom* . Its function is not merely to grant power to groups, but to enrich the individual's participation in the democratic process by his acting through those groups. [emphasis added]

Professor Emerson, above, at p. 4, stated:

> ... a theory of association must begin with the individual. In a society governed by democratic principles it is the individual who is the ultimate concern of the social order. His interests and his rights are paramount. Association is an extension of individual freedom. It is a method of making more effective, of giving greater depth and scope to, the individual's needs, aspirations and liberties.

And Reena Raggi in the article "An Independent Right to Freedom of Association" (1977), 12 Harv. C.R.-C.L.L. Rev. 1, stated the position clearly, at pp. 15-16:

> This notion that an association is no more than the sum of its individual members seems essential in a society in which it is "the individual who is the ultimate concern of the social order." In such a society it would hardly seem possible that an abstract entity such as an association should enjoy rights apart from and indeed greater than its individual members; to hold otherwise would contradict the equality of opportunity which is at the heart of this argument for freedom of association.

158 The recognition of this principle in the case at bar is of great significance. The only basis on which it is contended that the Charter enshrines a right to strike is that of freedom of association. Collective bargaining is a group concern, a group activity, but the group can exercise only the constitutional rights of its individual members on behalf of those members. If the right asserted is not found in the Charter for the individual, it cannot be implied for the group merely by the fact of association. It follows as well that the rights of the in dividual members of the group cannot be enlarged merely by the fact of association.

The Scope of Freedom of Association in S. 2(d)

159 Various theories have been advanced to define freedom of association guaranteed by the Constitution. They range from the very restrictive to the virtually unlimited. To begin with, it has been said that freedom of association is limited to a right to associate with others in common pursuits or for certain purposes. Neither the objects nor the actions of the group are protected by freedom of association. This was the approach adopted in *Collymore v. A.G.*, [1970] A.C. 538, [1970] 2 W.L.R. 233, *(*sub nom. *Collymore v. A.G. Trinidad & Tobago)* [1969] 2 All E.R. 1207 (P.C.) . The facts of the case have been stated by the Chief Justice and need no repetition here. In its reasons, the Judicial Committee approved the words of Sir Hugh Wooding C.J., of the Court of Appeal of Trinidad and Tobago, which defined freedom of association in these terms, at p. 547:

> ... freedom of association means no more than freedom to enter into consensual arrangements to promote the common interest objects of the associating group. The objects may be any of many. They may be religious or social, political or philosophical, economic or professional, educational or cultural, sporting or charitable. But the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the peace, order and good government of the country.

160 This approach was followed in *Dolphin Delivery Ltd. v. R.W.D.S.U., Loc. 580*, [1984] 3 W.W.R. 481, 52 B.C.L.R. 1, 10 D.L.R. (4th) 198, 84 C.L.L.C. 14,036 (C.A.) , affirmed by this court on different grounds, [1986] 2 S.C.R. 573, [1987] 1 W.W.R. 577, 9 B.C.L.R. (2d) 273, 38 C.C.L.T. 184, 33 D.L.R. (4th) 174, 87 C.L.L.C. 14,002, 71 N.R. 83 , where Esson J.A., speaking for the British Columbia Court of Appeal on this issue, said, at p. 209:

> The freedom must be intended to protect the right of "everyone" to associate as they please, and to form associations of all kinds, from political parties to hobby clubs. Some will have objects and will be in favour of means of achieving those objects, which the framers of the Charter cannot have intended to protect. The freedom to associate carries with it no constitutional protection of the purposes of the association, or means of achieving those purposes.

161 The same approach was followed in *P.S.A.C. v. R.* (*P.S.A.C.* judgment delivered concurrently), both at trial, [1984] 2 F.C. 562, 11 D.L.R. (4th) 337, 9 C.R.R. 248 , and on appeal, [1984] 2 F.C. 889, 11 D.L.R. (4th) 387, 84 C.L.L.C. 14,054, 11 C.R.R. 97, 55 N.R. 285 . Other cases which have followed the *Collymore* approach include *Prime v. Man. Lab. Bd.; Mrs. K's Food Prod. Ltd. v. U.F.C.W.* (1983), 3 D.L.R. (4th) 74, 25 Man. R. (2d) 85 (Q.B.) , reversed on other grounds *(*sub nom. *Mrs. K's Food Prod. Ltd. v. U.F.C.W.)* 8 D.L.R. (4th) 641, 28 Man. R. (2d) 234 (C.A.) , and *Halifax Police Officers & NCO's Assn. v. Halifax* (1984), 11 C.R.R. 358, 64 N.S.R. (2d) 638, 143 A.P.R. 638 (T.D.) .

162 A second approach provides that freedom of association guarantees the collective exercise of constitutional rights or, in other words, the freedom to engage collectively in those activities which are constitutionally protected for each individual. This theory has been adopted in the United States to define the scope of freedom of association under the American Constitution. Professor L.H. Tribe in his treatise, American Constitutional Law (1978), describes the American position, as follows, at p. 702:

> [Freedom of association] is *a right to join with others to pursue goals independently protected by the first amendment* — such as political advocacy, litigation (regarded as a form of advocacy), or religious worship.

Further, in *Roberts v. U.S. Jaycees*, 468 U.S. 609 at 618, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984), Brennan J., writing for the majority of the United States Supreme Court, said:

> ... the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment — speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.

163 It will be seen that this approach guarantees not only the right to associate but as well the right to pursue those objects of association which by their nature have constitutional protection.

164 A third approach postulates that freedom of association stands for the principle that an individual is entitled to do in concert with others that which he may lawfully do alone and, conversely, that individuals and organizations have no right to do in concert what is unlawful when done individually. This approach is supported by Professor Emerson, above, where he states, at p. 4:

> ... as a starting point, an association should be entitled to do whatever an individual can do; conversely, conduct prohibited to an individual by a state can also be prohibited to an association.

A similar view has been expressed by the American scholar, Reena Raggi, above, pp. 15-16, and by Bayda C.J.S. in *R.W.D.S.U., Loc. 544, 496, 635 & 955 v. Sask.*, [1985] 5 W.W.R. 97, 19 D.L.R. (4th) 609 at 619, 85 C.L.L.C. 14,054, 21 C.R.R. 286, 39 Sask. R. 193 (C.A.) ("the *Dairy Workers* case"):

> Where an act is capable of being performed by a person alone or in association, then only if a person acting alone is forbidden to perform the act, is the person acting in association forbidden.

165 A fourth approach would constitutionally protect collective activities which may be said to be fundamental to our culture and traditions and which by common assent are deserving of protection. This approach was proposed by Kerans J.A. in *Black v. Law Soc. of Alta.*, [1986] 3 W.W.R. 590, 44 Alta. L.R. (2d) 1, 20 Admin. L.R. 140, 27 D.L.R. (4th) 527, 20 C.R.R. 117, 68 A.R. 259 (C.A.) . The court held in that case that legislative restrictions against partnerships for the practice of law between Alberta solicitors and non-resident solicitors violated freedom of association. Speaking for himself, Kerans J.A. stated, at p. 612:

> In my view, the freedom [of association] includes the freedom to associate with others in the exercise of Charter-protected rights and *also those other rights which — in Canada — are thought so fundamental as not to need formal expression: to marry, for example, or to establish a home and family, pursue an education or gain a livelihood* . [emphasis added]

166 A fifth approach rests on the proposition that freedom of association, under s. 2(*d*) of the Charter, extends constitutional protection to all activities which are essential to the lawful goals of an association. This approach was advanced in *S.E.I.U., Loc. 204 v. Broadway Manor Nursing Home* (1983), 44 O.R. (2d) 392, 83 C.L.L.C. 16,019, 4 D.L.R. (4th) 231, 10 C.R.R. 37 , by the Ontario Divisional Court. The court held that freedom of association included the freedom to bargain collectively and to strike, since, in its view, these activities were essential to the objects of a trade union and without them the association would be emasculated. Galligan J. said, at p. 409:

> But I think that freedom of association if it is to be a meaningful freedom must include freedom to engage in conduct which is reasonably consonant with the lawful objects of an association. And I think a lawful object is any object which is not prohibited by law.

And Smith J. said, at p. 463:

> It follows, and it is trite to say I suppose, that the freedom to associate carries with it the freedom to meet to pursue the lawful objects and activities essential to the association's purposes, being in this instance the well-being, economic or otherwise, of its members.

167 The sixth and final approach so far isolated in the cases, and by far the most sweeping, would extend the protection of s. 2(*d*) of the Charter to all acts done in association, subject only to limitation under s. 1 of the Charter. This is the position suggested by Bayda C.J.S. in the *Dairy Workers* case, supra. He said in his reasons for judgment, at pp. 620-21:

> To summarize, a person asserting the freedom of association under para. 2(*d*) is free (apart from s. 1 of the Charter) to perform in association without governmental interference any act that he is free to perform alone. *Where an act by definition is incapable of individual performance, he is free to perform the act in association provided the mental component of the act is not to inflict harm* . Such then is the "unregulated area" (to use Professor Lederman's expression) relative to the freedom of association. Such is the "sphere of activity within which the law [has guaranteed] to leave me alone", to use the words of the author of *Salmond on Jurisprudence* with an interpolation from s. 1 of the Charter. [emphasis added]

168 In presenting these six formulations of the concept of freedom of association, I do not mean to suggest that they are the only ones which might be developed. They do, however, embrace generally the concepts and arguments advanced before the court. In examining these formulations, I will consider them within the context of the Charter, the pre-existing law of Canada and the circumstances in which freedom of association is asserted.

169 As to the pre-existing law in Canada, it is sufficient to say that freedom of association is not a new right or freedom. It existed in Canada long before the Charter was adopted and was recognized as a basic right. It consisted in the liberty of two or more persons to associate together provided that they did not infringe a specific rule of common law or statute by having either an unlawful object or by pursuing their object by unlawful means: see Halsbury's Laws of England, 3rd ed., vol. 7, pp. 195-96; O. Hood Phillips and Paul Jackson, Constitutional and Administrative Law, 6th ed. (1978), p. 503. It may be observed as well that freedom of association was recognized and applied in relation to trade unions. The law of Canada and of each province has long recognized that trade unions could, and did, exist as lawful associations with rights and obligations fixed by law and that individuals had the right to belong to, and participate in, the activities of trade unions: see Collective Bargaining Law in Canada, 2nd ed. (1986), Carrothers, Palmer and Rayner, pp. 1-108.

170 Freedom of association was acknowledged and accepted as part of our social and legal fabric. The Charter upon its adoption guaranteed freedom of association as a free-standing right in s. 2(*d*). I do not seek to limit the effect of that guarantee to the law as it stood before adoption. I do, however, suggest that the Charter guarantee, which by itself does not in any way define freedom of association, must be construed with reference to the constitutional text and to the nature, history, traditions and social philosophies of our society. This approach makes relevant consideration of the pre-Charter situation and the nature and scope of the rights and obligations the law had ascribed to associations, in this case trade unions, before the adoption of the Charter.

171 Turning to the various approaches which have been briefly described above, I would conclude that both the fifth approach (which postulates that freedom of association constitutionally protects all activities which are essential to the lawful goals of an association) and the sixth (which postulates that freedom of association constitutionally protects all activities carried out in association, subject only to reasonable limitation under s. 1 of the Charter) are unacceptable definitions of freedom of association.

172 The fifth approach rejects the individual nature of freedom of association. To accept it would be to accord an independent constitutional status to the aims, purposes and activities of the association and thereby confer greater constitutional rights upon members of the association than upon non-members. It would extend Charter protection to all the activities of an association which are essential to its lawful objects or goals, but, it would not extend an equivalent right to individuals. The Charter does not give, nor was it ever intended to give, constitutional protection to all the acts of an individual which are essential to his or her personal goals or objectives. If Charter protection is given to an association for its lawful acts and objects, then the Charter protected rights of the association would exceed those of the individual merely by virtue of the fact of association. The unacceptability of such an approach is clearly demonstrated by Peter Gall in "Freedom of Association and Trade Unions: A Double-Edged Constitutional Sword" in Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms (1986), Weiler and Elliot eds., at p. 247:

> A brief example illustrates this point. One of our levels of government may decide to ban the ownership of guns. This would not infringe any individual right under the Charter. But if some individuals have combined to form a gun club, does the Charter's protection of freedom of association mean that the principal activity of the gun club, namely the ownership and use of guns, is now constitutionally protected? One is quickly forced to the conclusion that it does not. The Charter does not protect the right to bear arms, regardless of whether that activity is carried out by an individual or by an association. The mere fact that it is the principal activity of the gun club does not give it a constitutional status. I doubt whether there would be much, if any, disagreement on this point. Thus, by referring to this hypothetical situation we see that the principal activities of associations are not necessarily protected under the concept of freedom of association.

173 The sixth approach, in my opinion, must be rejected as well, for the reasons expressed in respect of the fifth. It would in even more sweeping terms elevate activities to constitutional status merely because they were performed in association. For obvious reasons, the Charter does not give constitutional protection to all activities performed by individuals. There is, for instance, no Charter protection for the ownership of property, for general commercial activity or for a host of other lawful activities. And yet, if the sixth approach were adopted, these same activities would receive protection if they were performed by a group rather than by an individual. In my view, such a proposition cannot be accepted. There is simply no justification for according Charter protection to an activity merely because it is performed by more than one person. This was recognized by Paul Cavalluzzo, above, at pp. 202-203:

> The problem with this [the sixth] approach is that it sanctifies conduct because it is engaged in by more than one citizen. Although the state is given the opportunity to justify interference under section 1, why should there be constitutional value in numbers? Surely, more is required to reach the threshold of attaining constitutional protection. Freedom of association is not a fundamental freedom because there is some inherent value in group activity. Not all individual expressions are protected by freedom of expression at the threshold stage. Likewise, not all associational conduct is protected by freedom of association.

