Court of Appeal File No.: C56961
Court of Appeal File No.: M42453
S.C.J Court File No: CV-12-9667-00-CL

COURT OF APPEAL FOR ONTARIO

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

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

Court of Appeal File No.: C56961
Court of Appeal File No.: M42453
S.C.J Court File No: CV-11-431153-00CP

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

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

Plaintiffs

- and –

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

Defendants

SUPPLEMENTAL BRIEF OF AUTHORITIES OF CLASS ACTION PLAINTIFFS

(MOTION TO QUASH RETURNABLE JUNE 28, 2013)

May 27, 2013

SISKINDS LLP
680 Waterloo Street
London, ON N6A 3V8
A. Dimitri Lascaris
Michael Robb
Tel: 519.672.2121 / Fax: 519.672.6065

KOSKIE MINSKY LLP
20 Queen Street West, Suite 900
Toronto, ON M5H 3R3
Kirk Baert
Jonathan Ptak
Tel: 416.595.2149 / Fax: 416.204.2903

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP
155 Wellington Street South, 35th Floor
Toronto, ON M5V 3H1
Ken Rosenberg
Massimo Starnino
Tel: 416.646.4300 / Fax: 416.646.4301

Lawyers for the Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action

TO: ATTACHED SERVICE LIST

Court of Appeal File No.:
Court of Appeal File No.: M42404
Court of Appeal File No.: M42399
S.C.J. Court File No.: CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED, AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court of Appeal File No.:
Court of Appeal File No.: M42404
Court of Appeal File No.: M42399
S.C.J. Court File No.: CV-11-431153-00CP

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

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

Plaintiffs

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

SERVICE LIST
(as of April 18, 2013)

TO: **BENNETT JONES LLP**
3400 One First Canadian Place,
P.O. Box 130
Toronto, Ontario M5X 1A4

Robert W. Staley
Tel: 416.777.4857
Fax: 416.863.1716
Email: staleyr@bennettjones.com

Derek J. Bell
Tel: 416.777.4638
Email: belld@bennettjones.com

Raj S. Sahni
Tel: 416.777.4804
Email: sahnir@bennettjones.com

Jonathan Bell
Tel: 416.777.6511
Email: bellj@bennettjones.com

Sean Zweig
Tel: 416.777.6254
Email: zweigs@bennettjones.com

Lawyers for the Applicant, Sino-Forest Corporation

AND TO: **FTI CONSULTING CANADA INC.**
T-D Waterhouse Tower
79 Wellington Street West
Toronto-Dominion Centre, Suite 2010,
P.O. Box 104
Toronto, Ontario M5K 1G8

Greg Watson
Tel: 416.649.8100
Fax: 416.649.8101
Email: greg.watson@fticonsulting.com

Jodi Porepa
Tel: 416.649.8070
Email: Jodi.porepa@fticonsulting.com

Monitor

AND TO: **GOWLING LAFLEUR HENDERSON LLP**
1 First Canadian Place
100 King Street West, Suite 1600
Toronto, Ontario M5X 1G5

Derrick Tay
Tel: 416.369.7330
Fax: 416.862.7661
Email: derrick.tay@gowlings.com

Clifton Prophet
Tel: 416.862.3509
Email: clifton.prophet@gowlings.com

Jennifer Stam
Tel: 416.862.5697
Email: jennifer.stam@gowlings.com

Ava Kim
Tel: 416.862.3560
Email: ava.kim@gowlings.com

Jason McMurtrie
Tel: 416.862.5627
Email: jason.mcmurtrie@gowlings.com

Lawyers for the Monitor

AND TO: **AFFLECK GREENE MCMURTY LLP**
365 Bay Street, Suite 200
Toronto, Ontario M5H 2V1

Peter Greene
Tel: 416.360.2800
Fax: 416.360.8767
Email: pgreene@agmlawyers.com

Kenneth Dekker
Tel: 416.360.6902
Fax: 416.360.5960
Email: kdekker@agmlawyers.com

Michelle E. Booth
Tel: 416.360.1175
Fax: 416.360.5960
Email: mbooth@agmlawyers.com

Lawyers for BDO

AND TO: **BAKER MCKENZIE LLP**
Brookfield Place
2100-181 Bay Street
Toronto, Ontario M5J 2T3

John Pirie
Tel: 416.865.2325
Fax: 416.863.6275
Email: john.pirie@bakermckenzie.com

David Gadsden
Tel: 416.865.6983
Email: david.gadsden@bakermckenzie.com

Lawyers for Poyry (Beijing) Consulting Company Limited

AND TO: **LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP**
Suite 2600, 130 Adelaide Street West
Toronto, Ontario M5H 3P5

Peter H. Griffin
Tel: 416.865.9500
Fax: 416.865.3558
Email: pgriffin@litigate.com

Peter J. Osborne
Tel: 416.865.3094
Fax: 416.865.3974
Email: posborne@litigate.com

Linda L. Fuerst
Tel: 416.865.3091
Fax: 416.865.2869
Email: lfuerst@litigate.com

Shara Roy
Tel: 416.865.2942
Fax: 416.865.3973
Email: sroy@litigate.com

Lawyers for Ernst & Young LLP

AND TO: **OSLER, HOSKIN & HARCOURT LLP**
1 First Canadian Place
100 King Street West
Suite 6100, P.O. Box 50
Toronto, Ontario M5X 1B8

Larry Lowenstein
Tel: 416.862.6454
Fax: 416.862.6666
Email: llowenstein@osler.com

Edward Sellers
Tel: 416.862.5959
Email: esellers@osler.com

Geoffrey Grove
Tel: (416) 862-4264
Email: ggrove@osler.com

Lawyers for the Board of Directors of Sino-Forest Corporation

AND TO: **SISKINDS LLP**
680 Waterloo Street
P.O. Box 2520
London, Ontario N6A 3V8

A. Dimitri Lascaris
Tel: 519.660.7844
Fax: 519.672.6065
Email: dimitri.lascaris@siskinds.com

Charles M. Wright
Tel: 519.660.7753
Email: Charles.wright@siskinds.com

Lawyers for an Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action against the Applicant

AND TO: **KOSKIE MINSKY LLP**
20 Queen Street West, Suite 900
Toronto, Ontario M5H 3R3

AND TO: **MILLER THOMSON LLP**
Scotia Plaza, 40 King Street West
Suite 5800
Toronto, Ontario M5H 3S1

Kirk M. Baert
Tel: 416.595.2117
Fax: 416.204.2899
Email: kbaert@kmlaw.ca

Jonathan Ptak
Tel: 416.595.2149
Fax: 416.204.2903
Email: jptak@kmlaw.ca

Jonathan Bida
Tel: 416.595.2072
Fax: 416.204.2907
Email: jbida@kmlaw.ca

Garth Myers
Tel: 416.595.2102
Fax: 416.977.3316
Email: gmyers@kmlaw.ca

Lawyers for an Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action against the Applicant

Emily Cole
Tel: 416.595.8640
Email: ecole@millerthomson.com

Joseph Marin
Tel: 416.595.8579
Email: jmarin@millerthomson.com

Lawyers for Allen Chan

AND TO: **McCARTHY TETRAULT LLP**
Suite 2500, 1000 De La Gauchetiere St. West
Montreal, Québec, H3B 0A2

Alain N. Tardif
Tel: 514.397.4274
Fax : 514.875.6246
Email: atardif@mccarthy.ca

Mason Poplaw
Tel: 514.397.4155
Email: mpoplaw@mccarthy.ca

Céline Legendre
Tel: 514.397.7848
Email: clegendre@mccarthy.ca

Lawyers for Ernst & Young LLP

AND TO: **DAVIS LLP**
1 First Canadian Place, Suite 6000
PO Box 367
100 King Street West
Toronto, Ontario M5X 1E2

Susan E. Friedman
Tel: 416.365.3503
Fax: 416.777.7415
Email: sfriedman@davis.ca

Bruce Darlington
Tel: 416.365.3529
Fax: 416.369.5210
Email: bdarlington@davis.ca

Brandon Barnes
Tel: 416.365.3429
Fax: 416.369.5241
Email: bbarnes@davis.ca

Lawyers for Kai Kat Poon

AND TO: **PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**
155 Wellington Street, 35th Floor
Toronto, Ontario M5V 3H1

Ken Rosenberg
Tel: 416.646.4304
Fax: 416.646.4301
Email: ken.rosenberg@paliareroland.com

Massimo (Max) Starnino
Tel: 416.646.7431
Email: max.starnino@paliareroland.com

Lawyers for an Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action against the Applicant

AND TO: **TORYS LLP**
79 Wellington Street West
Suite 3000, Box 270
Toronto-Dominion Centre
Toronto, Ontario M5K 1N2

John Fabello
Tel: 416.865.8228
Fax: 416.865.7380
Email: jfabello@torys.com

David Bish
Tel: 416.865.7353
Email: dbish@torys.com

Andrew Gray
Tel: 416.865.7630
Email: agray@torys.com

Lawyers for the Underwriters named in Class Actions

AND TO: **KIM ORR BARRISTERS P.C.**
19 Mercer St., 4th Floor
Toronto, ON M5V 1H2

James C. Orr
Tel: 416.349.6571
Fax: 416.598.0601
Email: jo@kimorr.ca

Won J. Kim
Tel: 416.349.6570
Fax: 416.598.0601
Email: wjk@kimorr.ca

Michael C. Spenser
Tel: 416.349.6599
Fax: 416.598.0601
Email: mcs@kimorr.ca

Megan B. McPhee
Tel: 416.349.6574
Fax: 416.598.0601
Email: mbm@kimorr.ca

Yonatan Rozenszajn
Tel: 416.349.6578
Fax: 416.598.0601
Email: yr@kimorr.ca

Tanya T. Jemec
Tel: 416.349.6573
Fax: 416-598.0601
Email: ttj@kimorr.ca

Lawyers for Invesco Canada Ltd., Northwest & Ethical Investments L.P., Comité Syndical National De Retraite Batirente Inc., Matrix Asset Management Inc., and Gestion Férique and Montrusco Bolton Investments Inc.

AND TO: **WARDLE DALEY BERNSTEIN LLP**
2104 - 401 Bay Street, P.O. Box 21
Toronto Ontario M5H 2Y4

Peter Wardle
Tel: 416.351.2771
Fax: 416.351.9196
Email: pwardle@wdblaw.ca

Simon Bieber
Tel: 416.351.2781
Email: sbieber@wdblaw.ca

Erin Pleet
Tel: 416.351.2774
Email: epleet@wdblaw.ca

Lawyers for David Horsley

AND TO:

THORNTON GROUT FINNIGAN LLP
Suite 3200, 100 Wellington Street West
P. O. Box 329, Toronto-Dominion Centre
Toronto, Ontario M5K 1K7

James H. Grout
Tel: 416.304.0557
Fax: 416.304.1313
Email: jgrout@tgf.ca

Kyle Plunkett
Tel: 416-304-7981
Fax: 416.304.1313
Email: kplunkett@tgf.ca

Lawyers for the Ontario Securities Commission

GOODMANS LLP
333 Bay Street, Suite 3400
Toronto, Ontario M5H 2S7

Benjamin Zarnett
Tel: 416.597.4204
Fax: 416.979.1234
Email: bzarnett@goodmans.ca

Robert Chadwick
Tel: 416.597.4285
Email: rchadwick@goodmans.ca

Brendan O'Neill
Tel: 416.979.2211
Email: boneill@goodmans.ca

Caroline Descours
Tel: 416.597.6275
Email: cdescours@goodmans.ca
Lawyers for Ad Hoc Committee of Bondholders

PARTIES WHO DID NOT RESPOND TO CONFIRM THEIR PARTICIPATION OR THEIR INTENTION TO REMAIN IN THE SERVICE LIST IN THE MOTION FOR LEAVE TO APPEAL AND FOR THE APPEAL

MERCHANT LAW GROUP LLP
Saskatchewan Drive Plaza
100-2401 Saskatchewan Drive
Regina, Saskatchewan S4P 4H8

E.F. Anthony Merchant, Q.C.
Tel: 306.359.7777
Fax: 306.522.3299
tmerchant@merchantlaw.com

Lawyers for the Plaintiffs re Saskatchewan action

ERNST & YOUNG LLP
222 Bay Street, P.O. Box 251
Toronto, Ontario M5K 1J7

Mike P. Dean
Tel: 416-943-2134
Fax: 416-943-3300
Email: Mike.P.Dean@ca.ey.com

THE BANK OF NEW YORK MELLON
Global Corporate Trust
101 Barclay Street – 4th Floor East
New York, New York 10286

David M. Kerr, Vice President
Tel: 212.815.5650
Fax: 732.667.9322
Email: david.m.kerr@bnymellon.com

Convertible Note Indenture Trustee

THE BANK OF NEW YORK MELLON
320 Bay Street, 11th Floor
Toronto, Ontario M5H 4A6

George Bragg
Tel: 416.933.8505
Fax: 416.360.1711 / 416.360.1737
Email: George.bragg@bnymellon.com

Convertible Note Indenture Trustee

THE BANK OF NEW YORK MELLON
12/F Three Pacific Place
1 Queen's Road East, Hong Kong

Marelize Coetzee, Vice President
Relationship Manager, Default Administration Group – APAC
Tel: 852.2840.6626
Mobile: 852.9538.5010
Email: marelize.coetzee@bnymellon.com

Tin Wan Chung
Tel: 852.2840.6617
Fax: 852.2295-3283
Email: tin.chung@bnymellon.com

Grace Lau
Email: grace.lau@bnymellon.com

Convertible Note Indenture Trustee

THOMPSON HINE LLP
335 Madison Avenue – 12th Floor
New York, New York 10017-4611

Yesenia D. Batista
Tel: 212.908.3912
Fax: 212.344.6101
Email: yesenia.batista@thompsonhine.com

Irving Apar
Tel: 212.908.3964
Email: irving.apar@thompsonhine.com

Curtis L. Tuggle
3900 Key Center, 127 Public Square
Cleveland, Ohio 44114
Tel: 216.566.5904
Fax: 216.566.5800
Email: Curtis.tuggle@thompsonhine.com

Lawyers for Senior Note Indenture Trustee

LINKLATERS LLP
10th Floor, Alexandra House
18 Chater Road
Hong Kong China

Melvin Sng
Tel: 852 2901 5234
Fax: 852 2810 8133
Email: Melvin.Sng@linklaters.com

Lawyers for Sino-Forest Corporation (Hong Kong)

LINKLATERS LLP
10th Floor, Alexandra House
18 Chater Road
Hong Kong China

Hyung Ahn
Tel: 852 2842 4199
Fax: 852 2810 8133
Email: hyung.ahn@linklaters.com

Samantha Kim
Tel: 852.2842 4197
Email: Samantha.Kim@Linklaters.com
Jon Gray
Tel: 852.2842.4188
Email: Jon.Gray@linklaters.com

Lawyers for Sino-Forest Corporation (U.S.)