174 I am also of the view that the fourth approach, which postulates that freedom of association embraces those collective activities which have attained a fundamental status in our society because they are deeply rooted in our culture, traditions and history, is an unacceptable definition. By focusing on the activity or the conduct itself, this fourth approach ignores the fundamental purpose of the right. The purpose of freedom of association is to ensure that various goals may be pursued in common as well as individually. Freedom of association is not concerned with the particular activities or goals themselves; it is concerned with how activities or goals may be pursued. While activities such as establishing a home, pursuing an education or gaining a livelihood are important if not fundamental activities, their importance is not a consequence of their potential collective nature. Their importance flows from the structure and organization of our society and they are as important when pursued individually as they are when pursued collectively. Even institutions such as marriage and the family, which by their nature are collective, do not fall easily or completely under the rubric of freedom of association. For instance, freedom of association would have no bearing on the legal consequences of marriage, such as the control or ownership of matrimonial property. This is not to say that fundamental institutions, such as marriage, will never receive the protection of the Charter. The institution of marriage, for example, might well

be protected by freedom of association in combination with other rights and freedoms. Freedom of association alone, however, is not concerned with conduct; its purpose is to guarantee that activities and goals may be pursued in common. When this purpose is considered, it is clear that s. 2(*d*) of the Charter cannot be interpreted as guaranteeing specific acts or goals, whether or not they are fundamental in our society.

175 Of the remaining approaches, it must surely be accepted that the concept of freedom of association includes at least the right to join with others in lawful, common pursuits and to establish and maintain organizations and associations as set out in the first approach. This is essentially the freedom of association enjoyed prior to the adoption of the Charter. It is, I believe, equally clear that, in accordance with the second approach, freedom of association should guarantee the collective exercise of constitutional rights. Individual rights protected by the Constitution do not lose that protection when exercised in common with others. People must be free to engage collectively in those activities which are constitutionally protected for each individual. This second definition of freedom of association embraces the purposes and values of the freedoms which were identified earlier. For instance, the indispensable role played by freedom of association in the democratic process is fully protected by guaranteeing the collective exercise of freedom of expression. Group advocacy, which is at the heart of all political parties and special interest groups, would be protected under this definition. As well, group expression directed at educating or informing the public would be protected from *government interference* : see the judgment of this court in *Dolphin Delivery* , supra. Indeed, virtually every group activity which is important to the functioning of democracy would be protected by guaranteeing that freedom of expression can be exercised in association with others. Furthermore, religious groups would receive protection if their activities constituted the collective exercise of freedom of religion. Thus, the principal purposes or values of freedom of association would be realized by interpreting s. 2(*d*) as protecting the collective exercise of the rights enumerated in the Charter.

176 One enters upon more controversial ground when considering the third approach, which provides that whatever action an individual can *lawfully* pursue as an individual, freedom of association ensures he can pursue with others. Conversely, individuals and organizations have no constitutional right to do in concert what is unlawful when done alone. This approach is broader than the second, since constitutional protection attaches to all group acts which can be lawfully performed by an individual, whether or not the individual has a constitutional right to perform them. It is true, of course, that in this approach the range of Charter protected activity could be reduced by legislation, because the legislature has the power to declare what is and what is not lawful activity for the individual. The legislature, however, would not be able to attack directly the associational character of the activity, since it would be constitutionally bound to treat groups and individuals alike. A simple example illustrates this point: golf is a lawful but not constitutionally protected activity. Under the third approach, the legislature could prohibit golf entirely. However, the legislature could not constitutionally provide that golf could be played in pairs but in no greater number, for this would infringe the Charter guarantee of freedom of association. This contrasts with the second approach, which would provide no protection against such legislation, because golf is not a constitutionally protected activity for the individual. Thus, the range of group activity protected by the third approach is greater than that of the second, but the greater range is to some extent illusory because of the power of the legislature to say what is and what is not lawful activity for the individual. This approach, in my view, is an acceptable interpretation of freedom of association under the Charter. It is clear that, unlike the fifth and sixth approaches, this definition of freedom of association does not provide greater constitutional rights for groups than for individuals; it simply ensures that they are treated alike. If the state chooses to prohibit everyone from engaging in an activity and that activity is not protected under the Constitution, freedom of association will not afford any protection to groups engaging in the activity. Freedom of association as an independent right comes into play under this formulation when the state has permitted an individual to engage in an activity and yet forbidden the group from doing so. Moreover, unlike the fourth approach, the inquiry is firmly focused on the fundamental purpose of freedom of association, namely, to permit the collective pursuit of common goals. As noted by the Chief Justice, at p. 44 [p. 137]:

> ... if a legislature permits an individual to enjoy an activity which it forecloses to a collectivity, it may properly be inferred that the legislature intended to prohibit the collective activity because of its collective or associational aspect. Conversely, one may infer from a legislative proscription which applies equally to individuals and groups that the purpose of the legislation was a bona fide prohibition of a particular activity because of detrimental qualities

inhering in the activity (e.g., criminal conduct), and not merely because of the fact that the activity might sometimes be done in association.

Finally, this approach fully realizes the value or purpose of association. Activities which the state permits an individual to pursue may be pursued in a group. Associations engaged in scientific, educational, recreational and charitable pursuits would receive protection even though these activities or pursuits may not be independently protected by the Charter, provided these activities are not forbidden at law to individuals. The objective of guaranteeing the freedom of individuals to unite in organizations of their choice for the pursuit of objects of their choice would be achieved.

177 It follows from this discussion that I interpret freedom of association in s. 2(*d*) of the Charter to mean that Charter protection will attach to the exercise in association of such rights as have Charter protection when exercised by the individual. Furthermore, freedom of association means the freedom to associate for the purposes of activities which are lawful when performed alone. But, since the fact of association will not by itself confer additional rights on individuals, the association does not acquire a constitutionally guaranteed freedom to do what is unlawful for the individual.

178 When this definition of freedom of association is applied, it is clear that it does not guarantee the right to strike. Since the right to strike is not independently protected under the Charter, it can receive protection under freedom of association only if it is an activity which is permitted by law to an individual. Accepting this conclusion, the appellants argue that freedom of association must guarantee the right to strike because individuals may lawfully refuse to work. This position, however, is untenable for two reasons. First, it is not correct to say that it is lawful for an individual employee to cease work during the currency of his contract of employment. Belzil J.A., in the Alberta Court of Appeal, in the case at bar, dealt with this point in these words [at p. 324]:

> The argument falters on the premise that cessation of work by one person is lawful. The rationale advanced for that premise is that the courts will not compel a servant to fulfil his contract of service, therefore cessation [of work] by a servant is lawful. While it is true that the courts will not compel a servant to fulfil his contract of service, the servant is nevertheless bound in law by his contract and may be ordered to pay damages for the unlawful breach of it. It cannot be said that his cessation of work is lawful.

The second reason is simply that there is no analogy whatever between the cessation of work by a single employee and a strike conducted in accordance with modern labour legislation. The individual has, by reason of the cessation of work, either breached or terminated his contract of employment. It is true that the law will not compel the specific performance of the contract by ordering him back to work as this would reduce "the employee to a state tantamount to slavery": I. Christie, Employment Law in Canada (1980), p. 268. But, this is markedly different from a lawful strike. An employee who ceases work does not contemplate a return to work, while employees on strike always contemplate a return to work. In recognition of this fact, the law does not regard a strike as either a breach of contract or a termination of employment. Every province and the federal Parliament has enacted legislation which preserves the employer-employee relationship during a strike: see Canada Labour Code, R.S.C. 1970, c. L-1, as amended, s. 107(2); Labour Relations Act, R.S.A. 1980, c. L-1.1, as amended, s. 1(2); Labour Code, R.S.B.C. 1979, c. 212, as amended, s. 1(2); the Labour Relations Act, S.M. 1972, c. 75, as amended, s. 2(1); the Industrial Relations Act, R.S.N.B. 1973, c. I-4, as amended, s. 1(2); the Labour Relations Act, S.N. 1977, c. 64, as amended, s. 2(2); the Trade Union Act, S.N.S. 1972, c. 19, as amended, s. 13; Labour Relations Act, R.S.O. 1980, c. 228, as amended, s. 1(2); the Labour Act, R.S.P.E.I. 1974, c. L-1, as amended, s. 8(2); the Labour Code, R.S.Q. 1977, c. C-27, as amended, s. 110; and the Trade Union Act, R.S.S. 1978, c. T-17, s. 2(*f*); and see *C.P.R. v. Zambri*, [1962] S.C.R. 609, 34 D.L.R. (2d) 654 [Ont.]. Moreover, many statutes provide employees with reinstatement rights following a strike (Ontario, Labour Relations Act, s. 73; Quebec, Labour Code, s. 110.1; Manitoba, Labour Relations Act, s. 11; and see *C.A.L.P.A. v. Eastern Prov. Airways Ltd.* (1983), 5 L.R.B.R. (N.S.) 368) and in the province of Quebec the employer is expressly prohibited from replacing employees who are lawfully on strike (s. 109.1).

179 Modern labour relations legislation has so radically altered the legal relationship between employees and employers in unionized industries that no analogy may be drawn between the lawful actions of individual employees in ceasing to work and the lawful actions of union members in engaging in a strike. As Laskin C.J.C. stated in *McGavin Toastmaster*

Ltd. v. Ainscough, [1976] 1 S.C.R. 718 at 725, [1975] 5 W.W.R. 444, 54 D.L.R. (3d) 1, 75 C.L.L.C. 14,277, 4 N.R. 618 [B.C.]:

> The reality is, and has been for many years now throughout Canada, that individual relationships as between employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements. The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement which, as the one involved here, deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principal parties thereto.

It is apparent, in my view, that interpreting freedom of association to mean that every individual is free to do with others that which he is lawfully entitled to do alone would not entail guaranteeing the right to strike. I am supported in this conclusion by the Chief Justice, who states at p. 45 [p. 137] in his judgment:

> There is no individual equivalent to a strike. The refusal to work by one individual does not parallel a collective refusal to work. The latter is *qualitatively* rather than quantitatively different.

Restrictions on strikes are not aimed at and do not interfere with the collective or associational character of trade unions. It is therefore my conclusion that the concept of freedom of association does not extend to the constitutional guarantee of a right to strike. This conclusion is entirely consistent with the general approach of the Charter, which accords rights and freedoms to the individual but, with a few exceptions noted earlier, does not confer group rights. It is also to be observed that the Charter, with the possible exception of s. 6(2)(*b*) (right to earn a livelihood in any province) and s. 6(4), does not concern itself with economic rights. Since trade unions are not one of the groups specifically mentioned by the Charter, and are overwhelmingly, though not exclusively, concerned with the economic interests of their members, it would run counter to the overall structure and approach of the Charter to accord by implication special constitutional rights to trade unions.

180 Labour relations and the development of the body of law which has grown up around that subject have been for many years one of the major preoccupations of legislators, economic and social writers and the general public. Strikes are commonplace in Canada and have been for many years. The framers of the Constitution must be presumed to have been aware of these facts. Indeed, questions of collective bargaining and a right to strike were discussed in the Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (Issue 43, pp. 68-79, 22nd January 1981). It is apparent from the deliberations of the committee that the right to strike was understood to be separate and distinct from the right to bargain collectively. And, while a resolution was proposed for the inclusion of a specific right to bargain collectively, no resolution was proposed for the inclusion of the right to strike. This affords strong support for the proposition that the inclusion of a right to strike was not intended.

181 Specific reference to the right to strike appears in the Constitutions of France (in the preamble of the Constitution of the Fifth Republic of 1958) and Italy (art. 40). Further, in Japan (art. 28) the rights of trade unions are specifically guaranteed. The framers of the Constitution must be presumed to have been aware of these constitutional provisions. The omission of similar provisions in the Charter, taken with the fact that the overwhelming preoccupation of the Charter is with individual, political and democratic rights with conspicuous inattention to economic and property rights, speaks strongly against any implication of a right to strike. Accordingly, if s. 2(*d*) is read in the context of the whole Charter, it cannot, in my opinion, support an interpretation of freedom of association which could include a right to strike.

182 Furthermore, it must be recognized that the right to strike accorded by legislation throughout Canada is of relatively recent vintage. It is truly the product of this century and, in its modern form, is in reality the product of the latter half of this century. It cannot be said that it has become so much a part of our social and historical traditions that it has acquired the status of an immutable, fundamental right, firmly embedded in our traditions, our political and social philosophy. There is then no basis, as suggested in the fourth approach to freedom of association, for implying a

constitutional right to strike. It may well be said that labour relations have become a matter of fundamental importance in our society, but every incident of that general topic has not. The right to strike as an element of labour relations has always been the subject of legislative control. It has been abrogated from time to time in special circumstances and is the subject of legal regulation and control in all Canadian jurisdictions. In my view, it cannot be said that at this time it has achieved status as a fundamental right which should be implied in the absence of specific reference in the Charter.

183 While I have reached a conclusion and expressed the view that the Charter upon its face cannot support an implication of a right to strike, there is as well, in my view, a sound reason grounded in social policy against any such implication. Labour law, as we have seen, is a fundamentally important as well as an extremely sensitive subject. It is based upon a political and economic compromise between organized labour — a very powerful socio-economic force — on the one hand, and the employers of labour — an equally powerful socio-economic force — on the other. The balance between the two forces is delicate and the public at large depends for its security and welfare upon the maintenance of that balance. One group concedes certain interests in exchange for concessions from the other. There is clearly no correct balance which may be struck giving permanent satisfaction to the two groups, as well as securing the public interest. The whole process is inherently dynamic and unstable. Care must be taken then in considering whether constitutional protection should be given to one aspect of this dynamic and evolving process while leaving the others subject to the social pressures of the day. Great changes — economic, social and industrial — are afoot, not only in Canada and in North America, but as well in other parts of the world. Changes in the Canadian national economy, the decline in resource-based as well as heavy industries, the changing patterns of international trade and industry, have resulted in great pressure to reassess the traditional approaches to economic and industrial questions, including questions of labour law and policy. In such countries as Sweden (Prof. Dr. Axel Adlercreutz, "Sweden", in International Encyclopaedia for Labour Law and Industrial Relations (1985), vol. 9, ed.-in-chief Prof. Dr. R. Blanpain) and West Germany (Prof. Dr. Th. Ramm, "Federal Republic of Germany" in International Encyclopaedia for Labour Law and Industrial Relations (1979), vol. 5), different directions in labour relations have been taken. It has been said that these changes have led to increased efficiency and job satisfaction. Whatever the result of such steps, however, it is obvious that the immediate direction of labour policy is unclear. It is, however, clear that labour policy can only be developed step by step with, in this country, the provinces playing their "classic federal role as laboratories for legal experimentation with our industrial relations ailments": Paul Weiler, Reconcilable Differences (1980), p. 11. The fulfilment of this role in the past has resulted in the growth and development of the body of labour law which now prevails in Canada. The fluid and constantly changing conditions of modern society demand that it continue. To intervene in that dynamic process at this early stage of Charter development by implying constitutional protection for a right to strike would, in my view, give to one of the contending forces an economic weapon removed from and made immune, subject to s. 1, to legislative control, which could go far towards freezing the development of labour relations and curtailing that process of evolution necessary to meet the changing circumstances of a modern society in a modern world. This, I repeat, is not to say that a right to strike does not exist at law or that it should be abolished. It merely means that at this stage of our Charter development such a right should not have constitutional status which would impair the process of future development in legislative hands. Of particular interest in this connection are the words of Peter Gall in his article, above, at p. 248, where he said:

> Collective bargaining is extremely important in our society and has been for some time now. But will it always be so? Can we confidently predict that 50 or even 20 years from now collective bargaining will still be the primary activity of trade unions? Or will we have adopted some other technique for setting terms and conditions of employment, such as full-scale interest arbitration or greater reliance on legislated standards. If we cannot reject this out of hand, and I do not think we can, then we must seriously question whether collective bargaining is the kind of activity that warrants constitutional status. The Charter enshrines the fundamental principles of individual liberty. The activities of man may change over time, but these principles remain constant. Collective bargaining does not have this same timeless quality, and, accordingly, we should be leery of giving it constitutional protection under the concept of freedom of association. If the drafters had intended to enshrine collective bargaining constitutionally, it would have been a simple matter to do so explicitly. The fact that it was not done explicitly indicates that this was not intended.

184 To constitutionalize a particular feature of labour relations by entrenching a right to strike would have other adverse effects. Our experience with labour relations has shown that the courts, as a general rule, are not the best arbiters of disputes which arise from time to time. Labour legislation has recognized this fact and has created other procedures and other tribunals for the more expeditious and efficient settlement of labour problems. Problems arising in labour matters frequently involve more than legal questions. Political, social and economic questions frequently dominate in labour disputes. The legislative creation of conciliation officers, conciliation boards, labour relations boards and labour dispute resolving tribunals has gone far in meeting needs not attainable in the court system. The nature of labour disputes and grievances and the other problems arising in labour matters dictates that special procedures outside the ordinary court system must be employed in their resolution. Judges do not have the expert knowledge always helpful and sometimes necessary in the resolution of labour problems. The courts will generally not be furnished in labour cases, if past experience is to guide us, with an evidentiary base upon which full resolution of the dispute may be made. In my view, it is scarcely contested that specialized labour tribunals are better suited than courts for resolving labour problems, except for the resolution of purely legal questions. If the right to strike is constitutionalized, then its application, its extent and any questions of its legality become matters of law. This would inevitably throw the courts back into the field of labour relations and much of the value of specialized labour tribunals would be lost. This point has been commented upon by Professor J.M. Weiler in an article, "The Regulation of Strikes and Picketing under the Charter" in Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms (1986), Weiler and Elliot eds., at pp. 226-27:

> The doctrine of exclusive representation is but one of hundreds of critical policy choices made by our legislatures in the evolution of the current system of collective bargaining law in Canada. Others include restrictions of employer and employee free speech, prohibition of strikes during the term of a collective agreement, compulsory grievance arbitration, and 72 hours' notice before a strike or lockout. All these ingredients of collective bargaining law could be attacked as unjustified restrictions of collective bargaining rights. There are examples in many other jurisdictions in Canada and in other democratic industrialized countries where these restrictive aspects of collective bargaining law do not exist. How will a judge determine whether these meet the standards of a free and democratic society?
>
> I won't belabour this point any further. I believe our current system of collective bargaining law regulating the relations between workers and employers is too complicated and sophisticated a field to be put under the scrutiny of a judge in a contest between two litigants arguing vague notions such as "reasonable" and "justifiable" in a free and democratic society. I have no confidence that our adversary court system is capable of arriving at a proper balance between the competing political, democratic and economic interests that are the stuff of labour legislation.
>
> If collective bargaining were constitutionalized under section 2(*d*), my worry is that judges might be flooded with arguments from litigants who are unhappy with the current tilt in the balance of power between unions, employers, and individual employees in collective bargaining legislation. These litigants will challenge a particular aspect of collective bargaining law, citing vague arguments of democratic, associational, economic, or political rights that will only serve to confuse the judge. Other parties whose interests will be affected by the decision may not receive intervener status or may not even be aware of the case. It is unlikely that the necessary evidential base to decide the policy issue will be provided. When we consider that collective bargaining law is polycentric in nature, adjustments to the delicate industrial relations balance in one part of the system might have unanticipated and unfortunate effects in another.
>
> The lessons of the evolution of our labour law regime in the past 50 years display very clearly that the legislatures are far better equipped than the courts to strike the appropriate balance between the interests of the individual employee, the union, the employer and the public. For 20 years the direction of labour law reform in Canada has been to limit excessive judicial review of specialized labour boards because of the problems that result from absentee management by the judges. At the same time, more original jurisdiction has been provided to labour boards to regulate economic disputes between workers and their employers. For the same reasons that the courts have been increasingly excluded from the role of umpiring collective bargaining disputes, they should not be re-entering the

mainstream of labour law development in their capacity as interpreters of concepts such as "freedom of association" in section 2(*d*) of the Charter. The courtroom is not the place to be developing collective bargaining policy.

In summary, my concerns about interpreting freedom of association in section 2(*d*) to "constitutionalize collective bargaining" go beyond the problems that this would present for industrial relations in Canada. I am concerned that if the courts interpret the Charter to include rights that are not expressly provided for and thus are even more difficult to define as to value and scope, they will be overloaded with litigation under section 1 and two opposite, but equally unhappy, scenarios may result. Some judges might interpret section 1 so aggressively as to initiate the process of remaking large chunks of Canadian law. This might cause the legislators to retaliate by invoking the override provisions in section 33 of the Charter. Alternatively, the courts might take the opposite tack by giving the legislatures too broad an ambit under section 1. In either case, the result might be the trivialization of the rights that were expressly intended to be protected in provisions such as section 2(*d*). Where the Charter is ambiguous as to the extent to which a certain right or freedom is protected, the better approach is for our courts to proceed very cautiously: first, by interpreting section 2 so as to give a limited application to the rights allegedly implicitly protected; then by providing a more searching scrutiny within section 1 of those rights that have expressly been protected in section 2.

185 A further problem will arise from constitutionalizing the right to strike. In every case where a strike occurs and relief is sought in the courts, the question of the application of s. 1 of the Charter may be raised to determine whether some attempt to control the right may be permitted. This has occurred in the case at bar. The s. 1 inquiry involves the reconsideration by a court of the balance struck by the legislature in the development of labour policy. The court is called upon to determine, as a matter of constitutional law, which government services are essential and whether the alternative of arbitration is adequate compensation for the loss of a right to strike. In the *P.S.A.C.* case, the court must decide whether mere postponement of collective bargaining is a reasonable limit, given the government's substantial interest in reducing inflation and the growth in government expenses. In the *Dairy Workers* case, the court is asked to decide whether the harm caused to dairy farmers through a closure of the dairies is of sufficient importance to justify prohibiting strike action and lockouts. None of these issues is amenable to principled resolution. There are no clearly correct answers to these questions. They are of a nature peculiarly apposite to the functions of the legislature. However, if the right to strike is found in the Charter, it will be the courts which time and time again will have to resolve these questions, relying only on the evidence and arguments presented by the parties, despite the social implications of each decision. This is a legislative function into which the courts should not intrude. It has been said that the courts, because of the Charter, will have to enter the legislative sphere. Where rights are specifically guaranteed in the Charter, this may on occasion be true. But where no specific right is found in the Charter and the only support for its constitutional guarantee is an implication, the courts should refrain from intrusion into the field of legislation. That is the function of the freely elected legislatures and Parliament.

186 I would, therefore, dismiss the appeal and answer the constitutional questions, as follows:

1. Are the provisions of the *Public Service Employee Relations Act* that provide compulsory arbitration as a mechanism for resolution of disputes and prohibit the use of lockouts and strikes, in particular sections 49, 50, 93 and 94 thereof, inconsistent with the *Constitution Act, 1982* , and if so, in what particular or particulars, and to what extent?

Answer: The provisions of the Public Service Employee Relations Act which prohibit the use of strikes and lockouts are not inconsistent with the provisions of the Constitution Act, 1982, since the Constitution Act, 1982, does not guarantee a right to strike.

2. Are the provisions of the *Labour Relations Act* that provide compulsory arbitration as a mechanism for resolution of disputes and prohibit the use of lockouts and strikes, in particular sections 117.1, 117.2 and 117.3 thereof, inconsistent with the *Constitution Act, 1982* , and if so, in what particular or particulars, and to what extent?

Answer: The provisions of the Labour Relations Act which prohibit the use of strikes and lockouts are not inconsistent with the provi sions of the Constitution Act, 1982, since the Constitution Act, 1982, does not guarantee a right to strike.

3. Are the provisions of the *Police Officers Collective Bargaining Act* that provide for compulsory arbitration as a mechanism for the resolution of disputes and prohibit the use of lockouts and strikes, in particular sections 3, 9, and 10 thereof, inconsistent with the *Constitution Act, 1982* , and if so, in what particular or particulars, and to what extent?

Answer: The provisions of the Police Officers Collective Bargaining Act which prohibit the use of strikes and lockouts are not inconsistent with the provisions of the Constitution Act, 1982, since the Constitution Act, 1982, does not guarantee a right to strike.

4. Are the provisions of the *Public Service Employee Relations Act* that relate to the conduct of arbitration, in particular sections 48 and 55 thereof, inconsistent with the *Constitution Act, 1982* , and if so, in what particular or particulars, and to what extent?

Answer: The provisions of the Public Service Employee Relations Act which relate to the conduct of arbitration are not inconsistent with the provisions of the Constitution Act, 1982, since the Constitution Act, 1982, does not guarantee a specific form of dispute resolution as a substitute for the right to strike.

5. Are the provisions of the *Labour Relations Act* that relate to the conduct of arbitration, in particular section 117.8 thereof, inconsistent with the *Constitution Act, 1982* , and if so, in what particular or particulars, and to what extent?

Answer: The provisions of the Labour Relations Act which relate to the conduct of arbitration are not inconsistent with the provisions of the Constitution Act, 1982, since the Constitution Act, 1982, does not guarantee a specific form of dispute resolution as a substitute for the right to strike.

6. Are the provisions of the *Police Officers Collective Bargaining Act* that relate to the conduct of arbitration, in particular sections 2(2) and 15 thereof, inconsistent with the *Constitution Act, 1982* , and if so, in what particular or particulars, and to what extent?

Answer: The provisions of the Police Officers Collective Bargaining Act which relate to the conduct of arbitration are not inconsistent with the provisions of the Constitution Act, 1982, since the Constitution Act, 1982, does not guarantee a specific form of dispute resolution as a substitute for the right to strike.

7. Does the *Constitution Act, 1982* , limit the right of the Crown to exclude any one or more of the following classes of its employees from units for collective bargaining:

a) an employee who exercises managerial functions;

b) an employee who is employed in a confidential capacity in matters relating to labour relations;

c) an employee who is employed in a capacity that is essential to the effective functioning of the Legislature, the Executive or the Judiciary;

d) an employee whose interests as a member of a unit for collective bargaining could conflict with his duties as an employee?

Answer: I prefer not to answer this question, for the reasons given by the Chief Justice.