APPLEBY GLOBAL
Jayla Place, Wickham's Cay1
P.O. Box 3190, Road Town
Tortola VG1110 BVI

Eliot Simpson
Tel: 284.852.5321
Fax: 284.494.7279
Email: esimpson@applebyglobal.com

Andrew Willins
Tel: 284 852 5323
Email: awillins@applebyglobal.com

Andrew Jowett
Tel: 284 852 5316
Email: ajowett@applebyglobal.com

Lawyers for Sino-Forest Corporation (BVI)

KING AND WOOD MALLESONS
9th Floor, Hutchison House
Central, Hong Kong Island
Hong Kong (SAR)

Edward Xu
Tel: 852.2848.4848
Fax: 852.2845.2995
Email: Edward.Xu@hk.kwm.com

Helena Huang
Tel: 852.2848.4848
Email: Helena.huang@kingandwood.com

Tata Sun
Tel: 852.2848.4848
Email: tata.sun@kingandwood.com

Lawyers for Sino-Forest Corporation (PRC)

EMMET, MARVIN & MARTIN, LLP
120 Broadway, 32nd Floor
New York, NY 10271

Margery A. Colloff
Tel: 212.238.3068 or 212.653.1746
Fax: 212.238.3100
Email: mcolloff@emmetmarvin.com

U.S. Lawyers for the Convertible Note Indenture Trustee (The Bank of New York Mellon)

ONTARIO SECURITIES COMMISSION
Suite 1900, 20 Queen Street West
Toronto, Ontario M5H 3S8

Hugh Craig
Senior Litigation Counsel
Tel: 416.593.8259
Email: hcraig@osc.gov.on.ca

FRASER MILNER CASGRAIN LLP
77 King Street West, Suite 400
Toronto-Dominion Centre
Toronto Ontario M5K 0A1

Neil S. Rabinovitch
Tel: 416.863.4656
Fax: 416 863 4592
Email: neil.rabinovitch@fmc-law.com

Jane Dietrich
Tel: 416.863.4467
Email: jane.dietrich@fmc-law.com

Lawyers for Contrarian Capital Management, LLC

LAPOINTE ROSENSTEIN MARCHAND MELANÇON, S.E.N.C.R.L.
1250, boul. René-Lévesque Ouest, bureau 1400
Montréal (Québec) Canada H3B 5E9

Bernard Gravel
Tel: 514.925.6382
Fax: 514.925.5082
Email: bernard.gravel@lrmm.com

Bruno Floriani
Tel: 514.925.6310
Email: bruno.floriani@lrmm.com

Québec counsel for Pöyry (Beijing) Consulting Company Ltd.

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto, ON M5V 3J7

Jay Swartz
Tel: 416.863.5520
Fax: 416.863.0871
Email: jswartz@dwpv.com

James Doris
Tel: 416.367.6919
Fax: 416.863.0871
Email: jdoris@dwpv.com

Canadian Counsel for the Plaintiff and the Proposed Class re New York action

FASKEN MARTINEAU LLP
333 Bay Street, Suite 2400,
Bay-Adelaide Centre, Box 20
Toronto, Ontario M5H 2T6

Stuart Brotman
Tel: 416.865.5419
Fax: 416.364.7813
Email: sbrotman@fasken.com

Conor O'Neill
Tel: 416 865 4517
Email: coneill@fasken.com

Canadian Lawyers for the Convertible Note Indenture Trustee (The Bank of New York Mellon)

DAVIES HOWE PARTNERS LLP
5TH Floor, 99 Spadina Avenue
Toronto, Ontario M5V 3P8

David Cherepacha
Tel: 416-977-7088
Fax: 416-977-8931
E-mail: davidc@davieshowe.com

Lawyers for Certain Underwriters at Lloyds of London, being Sagicor Syndicate 1206 at Lloyds and Barbican Financial $ Professional Lines Consortium Syndicate 9562 at Lloyds

COHEN MILSTEIN SELLERS & TOLL PLC
88 Pine Street, 14th Floor
New York, NY 10005

Richard S. Speirs
Tel: 212.838.7797
Fax: 212.838.7745
Email: rspeirs@cohenmilstein.com

Stefanie Ramirez
Tel: 202.408.4600
Email: sramirez@cohenmilstein.com

Attorneys for the Plaintiff and the Proposed Class re New York action

COHEN MILSTEIN SELLERS & TOLL PLC
1100 New York, Ave., N.W.
West Tower, Suite 500
Washington, D.C. 20005

Steven J. Toll
Tel: 202.408.4600
Fax: 202.408.4699
Email: stoll@cohenmilstein.com

Matthew B. Kaplan
Tel: 202.408.4600
Email: mkaplan@cohenmilstein.com

Elizabeth Aniskevich
E-mail: eaniskevich@cohenmilstein.com

Attorneys for the Plaintiff and the Proposed Class re New York action

PARTIES WHO CONFIRMED THAT THEY WILL NOT PARTICIPATE IN THE MOTION FOR LEAVE TO APPEAL OR THE APPEAL

CLYDE & COMPANY
390 Bay Street, Suite 800
Toronto, Ontario M5H 2Y2

Mary Margaret Fox
Tel: 416.366.4555
Fax: 416.366.6110
Email: marymargaret.fox@clydeco.ca

Paul Emerson
Tel: 416.366.4555
Email: paul.emerson@clydeco.ca

Lawyers for ACE INA Insurance and Chubb Insurance Company of Canada

RICKETTS, HARRIS LLP
Suite 816, 181 University Ave
Toronto ON M5H 2X7

Gary H. Luftspring
Tel: 647.288.3362
Fax: 647.260.2220
Email: GLuftspring@rickettsharris.com

Sam Sasso
Tel: 416.364.6211 (ext. 285)
Fax: 647.260.2220
Email: ssasso@rickettsharris.com

Lawyers for Travelers Insurance Company of Canada

LAW DEBENTURE TRUST COMPANY OF NEW YORK
400 Madison Avenue – 4th Floor
New York, New York 10017

James D. Heaney
Tel: 646-747-1252
Fax: 212-750-1361
Email: james.heaney@lawdeb.com

Senior Note Indenture Trustee

CHAITONS LLP
5000 Yonge Street, 10th Floor
Toronto, Ontario M2N 7E9

Harvey G. Chaiton
Tel: 416.218.1129
Fax: 416.218.1849
Email: Harvey@chaitons.com

Lawyers for the Law Debenture Trust Company of New York

INDEX

TAB 1

Fantl v. Transamerica Life Canada

95 O.R. (3d) 767

Court of Appeal for Ontario,

Winkler C.J.O., Goudge and Simmons JJ.A.

May 7, 2009

Actions -- Abuse of process -- Law firm which represented plaintiff in proposed class proceeding dissolving -- Plaintiff deciding not to follow lawyer who had acted as supervising counsel and instead retaining new firm formed by other partners of old firm -- Former supervising counsel moving unsuccessfully for order striking notice of change of solicitors and then bringing competing action with new plaintiff which overlapped significantly with existing action -- New action constituting abuse of process -- New action stayed.

Civil procedure -- Class proceedings -- Counsel -- Representative plaintiff not required to seek and obtain court approval of decision to choose new class counsel but court having jurisdiction to review that [page768] decision where it is contested -- Test on review whether counsel is competent, whether there were any improper considerations underlying choice made by plaintiff and whether prejudice to class would result from choice -- Lawyers not having vested interest in subject matter of class proceeding entitling them to override representative plaintiff's decision to change counsel.

The plaintiff in a proposed class proceeding retained a law firm, REKO. The retainer agreement was between the plaintiff and REKO, and not between the plaintiff and any of REKO's individual lawyers. K acted as supervising partner, although other lawyers worked more closely on the case. Following the dissolution of REKO, the plaintiff decided to retain a new firm formed by some of the REKO partners, REO. K's new firm, KO, brought a motion for an order striking the notice of change of solicitors and an order requiring the plaintiff to retain KO. In the alternative, KO sought to have the plaintiff removed as representative plaintiff and two new representative plaintiffs substituted in his stead. The motion was dismissed, and the Divisional Court affirmed that decision. KO appealed.

Held, the appeal should be dismissed.

It is unnecessary for a representative plaintiff to seek and obtain court approval for every decision

involving the selection or change of counsel. However, the case-management judge charged with responsibility for the supervision of the proceeding should be immediately and directly notified of a change. If the decision is contested and properly comes before the court on motion, the court is within its jurisdiction to review the plaintiff's decision. Once the court's jurisdiction is engaged, any review of the decision must be directed to three factors: (1) the competence of counsel chosen by the plaintiff; (2) whether there were any improper considerations underlying the choice made by the plaintiff; and (3) whether there is prejudice to the class as a result of the choice. Unless this inquiry reveals something was unsatisfactory to the court, it ought not to interfere with the choice of counsel made by the plaintiff. Any intervention based on the court's supervisory jurisdiction must be limited to situations where there is cogent evidence that steps taken may have an adverse impact on the absent class members.

In this case, there was no question about the competence of REO. There were no improper considerations underlying the plaintiff's choice. The fact that the plaintiff was a close friend of one of the REO partners did not constitute an improper purpose. An improper purpose would be one where the plaintiff was seeking to gain a personal advantage, the hope of an advantage not shared by the class members or was motivated in some way that was inconsistent with the interests of the class. To the extent that prejudice was argued by KO, it focused on the economic prejudice to itself rather than on any prejudice to the interests of the class. The Class Proceedings Act, 1992, S.O. 1992, c. 6 does not, and was never intended to, provide lawyers with a vested interest in the subject matter of a lawsuit entitling them to override the choices of the representative plaintiff, including the choice of counsel. There was no demonstrated prejudice to the class. As a result, there was no reason to interfere with the plaintiff's choice of counsel. There was also no basis for removing him as representative plaintiff.

After its motion was dismissed, KO brought a competing class action against the same defendant, with a new representative plaintiff, which overlapped significantly with the existing action. That action amounted to an abuse of process and should be stayed. [page769]

Cases referred to

Cassano v. Toronto-Dominion Bank (2007), 87 O.R. (3d) 401, [2007] O.J. No. 4406, 2007 ONCA 781, 230 O.A.C. 224, 47 C.P.C. (6th) 209, 162 A.C.W.S. (3d) 18; Ford v. F. Hoffman-La Roche Ltd. (2005), 74 O.R. (3d) 758, [2005] O.J. No. 1118, [2005] O.T.C. 207, 12 C.P.C. (6th) 226, 138 A.C.W.S. (3d) 19 (S.C.J.); Heron v. Guidant Corp., [2007] O.J. No. 3823 (S.C.J.) [Leave to appeal refused [2008] O.J. No. 48, 232 O.A.C. 366, 163 A.C.W.S. (3d) 906 (Div. Ct.)]; Housen v. Nikolaisen, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31, 2002 SCC 33, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, J.E. 2002-617, 219 Sask. R. 1, 10 C.C.L.T. (3d) 157, 30 M.P.L.R. (3d) 1, 112 A.C.W.S. (3d) 991; Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 46 O.R. (3d) 130, [1999] O.J. No. 2245, 99 O.T.C. 384, 37 C.P.C. (4th) 175, 88 A.C.W.S. (3d) 1138 (S.C.J.); Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572, 103 O.T.C. 161, 40 C.P.C.

(4th) 151, 91 A.C.W.S. (3d) 351 (S.C.J.); Ricardo v. Air Transat A.T. Inc., [2002] O.J. No. 1090, [2002] O.T.C. 205, 21 C.P.C. (5th) 297, 113 A.C.W.S. (3d) 945 (S.C.J.); Setterington v. Merck Frosst Canada Ltd., [2006] O.J. No. 376, [2006] O.T.C. 97, 26 C.P.C. (6th) 173, 145 A.C.W.S. (3d) 566 (S.C.J.); Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd., [2000] O.J. No. 4594, [2000] O.T.C. 877, 4 C.P.C. (5th) 169, 101 A.C.W.S. (3d) 472 (S.C.J.); Ward-Price v. Mariners Haven Inc. (2004), 71 O.R. (3d) 664, [2004] O.J. No. 2308, [2004] O.T.C. 474, 3 C.P.C. (6th) 116, 131 A.C.W.S. (3d) 388 (S.C.J.); Western Canadian Shopping Centres v. Dutton, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63, 2001 SCC 46, 201 D.L.R. (4th) 385, 272 N.R. 135, [2002] 1 W.W.R. 1, J.E. 2001-1430, 94 Alta. L.R. (3d) 1, 286 A.R. 201, 8 C.P.C. (5th) 1, 106 A.C.W.S. (3d) 397

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5(1), 12, 13, 20, 29(1), (2), 32(2), 33(1), (4)

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 134(1) [as am.]

APPEAL from order of the Divisional Court (Cunningham A.C.J.S.C.J., Carnwath and Bellamy JJ.), [2008] O.J. No. 4928, 2008 CanLII 63563 (Div. Ct.) dismissing an appeal from the decision of Perell J., [2008] O.J. No. 1536, 2008 CanLII 17304 (S.C.J.) dismissing a motion for an order striking the notice of change of solicitors and for other relief.

Alan J. Lenczner, Q.C., and Naomi Loewith, for appellant Kim Orr Barristers P.C.

Bonnie A. Tough and Jennifer M. Lynch, for respondent Joseph Fantl.

Mary Jane Stitt, for respondent Transamerica Life Canada.

The judgment of the court was delivered by

WINKLER C.J.O.: --

Overview

[1] This appeal relates to a representative plaintiff's right to choose new counsel in a class proceeding, following the dissolution [page770] of the law firm originally retained by the plaintiff to prosecute the action.

[2] The appellant is a law firm, Kim Orr Barristers P.C. ("KO"). Joseph Fantl is the representative plaintiff in a class proceeding brought against the defendant Transamerica Life Canada

("Transamerica"). Both Mr. Fantl and Transamerica are respondents in this appeal.

[3] In 2006, Mr. Fantl retained the law firm of Roy Elliott Kim O'Connor ("REKO") to act in the prosecution of the intended class action lawsuit against Transamerica. A team of REKO lawyers worked on the matter. Toward the end of 2007, REKO dissolved.

[4] Certain of the team of lawyers formerly engaged on the file joined the newly formed law firm of Roy Elliott O'Connor ("REO"). Others followed one of REKO's former partners, Won Kim, to form the appellant law firm KO, while the remaining lawyer chose to go elsewhere. Because of the disbanding of REKO, Mr. Fantl was forced to decide what firm to retain to continue the matter. He chose REO because he knew and was a friend of Peter Roy, and because he had some experience with, and respected members of, the firm. As such, he trusted them to carry the case forward.

[5] Mr. Fantl served a notice of change of solicitors naming REO as counsel. KO brought a motion pursuant to s. 12 of the Class Proceedings Act, 1992, S.O. 1992, c. 6 (the "CPA") asking for various forms of relief, including an order striking the notice of change of solicitors and an order requiring Mr. Fantl to retain KO. In the alternative, KO sought to have Mr. Fantl removed as representative plaintiff and two new representative plaintiffs (Yi-Yea (Riya) Kang and Jeong-Ae Seok) substituted in his stead. The motion judge dismissed the motion in its entirety. KO appealed the decision of the motion judge to the Divisional Court, which dismissed the appeal. KO appeals to this court, with leave. An expedited hearing was granted given that a settlement has been reached and the settlement approval hearing relating to the case is imminent.

[6] The motion judge, in refusing to grant the relief requested, held that a representative plaintiff has a right to retain counsel of his or her choice. He found that the test to be applied in determining whether the plaintiff's choice of counsel should stand is whether the counsel is adequate. Thus, he adopted the same test for counsel as is required by s. 5(1) of the CPA in determining whether a representative plaintiff may carry an action forward. [page771]

[7] In this context, the motion judge noted that while the court has a broad supervisory jurisdiction in class proceedings, it should not intervene in a plaintiff's choice of counsel unless the choice would deny putative class members adequate legal representation. He rejected the appellant's theory that the proper test to be applied is whether the plaintiff's choice is in the best interests of the class. Hence, he refused to engage in a comparison of the two law firms to determine which group was superior. The Divisional Court upheld the reasons of the motion judge on these central issues.

[8] Following the dismissal of the motion, KO brought a competing action against Transamerica, with Ms. Kang as the proposed representative plaintiff (the "Kang action"). The Kang action overlaps significantly with Mr. Fantl's action.

[9] The appellant advances the same arguments on this appeal as were made to the courts below, contending that the motion judge erred by applying the wrong test. The competence of REO to act as class counsel is not in issue. This notwithstanding, on a comparison basis applying the test of best

interests of the class, the appellant submits that the plaintiff ought to be directed to retain the KO firm. Consequently, the plaintiff's choice of counsel ought to be set aside and new representative plaintiffs appointed in place of Mr. Fantl.

[10] The respondent submits that the motion judge applied the appropriate test and suggests that the key consideration in the analysis should be whether the plaintiff's decision caused any prejudice to the class members. Since there is no dispute as to the competence of REO counsel, and since the settlement discussions have advanced to the point of a settlement approval hearing, the motion judge's decision not to interfere with Mr. Fantl's choice of counsel should be upheld.

[11] I cannot accede to the appellant's submissions. In my view, the representative plaintiff is entitled to select, and is indeed responsible for selecting, class counsel. In a circumstance like this, when a decision properly comes before the supervisory court for review, the criteria to be considered in determining whether the plaintiff's choice of counsel can stand are: competence of counsel; whether the choice was based on any improper considerations; and whether the choice resulted in any prejudice to the class. In the present case, competence of counsel is conceded. There is no evidence of any improper purpose in the selection of counsel or of any prejudice to the class as a result of that decision. Furthermore, the Kang action, commenced after the motion judge dismissed the appellant's motion, is an abuse of process. [page772]

[12] I would dismiss the appeal, and exercise my discretion under s. 134(1) of the Courts of Justice Act, R.S.O. 1990, c. C.43 (the "CJA") and s. 13 of the CPA, to stay the Kang action. My reasons, which differ from those of the motion judge, follow.

The Issues

[13] There are three central issues on this appeal. First, is the representative plaintiff in an intended class proceeding, who is required to retain new counsel after the proceeding has been commenced, entitled to select counsel of his or her own choosing or is the court, in the exercise of its supervisory jurisdiction under the CPA, always required to approve class counsel?

[14] Second, regardless of the answer to the first question, if the selection of counsel comes before the court for review, what is the proper test to be applied in determining whether the plaintiff's selection of class counsel should stand?

[15] Third, the appellant has asked this court to review whether Mr. Fantl should be replaced as the representative plaintiff. This requested relief bears on the status of a competing action, launched by the appellant following the dismissal of its motion, in which Ms. Kang is the representative plaintiff.

Facts

[16] This appeal arises from a proposed class action against Transamerica that has yet to be

certified. Mr. Fantl is not the original representative plaintiff in this action. The action was initially started by Michael Millman, a chartered accountant in British Columbia who owned an insurance policy issued by the company that is now Transamerica and which contained an investment option known as the Can-Am fund. Mr. Millman sought to sue Transamerica on the basis that (1) Transamerica had overcharged him for management expenses; and (2) that the Can-Am fund had not tracked or replicated the results of the S&P 500 total-return index as had been promised.

[17] The lawyer retained by Mr. Millman referred the claims to Sutts, Strosberg LLP in Ontario for the purpose of commencing a class action. On December 29, 2003, a statement of claim was issued by Mr. Millman's new counsel against Transamerica.

[18] Although there is disputed evidence as to the timing and roles of the parties, the motion judge found that by autumn 2005, the case had been transferred to the law firm REKO. He further found that, upon the transfer of the file, Mr. Kim became the supervising lawyer on the case. Shortly thereafter, Mr. Millman indicated that he was no longer prepared to act as the representative plaintiff in the case. [page773]

[19] Mr. Fantl was a long-standing friend of REKO partner Mr. Roy and had been seeking legal advice from the firm on an unrelated matter at about the time that the original representative plaintiff removed himself from the file. During discussions, it emerged that Mr. Fantl was also an investor in the Can-Am fund operated by Transamerica. REKO's lawyers invited him to act as the new representative plaintiff in the action and he accepted.

[20] In May 2006, Mr. Fantl signed a retainer agreement with REKO. The retainer agreement was between Mr. Fantl and the law firm, and not between Mr. Fantl and any of REKO's individual lawyers.

[21] Between September 2005 and April 2007, the case progressed. The statement of claim was amended, material for the certification was prepared and cross-examinations were conducted. The certification motion did not proceed in May 2007, as scheduled, because Mr. Kim and counsel for Transamerica began to explore the idea of consent certification and a settlement of the management expenses claim. The parties indicated in a case conference on September 12, 2007 that there was a prospect of settlement but that the scope of the funds implicated in the claim was growing significantly, beyond just the Can-Am fund.

[22] The motion judge found that Mr. Kim had been the partner at REKO with the most involvement in Mr. Fantl's case and that Mr. Kim had been assisted in this work to varying degrees by six associate lawyers. The motion judge also noted Mr. Fantl's evidence that he had had minimal contact with Mr. Kim throughout the course of the class action and that Mr. Kim had not provided him with any reports or advice on the case, apart from one brief conversation.

[23] For reasons not disclosed to the motion judge, REKO dissolved on December 31, 2007. Mr. Kim established the firm now known as KO, and REKO's other former partners established the new

firm called REO.

[24] Mr. Roy wrote to Mr. Fantl to inform him of REKO's dissolution and to seek instructions with respect to carriage of the class action. On January 5, 2008, Mr. Fantl wrote to REO to say that he had chosen the firm to act as his lawyers for the class action. He cited his "personal knowledge of Mr. Roy, his abilities and integrity as a lawyer and my confidence in his judgment" as among the reasons for his choice. In this regard, the motion judge noted that Mr. Fantl had been the best man at Mr. Roy's wedding. In his affidavit evidence, Mr. Fantl also noted that his choice of counsel was influenced by the fact that [page774] "REO has extensive class action experience and the senior partners have a great deal of experience in complex litigation, including settlement of complicated cases". Mr. Fantl was not cross-examined on his affidavit. REO served the notice of change of solicitors and came on the record on January 18, 2008.

[25] KO subsequently brought a motion to set aside the notice of change of solicitors and to disqualify Mr. Fantl from being the representative plaintiff in the class action. It argued before the motion judge that Mr. Fantl had breached his duty to the intended class members by choosing REO and that, based on the success and progress achieved by Mr. Kim in the action, it was in the best interests of the class that KO be appointed as solicitor of record. KO also argued that, in the alternative, the court should replace Mr. Fantl with two new proposed representative plaintiffs, Ms. Seok and Ms. Kang. Mr. Fantl argued that the court's jurisdiction to govern the solicitor-client relationship was limited to the post-certification phase and that, in any event, Mr. Fantl had fulfilled his duty to the intended class members by choosing adequate counsel.

[26] KO's motion was dismissed. The dismissal was upheld by the Divisional Court. Following the dismissal of the motion, KO brought a competing action against Transamerica, with Ms. Kang as the proposed representative plaintiff. The Kang action covers 25 of the 26 investment funds that are the subject of the proposed settlement agreement in the instant case. The only distinction between the two is that the Kang action does not include the Can-Am fund.

Decision of the Motion Judge

[27] In his reasons [[2008] O.J. No. 1536 (S.C.J.)], the motion judge characterized the "overarching issue in the case" as being whether the court has the jurisdiction to supervise the relationships arising in a class proceeding, both pre- and post-certification: at para. 56. He held that, on the basis of the court's inherent jurisdiction to control its own process and the powers derived from s. 12 of the CPA, the court's jurisdiction to supervise a class proceeding "exists from the outset of the litigation and the Court has the jurisdiction to make orders to protect putative class members as potential parties to the litigation": at para. 58.