***Le Dain J.* (*Beetz* and *La Forest* JJ. concurring):**

187 The background, the issues and the relevant authority and considerations in this appeal [from case reported at [1985] 2 W.W.R. 289, 35 Alta. L.R. (2d) 124, 16 D.L.R. (4th) 359, 85 C.L.L.C. 14,027, 57 A.R. 268] are fully set out in the reasons for judgment of the Chief Justice and Mr. Justice McIntyre. I agree with Mr. Justice McIntyre that the constitutional guarantee of freedom of association in s. 2(*d*) of the Canadian Charter of Rights and Freedoms does not include, in the case of a trade union, a guarantee of the right to bargain collectively and the right to strike, and accordingly I would dismiss the appeal and answer the constitutional questions in the manner proposed by him. I wish to indicate, if only briefly, the general considerations that lead me to this conclusion.

188 In considering the meaning that must be given to freedom of association in s. 2(*d*) of the Charter it is essential to keep in mind that this concept must be applied to a wide range of associations or organizations of a political, religious, social or economic nature, with a wide variety of objects, as well as activity by which the objects may be pursued. It is in this larger perspective, and not simply with regard to the perceived requirements of a trade union, however important they may be, that one must consider the implications of extending a constitutional guarantee, under the concept of freedom of association, to the right to engage in particular activity on the ground that the activity is essential to give an association meaningful existence.

189 In considering whether it is reasonable to ascribe such a sweeping intention to the Charter I reject the premise that without such additional constitutional protection the guarantee of freedom of association would be a meaningless and empty one. Freedom of association is particularly important for the exercise of other fundamental freedoms, such as freedom of expression and freedom of conscience and religion. These afford a wide scope for protected activity in association. Moreover, the freedom to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal is not to be taken for granted. That is indicated by its express recognition and protection in labour relations legislation. It is a freedom that has been suppressed in varying degrees from time to time by totalitarian regimes.

190 What is in issue here is not the importance of freedom of association in this sense, which is the one I ascribe to s. 2(*d*) of the Charter, but whether particular activity of an association in pursuit of its objects is to be constitutionally protected or left to be regulated by legislative policy. The rights for which constitutional protection is sought — the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer — are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise. It is surprising that in an area in which this court has affirmed a principle of judicial restraint in the review of administrative action we should be considering the substitution of our judgment for that of the legislature by constitutionalizing in general and abstract terms rights which the legislature has found it necessary to define and qualify in various ways according to the particular field of labour relations involved. The resulting necessity of applying s. 1 of the Charter to a review of particular legislation in this field demonstrates in my respectful opinion the extent to which the court becomes involved in a review of legislative policy for which it is really not fitted.

Appeal dismissed.

Footnotes

* Chouinard J. took no part in the judgment.

TAB 9

2003 SCC 3, 2003 CSC 3
Supreme Court of Canada

Siemens v. Manitoba (Attorney General)

2002 CarswellMan 574, 2002 CarswellMan 575, 2003 SCC 3, 2003 CSC 3, [2002] S.C.J. No. 69, [2003] 1 S.C.R. 6, [2003] 4 W.W.R. 1, [2003] A.C.S. No. 69, 102 C.R.R. (2d) 345, 119 A.C.W.S. (3d) 564, 173 Man. R. (2d) 1, 221 D.L.R. (4th) 90, 293 W.A.C. 1, 299 N.R. 267, 34 M.P.L.R. (3d) 163, 47 Admin. L.R. (3d) 205, 55 W.C.B. (2d) 609, J.E. 2003-270, REJB 2003-36968

David Albert Siemens, Eloisa Ester Siemens and Sie-Cor Properties Inc. o/a The Winkler Inn, Appellants v. The Attorney General of Manitoba and the Government of Manitoba, Respondents and The Attorney General of Canada, the Attorney General for Ontario, the Attorney General for New Brunswick, the Attorney General for Alberta, 292129 Alberta Ltd., operating as The Empress Hotel, 484906 Alberta Ltd., operating as Lacombe Motor Inn, Leto Steak & Seafood House Ltd., Neubro Holdings Inc., operating as Lacombe Hotel, Wayne Neufeld, 324195 Alberta Ltd., operating as K.C.'s Steak & Pizza, and Katerina Kadoglou, Interveners

McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps JJ.

Heard: October 31, 2002
Judgment: October 31, 2002
Written reasons: January 30, 2003
Docket: 28416

Proceedings: additional reasons to 2002 CarswellMan 461 (S.C.C.); affirming 2000 MBCA 152, [2001] 2 W.W.R. 515, 153 Man. R. (2d) 106, 238 W.A.C. 106, 85 C.R.R. (2d) 59 (Man. C.A.); affirming 2000 MBQB 140, [2001] 2 W.W.R. 491, 151 Man. R. (2d) 49, 78 C.R.R. (2d) 268 (Man. Q.B.)

Counsel: *David G. Hill* and *Curtis A. Knudson*, for appellants
Shawn Greenberg and *Jayne Kapac*, for respondents
Robert W. Hubbard, for intervener Attorney General of Canada
Hart Schwarts, for intervener Attorney General for Ontario
Gabriel Bourgeois, Q.C., for intervener Attorney General for New Brunswick
Roderich Wiltshire, for intervener Attorney General for Alberta
Ronald J. Dumonceaux and *Graham K. Neill*, for interveners 292129 Alberta Ltd. et al.

Headnote

Gaming --- Legislative competence — Miscellaneous issues

Manitoba Gaming Control Local Option (VLT) Act in its entirety and s. 16 in particular are intra vires provincial legislature — Purposes of Act are to regulate gaming in province and to allow for local input into video lottery terminals — Provision that deemed municipal plebiscite supporting prohibition of VLTs to be binding and that resulted in termination of siteholder agreement between plaintiffs and Manitoba Lotteries Corporation and removal of VLTs from plaintiffs' premises was constitutional.

Constitutional law --- Distribution of legislative powers — Relation between federal and provincial powers — Ancillary and necessarily incidental legislation (double aspect, pith and substance) — General principles

Manitoba Gaming Control Local Option (VLT) Act in its entirety and s. 16 in particular are intra vires provincial legislature — Purposes of Act are to regulate gaming in province and to allow for local input into issue of video lottery

terminals — Provision that deemed municipal plebiscite supporting prohibition of video lottery terminals to be binding and that resulted in termination of siteholder agreement between plaintiffs and Manitoba Lotteries Corporation and removal of VLTs from plaintiffs' premises was constitutional.

Constitutional law --- Distribution of legislative powers — Relation between federal and provincial powers — Colourability — General principles

Manitoba Gaming Control Local Option (VLT) Act in its entirety and s. 16 in particular are intra vires provincial legislature — Purposes of Act are to regulate gaming in province and to allow for local input into issue of video lottery terminals — Act was not colourable attempt by provincial legislature to legislate criminal law, as Act has neither penal consequences nor criminal law purpose.

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Freedom of expression — Nature and scope of expression

Effect of "deemed vote" in s. 16 of Manitoba Gaming Control Local Option (VLT) Act does not violate freedom of expression in s. 2(b) of Canadian Charter of Rights and Freedoms by denying plaintiffs' right to vote in plebiscite under Act — Although voting is protected form of expression, there is no constitutional right to vote in referendum, which is creation of legislation.

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Life, liberty and security — Economic, commercial and proprietary rights

Section 16 of Manitoba Gaming Control Local Option (VLT) Act does not violate right of plaintiffs under s. 7 of Canadian Charter of Rights and Freedoms to pursue lawful occupation or restrict their freedom of movement — Right to life, liberty, and security of person encompasses fundamental life choices, not pure economic interests — Ability to generate business revenue by chosen means is not protected under s. 7.

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Equality rights — General

Section 16 of Manitoba Gaming Control Local Option (VLT) Act does not violate right of plaintiffs under s. 15(1) of Canadian Charter of Rights and Freedoms by making discriminatory distinction between them and other residents of Manitoba — Residence in town was not analogous ground of discrimination, because nothing suggested that its residents have been historically disadvantaged or have suffered any prejudice — Town was singled out in s. 16 because it was only municipality that had held plebiscite on video lottery terminals, and purpose of section was to respect will of residents as expressed in plebiscite.

Jeu --- Compétence législative — Questions diverses

Loi sur les options locales en matière de jeu (appareils de loterie vidéo), en particulier l'art. 16, relève en entier de la compétence législative de la province — Loi a pour objet la réglementation du jeu à l'intérieur de la province ainsi que l'obtention de l'opinion locale sur la question des appareils de loterie vidéo (ALV) — Était constitutionnelle la disposition prévoyant que le référendum municipal en faveur de l'interdiction des ALV était décisionnel et donnait lieu à l'annulation de l'accord d'exploitation du site des demandeurs et au retrait des ALV de leur local — Loi sur les options locales en matière de jeu (appareils de loterie vidéo), L.M. 1999, c. 44, art. 16.

Droit constitutionnel --- Partage des compétences législatives — Rapport entre les compétences fédérales et compétences provinciales — Législation accessoire et nécessairement secondaire (double aspect, caractère véritable) — Principes généraux

Loi sur les options locales en matière de jeu (appareils de loterie vidéo), en particulier l'art. 16, relève en entier de la compétence législative de la province — Loi a pour objet la réglementation du jeu à l'intérieur de la province ainsi que l'obtention de l'opinion locale sur la question des appareils de loterie vidéo (ALV) — Était constitutionnelle la disposition prévoyant que le référendum municipal en faveur de l'interdiction des ALV était décisionnel et donnait lieu à l'annulation de l'accord d'exploitation du site des demandeurs et au retrait des ALV de leur local — Loi sur les options locales en matière de jeu (appareils de loterie vidéo), L.M. 1999, c. 44, art. 16.

Droit constitutionnel --- Partage des compétences législatives — Rapport entre les compétences fédérales et compétences provinciales — Législation déguisée — Principes généraux

Loi sur les options locales en matière de jeu (appareils de loterie vidéo), en particulier l'art. 16, relève en entier de la compétence législative de la province — Loi a pour objet la réglementation du jeu à l'intérieur de la province ainsi que l'obtention de l'opinion locale sur la question des appareils de loterie vidéo (ALV) — Loi ne constitue pas une tentative

déguisée de légiférer en matière de droit criminel puisqu'elle ne comporte aucune conséquence pénale et que son objet ne relève pas du droit criminel — Loi sur les options locales en matière de jeu (appareils de loterie vidéo), L.M. 1999, c. 44, art. 16.

Droit constitutionnel --- Charte canadienne des droits et libertés — Nature des droits et libertés — Liberté d'expression — Nature et étendue de l'expression

« Présomption de scrutin » contenue dans l'art. 16 de la Loi sur les options locales en matière de jeu (appareils de loterie vidéo) n'a pas pour effet de violer la liberté d'expression protégée par l'art. 2b) de la Charte en retirant aux demandeurs leur droit de voter au référendum prévu par la Loi — Même si le droit de vote représente une forme d'expression protégée, il demeure qu'il n'existe aucun droit constitutionnel de voter à un référendum, lequel est une création de la loi — Charte canadienne des droits et libertés, art. 2b) — Loi sur les options locales en matière de jeu (appareils de loterie vidéo), L.M. 1999, c. 44, art. 16.

Droit constitutionnel --- Charte canadienne des droits et libertés — Nature des droits et libertés — Vie, liberté et sécurité — Droits économiques, commerciaux et de propriété

Article 16 de la Loi sur les options locales en matière de jeu (appareils de loterie vidéo) ne porte pas atteinte au droit des demandeurs d'exercer un métier licite garanti par l'art. 7 de la Charte ni ne restreint leur liberté de mouvement — Droit à la vie, à la liberté et à la sécurité de sa personne comprend les choix de vie fondamentaux, mais non les intérêts économiques purs — Capacité de générer du revenu d'entreprise selon le moyen choisi n'est pas protégée par l'art. 7 — Charte canadienne des droits et libertés, art. 7 — Loi sur les options locales en matière de jeu (appareils de loterie vidéo), L.M. 1999, c. 44, art. 16.

Droit constitutionnel --- Charte canadienne des droits et libertés — Nature des droits et libertés — Droit à l'égalité — En général

Article 16 de la Loi sur les options locales en matière de jeu (appareils de loterie vidéo) ne porte pas atteinte au droit des demandeurs en vertu de l'art. 15 de la Charte en faisant une distinction discriminatoire entre les demandeurs et les autres résidents du Manitoba — Fait de résider dans la Ville ne constituait pas un motif analogue de discrimination puisque rien ne suggérait que les résidents de la Ville avaient été historiquement désavantagés ou qu'ils souffraient d'un quelconque préjudice — Ville a été mentionnée dans l'art. 16 parce qu'elle était la seule municipalité à avoir tenu un référendum sur la question des appareils de loterie vidéo et parce que l'article avait pour objet de respecter la volonté exprimée par les résidents lors du référendum — Charte canadienne des droits et libertés, art. 15(1) — Loi sur les options locales en matière de jeu (appareils de loterie vidéo), L.M. 1999, c. 44, art. 16.

The plaintiffs were the sole shareholders of a company that had entered into a "siteholder" agreement with the Manitoba Lotteries Corporation to operate several revenue-generating video lottery terminals in their hotel in the town of Winkler, Manitoba. The siteholders received a percentage of the revenue from the VLTs, which remained the property of the corporation. A non-binding plebiscite was held supporting the prohibition of VLTs in the town. The following year, the Manitoba government enacted the Gaming Control Local Option (VLT) Act, enabling municipalities to hold binding plebiscites on the prohibition of VLTs. Section 16 of the Act specifically deemed the Winkler plebiscite to be binding, resulting in the termination of the siteholder agreement between the plaintiffs and the lotteries corporation and the removal of the VLTs from their premises.

The plaintiffs challenged the legislation on the grounds that s. 16 violated ss. 2(b), 7 and 15(1) of the Canadian Charter of Rights and Freedoms and that the legislation was ultra vires the provincial government because it encroached upon Parliament's exclusive jurisdiction over criminal law. The motions judge rejected the application of the plaintiffs for an order of certiori and their appeal was dismissed. The plaintiffs appealed.

Held: The appeal was dismissed.

Per Major J.: The Winkler plebiscite was not held pursuant to a resolution prohibiting VLTs, as required by the Act. In accordance with the principles of purposive interpretation, however, s. 16 was intended to incorporate the wishes already expressed by Winkler voters into the broader provincial scheme. The province attempted to give effect to the Winkler plebiscite by incorporating the deeming provision into the Act to bring Winkler within the larger scheme of VLT plebiscites in the province. Unless legislation is otherwise unconstitutional, the particular means chosen by the legislature cannot be used as a reason to declare it invalid. Similarly, because the evaluation of Charter claims should be contextual,

the plaintiffs' Charter claims could not be assessed without considering the plebiscite. The legislature did not arbitarily single out the town, but enacted s. 16 in response to the wishes of the Winkler voters.

To determine whether the Manitoba government had legislative authority to enact the Act, it was necessary to inquire into the purpose and effects of the legislation to identify its pith and substance. The purpose of the Act as a whole is to allow municipalities to express, by binding plebiscite, whether they wish VLTs to be permitted or prohibited within their communities. The purposes of s. 16 are to prohibit VLTs in Winkler and to cancel existing siteholder agreements. The provision was enacted to give effect to the plebiscite that had been held before the Act came into force. Section 16(1) cancelled the siteholder agreement between the plaintiffs' hotel and the lotteries corporation, and by deeming a resolution prohibiting VLTs to have been approved in Winkler in accordance with the Act, s. 16(2) put the town into the "starting position" of prohibiting VLTs. The pith and substance of the Act falls within a provincial head of legislative authority, because gaming falls within the "double aspect" doctrine and can be subject to legislation by both the federal and provincial governments. The Act was prima facie validly enacted under s. 92¶13 and 92¶16 of the Constitution Act, 1867. Section 16(1) specifically deals with siteholder agreements, which are contractual in nature and thus fall under property and civil rights. On a broader level, the municipal plebiscites empower each community to determine whether VLTs are to be permitted, thereby invoking matters of a local nature. The Act in its entirety and s. 16 in particular are intra vires the provincial legislature. The purposes of the Act are to regulate gaming in the province and to allow for local input into the issue of VLTs, both of which fall under the powers enumerated in s. 92 of the Constitution Act, 1867. The Act was not a colourable attempt by the provincial government to legislate criminal law, as the Act has neither penal consequences nor a criminal law purpose. Although s. 3(1) prohibits the operation of VLTs in municipalities that have banned them pursuant to a binding plebiscite, that alone was not sufficient to establish that the Act is, in pith and substance, criminal law. The prohibition did not create a provincial offence, and neither did it impose a penalty for operating VLTs in those municipalities. Even if it had, the presence of a prohibition and a penalty would not invalidate an otherwise acceptable use of provincial legislative power. The termination of siteholder agreements could not be characterized as a forfeiture of VLTs within the meaning of criminal law, because the siteholder has no property interest in the machines. The siteholder has lost only the opportunity to earn a percentage of the revenue generated by the VLTs. The Act could not be said to have been an attempt by the Manitoba government to legislate criminal law because the trial judge found no evidence that it was enacted to regulate public morality, found no basis to assume that the dominant purpose for prohibiting VLTs in certain locations was to regulate public morality, and found that the presence of moral considerations does not, per se, render a law ultra vires the provincial legislature. The dominant purpose of the Act is to regulate gaming in the province, not to express moral disapproval of VLTs. When a law is, in pith and substance, related to the provincial legislative sphere, it will not be struck down merely because it has incidental effects on a federal head of power.

The effect of the "deemed vote" in s. 16 did not deny the plaintiffs the right to vote in a plebiscite under the Act and, therefore, violate their freedom of expression in s. 2(b) of the Charter. Although voting is a protected form of expression, s. 16 does not violate that freedom because there is no constitutional right to vote in a referendum. A municipal plebiscite, like a referendum, is a creation of legislation. In this case, any right to vote in a plebiscite must be found within the language of the Act, which alone defines the terms and qualifications for voting. Accordingly, the Act did not deny the plaintiffs the right to vote in a VLT plebiscite. Moreover, it did not prevent the residents of Winkler from voting in future plebiscites on the issue of VLTs. Like all other residents of Manitoba, the plaintiffs were free to initiate a plebiscite under the Act either to reinstate or remove VLTs from their municipality.

Section 16 does not violate the right of the plaintiffs under s. 7 of the Charter to pursue a lawful occupation or restrict their freedom of movement by preventing them from pursuing their chosen profession in a certain location. The right to life, liberty, and security of the person encompasses fundamental life choices, not pure economic interests. Consequently, the rights asserted by the plaintiffs did not fall within the meaning of s. 7. The alleged right of the plaintiffs to operate VLTs at their place of business was purely an economic interest and could not be characterized as a fundamental life choice. The ability to generate business revenue by one's chosen means is not protected under s. 7 of the Charter.

Likewise, s. 16 did not violate the rights of the plaintiffs under s. 15(1) of the Charter by distinguishing between them and other residents of Manitoba based on the analogous ground of residence, which distinction would be discriminatory because it denied them the opportunity to vote in a binding plebiscite on the issue of VLTs. Atlhough s. 16 clearly

distinguishes between Winkler and other municipalities, residence in Winkler did not constitute an analogous ground of discrimination, because nothing suggested that Winkler residents have been historically disadvantaged or have suffered any prejudice. Moreover, the legislation did not discriminate against them in any substantive sense. Winkler was singled out in s. 16 because it was the only municipality to have held a plebiscite on the issue of VLTs, and the very purpose of the section was to respect the will of the residents as expressed in their plebiscite. Within that context, it was unlikely that any reasonable resident of Winkler would feel that he or she has been marginalized, devalued, or ignored as a member of Canadian society. There was no harm to dignity and no violation of s. 15(1).

Les demandeurs étaient les seuls actionnaires d'une compagnie qui avait conclu un contrat d'exploitation du site avec la Corporation des loteries du Manitoba dans le but d'exploiter dans leur hôtel, situé dans la ville de Winkler, plusieurs appareils de loterie vidéo (ALV) générateurs de revenus. Les exploitants du site recevaient un pourcentage des revenus générés par les ALV, lesquels demeuraient la propriété de la Corporation. Un référendum consultatif a été tenu; ses résultats appuyaient l'interdiction d'avoir des ALV dans la Ville. L'année suivante, le gouvernement manitobain a adopté la Loi sur les options locales en matière de jeu (appareils de loterie vidéo), qui permettait aux municipalités de tenir des référendums portant sur l'interdiction des ALV. L'article 16 présumait spécifiquement que le référendum tenu par la ville de Winkler était décisionnel, ce qui donnait lieu à l'annulation de l'accord d'exploitation du site des demandeurs et au retrait des ALV de leur local.

Les demandeurs ont contesté la Loi, soutenant que l'art. 16 contrevenait aux art. 2b), 7 et 15 de la Charte canadienne des droits et libertés et excédait la compétence du gouvernement provincial parce qu'il empiétait sur la compétence du Parlement fédéral en matière de droit criminel. Le juge de première instance a rejeté la demande de certiorari présentée par les demandeurs; leur pourvoi a également été rejeté. Les demandeurs ont interjeté appel.

Arrêt: Le pourvoi a été rejeté.

Le référendum tenu par la ville de Winkler n'a pas été tenu en vertu d'une résolution visant à interdire les ALV comme l'exigeait la Loi. Cependant, conformément aux principes d'interprétation en fonction de l'objet, l'art. 16 avait pour but d'incorporer dans le régime général de la province la volonté exprimée par les électeurs de Winkler. Par le biais de la Loi, la province a tenté de donner effet au référendum tenu par Winkler à l'aide de plusieurs moyens, dont la disposition créatrice de présomption utilisée, afin d'inclure Winkler dans le régime général de la province portant sur les référendums relatifs aux ALV. Les moyens particuliers choisis par le législateur ne pouvaient servir de fondement pour déclarer la loi invalide, à moins que celle-ci ne soit par ailleurs inconstitutionnelle. De façon similaire, les arguments des demandeurs fondés sur la Charte ne pouvaient être examinés sans tenir compte du référendum, puisque l'évaluation d'arguments fondés sur la Charte doit être contextuelle. Le législateur n'a pas mentionné la Ville arbitrairement; il a plutôt adopté l'art. 16 afin de répondre aux désirs exprimés par les électeurs de Winkler.

Pour déterminer si le gouvernement manitobain avait la compétence législative pour adopter la Loi, il était nécessaire d'examiner l'objet et les effets de celle-ci dans le but d'identifier son caractère véritable. La Loi visait à permettre aux municipalités de dire, à l'aide d'un référendum décisionnel, si elles voulaient que les ALV soient permis ou interdits dans leur communauté. L'article 16 a pour but d'interdire les ALV dans la ville de Winkler et d'annuler les accords d'exploitation du site existants. La disposition a été adoptée afin de donner effet au référendum tenu avant l'entrée en vigueur de la Loi. L'article 16(1) avait pour effet d'annuler l'accord d'exploitation du site conclu avec l'hôtel des demandeurs; l'art. 16(2) avait pour effet de mettre la Ville dans la « situation de départ » permettant d'interdire les ALV, et ce, en présumant qu'une résolution interdisant les ALV avait été approuvée par Winkler conformément à la Loi. Le caractère véritable de la Loi relève du chef de compétence de la province puisque le jeu relève de la règle du « double aspect » et peut être assujetti aux lois des gouvernements fédéral et provincial. La Loi apparaissait, prima facie, avoir été validement adoptée en vertu des art. 92¶13 et 92¶16 de la Loi constitutionnelle de 1867. L'article 16(1) porte spécifiquement sur les accords d'exploitation du site, lesquels sont de nature contractuelle et relèvent donc de la propriété et des droits civils. De façon plus générale, les référendums municipaux permettent à chaque communauté de décider si les ALV doivent être permis, faisant ainsi intervenir des questions de nature locale. La Loi dans son ensemble et l'art. 16 en particulier relèvent à l'intérieur de la compétence du législateur provincial. La Loi a pour but de réglementer le jeu dans la province et de permettre aux populations locales de donner leur opinion sur la question des ALV, questions qui relèvent toutes deux des compétences énumérées à l'art. 92 de la Loi constitutionnelle de 1867.

La Loi ne constituait pas une tentative déguisée de légiférer en matière de droit criminel puisqu'elle n'avait aucune conséquence pénale et que son objet ne relevait pas du droit criminel. Même si l'art. 3(1) interdit l'exploitation d'ALV dans les municipalités qui les ont interdits conformément à un référendum décisionnel, cela n'était pas suffisant pour établir que, de par son caractère véritable, la Loi relevait du droit criminel. L'interdiction ne créait aucune infraction provinciale ni n'imposait d'amende pour l'exploitation d'ALV dans ces municipalités. Même si elle l'avait fait, la simple présence d'une interdiction et d'une amende n'invalidait pas un usage par ailleurs acceptable de la compétence législative provinciale. On ne pouvait qualifier l'annulation des accords d'exploitation du site de perte au sens du droit criminel, puisque l'exploitant du site n'est pas propriétaire des machines. L'exploitant du site a tout simplement perdu la possibilité de gagner un pourcentage du revenu généré par les ALV.

On ne pouvait dire, de toute façon, que la Loi constituait une tentative de légiférer en matière de droit criminel puisque le juge de première instance n'a trouvé aucune preuve que la Loi avait été adoptée dans le but de réglementer la moralité publique. Rien ne permettait de présumer que l'objet premier de l'interdiction des ALV à certains endroits était de réglementer la moralité publique. De plus, la présence de considérations morales ne pouvait en soi faire qu'une loi excède la compétence du législateur provincial. La Loi avait comme objet premier la réglementation du jeu dans la province, et non l'expression de la désapprobation morale visant les ALV. Lorsque le caractère véritable d'une loi a un lien avec un domaine de compétence provinciale, la loi ne sera pas invalidée simplement parce qu'elle a des effets accessoires sur un chef de compétence fédérale.

La « présomption de scrutin » prévue par l'art. 16 n'avait pas pour effet de priver les demandeurs de leur droit de voter au référendum prévu par la Loi et donc de porter atteinte à leur liberté d'expression protégée par l'art. 2b) de la Charte. Même si le droit de vote est une forme d'expression protégée, l'art. 16 ne porte pas atteinte à cette liberté puisqu'il n'existe aucun droit constitutionnel de voter à un référendum. Le référendum municipal est une création de la loi. En l'espèce, le droit de voter au référendum devait se trouver dans les termes de la Loi, qui est la seule à définir les termes et qualifications du droit de vote. Par conséquent, la Loi ne pouvait priver les demandeurs du droit de voter au référendum portant sur les ALV. En outre, elle n'empêchait pas les résidents de Winkler de voter à d'autres référendums portant sur la question des ALV. Comme tout autre résident du Manitoba, les résidents de Winkler pouvaient faire un référendum en vertu de la Loi visant à rétablir les ALV dans leur municipalité ou à les retirer.