[28] Having determined that the court has the jurisdiction to supervise all relationships arising out of a class proceeding from the outset of the litigation, the motion judge turned specifically to a consideration of the solicitor-client relationship. He recognized that in an ordinary action, well-established principles dictate that a litigant has the autonomy to choose counsel without

[page775] court interference. However, he noted that these principles cannot be transferred directly to the class action context due to the responsibilities owed by the representative plaintiff, class counsel and the court to absent class members.

[29] The motion judge acknowledged previous case law suggesting that a solicitor-client relationship û with all its concomitant duties and obligations û may not exist between class counsel and proposed class members in the pre-certification stage. However, he held that a sui generis relationship exists between class counsel and proposed class members, and that at least some of the responsibilities inherent in the solicitor-client relationship are owed by counsel to the proposed class.

[30] In considering the proper test for determining whether Mr. Fantl's choice of counsel should stand, the motion judge reviewed the case law that had developed in relation to the adequacy of the representative plaintiff, carriage motions and the removal or change of counsel. Ultimately, he likened the fact situation of the instant case as being akin to that of choosing a solicitor of record at the outset of litigation. He thus applied the standard applied by the court on a certification motion: whether the representative plaintiff has selected "competent counsel that will adequately represent the proposed class if the action is certified": at para. 105.

[31] In so deciding, the motion judge noted that this standard did not require the representative plaintiff to choose the best or more superior counsel. In this respect, while he stated that "Mr. Kim might or might not be a better choice", Mr. Fantl's choice of REO as solicitor of record met the standard of competency and adequacy: at para. 110. Accordingly, the motion was dismissed.

Decision of the Divisional Court

[32] On appeal, the appellant submitted before the Divisional Court that the motion judge had applied the wrong legal test when determining whether Mr. Fantl had properly appointed REO as the new class counsel.

[33] The Divisional Court reviewed the motion judge's conclusions and found that he had committed no error of law. In particular, the Divisional Court [[2008] O.J. No. 4928 (Div. Ct.)] endorsed the motion judge's central conclusion that, "having selected competent counsel to represent the class, the fact there are other counsel who may be a better choice does not change the standard Mr. Fantl must meet": at para. 37. [page776]

Positions of the Parties

[34] The thrust of the appellant's argument is that, even though the litigation is being conducted by a representative or intended representative plaintiff, where a decision is required in the conduct of the proceeding, including one that occurs at the pre-certification stage, the decision of the plaintiff must receive the court's approval.

[35] The appellant contends that this is necessitated by an overriding concern for the interests of the absent class members. Accordingly, in its submission, the test to be applied by the court is whether the decision made by the plaintiff is in the best interests of the class. This, says the appellant, is the test to be applied by a court throughout a class proceeding, regardless of the issue to be decided or the stage of the proceeding.

[36] The respondents advance a more limited view of the supervisory role of the court in the exercise of its jurisdiction under the CPA. They caution that it is not appropriate for the court to "descend into the arena" and assume the responsibility of the plaintiff in conducting the litigation.

Analysis

[37] In addressing the issues raised in this appeal, I am guided by the reasons of the Supreme Court of Canada in Housen v. Nikolaisen, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31, which sets out the standards of review in appeals from a judge's order.

Issue 1: Supervisory jurisdiction of the court

[38] It is now well-settled that class proceedings are sui generis litigation. In part, this is because of the existence of the proposed class in addition to the putative representative plaintiff. As stated by Cullity J. in Heron v. Guidant Corp., [2007] O.J. No. 3823 (S.C.J.), leave to appeal refused [2008] O.J. No. 48, 232 O.A.C. 366 (Div. Ct.), at para. 10:

> From the commencement of a class proceeding the court, as well as the named plaintiff has responsibilities to members of the class . . . . They are not parties to the proceeding but they are not strangers. Their rights are as much at stake as those of the plaintiffs. It is consistent with their sui generis status, and the objectives of the CPA, that their interests should not be vulnerable to the deficiencies in the ability of the named plaintiff to represent them.

(Citations omitted)

[39] The existence of the absent class members, among other factors, is the reason that the court's supervisory jurisdiction is [page777] engaged from the inception of an intended class proceeding. It continues throughout the "stages" of the proceeding until a final disposition, including the implementation of the administration of a settlement or, where applicable, a resolution of all individual issues.

[40] The supervisory jurisdiction of the court over the class proceeding is not in issue on this appeal. The parties acknowledge that the court has supervisory jurisdiction throughout the proceeding. They do, however, posit markedly different theories as to the circumstances in which this jurisdiction must or ought to be exercised.

[41] While I do not agree with the appellant's position that the court must be actively engaged at every turn in the proceeding, I am equally circumspect about the "hands off" approach advocated by the respondents. Neither view accurately captures the role of the court in respect of a class proceeding.

[42] The CPA is specific as to certain matters arising out of litigation conducted under the aegis of the statute that require court approval. These include, inter alia, the abandonment or discontinuance of an action, approval of settlements, notice to class members and class counsel fees: see ss. 29(1), 29(2), 20 and 32(2) of the CPA respectively. In addition to such enumerated and specific matters requiring court approval, the legislature has also seen fit to provide the court, under s. 12 of the CPA, with a broad, discretionary jurisdiction to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination". Although the court's ongoing supervisory jurisdiction is manifest in the CPA, this is not to say that every decision made by the plaintiff or counsel in the prosecution of the class action lawsuit requires the sanction of the court.

[43] The motion under appeal was brought pursuant to s. 12 of the CPA. The appellant argues that a notice of change of solicitors should not have been delivered without first obtaining an order of the court on motion brought by the representative plaintiff, so as to have the court approve the new class counsel. Further, the appellant contends that this determination should only be made on the basis of the "best interests of the class".

[44] I disagree. The position advanced by the appellant appears to be an attempt to combine certain developed principles of class action jurisprudence so as to elevate the court's supervisory role over the proceeding to one of mandatory intervention. While it is true that the court has a responsibility to the absent class members, the prosecution of the action rests squarely with the representative plaintiff. The representative plaintiff in a class action [page778] lawsuit is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report.

[45] This is clear from a reading of the CPA. In order to obtain certification, s. 5(1) of the CPA requires that the court be satisfied that the representative plaintiff "has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class". In other words, as stated by the Supreme Court of Canada in Western Canadian Shopping Centres v. Dutton, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63, at para. 41:

> In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class.

(Citations omitted)

[46] As is also stated in this passage, an important part of this representative plaintiff's plan is the retention of "competent" counsel.

[47] I do not view it as necessary for the plaintiff to seek and obtain approval of the court for every decision involving the selection or change of counsel. However, I am of the view that the case-management judge charged with responsibility for the supervision of the proceeding should be immediately and directly notified of such a change. Further, if this decision is contested and properly comes before the court on motion, the court is well within its jurisdiction to review the plaintiff's decision.

Issue 2: Test for reviewing a plaintiff's choice of counsel

[48] The parties vigorously disputed the test to be applied when the court reviews a representative plaintiff's choice of counsel. In his reasons, the motion judge correctly identified the issues and canvassed the relevant case law in deciding that question. In my view, he made no error in holding that the choice of counsel upon REKO's dissolution was a matter for Mr. Fantl to deal with and that his decision did not warrant interference by the court. Nonetheless, I would arrive at that result for different reasons and based on a different analysis than that of the motion judge.

[49] The appellant has argued that this court should evaluate Mr. Fantl's choice of counsel by determining whether he was acting in the "best interests of the class" in so choosing. On the other [page779] hand, the respondent contends that the motion judge was correct in applying a test of adequacy to Mr. Fantl's choice of counsel. In my view, both approaches miss the mark. Once the court's jurisdiction is engaged, any review by the court of a decision as to choice of counsel must be directed to three factors:

(1) Has the plaintiff chosen competent counsel?
(2) Were there any improper considerations underlying the choice made by the plaintiff?
(3) Is there prejudice to the class as a result of the choice?

[50] Unless this inquiry reveals something unsatisfactory to the court, it ought not to interfere with the choice of counsel made by the plaintiff. The court is not a substitute decision-maker for the plaintiff in the litigation. Accordingly, any intervention based on its supervisory jurisdiction must be limited to situations where there is cogent evidence that steps taken may have an adverse impact on the absent class members.

[51] In formulating these criteria for review of the choice of counsel by the plaintiff, I am necessarily rejecting the argument of the appellant that the only test to be applied by the court is whether the choice is "in the best interests of the class". It must be remembered that the broad and guiding "best interests" principle developed in recognition of the distinction that must be made between the interests of individual class members and the interests of the class as a whole when the

court is considering certain issues: see Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572, 40 C.P.C. (4th) 151 (S.C.J.); Ford v. F. Hoffman-La Roche Ltd. (2005), 74 O.R. (3d) 758, [2005] O.J. No. 1118 (S.C.J.); and Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 46 O.R. (3d) 130, [1999] O.J. No. 2245 (S.C.J.). Here, the context is very different.

[52] Moreover, where the issue before the court is the plaintiff's choice of counsel, insofar as the "interests of the class" must be considered, they are sufficiently addressed under the prejudice criterion. Where there is no prejudice, the choice of "competent counsel" who has not been selected for any improper purpose will also be in the interests of the class.

[53] By applying these criteria, the court avoids the "contest" approach proposed by the appellant, which pits two sets of competing lawyers against each other and undermines the role of the representative plaintiff in selecting counsel. Such an approach is neither necessary nor productive where, as here, competence is conceded and there is no evidence that the plaintiff has [page780] acted improperly or in a manner that prejudices the interests of the class.

[54] The appellant contends that the "contest" approach is appropriate in the present circumstances because the choice of counsel is analogous to a carriage motion. I disagree. A carriage motion is a motion to determine which of two or more overlapping, competing intended class actions should be allowed to proceed and which should be stayed. A carriage motion involves a competition which, of necessity, requires a comparison of the competing proceedings. Unlike a carriage motion, there is no competition between proceedings here. It is for this reason that any analogy between a carriage motion and the present circumstances breaks down.

Application of the test to the instant case

[55] The instant proceeding involves the choice of counsel upon dissolution of the class counsel law firm. The retainer agreement was entered into between Mr. Fantl and REKO, and not with Mr. Kim or any other individual lawyer. A team of lawyers at the predecessor firm dealt with the case.

[56] On dissolution, some of the team formed the appellant, some formed REO and one lawyer joined another firm. Lawyers in each of these factions had participated in the work on the file to varying degrees. The lawyer who did the most work on the file was the associate who left and went to an unrelated firm.

[57] The record indicates that, although Mr. Kim was the senior partner on the case, he did not take instructions from, or report to, Mr. Fantl and that he only accompanied Mr. Fantl to cross-examinations. He attended one settlement meeting with the defendant at which defendant's counsel offered to settle the claim, expand the class definition and communicate this development to class members.

[58] In the context of this file, and in the eyes of Mr. Fantl, there was more to the REKO firm than just Mr. Kim. Mr. Fantl was faced with three choices. He could go with the appellant, the REO

firm or choose a different firm. He chose the REO firm.

[59] The appellant argues that the failure to retain KO was akin to a dismissal of counsel. I do not accept this characterization of the facts before this court. The appellant was not terminated by the plaintiff. Indeed, KO had no relationship with the plaintiff capable of termination. Rather, its complaint is that the plaintiff did not choose to retain its lawyers after REKO's dissolution.

[60] Turning to the first factor of the test, competence of counsel of choice was conceded in the present case. I note the appellant's submission that competence of counsel is not a useful [page781] benchmark since every lawyer in Ontario is competent and thus no motion challenging a plaintiff's choice of counsel is likely to ever be successful. I disagree. Where competence is a live issue, the court should consider under this head:

(1) the nature of the lawsuit;
(2) the complexity of the litigation;
(3) the fact that it was a class proceeding;
(4) the experience of counsel as to subject matter and class actions;
(5) the resources of counsel;
(6) the stage of the proceedings at which the review occurs; and
(7) any other considerations the court might deem to be appropriate.

[61] Moreover, when considering competence of counsel, the court must take into account the fact that, after certification, class counsel will be in a solicitor-client relationship with the class members, with all of the responsibilities that entails, extending until the implementation of a settlement or final disposition of any individual issues. In other words, given that the class may include a large number of people, this obligation may be significant and prolonged: see, generally, Cassano v. Toronto-Dominion Bank (2007), 87 O.R. (3d) 401, [2007] O.J. No. 4406 (C.A.) and Ward-Price v. Mariners Haven Inc. (2004), 71 O.R. (3d) 664, [2004] O.J. No. 2308 (S.C.J.), at para. 7.

[62] These criteria serve to advance an object of the CPA, namely, to obtain first class representation for class members.

[63] Turning to the second factor, there is no evidence of any improper purpose or motive on the part of the plaintiff in making his decision to retain REO. The appellant points to the plaintiff's friendship with Mr. Roy, one of the partners of REO, as the driving factor in choice of counsel. While that was a consideration, it was not the only factor for the plaintiff's choice of counsel. As noted by the motion judge and as indicated in the record, Mr. Fantl was attracted to REO because of the competence of counsel, which is not disputed, and its reputation in class action work.

[64] In any event, I would not accept that the fact of an acknowledged friendship between the plaintiff and his counsel of choice would constitute an improper purpose in and of itself. An [page782] improper purpose would be one where the plaintiff was seeking to gain a personal

advantage, the hope of an advantage not shared by the class members or was motivated in some way that was inconsistent with the interests of the class.

[65] Turning to the third factor, to the extent that prejudice was argued by the appellant, this line of argument focused on the economic prejudice to the appellant rather than on any prejudice to the interests of the class. The appellant emphasized what was characterized as the policy arguments in support of entrepreneurial lawyers, which were said to advance one of the goals of the CPA -- access to justice. Effectively, the appellant's argument is that it would be unfair for a plaintiff, upon dissolution of his or her counsel's law firm, to choose any lawyer other than the lawyer who had previously acted as the lead counsel. In other words, in a class action, the lawyer's time and effort on the file constitutes an equity investment by the lawyer in the case. It is argued that if representative plaintiffs are allowed to switch counsel at will, there will be less of an incentive for counsel to take on class actions and make an investment of time and effort that may be lost.

[66] There is no question that class proceedings are entrepreneurial in nature. However, the proposition advanced by the appellant would only be supportable if the creation of an entrepreneurial class-action bar was a policy goal underpinning the CPA. This argument fails because as far as the CPA is concerned, the entrepreneurial lawyer is a means to an end, not an end in and of itself. Were it otherwise, one of the criticisms of the CPA, that it promulgates plaintiffless litigation benefiting only the lawyers involved, would be well-founded. Such is not the case.

[67] Sections 33(1) and (4) of the CPA, which provide for contingency fees and a multiplier effect on fees to reward risk and success, are intended to provide sufficient incentives for lawyers to take on class proceedings that would not otherwise be attractive. This is the entrepreneurial aspect of class proceedings legislation that enhances access to justice. The CPA does not, nor was it ever intended to, provide lawyers with a vested interest in the subject matter of the lawsuit entitling them to override the choices of the representative plaintiff in the litigation, including the choice of counsel.

[68] In any event, Mr. Kim's investment of time and effort in the action while at REKO will be protected through the process of dissolving that firm.

[69] In conclusion, in light of the three factors set out above, namely, that competence of counsel is not in issue, there is no [page783] evidence of any improper purpose or considerations in choice of counsel, and no demonstrated prejudice to the class, there is no reason to interfere with the choice of counsel by Mr. Fantl.

Issue 3: Substitution of the representative plaintiff and the status of the Kang action

[70] Before Perell J., the appellant sought an order adding Ms. Seok and Ms. Kang as potential representative plaintiffs to replace Mr. Fantl as the plaintiff. Perell J. denied its request.

[71] On appeal, the appellant argued that Mr. Fantl's decision not to retain the appellant, in the

face of Mr. Kim's success on the file, suggests that Mr. Fantl will not best represent the class members and, thus, ought to be removed. On behalf of Ms. Kang and Ms. Seok, it argued that they should be substituted as representative plaintiffs. The respondents opposed, saying that, as with the commencement of the Kang action, this is simply an attempt to determine who will represent the interests of the class.

[72] Mr. Fantl has prosecuted the action to the point of settlement. There is no suggestion that he has been less than diligent in this respect. Indeed, Mr. Fantl stepped in to represent the class when the original representative plaintiff chose to abandon that role. He did so after being approached by solicitors from REKO, some of whom now stand with opposing interests on this appeal.

[73] While not necessarily determinative, the choice to approach Mr. Fantl to act in the representative capacity indicates that none of the counsel had any concerns about his ability to perform that role at that time. Moreover, when the plaintiff assumed the representation of the class, it must have been implicitly understood by his solicitors that he would be the one providing instructions for the litigation of the action.

[74] In light of these factors and my conclusion above that Mr. Fantl chose competent counsel, did not act with an improper purpose or act to the prejudice of the class, there is no basis to interfere with the decision of the motion judge not to remove or replace Mr. Fantl as the representative plaintiff in this action.

Stay of Kang action

[75] The appellant commenced the Kang action following the dismissal of the motion to strike the notice of change of solicitors and replace the representative plaintiff, notwithstanding its admission before the motion judge that such a move would be "disingenuous": at para. 99. Indeed, the Divisional Court commented on this development in the following terms, at para. 11 of its reasons: [page784]

> Most remarkable of all, and independent of this motion under appeal, the lawyer has started a separate class proceeding against Transamerica in the name of Ms. Kang, the proposed representative plaintiff. This is the same Ms. Kang whom the lawyer seeks to have added as representative plaintiff with Mr. Fantl, or, in the alternative, to replace Mr. Fantl, his former client, with Ms. Kang and Ms. Seok.

[76] I agree with the observation of the Divisional Court that the bringing of the Kang action after having lost the motion before the motion judge was "most remarkable". The only purpose for doing this can be to provide a platform for a carriage motion to challenge the instant proceeding as the proper proceeding to take the action forward to settlement on behalf of the class.

[77] Apart from the fact that the appellant brought the second duplicative proceeding, which would in my view be determinative in and of itself, a carriage motion would also involve the

appellant in bringing a proceeding against its former client.

[78] The essence of the respondents' argument is that the Kang action amounts to an abuse of process. I agree. Accordingly, pursuant to the jurisdiction conferred upon this court under s. 134(1) of the CJA and s. 13 of the CPA, I would stay the Kang action.

[79] If allowed to proceed, the Kang action would inevitably be stayed in any event. Considering the factors outlined by Cumming J. in Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd., [2000] O.J. No. 4594, 4 C.P.C. (5th) 169 (S.C.J.), at para. 49, there is no question that Mr. Fantl's action would proceed over the Kang action given that it is so "significantly more advanced than the other": Setterington v. Merck Frosst Canada Ltd., [2006] O.J. No. 376, 26 C.P.C. (6th) 173 (S.C.J.), at para. 22; and Ricardo v. Air Transat A.T. Inc., [2002] O.J. No. 1090, 21 C.P.C. (5th) 297 (S.C.J.), at para. 24.

[80] Further, as this action is on the cusp of settlement, the delay caused by a carriage motion would only serve to postpone the class members' access to justice. Even the appellant recognized that time was of the essence in this case, given the imminent settlement approval hearing, when it sought and was granted an expedited hearing of this appeal. Therefore, regardless of whether the competing actions are analyzed through the lens of best interests of the class or through that of prejudice, I reach the same inevitable conclusion that the Kang action should be stayed. The class members are entitled to certainty.

Conclusion

[81] In conclusion, I would dismiss the appeal. Further, I would grant a stay of the Kang action. Mr. Fantl shall receive [page785] costs of $10,000 for the appeal and $5,000 for the leave motion, inclusive of disbursements and GST. The appellant shall also pay to Transamerica its costs of $6,350 for the appeal and $2,000 for the leave motion, inclusive of disbursements and GST.

Appeal dismissed.

TAB 2

Case Name:

Kedia International Inc. v. Royal Bank of Canada

Between
Kedia International Inc., GMC Manufacturing Ltd. and Mohan Kedia, Appellants (Plaintiffs), and Royal Bank of Canada, Respondent (Defendant/Plaintiff by Counterclaim), and Wolrige Mahon Limited and RBC Dominion Securities Inc., Respondents (Defendants), and Kedia International Inc., Appellant (Defendant by Counterclaim)

[2007] B.C.J. No. 125

2007 BCCA 47

154 A.C.W.S. (3d) 1008

Vancouver Registry No. CA034665

British Columbia Court of Appeal
Vancouver, British Columbia

Rowles J.A.
(In Chambers)

Heard: January 9, 2007.
Judgment: January 26, 2007.

(30 paras.)

Civil procedure -- Disposition without trial -- Stay of action -- Application by plaintiffs for leave to appeal from case management judge's order respecting procedural matters and for stay of order dismissed -- Case management judge's order concerned matters of practice and therefore leave to appeal was required -- Stay of proceedings was not appropriate and would have frustrated the trial process and delayed the trial.

Application by the plaintiffs, Kedia International and others, for leave to appeal from, and a stay of, a case management judge's order respecting a number of procedural matters. The plaintiffs had brought an action against the Royal Bank, Wolrige Mahon, and RBC Dominion Securities for damages arising from alleged misconduct in the course of a banking and bullion trading relationship. The case management judge adjourned the trial for four weeks, extended the time reserved for trial from 14 to 30 days, and set a schedule for the timing of various pre-trial procedures. The judge also dismissed the plaintiffs' motion for a jury trial, for costs thrown away, for return of allegedly unauthorized debits, for security, and for additional discoveries or cross-examinations.

HELD: Application dismissed. The case management judge's order concerned matters of practice and therefore leave to appeal was required. A stay of proceedings was not appropriate as there was no serious issue to be tried, the plaintiffs failed to adduce any evidence of irreparable harm if a stay were refused, and the balance of convenience favoured the defendants. It would have been contrary to the interests of justice to deny the defendants the right to proceed with discovery and other procedural steps required to prepare for trial while an unmeritorious application for leave to appeal went forward to a hearing. A stay of proceedings would have frustrated the trial process and delayed the trial.

Statutes, Regulations and Rules Cited:

Court of Appeal Act, R.S.B.C. 1966, c. 77, s. 7(1)(b), s. 7(2)

Counsel:

Mohan Kedia: In person, Appellant

Mark D. Andrews Q.C.,
Jennifer Francis: Counsel for the Respondent

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1 ROWLES J.A.:-- During the course of a case management conference, Madam Justice Stromberg-Stein made an order respecting a number of procedural matters. The applicants have filed both a Notice of Appeal and a Notice of Application for Leave to Appeal from the order.

2 As set out in their motion before me, the applicants seek the following:

1. The Plaintiff requests this Honourable Court for directions to file Notice of Appeal and Notice of Application for Leave to Appeal.
2. The Plaintiff request stay order for the decision of the Honourable Madam Justice Stromberg-Stein dated December 15th, 2006;

3. The Plaintiff is permitted to bring all the motion related to this matter before Court of Appeal.
4. The Plaintiff request to extend time period to 90 days for filing the documents.
5. The Plaintiff is permitted to amend the Cause of Style already filed on December 15th, 2006.

3 During the hearing of the motion, the applicants abandoned the fifth part of the application as unnecessary.

4 By way of background, the applicant plaintiffs, Kedia International Inc. ("Kedia International"), GMC Manufacturing Ltd. ("GMC") and Mohan Kedia, brought an action against the defendants, now respondents, Royal Bank of Canada ("RBC"), Wolrige Mahon Limited ("Wolrige") and RBC Dominion Securities Inc. ("RBC Securities") alleging misconduct by the defendants in the course of a banking and bullion trading relationship. The action was commenced on 20 April 2000 and was originally scheduled to proceed to trial on 8 July 2002. The trial was adjourned on a number of occasions when the applicants sought to amend their pleadings. A Further Amended Statement of Claim was filed on 19 December 2006.

5 The plaintiffs' claim, as most recently amended, includes allegations of negligence, breach of contract, breach of fiduciary duty, breach of various statutory duties, defamation, intentional and/or negligent infliction of emotional harm resulting in wrongful death, negligent misrepresentation, fraudulent misrepresentation, intentional interference with contractual relations and wrongful seizure. The principal claims asserted are as follows:

(a) Bullion delivery errors: RBC delivered gold when there were insufficient funds in the bullion account, contrary to the procedure agreed between the plaintiffs and RBC; RBC charged Kedia International for gold when it could not provide satisfactory proof of delivery to an authorized person. Kedia International claims that the overdraft on its account, which is the subject of the counterclaim by RBC, is the result of improper debits, that it is not liable for the amount and that, in fact, it is entitled to be repaid for improper debits in the amount of $1.9 million.

(b) Forward trading errors: RBC changed the manner in which it operated Kedia International's forward trading account without notice to or consent from Kedia International, which resulted in loss and damage to Kedia International.

(c) Taking of security, seizure and destruction of the plaintiffs' business: the security agreements executed by the plaintiffs in March 1998 and February 1999 are unenforceable; there was no debt; RBC and Wolrige Mahon were negligent in their enforcement of the security agreements; RBC defamed Mohan Kedia and his son to the Scotiabank. As a result, the plaintiffs' claim damages for loss of profits that would have been made by Kedia International and GMC, loss of receivables that should have been collected by Mahon, and damages for loss of

value of seized equipment.

(d) Wrongful death: RBC wrongly accused Viki Kedia of fraud in respect of the Goldrich Cheques with the intention of causing, or knowing that it would cause him mental distress, which resulted in Viki Kedia committing suicide. Mohan Kedia claims damages under the ***Family Compensation Act,*** R.S.B.C. 1996, c. 126.

6 The order the applicants wish to appeal was made during a case management conference held 13-15 December 2006. The case management judge adjourned the trial for four weeks, extended the time reserved for trial from 14 to 30 days and set a schedule for the timing of various pre-trial procedures. In addition, the judge dismissed the applicants' motion for a jury trial, for costs thrown away, for return of allegedly unauthorized debits, for security and for additional discoveries or cross-examinations. In relation to some matters, the judge granted liberty to reset the applications after further procedural steps were concluded.