L'article 16 ne porte pas atteinte au droit des demandeurs d'exercer un métier licite garanti par l'art. 7 de la Charte ni ne restreint leur liberté de mouvement en les empêchant d'exercer dans un certain endroit la profession qu'ils ont choisie. Le droit à la vie, à la liberté et à la sécurité de la personne comprend le droit de faire des choix de vie fondamentaux, mais non les intérêts économiques purs. Par conséquent, les droits allégués par les demandeurs n'étaient pas visés par l'art. 7. Le droit allégué par les demandeurs d'exploiter des ALV dans leur établissement commercial était un intérêt économique pur et ne pouvait être qualifié de choix de vie fondamental. La capacité de générer des revenus d'entreprise grâce au moyen choisi n'est pas protégée par l'art. 7 de la Charte.

L'article 16 ne porte pas non plus atteinte au droit des demandeurs garanti par l'art. 15(1) de la Charte en faisant une distinction fondée sur le motif analogue de résidence entre les demandeurs et tous les autres résidents du Manitoba, distinction qui serait discriminatoire parce qu'elle priverait les demandeurs de la possibilité de voter dans un référendum décisionnel sur la question des ALV. Même si l'art. 16 fait clairement une distinction entre la ville de Winkler et les autres municipalités, le fait de résider à Winkler ne constituait pas un motif analogue de discrimination, puisque rien ne permettait de suggérer que les résidents de Winkler avaient été historiquement désavantagés ou avaient souffert d'un quelconque préjudice. De plus, la Loi ne faisait aucune discrimination réelle à leur endroit. La ville de Winkler était mentionnée dans l'art. 16 parce qu'elle était la seule municipalité à avoir tenu un référendum sur la question des ALV et parce que l'objet même de l'article était de respecter la volonté exprimée par les résidents lors du référendum. Pris dans ce contexte, il était peu probable qu'un résident raisonnable de Winkler ait l'impression d'avoir été marginalisé, dévalué ou ignoré à titre de membre de la société canadienne. Aucune atteinte à la dignité ni aucune atteinte à l'art. 15(1) n'avaient été portées.

The judgment of the court was delivered by *Major J.*:

I. Introduction

1 In 1999, the Government of Manitoba enacted local option legislation enabling municipalities to hold binding plebiscites on the prohibition of video lottery terminals ("VLTs") in their communities. The legislation set out the procedure by which the plebiscites were to be initiated, held, and given effect. In addition, the legislation contained a specific section dealing with the Town of Winkler, which had held a non-binding plebiscite supporting a prohibition of VLTs the previous year. As a result of the legislation, VLTs were prohibited in Winkler until such time as a future binding plebiscite, held in accordance with the legislation, would permit their return to the municipality.

2 Both the Manitoba Court of Queen's Bench and the Court of Appeal concluded that the *Gaming Control Local Option (VLT) Act*, S.M. 1999, c. 44 ("VLT Act"), either as a whole or s. 16 in particular, was neither *ultra vires* the provincial legislature, nor did it violate the *Canadian Charter of Rights and Freedoms*. The appellants subsequently challenged the legislation before this Court on the grounds that s. 16, dealing specifically with Winkler, violates ss. 2(b), 7, and 15(1) of the *Charter*. They also argued that the legislation is *ultra vires* the provincial government because it is an affront to Parliament's exclusive jurisdiction over criminal law. On October 31, 2002, the Court unanimously dismissed their appeal. These are the reasons for that decision.

II. Facts

3 The Manitoba Lotteries Corporation ("MLC") is responsible for operating lottery schemes, including VLTs, in the province. The MLC enters into agreements with "siteholders" to place VLTs on the siteholders' property. The siteholders then receive a per centage of the VLTs' revenue. However, the VLTs remain the property of the MLC and, according to the terms of the siteholder agreement, can be removed at any time, with or without cause.

4 The appellants, David and Eloisa Siemens, are the sole shareholders of Sie-Cor Properties Inc., which purchased The Winkler Inn in 1993. They invested a considerable amount of money in the renovation and expansion of the Inn, and submitted that VLTs were an important consideration when making their investment. The appellants increased the number of VLTs from 8 to 10 when they first purchased The Winkler Inn, and then from 10 to 12 in the fall of 1994. Their mortgage payments roughly coincided with the monthly VLT revenue.

5 In August 1998, the Town of Winkler passed a resolution to hold a plebiscite regarding VLTs in the municipality. The plebiscite was held in conjunction with the October municipal elections. The question was:

> Should the Town of Winkler request that the Provincial Government ban video lottery terminals in Winkler, which would result in the Town of Winkler losing its annual municipal VLT grant?

Approximately 50 per cent of eligible voters participated in the plebiscite, including Mr. and Mrs. Siemens. A sizeable majority (77.8 per cent) of the votes cast were in favour of requesting a ban on VLTs. In response to the plebiscite, the Town of Winkler passed a resolution in December 1998 to forward the results to the Government of Manitoba. Sie-Cor Properties Inc., in turn, filed an application in the Court of Queen's Bench seeking a declaration that the resolution was invalid and an order of *certiorari* quashing it.

6 In July 1999, while Sie-Cor's application was proceeding to a hearing, the Manitoba Government passed the VLT Act. The Act permits municipalities to hold binding plebiscites regarding the prohibition of VLTs within their jurisdictions. In addition, the government used the new legislation as an opportunity to give effect to the plebiscite that had already been held in Winkler. Specifically, s. 16 of the Act seeks to terminate the siteholder agreements in Winkler and deems that a resolution prohibiting VLTs was passed in accordance with the Act. Pursuant to this legislation, the siteholder agreement with The Winkler Inn was terminated effective December 1, 1999.

III. Relevant Statutory Provisions

7 *The Gaming Control Local Option (VLT) Act*, S.M. 1999, c. 44

> 1 In this Act,

. . . . .

"plebiscite" means a vote by the electors of a municipality on a resolution approved by the council or stated on a petition

(a) to prohibit video lottery gaming within the municipality, or

(b) where video lottery gaming within the municipality is prohibited because of a plebiscite, to permit video lottery gaming within the municipality;

. . . . .

"video lottery gaming" means the operation of a lottery scheme, as defined in the *Criminal Code* (Canada), that involves the use of a video lottery terminal.

. . . . .

3(1) Notwithstanding section 3 of *The Manitoba Lotteries Corporation Act*, no person shall carry on any video lottery gaming, under a siteholder agreement or otherwise, within a municipality while a resolution prohibiting video lottery gaming within the municipality is in effect.

3(2) A resolution prohibiting video lottery gaming within a municipality comes into effect on the first day of the fifth month following the month in which it is approved by a majority of the votes cast in a plebiscite and continues in effect until a resolution permitting video lottery gaming within the municipality is approved by a majority of the votes cast in a plebiscite.

. . . . .

16(1) Each siteholder agreement existing before the coming into force of this section respecting the operation of video lottery terminals at a site located in the Town of Winkler is terminated on the first day of the fifth month following the month in which this Act comes into force, and the corporation shall remove all video lottery terminals from sites located in the Town of Winkler as soon as practicable after that day.

16(2) A resolution to prohibit video lottery gaming within the Town of Winkler is deemed for the purposes of this Act to have been approved by a plebiscite and is deemed to come into effect on the first day of the fifth month following the month in which this Act comes into force.

Criminal Code, R.S.C. 1985, c. C-46

207.1(1) Notwithstanding any of the provisions of this Part relating to gaming and betting, it is lawful

(a) for the government of a province, either alone or in conjunction with the government of another province, to conduct and manage a lottery scheme in that province, or in that and the other province, in accordance with any law enacted by the legislature of that province; . . .

Constitution Act, 1867

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, -

. . . . .

13. Property and Civil Rights in the Province.

. . . . .

16. Generally all Matters of a merely local or private Nature in the Province.

Canadian Charter of Rights and Freedoms

2. Everyone has the following fundamental freedoms:

. . . . .

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

. . . . .

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

. . . . .

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

IV. Judgments Below

A. Manitoba Court of Queen's Bench (2000), [2001] 2 W.W.R. 491

8 In February 2000, Hamilton J. heard arguments on a motion to have certain questions of law determined before trial on Sie-Cor's *certiorari* application. At issue was whether the VLT Act, either as a whole or s. 16 in particular, was *ultra vires* the provincial legislature as an invasion into the federal government's criminal law power, and whether s. 16 violated ss. 2(b), 6, 7, and 15(1) of the *Charter*. It was also argued that the legislation constituted prohibited discrimination under the Manitoba *Human Rights Code*, S.M. 1987-88, c. 45. Hamilton J. rejected all the appellants' claims.

9 In dismissing the division of powers argument, Hamilton J. relied on *R. v. Furtney*, [1991] 3 S.C.R. 89 (S.C.C.). That case held that gaming was a matter within the "double aspect" doctrine, such that both Parliament and the provincial legislatures had jurisdiction to legislate in that area. She found that the VLT Act was, therefore, *prima facie* within the legislative authority of the Manitoba Government. She also found that the VLT Act was not an attempt to enact criminal law, as the legislation lacked both penal consequences and a criminal law purpose.

B. Manitoba Court of Appeal (2000), [2001] 2 W.W.R. 515

10 In a short oral judgment delivered by Twaddle J.A. (Kroft and Steel JJ.A. concurring), the Manitoba Court of Appeal dismissed the appeal on all grounds, expressing that it was in "substantial agreement" with Hamilton J., "both with respect to the declarations made and her reasons for them."

V. Issues

11 By order of the Chief Justice dated December 19, 2001, the following constitutional questions were stated for the Court's consideration:

(1) Is *The Gaming Control Local Option (VLT) Act*, S.M. 1999, c. 44, in its entirety *ultra vires* the Legislature of the Province of Manitoba as it relates to a subject matter which is within the exclusive jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?

(2) Is s. 16(1) of *The Gaming Control Local Option (VLT) Act*, S.M. 1999, c. 44, *ultra vires* the Legislature of the Province of Manitoba as it relates to a subject matter which is within the exclusive jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?

(3) Is s. 16 of *The Gaming Control Local Option (VLT) Act* inconsistent with s. 2(b) of the *Canadian Charter of Rights and Freedoms*?

(4) If the answer to question 3 is in the affirmative, is s. 16 of *The Gaming Control Local Option (VLT) Act* nevertheless justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?

(5) Is s. 16 of *The Gaming Control Local Option (VLT) Act* inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*?

(6) If the answer to question 5 is in the affirmative, is s. 16 of *The Gaming Control Local Option (VLT) Act* nevertheless justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?

(7) Is s. 16 of *The Gaming Control Local Option (VLT) Act* inconsistent with s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

(8) If the answer to question 7 is in the affirmative, is s. 16 of *The Gaming Control Local Option (VLT) Act* nevertheless justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?

VI. Analysis

A. Interpreting the VLT Act

12 A significant portion of the appellants' submissions focused on the proper characterization and interpretation of the VLT Act, and particularly s. 16 of that Act. The main thrust of their argument was that s. 16 of the VLT Act did not "give effect" to the plebiscite that occurred in Winkler in 1998 and that, therefore, the constitutionality of the legislation must be assessed without reference to that plebiscite. They noted that s. 16 does not explicitly refer to the 1998 plebiscite, and that s. 16(2) refers to the indefinite "a plebiscite" rather than the definite "the plebiscite." As well, they submitted that the subsection deems a resolution prohibiting gaming to have been passed by a municipal plebiscite in Winkler, when no such resolution was ever approved by the town council. These characteristics allegedly demonstrate that s. 16 of the VLT Act did not give effect to the plebiscite that actually occurred in Winkler in the fall of 1998, and that it unfairly attributes a binding plebiscite to the residents of Winkler, who never voted in such a plebiscite.

13 The appellants expressed puzzlement at being affected by the 1998 plebiscite, as that plebiscite was not held pursuant to a resolution prohibiting VLTs, as required by the Act. The answer to that puzzlement is that the VLT Act has a more general application, and, in accordance with the principles of purposive interpretation, that s. 16 was intended to incorporate the wishes already expressed by Winkler voters into the broader provincial scheme.

14 No doubt the legislation could have been drafted in a way that more explicitly expressed the purpose of s. 16. Nevertheless, given the entire context of the legislation, the legislative purpose is clear. The Town of Winkler held a non-binding plebiscite in the fall of 1998, in which a majority of votes cast supported a request to remove VLTs from the community. The town council forwarded the results of the plebiscite to the provincial government. In response, the provincial government enacted legislation prohibiting the operation of VLTs in Winkler and terminating all siteholder agreements in that community.

15 The appellants acknowledged at the appeal that, if the government had wished to enact legislation dealing solely with the prohibition of VLTs in the Town of Winkler, it could legitimately have done so. However, instead of giving effect to the Winkler plebiscite in an Act designed solely for that purpose, the government incorporated a section prohibiting VLTs in Winkler into a larger statute that established a scheme for all municipalities to prohibit or reinstate VLTs through binding plebiscites. I cannot see how the legislative structure chosen by the government affects the Act's constitutionality. Through the VLT Act, the province attempted to bring Winkler within the larger scheme of VLT plebiscites in the province. In order to do so, it deemed that Winkler voters had approved a VLT prohibition in accordance with the Act. All the parties agree that the Winkler plebiscite did not, in fact, approve such a prohibition. Indeed, since the Winkler plebiscite preceded the introduction of the VLT Act, it was impossible for voters to do so. Regardless, the legislature had the latitude to give effect to the Winkler plebiscite by various means, including the deeming provision it used. Unless the legislation is otherwise unconstitutional, the particular means chosen by the legislature cannot be used as a basis to declare it invalid.