7 In the first paragraph of their motion, the applicants seek directions as to whether leave to appeal is required. Section 7(2) of the ***Court of Appeal Act***, R.S.B.C. 1966, c. 77 provides that leave is required when an appeal is brought from an interlocutory order. By section 7(1)(b) of the ***Act***, "interlocutory order" includes an order made under the Supreme Court Rules on a matter of practice or procedure. The order made by Justice Stromberg-Stein concerns matters of practice or procedure and therefore leave is required.

8 In the third paragraph of their motion, the applicants seek an order that this court hear all future motions relating to the proceedings in the trial court. Such an order cannot be granted because the Court of Appeal does not have jurisdiction to hear such motions. The Court of Appeal is a statutory court and its jurisdiction is generally limited to those powers given by statute and to matters which are necessary or incidental to the hearing and determination of appeals. The fact that an appeal or a notice of application for leave to appeal has been filed does not cloak this court with jurisdiction to hear and determine motions in proceedings in the trial court.

9 In the second paragraph in their motion, the applicants seek a stay of the proceedings in the trial court pending the determination of either a leave to appeal application or the appeal of the order.

10 Generally, where the proceedings in the trial court are on-going, an order for a stay of those proceedings would not be appropriate. In ***Hama v. Werbes***, [1999] B.C.J. No. 2771, 1999 BCCA 714, Esson J.A. (in Chambers) said (para. 2):

> There is no precedent to my knowledge for an order that would have the effect of interfering with the conduct of a proceeding which is properly before a Supreme Court judge. I do not say there are no circumstances in which this Court would exercise its power under the *Court of Appeal Act* and *Rules* to stay proceedings, but as a general principle it seems to me that would be inappropriate ....

11 The three-stage test set out in ***Manitoba (Attorney General) v. Metropolitan Stores Ltd.***, [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321 and reiterated in ***R.J.R. - MacDonald Inc. v. Canada (Attorney General)***, [1994] 1 S.C.R. 311 at 334, 111 D.L.R. (4th) 385 requires an applicant for a stay to show the following:

> (1) that there is some merit to the appeal in the sense that there is a serious question to be determined;
> (2) that irreparable harm would be occasioned to the applicant if the stay was refused; and
> (3) that, on balance, the inconvenience to the applicant if the stay was refused would be greater than the inconvenience to the respondent if the stay was granted.

12 For the reasons which follow, I am of the view that the applicants have fallen well short of showing that a stay of proceedings ought to be granted.

13 The proposed ground of appeal set out in the application for leave to appeal is as follows:

> Madam Justice Stromberg-Stein denied most of the motions requested by the Plaintiff and adjourned the trial date against the Plaintiff's consent.

14 Neither the ground of appeal nor the applicants' written argument suggests any error in principle in relation to the order made by Madam Justice Stromberg-Stein.

15 The applicants' main complaint in respect of the order made by the case management judge concerns the adjournment of the trial from 11 April 2007 to 7 May 2007. The judge made that order primarily on the basis that the 14 days scheduled for the trial beginning on 11 April 2007 would not provide sufficient time to complete the trial. The judge considered that 30 days was a more realistic estimate of the time required for trial.

16 The applicants opposed the adjournment because it meant cancelling arrangements made on the basis of an 11 April 2007 trial date, thus resulting in additional expense. The judge had to weigh the prejudice to the applicants in additional expense against the inefficiency that would result from failing to complete the trial in the time available and having to continue the trial at a later date when further time was available. In an attempt to minimize any potential prejudice to the applicants, the case management judge made inquiries of the court registry to determine if another judge was available to hear the trial. Based on her inquiries, she offered the applicants a trial date of 16 April 2007 for 30 days with a different trial judge. The result would have been a delay in the commencement of the trial of less than a week. The applicants declined this offer, insisting that any delay in the trial date was unacceptable.

17 Given the history of the litigation and the complexity of the case, the conclusion of the case management judge that 14 days would be insufficient time to complete the trial cannot reasonably be doubted. Based on her own availability and information obtained from the court registry, it was

clear that no judge was available to hear the trial for 30 days commencing on 11 April 2007. The other attempts made to accommodate the applicants were offered and declined.

18 Other provisions in the order with which the applicants take issue concern the mode and conduct of the trial. The case management judge directed that their application for return of improper debits be heard at trial and dismissed their application to sever issues for hearing by summary trial and for leave to have the remaining issues heard by a jury. On the application for a trial by jury, the judge held that: (1) the applicants were out of time to file a jury notice, (2) there were no facts upon which she could exercise her discretion to extend time and (3) in any event, she was satisfied that the action was not suitable for a jury trial, either in whole or in part.

19 The judge was entitled to weigh the matters to which she referred in her reasons and to exercise her discretion to direct that the trial should take its normal course rather than having issues severed or heard in advance of trial. Her reasons do not disclose an error in principle and it cannot be said that she was clearly wrong in exercising her discretion to require the plaintiffs to proceed to a trial by judge on all issues.

20 The remaining parts of the order appear to be of minor significance and the applicants do not appear to take issue with them.

21 The proposed ground of appeal and the arguments made by the applicants do not raise any issues of principle to be considered by this court. The order made deals almost entirely with procedural matters and all are discretionary in nature. In relation to each part of the motion the applicants had brought before her, the case management judge gave cogent, if brief, reasons for the order or directions she gave.

22 It is well settled that with appeals against such discretionary orders, the burden is on the applicant to show an error in principle, a clearly wrong result or a serious injustice: See ***C.C.L. Industries Inc. v. Adams et al.*** (1983), 54 B.C.L.R. 332 at 335, reaffirmed in ***Amyotte v. 469238 B.C. Ltd. (c.o.b. Lawrence Heights)***, [2006] B.C.J. No. 2722, 2006 BCCA 414 at para. 25; ***Yang v. Yang***, [2000] B.C.J. No. 1765, 2000 BCCA 486. That has particular force with respect to procedural matters made by a case management judge. As Mr. Justice Donald noted in ***Robak Industries Ltd. v. Gardner*** (2006), 57 B.C.L.R. (4th) 23, 2006 BCCA 395 (paras. 12-13):

> The test is even more stringent when the order in question was made by a case management judge. In this regard I refer to the decision of Mr. Justice Goldie in chambers in *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada Ltd.* (1992), 75 B.C.L.R. (2nd) 31 (B.C.C.A. [in Chambers]) at [paragraph] 9 and 10:
>
> 9. In my view, where one judge has continuing responsibility for pre-trial management for an action such as this, a much stronger case than is present here would have to be made out before this Court would interfere

> with his discretion. In that respect I note that Mr. Justice Wallace said in *Aylsworth v. Richardson Greenshields of Canada Ltd.* [1987] B.C.J. No. 3133 (December 24, 1987), Docs. Vancouver CA008575 and CA008583 (B.C.C.A.), on an application for leave to appeal:
>
> > It has been the general practice of this Court respecting appeals from interlocutory orders to not intervene with such orders or to substitute its view for that of the trial judge, where such orders involve the exercise of the chambers judge's discretion and he has applied appropriate legal principles ...
> >
> > In my view, it would be even less appropriate for this Court to intervene where the discretion exercised by the pre-trail judge is concerned with giving directions incidental to the case-management of complex litigation.
> >
> > Without attempting to state an exhaustive list of conditions which would justify this court interfering with an order of a pre-trial judge, it is my opinion that unless such direction finally disposes of a fundamental issue in the lawsuit or contravenes the rules of natural justice this Court would not review the pre-trial judge's exercise of his discretion. [...]
>
> This Court's policy of non-intervention derives from the obvious reason that the orderly pre-trial processes in complex cases should be interrupted by this Court as seldom as possible given the power of the case management judge to adjust to evolving circumstances and even to re-visit directions when necessary.

23 In this case, no error in principle, clearly wrong result or serious injustice has been shown by the applicants. In my opinion, an appeal of the order would be bound to fail.

24 The applicants have failed to adduce any evidence of irreparable harm if a stay of proceedings is refused.

25 The balance of convenience clearly favours the respondents. The pre-trial procedures which are the subject of the order (examinations for discovery and delivery of expert reports) will be required, regardless of the outcome of any appeal or leave to appeal application. Proceeding with these matters in accordance with the schedule set by the case management judge would not render the appeal moot and would not prejudice the applicants. If anything, the applicants ought to be

adhering to the schedule if they are really seeking to restore the 11 April 2007 trial date, for it would be essential that discoveries and the exchange of expert reports take place in order that all parties may properly prepare for trial.

26 It would be contrary to the interests of justice to deny the respondents the right to proceed with discovery and other procedural steps required to prepare for trial while an unmeritorious application for leave to appeal went forward to a hearing. It is plain that granting a stay of proceedings would frustrate the trial process and delay the trial.

27 A further delay in the trial has the potential to cause prejudice to the respondents. As noted earlier, this action was commenced in April 2000 and was originally scheduled to proceed to trial in July 2002. The trial has already been delayed by over four and one-half years. The passage of time, while generally prejudicial in any case, may be particularly so in this case where a number of the critical issues will turn on alleged oral agreements made between 1996 and 1998 and what was said and done at meetings between the parties in 1999.

28 Finally I note that the action is scheduled to be heard at the same time as a related proceeding (Action No. C990145, referred to as the "Goldrich Action"). Madam Justice Satanove held that trying these two actions at the same time "... will save time and expense for the plaintiffs, the defendants and the court, and avoid the risk of inconsistent findings of facts".

29 In summary, the proposed appeal is without merit. To grant a stay of proceedings in this case would clearly interfere with preparation for trial and would almost certainly result in the loss of the trial date. The applicants have not shown that any irreparable harm would result if the stay is not granted and the balance of convenience clearly favours the respondents. The application for a stay of proceedings is refused.

30 In the fourth part of their motion, the applicants "request to extend time period to 90 days for filing the documents". As the proposed appeal is bound to fail, it is not in the interests of justice to extend the time for filing documents. That part of the applicants' motion is also dismissed.

ROWLES J.A.

cp/e/qlemo/qlbrl

TAB 3

Indexed as:

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

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

[1993] 2 S.C.R. 53

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

File No.: 21645.

Supreme Court of Canada

1992: February 6 / 1993: April 22.

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

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

* Stevenson J. took no part in the judgment.

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

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

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

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

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

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

right of appeal could be found in the ITA or the Criminal Code. The Court of Appeal would in any event have dismissed the appeal on the merits.

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

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

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

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

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

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

Parliament, in the exercise of a federal head of power, may provide procedures for the enforcement of the measures it has enacted. That is a matter within its exclusive competence. Parliament can adopt provincial procedures for that purpose, and such an adoption will be assumed where it is necessary to give effect to a right. When Parliament selects a specific and integrated procedure, however, there is no room for the operation of provincial law. The enforcement provisions of the ITA form part of the uniform and integrated procedure for the investigation and prosecution of

offences under the Act. No federal adoption was made or can be assumed here. Barring such adoption it is constitutionally unacceptable to read in appeals for other interlocutory proceedings or to adopt other provincial rules of procedure.

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

A number of pre-trial remedies are available to a person who has been the subject of a search. Section 231.3(7) provides for review and the Criminal Code makes provision for a speedy application for the return of seized goods. If the matter should proceed to trial, the accused may attack the search warrant in any way he considers appropriate, including the allegation that it infringes the provisions of s. 8 of the Charter. If the matter should not go to trial, a party may still seek civil damages for compensation.

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

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

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

The power to issue a search warrant under the ITA is vested in a superior court judge and at common law a decision of a superior court judge cannot be the subject of collateral attack. The judge issuing the warrant is not in a position to review for constitutionality at an ex parte hearing, and may not have the jurisdiction to do so on a later review of the ex parte order. An action for a

declaration would not be barred, even if on later review the judge is competent to review the warrant and the empowering legislation on the basis of constitutionality, because that remedy would not provide sufficient constitutional protection.

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

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

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

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

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

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

right of appeal conferred by provincial legislation, and should also extend to ancillary relief which enables the Court to give effect to the declaration.

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

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

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

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

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

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

Cases Cited

By La Forest J.

Applied: Baron v. Canada, [1993] 1 S.C.R. 416; followed: Knox Contracting Ltd. v. Canada, [1990] 2 S.C.R. 338; referred to: R. v. Meltzer, [1989] 1 S.C.R. 1764; Mills v. The Queen, [1986] 1 S.C.R. 863; R. v. Seaboyer, [1991] 2 S.C.R. 577; R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627; Attorney General of Canada v. Canadian National Transportation, Ltd., [1983] 2 S.C.R. 206; In re Storgoff, [1945] S.C.R. 526; Attorney-General for Alberta v. Atlas Lumber Co., [1941] S.C.R. 87; Attorney General of Quebec v. Attorney General of Canada, [1945] S.C.R. 600; Ministre du Revenu National v. Lafleur, [1964] S.C.R. 412, 46 D.L.R. (2d) 439; R. v. Wetmore, [1983] 2 S.C.R. 284; Goldman v. Hoffmann-La Roche Ltd. (1987), 35 C.C.C. (3d) 488; Adler v. Adler, [1966] 1 O.R. 732; Ontario (Attorney General) v. Pembina Exploration Canada Ltd., [1989] 1 S.C.R. 206; Welch v. The King, [1950] S.C.R. 412; Taylor v. Attorney-General (1837), 8 Sim. 413, 59 E.R. 164; Guaranty Trust Co. of New York v. Hannay & Co., [1915] 2 K.B. 536; Dyson v. Attorney-General, [1911] 1 K.B. 410; Attorney General of Canada v. Law Society of British Columbia, [1982] 2 S.C.R. 307; Terrasses Zarolega Inc. v. Régie des installations olympiques, [1981] 1 S.C.R. 94; Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236; Re Southam Inc. and The Queen (No. 1) (1983), 41 O.R. (2d) 11; Canadian Newspapers Co. v. Attorney-General for Canada (1985), 49 O.R. (2d) 557; Wilson v. The Queen, [1983] 2 S.C.R. 594; Argentina v. Mellino, [1987] 1 S.C.R. 536; Crevier v. Attorney General of Quebec, [1981] 2 S.C.R. 220; Canada Labour Relations Board v. Paul L'Anglais Inc.,

[1983] 1 S.C.R. 147.

By L'Heureux-Dubé J.

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

By Sopinka J.

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

Statutes and Regulations Cited

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

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

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

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

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

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

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

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

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

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

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

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

Facts

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

8 Following an investigation, officers of Revenue Canada formed the belief that the appellants were evading or attempting to evade the payment of taxes by making false and deceptive statements

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

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

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

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

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

(a) the judgment of the Supreme Court of British Columbia was one made in the course of civil proceedings seeking a declaration and consequently was appealable as of right under s. 6 of the Court of Appeal Act, S.B.C. 1982, c. 7, as amended;
(b) the order was made in a taxation matter under s. 91(3) of the Constitution Act, 1867 and not in a criminal matter (s. 91(27)), and in the absence of specific legislation, was appealable under s. 6 of the Court of Appeal Act; and

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

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

Rights of Appeal Generally

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

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

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

17 For most civil matters, the provincial legislatures have created a right of appeal. In British Columbia, that right is found in the Court of Appeal Act. Section 6 sets forth the circumstances where appeals are available. The first issue in this case is whether that procedure applies to a penal proceeding falling within the exclusive jurisdiction [page71] of the federal Parliament, specifically a proceeding taken in respect of an alleged offence under the Income Tax Act.

The Procedure Under s. 231.3 of the Income Tax Act

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

> 239. (1) Every person who has
>
> (a) made, or participated in, assented to or acquiesced in the making of, false or deceptive statements in a return, certificate, statement or answer filed or made as required by or under this Act or a regulation,

(b) to evade payment of a tax imposed by this Act, destroyed, altered, mutilated, secreted or otherwise disposed of the records or books of account of a taxpayer,
(c) made, or assented to or acquiesced in the making of, false or deceptive entries, or omitted, or assented to or acquiesced in the omission, to enter a material particular, in records or books of account of a taxpayer,
(d) wilfully, in any manner, evaded or attempted to evade, compliance with this Act or payment of taxes imposed by this Act, or

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(e) conspired with any person to commit an offence described by paragraphs (a) to (d),

is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to

(f) a fine of not less than 25% and not more than double the amount of the tax that was sought to be evaded, or
(g) both the fine described in paragraph (f) and imprisonment for a term not exceeding 2 years.

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

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

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

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

20 As I see it, the characterization of the foregoing procedure has already been settled by this Court in [page74] Knox Contracting, supra. In that case, this Court examined and characterized the search provisions of the Income Tax Act for the purposes of determining whether the court of appeal there had jurisdiction to hear an appeal on a search warrant. Cory J., Wilson and Gonthier JJ. concurring, ruled that the s. 231.3 search procedures under the Income Tax Act were enacted pursuant to federal jurisdiction over criminal law and procedure under s. 91(27) of the Constitution Act, 1867. He considered the search provisions to be the investigative arm of s. 239 which, in his view, were clearly criminal law because they punished deliberate acts, protected the public interest, and contained severe penalties. Section 231.3 was held to be the investigative arm of the criminal law because it was unrealistic "to divorce s. 231.3 from the offences sought to be uncovered by the search" (p. 356). He concluded that the power of the provincial legislatures under s. 92(14) of the

Constitution Act, 1867 does not extend to jurisdiction over the conduct of criminal prosecutions, citing Attorney General of Canada v. Canadian National Transportation, Ltd., [1983] 2 S.C.R. 206. Clearly on this view, the procedure for this case must be the procedure created by the federal Parliament.

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

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

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

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

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

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

[page76]

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

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

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

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

[page77]

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

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

National Transportation, Ltd., supra, and R. v. Wetmore, [1983] 2 S.C.R. 284, this Court held that Parliament is competent to legislate respecting the enforcement of all federal offences, regardless of the federal head of power under which the substantive offences were enacted.

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

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

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

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

30 The integrated procedure I have described is not confined to the period following the charge. Thus, Meltzer, supra, involved an authorization to intercept private communications--an electronic search--and it was held that no right of appeal existed because none had been provided as part of the procedure provided by the federal Parliament. The power to issue an authorization appears in the Criminal Code, but there is no magic in this. In Goldman v. Hoffmann-La Roche Ltd. (1987), 35 C.C.C. (3d) 488 (Ont. C.A.), it was held that [page79] there was no appeal in the parallel situation of a search warrant issued under the Competition Act, R.S.C. 1970, c. C-23, which is sustainable under both the trade and commerce power and the criminal law power.

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

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

443-44 D.L.R.:

> [TRANSLATION] It is obvious, however, that, particularly in the area of procedure, the criminal law existing in 1867 in the various territorial jurisdictions later united into what is now the one Canadian territorial jurisdiction of Confederation has evolved considerably during this lengthy period of history. This evolution, moving towards the formation of a uniform criminal law for Canada, has been accomplished through changes resulting expressly or by implication from the various legislative enactments effected by Parliament over the years. This uniform criminal law, achieved not by mere consolidations, but by two codifications, appears today in that grouping of legislative provisions which Parliament has systematically welded into a single body -- the Criminal Code of 1953-54 -- which is the product [page81] of additions, deletions and amendments as well as changes in structure. The relative interdependence of the provisions in diversified parts of the Criminal Code has already been noted in Welch v. The King ... [1950] S.C.R. 412 at p. 427, where, referring to the powers conferred by s. 873 on the Attorney-General, this Court said:
>
> > Like many others in the Code, they remain subject to qualifications and restrictions implicitly and necessarily flowing from other provisions in the same Act.

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

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

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

33 Nor are Canadian courts alone in resisting an admixture of civil and criminal procedure. The British courts have done the same, a fact that is all the more significant because Great Britain is a unitary state and because criminal procedure in that country is in no way limited to situations that would in Canada be considered criminal for constitutional purposes (the British approach is amply

discussed in Storgoff). The practical considerations [page82] to which I have referred earlier underlie this approach.

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

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

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

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

> This does not mean that an accused is left without remedies. Wide powers are provided in the Criminal Code for a person from whom articles are seized pursuant to a search warrant to make a speedy application for their return. See Criminal Code, R.S.C., 1985, c. C-46, s. 490(7), (8), (10) and (17). If the matter should proceed to trial then of course the accused may attack the search warrant in any way he considers appropriate, including the allegation that it infringes the

> provisions of s. 8 of the Canadian Charter of Rights and Freedoms. If, for any reason, the matter should not go to trial, a party may still seek civil damages for compensation. No injustice arises from the absence of a right to appeal the order issuing the search warrants.

The "Anomaly"

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

37 But, before arriving at any conclusion about what a court should do in the face of this alleged anomaly, one should examine the relevant policies behind the legislation. I should first of all say that the principal forum for the operation of criminal procedure is, of course, in the provincial court system, [page84] and there no appeal is provided. The likelihood is that Parliament did not really advert to the different procedures in the two courts. The right of appeal to the Federal Court of Appeal was not tailored to the needs of the criminal justice process, as it was in respect of criminal procedure in the provincial courts. Rather the provision for appeal in the Federal Court is a general one intended to meet the needs of the ordinary jurisdiction of that court, the major function of which is to deal with questions of a civil and administrative character and other matters peculiarly of federal concern, rather than the criminal justice process where different considerations may come into play. In short, the anomaly may lie in the assumption that a right of appeal to the Federal Court of Appeal exists. For there are strong reasons of policy for not providing appeals from interlocutory decisions in criminal proceedings generally. While I quite understand the temptation to read in a right of appeal in this case for the sake of consistency, I am deeply concerned about the general implications of courts of appeal reading in rights of appeals and other procedures into criminal proceedings. I might also note that there may still be an issue of the appropriate role for appellate review of the issue of search warrants by the Federal Court of Appeal pursuant to s. 28 of the Federal Court Act, R.S.C., 1985, c. F-7. It would amount to an unusual venture of the Federal Court of Appeal into the realm of what is largely criminal procedure.

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

39 In view of all these unanswered questions, it would be unsafe in the absence of argument to simply assume that the general right of appeal set forth in the Federal Court Act applies to a proceeding provided in a separate statute that is a mere adjunct to a general system of criminal procedure where appeals of this nature are not provided. If one reads all the relevant legislative provisions harmoniously in accordance with their underlying purpose, it is certainly arguable that

Parliament did not intend by this minor grant of jurisdiction to the Federal Court (in what is for it an untypical jurisdiction) to have had in contemplation the general right of appeal devised for quite different types of proceedings. There may, in other words, be no anomaly at all.

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

The Declaration of Unconstitutionality

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

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

43 In my view, the action can appropriately be used here. Since the declaration by its nature merely states the law without changing anything (see B. L. Strayer, The Canadian Constitution and the Courts (3rd ed. 1988)), it does not, in essence, constitute a review of a decision taken in a criminal proceeding.

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

problems Parliament sought to avoid by restricting appeals.

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

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

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

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

49 The judge issuing the warrant is not in a position to review for constitutionality at an ex parte

hearing, and I rather doubt that the judge, or another judge acting for him, could do so on a Wilson type review: Wilson v. The Queen, [1983] 2 S.C.R. 594. Neither Wilson nor Meltzer is clear on this point.

[page89]

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

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

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

v. Law Society of British Columbia, supra, at pp. 329-31.

Another Remedy

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

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

54 Even before the advent of the Charter, this Court had asserted some constitutional limits to the power of legislative bodies to insulate from judicial review decision makers performing certain functions under statute; see Crevier v. Attorney General of Quebec, [1981] 2 S.C.R. 220, and Canada Labour Relations Board v. Paul L'Anglais Inc., [1983] 1 S.C.R. 147. In these Charter days, this may call for a consideration of the extent to which proceedings that involve the liberty and security of the individual can be insulated from prompt and effective review for constitutionality by

the device of assigning to a superior court judge functions which for centuries have been performed by inferior court judges subject to judicial review and which, even today, are still performed by inferior court judges in the case of the most serious criminal offences. As I earlier mentioned, the [page92] judge issuing the warrant is not really in a position to review for constitutionality at an ex parte hearing, and assuming that judge is competent to review the warrant and the empowering legislation for constitutionality later, the effect, since the judge's decision is unreviewable, is to deprive the individual of that full measure of constitutional protection which is afforded in a prosecution under the Criminal Code to even the vilest criminal.

55 A court must look at least askance at such a statutory scheme. I note parenthetically that there is at least one other instance where the actions of a superior court judge are made subject to judicial review. In extradition, the decision of the extradition judge, who is usually a superior court judge, is subject to review by habeas corpus. Moreover, this Court has held that, absent legislation, the reviewing judge, and not the extradition judge, is the court of competent jurisdiction for the purposes of s. 24(1) of the Charter; see Argentina v. Mellino, supra.

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

Disposition

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

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

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

The following are the reasons delivered by

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

[page94]

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

SOPINKA J.:--

I. Introduction

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

61 I conclude that our decision in Knox Contracting is not determinative in this case and that the Court of Appeal had the jurisdiction to hear the appeal. In this regard, I limit my discussion to the form of proceedings for which an appeal was actually sought in this case. The basic relief requested was a declaration that the relevant provisions of the ITA authorizing search and seizure violated s. 8 of the Charter. This was coupled with a motion to set aside the warrants and seizure and for return of the documents. This ancillary relief was premised on the authorizing legislation is being declared invalid. [page95] For the reasons I gave in Baron, I conclude that the impugned provisions of the

ITA, the warrants issued under them and the searches and seizures carried out on the strength of the warrants are inconsistent with s. 8 of the Charter and consequently of no force or effect, pursuant to s. 52 of the Constitution Act, 1982.