16 It should be noted that the less-than-ideal legislative drafting is not an independent ground upon which legislation can be found unconstitutional. The wording of the statute is only relevant to the analysis in so far as it informs the

determination of the pith and substance of the legislation. As long as the pith and substance of s. 16 falls within the provincial sphere of legislative authority, it is immaterial whether it could have been drafted in clearer terms.

17 Similarly, it cannot be concluded that the wording of s. 16 dictates that the appellants' *Charter* claims must be assessed without considering the Winkler plebiscite of 1998. This Court has stated on numerous occasions that the evaluation of *Charter* claims should be contextual: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.), at p. 344 (*per* Dickson J. (as he then was)), *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.), at pp. 1355-1356 (*per* Wilson J.), *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 (S.C.C.), at pp. 224-226 (*per* Cory J.), *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 (S.C.C.), at para. 87 (*per* Bastarache J.), *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.), at para. 62 (*per* Iacobucci J.). The purpose and effects of the legislation cannot be examined in a vacuum, but must be considered in light of the facts as they are known to both the claimant and the legislator.

18 The rationale for contextual analysis is particularly strong in this case. But for the 1998 Winkler plebiscite, the provincial government would never have enacted s. 16 of the VLT Act. The legislature did not single out the Town of Winkler on an arbitrary basis; rather, it enacted s. 16 to respond to the wishes of Winkler voters. If the Court were to ignore the 1998 plebiscite in assessing the *Charter* claims, it would be ignoring the very circumstances that gave rise to the impugned section. This is both logically and legally flawed. Nevertheless, the analysis of the *Charter* claims is not dependent on the existence of the 1998 plebiscite, and the legislation would have been upheld in any event. The contextual analysis merely strengthens that conclusion.

B. The Division of Powers Claim

19 To determine whether the Manitoba Government had legislative authority to enact the VLT Act, it is necessary to identify the pith and substance of that legislation. In *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture)*, 2002 SCC 31 (S.C.C.), at para. 53, it was held that the pith and substance analysis involves an inquiry into both the purpose of the legislation and its effects. LeBel J. also wrote that, where a specific section of the legislation is being challenged, its pith and substance should be identified before that of the Act as a whole. If the impugned section is *ultra vires*, it may still be upheld if it is sufficiently integrated into a valid provincial legislative scheme (para. 58). However, since the appellants in the present case have challenged both s. 16 and the VLT Act as a whole, it is necessary to identify the pith and substance of both in any event.

20 The purpose of s. 16 of the VLT Act is to prohibit VLTs in Winkler and to cancel all existing siteholder agreements with respect to VLTs. The legislative debates on the VLT Act indicate that s. 16 was enacted to give effect to the plebiscite that had already been held in Winkler, albeit before the Act came into force. The responsible Minister said:

> As you may be aware, Madam Speaker, last fall the citizens of Winkler conducted a plebiscite requesting the removal of VLTs from that community. This legislation supports that community's will. This legislation will recognize the legitimacy of the 1998 VLT plebiscite in Winkler.

(Manitoba, Legislative Assembly, *Debates and Proceedings* (Hansard), 5th Sess., 36th Leg., vol. XLIX, No. 57A, July 8, 1999, at p. 4092 (Ms Render))

The effect of s. 16(1) of the VLT Act was to cancel the siteholder agreement with The Winkler Inn. Further, as indicated, s. 16(2) attempted to bring the non-binding Winkler plebiscite within the local option scheme outlined in the other sections of the Act. The Act allows plebiscites to be held on whether to prohibit VLTs within the municipality or, where a VLT prohibition is already in effect, on whether to reinstate VLTs within the municipality. Thus, by deeming a resolution prohibiting VLTs to have been approved in Winkler in accordance with the Act, the effect of s. 16(2) is to put the Town of Winkler into the "starting position" of prohibiting VLTs. If a subsequent VLT plebiscite is to be held in Winkler, the question will ask whether to reinstate VLTs in that community.

21 More broadly, the purpose of the VLT Act as a whole seems to be, quite simply, to allow municipalities to express, by binding plebiscite, whether they wish VLTs to be permitted or prohibited within their communities. This purpose is evident from the title of the Act, *The Gaming Control Local Option (VLT) Act*, which clearly expresses the government's desire to obtain local input on the issue of VLTs. The VLT Act was the government's response to two reports: the Manitoba Lottery Policy Review's *Working Group Report* (1995) (the "Desjardins Report"), and the Manitoba Gaming Control Commission's *Municipal VLT Plebiscite Review* (Winnipeg: The Commission, 1998). Both reports recommended that municipal plebiscites be held to determine local opinion on the issue of VLTs.

22 The pith and substance of the VLT Act falls within a provincial head of legislative authority. As Stevenson J. wrote for this Court in *Furtney*, *supra*, at p. 103, gaming is a matter that falls within the "double aspect" doctrine. Accordingly, gaming can be subject to legislation by both the federal and provincial governments:

> In my view, the regulation of gaming activities has a clear provincial aspect under s. 92 of the *Constitution Act, 1867* subject to Parliamentary paramountcy in the case of a clash between federal and provincial legislation. . . . Altogether apart from features of gaming which attract criminal prohibition, lottery activities are subject to the legislative authority of the province under various heads of s. 92, including, I suggest, property and civil rights (13), licensing (9), and maintenance of charitable institutions (7) (specifically recognized by the *Code* provisions). Provincial licensing and regulation of gaming activities is not *per se* legislation in relation to criminal law.

Without foreclosing discussion on other potential heads of jurisdiction, it is sufficient for this appeal to find that the VLT Act was, *prima facie*, validly enacted under ss. 92(13) and 92(16). Section 16(1) deals specifically with the siteholder agreements, which are contractual in nature and thereby fall under property and civil rights. On a broader level, the municipal plebiscites empower each community to determine whether VLTs will be permitted, thereby invoking matters of a local nature.

23 The VLT Act is not, as the appellants have submitted, a colourable attempt to legislate criminal law. The Act does not possess the relevant characteristics outlined by Rand J. in *Reference re Validity of s. 5(a) of Dairy Industry Act (Canada), (Margarine Case)* (1948), [1949] S.C.R. 1 (S.C.C.), at p. 50, and affirmed by the Privy Council in (1950), [1951] A.C. 179 (Canada P.C.), at p. 196, and, more recently, in *Reference re Firearms Act (Canada)*, [2000] 1 S.C.R. 783, 2000 SCC 31 (S.C.C.), at para. 27. These are (1) a prohibition, (2) coupled with a penalty, and (3) a criminal law purpose. The respondents conceded that the VLT Act contains a prohibition, namely, s. 3(1) prohibits the operation of VLTs in municipalities that have banned them as the result of a binding plebiscite. Nevertheless, this alone is insufficient to establish that the VLT Act is, in pith and substance, criminal law. The Act does not create penal consequences, and was not enacted for a criminal law purpose.

24 Although s. 3(1) prohibits the operation of VLTs in relevant municipalities, it does not create a provincial offence. Nor does it impose a penalty for operating VLTs in those municipalities. If VLT operators were to be charged with any offence, it would be under the gaming provisions in the *Criminal Code*, which prohibit gambling *except* in accordance with lottery schemes conducted and managed by the provinces. The effect of s. 3(1) of the VLT Act is simply to remove the exception and give full effect to the existing federal offences.

25 However, even if the VLT Act did create a provincial offence or impose a fine, that would not necessarily make it an attempt to legislate criminal law. Section 92(15) of the *Constitution Act, 1867* allows the provincial legislatures to impose fines or other punishments as a means of enforcing valid provincial law, and the provinces have enacted countless punishable offences within their legislative spheres. Motor vehicle offences are the classic example, and they have been declared constitutionally valid in, *inter alia*, *O'Grady v. Sparling*, [1960] S.C.R. 804 (S.C.C.) (careless driving), and *Ross v. Ontario (Registrar of Motor Vehicles)* (1973), [1975] 1 S.C.R. 5 (S.C.C.) (provincial licence suspension upon conviction for *Criminal Code* impaired driving offence). The mere presence of a prohibition and a penalty does not invalidate an otherwise acceptable use of provincial legislative power.

26 The appellants submitted that the VLT Act contains penal consequences because it terminates all siteholder agreements in municipalities that have voted to prohibit VLTs in accordance with the Act. Relying on this Court's decision in *Johnson v. Alberta (Attorney General)*, [1954] S.C.R. 127 (S.C.C.), they argued that the provisions of the VLT Act result in the forfeiture of VLTs, which can be characterized as a penalty. However, the termination of siteholder agreements cannot be characterized as a forfeiture within the meaning of the criminal law. At all times during a siteholder agreement, the MLC maintains ownership of the VLTs. The siteholder (in this case, the appellants) has no property interest in the machines. Therefore, when the agreement is terminated and the VLTs are removed from the siteholder's establishment, the siteholder is not required to forfeit any property. The siteholder has merely lost the opportunity to earn a percentage of the revenue that the VLTs generate.

27 That is sufficient to distinguish the present appeal from *Johnson*, *supra*, which properly identified the alleged penalty as a forfeiture. In that case, the impugned legislation specifically denied property rights in slot machines. Where the machines were being operated contrary to the legislation, the Act allowed police to confiscate those machines even if, except for the legislation, they would have been considered the property of the offender. In short, a violation of the legislation struck down in *Johnson* resulted in a loss of property. In the present case, however, the VLT Act merely allows the MLC to reclaim its own VLTs. This cannot be considered a forfeiture.

28 The conclusion that the VLT Act does not impose penal consequences makes it unnecessary to determine whether it was enacted for a criminal law purpose. Nevertheless, certain submissions made during the course of proceedings warrant a brief response. The appellants argued that the VLT Act was enacted for purposes of public morality, and that it was, therefore, an attempt to legislate criminal law. This submission is flawed on several bases. First, the trial judge found no evidence indicating that this law was enacted to regulate public morality. The province has authority to regulate gaming, and this includes provisions regulating where gaming may be conducted. Just as the province can regulate when and where alcohol may be legally consumed, so can it regulate when and where individuals can legally operate VLTs. It does not follow that, in doing so, the province is somehow regulating public morality.

29 Second, the province and individual municipalities may have any number of reasons for restricting gaming to certain locations. Some may concern the local economy, and others may be purely aesthetic or cultural. There is no basis on which to assume that the dominant purpose for prohibiting VLTs in certain locations is to regulate public morality. Indeed, the fact that the VLT Act does not affect VLTs located at racetracks or other "premises dedicated to gaming activity" suggests that the government was not attempting to condemn VLTs on any moral basis. See *Gaming Control Act*, S.M. 1996, c. 74, s. 1. Rather, it supports the interpretation that the VLT Act was designed merely to limit more "incidental" contact with VLTs - in taverns, for example - in municipalities that wish to do so.

30 Third, the presence of moral considerations does not *per se* render a law *ultra vires* the provincial legislature. In giving Parliament exclusive jurisdiction over criminal law, the *Constitution Act, 1867* did not intend to remove all morality from provincial legislation. In many instances, it will be impossible for the provincial legislature to disentangle moral considerations from other issues. For example, in the present case, it is difficult to ignore the various social costs associated with gambling and VLTs. As the Desjardins Report, *supra*, examined in detail, government-run gambling can have adverse social consequences, including addiction, crime, bankruptcy, and reductions in charitable gaming. The provincial government can legitimately consider these social costs when deciding how to regulate gaming in the province. The fact that some of these considerations have a moral aspect does not invalidate an otherwise legitimate provincial law.

31 The dominant purpose of the VLT Act is to regulate gaming in the province. Any moral aspects of the VLT Act fall within the doctrine of "incidental effects," recently affirmed by this Court in *Kitkatla Band*, *supra*, at para. 54, and *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21 (S.C.C.), at para. 23. Where a law is in pith and substance related to the provincial legislative sphere, it will not be struck down merely because it has incidental effects on a federal head of power. For instance, in *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59 (S.C.C.), it was held that a provincial law restricting nude entertainment at licensed taverns was valid. It is reasonable to assume that such a law would have had some incidental effects on public morality.

Yet the Court found that the law was validly enacted because in pith and substance it dealt with licensing, local matters, and property and civil rights.

32 In the present appeal, the provincial government passed a law that was within a provincial head of legislative authority. Although there is a possibility that local morality may affect which municipalities choose to ban VLTs through binding plebiscites, the dominant purpose of the VLT Act is not to express moral disapproval of VLTs. In as much as there is a moral aspect to the VLT Act, this effect is incidental to the overall regulatory scheme and does not infringe on Parliament's exclusive authority to legislate criminal law.

33 In making this determination, I am mindful of the presumption of constitutionality recognized in *Reference re Farm Products Marketing Act (Ontario)*, [1957] S.C.R. 198 (S.C.C.), at p. 255, *McNeil v. Nova Scotia (Board of Censors)*, [1978] 2 S.C.R. 662 (S.C.C.), at pp. 687-688, *Re Firearms Act*, *supra*, at para. 25. When faced with two plausible characterizations of a law, we should normally choose that which supports the law's constitutional validity.

34 The Attorney General of Canada's intervention in support of the provincial government creates a situation of attempted federal-provincial cooperation. The governments, in the absence of jurisdiction, cannot by simple agreement lend legitimacy to a claim that the VLT Act is *intra vires*. However, given that both federal and provincial governments guard their legislative powers carefully, when they do agree to shared jurisdiction, that fact should be given careful consideration by the courts: *O.P.S.E.U. v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2 (S.C.C.), at pp. 19-20, *Kitkatla Band*, *supra*, at paras. 72-73.

35 This principle is further bolstered in the present case by the explicit interaction of the *Criminal Code* and provincial gaming legislation. Section 207(1)(a) of the *Criminal Code* specifically creates an exception to the gaming and betting offences where a lottery scheme has been established by a province. It was first enacted in 1969 for the purpose of decriminalizing lotteries and allowing each province to determine whether it wished to establish a lottery scheme. Where no such scheme exists, the *Criminal Code* offences still apply. Parliament has intentionally designed a structure for gaming offences that affirms the double aspect of gaming and promotes federal-provincial cooperation in this area. Section 207(1)(a) removes the possibility of operational conflict and, with it, any question of paramountcy.

36 I conclude that the VLT Act in its entirety, and s. 16 in particular, are *intra vires* the provincial legislature. The Act's purposes are to regulate gaming in the province and to allow for local input on the issue of VLTs, both of which fall under the powers enumerated in s. 92 of the *Constitution Act, 1867*. It is not an attempt to legislate criminal law, as it has neither penal consequences nor a criminal law purpose. Finally, the issues of interjurisdictional immunity and paramountcy do not arise in this case, and they need not be discussed beyond what has already been stated.

C. The Claim of Improper Delegation

37 Before turning to the various *Charter* claims, a brief comment is warranted on the argument raised by the intervening group of Alberta merchants. They challenged the entire VLT Act on the ground that it constitutes an improper abdication of the legislature's law-making powers and usurps the authority of the Lieutenant Governor. These interveners submit that, by allowing municipalities to hold binding plebiscites, the provincial government has given them the power to make and repeal law. This, they argue, violates the provincial legislature's exclusive authority to make laws for the province.

38 This submission fails, as the interveners' argument rests on an incorrect characterization of the impugned legislation. The VLT Act does not, in any way, empower municipal voters to enact legislation. The Act has been wholly drafted, debated and enacted by the provincial legislature, and has been given Royal Assent by the Lieutenant Governor. It sets out how the municipal plebiscites will take place and what their effects will be in the relevant municipalities. The only role played by municipal electors is in initiating and voting in a plebiscite. The results of the plebiscite determine whether the prohibition in s. 3 of the VLT Act will apply in the municipality. In other words, the application of the statutory VLT prohibition is conditional upon there being a certain plebiscite result. Consequently, the VLT Act falls within the

category of "conditional legislation" which was upheld by the Privy Council in *Russell v. R.* (1882), (1881-82) L.R. 7 App. Cas. 829 (Canada P.C.), at p. 835:

> . . . the Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on the matters with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons power to legislate. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and the power so to legislate cannot be denied to the Parliament of Canada, when the subject of legislation is within its competency.

39 Through the VLT Act, the Manitoba Government has employed a statutory instrument to bind itself to respect local opinion. Nowhere does the Act, in purpose or effect, give municipal voters the power to legislate. This case is distinguishable from the *Reference re Initiative and Referendum Act (Manitoba)* (1916), 27 Man. R. 1 (Man. C.A.), upon which the interveners based their argument. There, the impugned legislation allowed voters to submit laws for approval by ballot and, if approved, the proposed law would be deemed an Act of the provincial legislature. Here, there has been no attempt to bypass the Legislative Assembly or to usurp its law-making function. The Act merely allows municipalities to decide on the applicability of the Act to their communities.

40 Finally, I would add that the interveners' argument would severely restrict Parliament and the provincial legislatures from enacting "local option" legislation, which was upheld over a century ago by the Privy Council in *Russell*, *supra*, with respect to the *Canada Temperance Act*. That decision was affirmed by the Privy Council in *Reference re Canada Temperance Act*, [1946] A.C. 193 (Ontario P.C.), and there is no need to question its continued validity as authority on this issue.

D. The Claim under s. 2(b) of the Charter

41 According to the appellants, the effect of the "deemed vote" in s. 16 of the VLT Act was to deny them the right to vote in a plebiscite under the Act and, therefore, to violate their freedom of expression in s. 2(b) of the *Charter*. There is no question since this Court's decision in *Haig v. R.*, [1993] 2 S.C.R. 995 (S.C.C.), that casting a vote is a form of expression that is protected under s. 2(b). The question in this case is whether s. 16 of the VLT Act actually violates this freedom. I conclude that it does not.

42 While *Haig* held that voting is a protected form of expression, it also concluded that there is no constitutional right to vote in a referendum. See L'Heureux-Dubé J., at pp. 1040-1041:

> A referendum is a creation of legislation. Independent of the legislation giving genesis to a referendum, there is no right of participation. The right to vote in a referendum is a right accorded by statute, and the statute governs the terms and conditions of participation. . . . In my view, though a referendum is undoubtedly a platform for expression, s. 2(b) of the *Charter* does not impose upon a government, whether provincial or federal, any positive obligation to consult its citizens through the particular mechanism of a referendum. Nor does it confer upon all citizens the right to express their opinions in a referendum. A government is under no constitutional obligation to extend this platform of expression to *anyone*, let alone to *everyone*. A referendum as a platform of expression is, in my view, a matter of legislative policy and not of constitutional law. [emphasis in original]

A municipal plebiscite, like a referendum, is a creation of legislation. In the present case, any right to vote in a plebiscite must be found within the language of the VLT Act. It alone defines the terms and qualifications for voting. Accordingly, the appellants cannot complain that the VLT Act, itself, denied them the right to vote in a VLT plebiscite.

43 A *caveat* was added in *Haig* that, once the government decides to extend referendum voting rights, it must do so in a fashion that is consistent with other sections of the *Charter*. However, as the appellants submitted that they had been denied referendum voting rights on a discriminatory basis, their claim should be assessed under s. 15(1), of which more will be said below.

44 Finally, it is worth noting that the VLT Act does not prevent the residents of Winkler from voting in future plebiscites on the issue of VLTs. They have not been disenfranchised from VLT plebiscites. Like all other residents of Manitoba, they are free to initiate a plebiscite under the Act to either reinstate or remove VLTs from their municipality.

E. The Claim under s. 7 of the Charter

45 The appellants also submitted that s. 16 of the VLT Act violates their right under s. 7 of the *Charter* to pursue a lawful occupation. Additionally, they submitted that it restricts their freedom of movement by preventing them from pursuing their chosen profession in a certain location, namely, the Town of Winkler. However, as a brief review of this Court's *Charter* jurisprudence makes clear, the rights asserted by the appellants do not fall within the meaning of s. 7. The right to life, liberty and security of the person encompasses fundamental life choices, not pure economic interests. As La Forest J. explained in *Godbout c. Longueuil (Ville)*, [1997] 3 S.C.R. 844 (S.C.C.), at para. 66:

> . . . the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.

More recently, *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44 (S.C.C.), concluded that the stigma suffered by Mr. Blencoe while awaiting trial of a human rights complaint against him, which hindered him from pursuing his chosen profession as a politician, did not implicate the rights under s. 7. See Bastarache J., at para. 86:

> The prejudice to the respondent in this case . . . is essentially confined to his personal hardship. He is not "employable" as a politician, he and his family have moved residences twice, his financial resources are depleted, and he has suffered physically and psychologically. However, the state has not interfered with the respondent and his family's ability to make essential life choices. To accept that the prejudice suffered by the respondent in this case amounts to state interference with his security of the person would be to stretch the meaning of this right.

46 In the present case, the appellants' alleged right to operate VLTs at their place of business cannot be characterized as a fundamental life choice. It is purely an economic interest. The ability to generate business revenue by one's chosen means is not a right that is protected under s. 7 of the *Charter*.

F. The Claim under s. 15(1) of the Charter

47 The appellants argued that their rights under s. 15(1) of the *Charter* were violated by s. 16 of the VLT Act. This claim should be analyzed in accordance with the three-pronged test summarized by Iacobucci J. in *Law*, *supra*, at para. 88:

> (A) whether a law imposes differential treatment between the claimant and others, in purpose or effect;
>
> (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and
>
> (C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.

The appellants submitted that part (A) of the test was met because s. 16 of the VLT Act distinguished between residents of Winkler and all other residents of Manitoba. They further argued that this distinction was based on the analogous ground of residence, and was discriminatory because it denied them the opportunity to vote in a binding plebiscite on the issue of VLTs.

48 There is no merit in this ground of appeal. First, although s. 16 of the VLT Act clearly makes a distinction between Winkler and other municipalities, it is implausible that residence in Winkler constitutes an analogous ground

of discrimination. Residence was rejected as an analogous ground in both *Haig*, *supra*, and *R. v. Turpin*, [1989] 1 S.C.R. 1296 (S.C.C.). Further, the majority in *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203 (S.C.C.), clearly stated that the analogous ground recognized in that case was "Aboriginality-residence," and that "no new water is charted, in the sense of finding residence, in the generalized abstract, to be an analogous ground" (para. 15). In rejecting the claimant's s. 15 argument in *Haig*, the majority explained, at p. 1044, why residence is an unlikely analogous ground:

> It would require a serious stretch of the imagination to find that *persons moving to Quebec less than six months before a referendum date* are analogous to persons suffering discrimination on the basis of race, religion or gender. People moving to Quebec less than six months before a referendum date do not suffer from stereotyping, or social prejudice. Though its members were unable to cast a ballot in the Quebec referendum, the group is not one which has suffered historical disadvantage, or political prejudice. Nor does the group appear to be "discrete and insular". Membership in the group is highly fluid, with people constantly flowing in or out once they meet Quebec's residency requirements. [emphasis in original]

Although the Court in *Haig* left it open for residence to be established as an analogous ground in the appropriate case, I share the trial judge's view here that this is not such a case. Nothing suggests that Winkler residents are historically disadvantaged or that they suffer from any sort of prejudice.

49 However, putting the appellants' case at its best and assuming that they could establish a distinction based on an analogous ground, the legislation does not discriminate against them in any substantive sense. It is not necessary to proceed through all the contextual factors listed by Iacobucci J. in *Law*, *supra*, because it is clear that the VLT Act directly corresponds to the circumstances of Winkler residents. The Town of Winkler was singled out in s. 16 of the VLT Act because it was the *only municipality* to have held a plebiscite on the issue of VLTs. The very purpose of that section was to respect the will of Winkler residents, as expressed in their 1998 plebiscite. Viewed in the context of that plebiscite, I am not convinced that any reasonable resident of Winkler would feel that he or she has been marginalized, devalued or ignored as a member of Canadian society (see *Law*, *supra*, at para. 53). There is no harm to dignity and no violation of s. 15(1).

50 It was noted above in the s. 2(b) claim that s. 15(1) might be implicated where the opportunity to vote in a plebiscite is extended to some and withheld from others based on a prohibited ground of discrimination. This would be the case if a law prohibited members of a certain race or religion from voting in a plebiscite. However, that is not the case in this appeal. First, as previously noted, the distinction in s. 16 of the VLT Act is not based on an analogous ground. Second, the distinction does not affect the qualification and ability of Winkler residents to vote in a VLT plebiscite under the Act. They are free to initiate a plebiscite should they wish to reinstate VLTs in their community. Consequently, although s. 16 makes a distinction for Winkler residents, that distinction has nothing to do with the alleged right to vote.

VII. Conclusion and Disposition

51 These reasons support the October 31, 2002, dismissal of this appeal. The respondents are entitled to costs, and the stated constitutional questions are answered as follows:

> (1) Is *The Gaming Control Local Option (VLT) Act*, S.M. 1999, c. 44, in its entirety *ultra vires* the Legislature of the Province of Manitoba as it relates to a subject matter which is within the exclusive jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?
>
> *Answer*: No.
>
> (2) Is s. 16(1) of *The Gaming Control Local Option (VLT) Act*, S.M. 1999, c. 44, *ultra vires* the Legislature of the Province of Manitoba as it relates to a subject matter which is within the exclusive jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?

Answer: No.

(3) Is s. 16 of *The Gaming Control Local Option (VLT) Act* inconsistent with s. 2(b) of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

(4) If the answer to question 3 is in the affirmative, is s. 16 of *The Gaming Control Local Option (VLT) Act* nevertheless justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to answer this question.

(5) Is s. 16 of *The Gaming Control Local Option (VLT) Act* inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

(6) If the answer to question 5 is in the affirmative, is s. 16 of *The Gaming Control Local Option (VLT) Act* nevertheless justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to answer this question.

(7) Is s. 16 of *The Gaming Control Local Option (VLT) Act* inconsistent with s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

(8) If the answer to question 7 is in the affirmative, is s. 16 of *The Gaming Control Local Option (VLT) Act* nevertheless justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to answer this question.

Appeal dismissed.

Pourvoi rejeté.

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 IMPERIAL TOBACCO CANADA LIMITED., *et al.*

Applicants

Court File No. CV-19-616077-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF THE APPLICANTS

OSLER, HOSKIN & HARCOURT LLP
P.O. Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Deborah Glendinning (LSO# 31070N)
Marc Wasserman (LSO# 44066M)
John A. MacDonald (LSO# 25884R)
Craig Lockwood (LSO# 46668M)

Tel: (416) 362-2111
Fax: (416) 862-6666

Lawyers to the Applicants,

Imperial Tobacco Canada Limited and
Imperial Tobacco Company Limited

Matter No: 1144377