II. The Facts

62 The facts of the present case are fully set out in the reasons for decision of McKenzie J. in Kourtessis v. M.N.R. (1987), 15 B.C.L.R. (2d) 200 (S.C.), 36 C.C.C. (3d) 304 (hereinafter Kourtessis (Part 1), cited to C.C.C.). Following an investigation, officers of Revenue Canada formed the opinion that the appellants Kourtessis and his company Hellenic Import-Export Co. had violated s. 239 ITA in that they were evading or attempting to evade the payment of taxes by making false and deceptive statements in income tax returns for the years 1979-1984. On October 22, 1986, Callaghan J. of the British Columbia Supreme Court issued warrants to search for and seize documents which could afford evidence of the alleged violations. These warrants were subsequently quashed by Proudfoot J. of the same court (as she then was) due largely to the Department's nondisclosure of material information in the affidavit material used before Callaghan J. In particular, the Department had failed to disclose that the investigators had been in contact with appellants' counsel who had offered to supply any further documentation that was required. The items that had been seized were not, however, returned to the appellants and on February 27, 1987 McEachern C.J.S.C. (as he then was) issued the search warrant challenged in this appeal for the seizure of relevant documents located at the Department's premises, subject to the conditions that everything seized would be [page96] sealed and the appellants would have 30 days to challenge the warrant.

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

> (a) quashing the warrant issued by McEachern C.J.S.C.;
>
> (b) quashing the search and seizure executed thereunder;
>
> (c) declaring s. 231.3 ITA to be inconsistent with ss. 7, 8 and 15 of the Charter and consequently pursuant to s. 52 of the Constitution Act, 1982 of no force or effect;
>
> (d) to return the items seized;
>
> (e) to return all summaries, notes and outlines taken of the items seized;

> (f) prohibiting the Department from using the items or copies, summaries, notes or outlines thereof or any information obtained therefrom; and
>
> (g) to destroy all copies, summaries, notes and outlines of the items that were not for any reason returned to the appellants.

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

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

The appellants also argued that the Department's application to McEachern C.J.S.C. for a warrant was an interference with the court's administration of justice; that the Department failed to exhaust all means available to them before applying for a warrant, as required by Proudfoot J.'s order; that the information in support of the application for a warrant failed to disclose the real purpose of the search; and that the warrant was not reasonably specific. The non-constitutional attack was dismissed by McKenzie J. (Kourtessis (Part 1), supra) and again by the Court of Appeal (Kourtessis v. Minister of National Revenue (1989), 39 B.C.L.R. (2d) 1, [1990] 1 W.W.R. 97, 50 C.C.C. (3d) 201, 72 C.R. (3d) 196, [1990] 1 C.T.C. 241, 89 D.T.C. 5464 (hereinafter Kourtessis (B.C.C.A.), cited to C.C.C.)).

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

legislation.

III. Points in Issue

A. Jurisdiction

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

B. The Charter

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

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

IV. Judgments Below

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

69 The appellants' non-constitutional arguments were heard by McKenzie J. and dismissed on July 6, 1987: Kourtessis (Part 1), supra. Their constitutional attack was rejected on August 16, 1988 by Lysyk J., and as a result the entire application was [page99] dismissed: Kourtessis v. M.N.R. (1988), 30 B.C.L.R. (2d) 342 (S.C.), [1989] 1 W.W.R. 508, 44 C.C.C. (3d) 79, [1989] 1 C.T.C. 56, 89 D.T.C. 5214. The appellants appealed to the British Columbia Court of Appeal. Apparently unsure whether leave was required, they gave both notice of appeal and notice of application for leave to appeal pursuant to the British Columbia Court of Appeal Act, S.B.C. 1982, c. 7, ss. 6(1)(a) and 6.1(2). The Minister then brought a motion to quash the appeal on the ground that no appeal lay from the B.C. Supreme Court's judgment. After reserving judgment on the motion to quash and hearing the merits of the appeal, the Court of Appeal allowed the motion to quash, holding that it had no jurisdiction to hear the appeal and that in any event it would dismiss the appeal on the merits: Kourtessis (B.C.C.A.), supra. Leave to appeal to this Court was granted on December 20, 1990, [1990] 2 S.C.R. viii.

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

[page100]

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

V. Analysis

A. Does an Appeal Lie?

72 I turn now to the issue of whether an appeal lies to a provincial court of appeal from a superior court judge's judgment dismissing an application [page101] which seeks, inter alia, (1) a declaration that s. 231.3 is unconstitutional, and (2) an order quashing and setting aside a s. 231.3 search warrant and the search and seizure carried out thereunder. This comes down to a question of the division of legislative powers between the federal government and the provinces. Whether the Province of British Columbia has the power to legislate appellate procedure in respect of the present

proceeding turns on the nature of the proceeding. This brings us face to face with Knox Contracting, supra.

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

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

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

> While I accept that ss. 231.3 and 239 are supportable under the power over criminal law and procedure, that does not end the inquiry. If these provisions are also [page103] supportable under s. 91(3) of the Constitution Act, 1867, the federal taxation power, then the jurisdiction to provide for an appeal is not

> exclusively federal. Section 92(14) of the Constitution Act, 1867 confers jurisdiction on the province to legislate in respect of procedure in civil matters. Accordingly, if ss. 231.3 and 239 are supportable under two heads of power, one criminal and one civil in nature, a right of appeal can be conferred by either federal or provincial legislation. In the absence of conflict, both forms of legislation are valid on the basis of the double aspect doctrine: see Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161.
>
> The notion that a statute is supportable under two heads of legislation is well established: see R. v. Hauser, [1979] 1 S.C.R. 984; R. v. Wetmore, [1983] 2 S.C.R. 284. The fact that provision is made for enforcement, including the creation of severe penalties, does not mean that the legislation is necessarily criminal.
>
> ...
>
> The nature of the Income Tax Act is such that it was undoubtedly passed under the federal taxation power. Most of its provisions have nothing to do with the criminal law power.

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

76 Applying this analytical framework to the proceedings in Knox Contracting, I concluded that there was no conflict with federal legislation and thus an appeal did lie pursuant to the New Brunswick Judicature Act, R.S.N.B. 1973, c. J-2. I was, however, in the minority in this conclusion. Cory J. (Gonthier and Wilson JJ. concurring), as noted, having held that the relevant provisions were enacted pursuant to the exclusive federal criminal law power, stated that a right of appeal would have to be found in federal legislation and that it was not necessary to inquire further into the relevant provisions' supportability as tax law. This was also a minority position. The opinion of La Forest J., speaking for himself, which was decisive of the result, approved of my reasoning on the

juristic character of the ITA but agreed with Cory J.'s disposition of the appeal. He was of the view that in the circumstances Parliament had shown a disposition to adopt "the ordinary procedures of the criminal law for their enforcement" (at p. 356). He concluded, however, with the following caveat (at p. 357):

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

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

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

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

legislation was incompetent. At page 736, Laskin J.A. stated:

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

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

> The foregoing position is supported by the following statement of Rand J. in Hellens v. Densmore, [1957] S.C.R. 768, at p. 783:
>
> > That after Confederation a right of appeal could be given by provincial law (in respect of divorce) appears to me to be unquestionable although the opposite opinion seems to have been held in the provincial Courts: the administration of justice by the Province surely extends to the final determination within the Province of the judgments of its own Courts.
>
> Indeed, unlike the cases already discussed, Rand J.'s holding cannot be explained on the basis of the historical inherent jurisdiction of a superior court. Appellate jurisdiction must be conferred by statute.

[page107]

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

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

that militate in favour of this solution as well to which I shall advert later. I turn first, however, to a discussion of the cases that have dealt directly with the issue.

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

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

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

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

(i) a declaration that the statute authorizing a search warrant violates the

Constitution, coupled with

(ii) an application to set aside the search warrant.

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

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

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

85 Furthermore, it must be stressed that a warrant under s. 231.3 ITA is granted ex parte. A motion to the superior court judge who issued the ex parte order or to another judge of the same court to set aside the ex parte order in accordance with civil procedure has been recognized by our Court as an appropriate procedure to review an ex parte authorization to wiretap issued under the Criminal Code. In Wilson v. The Queen, [1983] 2 S.C.R. 594, McIntyre J., after reviewing a body of jurisprudence describing the procedure for such review in civil cases, stated, at p. 608:

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

86 I see no reason why a superior court judge reviewing an ex parte order would be precluded from entertaining a Charter argument. Even if we assume that the superior court judge issuing the ex parte order is not empowered to decide a Charter issue, this does not mean that the reviewing court will be similarly limited. For example, the reviewing judge with respect to a wiretap authorization issued ex parte by a superior court judge is entitled to entertain an attack at trial on the

authorization under s. 8 of the Charter even if the reviewing judge is not a superior court judge. See R. v. Garofoli, [1990] 2 S.C.R. 1421. This conclusion applies a fortiori when the reviewing judge is also seized of an action for a declaration of invalidity based on the Charter. In that situation, the motion [page111] to set aside is simply called in aid to give effect to the right declared by the court. The court is clothed with jurisdiction to decide the Charter issue by virtue of the declaratory action.

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

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

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

[page112]

90 I would simply note that s. 231.3(7) does not appear to permit a challenge to the validity of the warrant on grounds that have been traditionally permitted. Indeed, in an earlier proceeding in this case, warrants were quashed by Proudfoot J. for lack of disclosure and specificity. Searches and seizures involve the most serious invasion of privacy. Search warrants issued under the Criminal Code can be attacked by motion to quash brought before the superior court of the province. The grounds include failure to disclose, lack of specificity, the existence of less intrusive investigatory procedures and the like. See Shumiatcher v. Attorney-General of Saskatchewan (No. 2) (1960), 34 C.R. 154 (Sask. Q.B.), Re Church of Scientology, supra, and R. v. Sismey (1990), 55 C.C.C. (3d) 281. I would be surprised if this procedure were not available to a citizen who is subject to a search under the ITA.

91 An application under s. 231.3(7) would be a wholly inappropriate proceeding to test the constitutional validity of the provision under which the seizure is made. Subsection (7) applies only if the judge is satisfied that the documents seized will not be needed for an investigation or

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

(ii) Declaratory Relief

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

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

94 The declaration is a traditionally civil remedy which in its modern incarnation originated in the United Kingdom rules of court of 1883 (W. Wade, Administrative Law (6th ed. 1988), at p. 594). They provided that no action was open to objection simply because it sought a declaration and

no other relief. This provision is preserved today in almost identical form in the British Columbia Rules of Court, r. 5(22), and in the rules or statutory provisions of other provinces.

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

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

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

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

B. Constitutionality of Section 231.3

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

VI. Disposition

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

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

100 A declaration will issue declaring that s. 231.3 ITA and the search warrant issued thereunder

are of no force or effect. In addition, an order will issue for the return of all documents, books, records, [page118] papers and things seized together with any copies or notes that have been made thereof. The appellants will have their costs here and in the courts below.

TAB 4

Case Name:

R. v. Abdullah

Between
Hussain Abdullah, appellant, and
Her Majesty the Queen, respondent

[2002] O.J. No. 1118

Court File No. C37579

Ontario Court of Appeal
Toronto, Ontario

Weiler, Charron and Sharpe JJ.A.

March 25, 2002.

(1 para.)

Civil rights -- Canadian Charter of Rights and Freedoms -- Practice -- Appeals -- Jurisdiction.

Appeal by Abdullah from an application based on infringement of his rights under the Canadian Charter of Rights and Freedoms.

HELD: Appeal quashed. The Court of Appeal did not have jurisdiction. There was no right of appeal from an adverse disposition of a Charter disposition at the stage of the proceedings.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982.

Counsel:

Robert Lewis, for the appellant.
No counsel mentioned for the respondent.

The judgment of the Court was delivered by

1 WEILER J.A. (endorsement):-- This Court has no jurisdiction to hear the appeal. Right of appeal must be created by statute. Appellate Tribunals have no inherent jurisdiction. The relief requested before Cunningham J. was not a request for a prerogative remedy either in form or in substance. It was an application based upon an alleged infringement of Charter right and there is no right of appeal from an adverse disposition of such an application at this stage: R. v. Morgentaler, Smoling, and Scott (1984), 16 C.C.C. (3d) 1 (Ont. C.A.). The appeal is therefore quashed.

WEILER J.A.

qp/t/qlhcc

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court of Appeal File Nos.: C56961/M42453
S.C.J. Court File Nos.: CV-12-9667-00-CL/ CV-11-431153-00CP

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

SUPPLEMENTAL BRIEF OF AUTHORITIES OF THE CLASS ACTION PLAINTIFFS (MOTION TO QUASH)

SISKINDS LLP
680 Waterloo Street
London, ON N6A 3V8
A. Dimitri Lascaris
Charles Wright
Tel: 519.672.2121 / Fax: 519.672.6065

KOSKIE MINSKY LLP
20 Queen Street West, Suite 900
Toronto, ON M5H 3R3
Jonathan Ptak (LSUC #45773F)
Tel: 416.595.2149 / Fax: 416.204.2903

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP
155 Wellington Street South, 35th Floor
Toronto, ON M5V 3H1
Ken Rosenberg
Massimo Starnino
Tel: 416.646.4300 / Fax: 416.646.4301

Lawyers for the Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action