KEABLE and ATTORNEY GENERAL OF THE PROVINCE OF QUEBEC v. ATTORNEY GENERAL OF CANADA and SOLICITOR GENERAL OF CANADA and THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE and ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF SASKATCHEWAN AND ATTORNEY GENERAL OF ALBERTA (Intervenants)

Supreme Court of Canada
Martland, Ritchie, Spence, Pigeon, Dickson, Beetz, Estey and Pratte, JJ.
October 31, 1978.

ADMINISTRATIVE LAW - TOPIC 6352
Judicial review - Evocation - Nature of - Quebec Code of Civil Procedure, Arts. 846-850 - The Supreme Court of Canada stated that a writ of evocation is the equivalent of certiorari and prohibition combined - See paragraphs 4, 56.

ADMINISTRATIVE LAW - TOPIC 6354
Judicial review - Evocation - Where writ available - Quebec Code of Civil Procedure, Arts. 946-850 - The Supreme Court of Canada stated that evocation was available to challenge the validity of the mandate, subpoena and orders of a Commissioner appointed under the Public Inquiry Commission Act, R.S.Q. 1964, c. 11 - See paragraphs 3 to 5 and 55 to 57.

ADMINISTRATIVE LAW - TOPIC 6356
Judicial review - Evocation - Scope of review by court - Quebec Code of Civil Procedure, Art. 847(2) - The Supreme Court of Canada held that in determining whether a writ of evocation should issue to a Commissioner appointed under the Public Inquiry Commission Act, R.S.Q. 1964, c. 11, it is sufficient for the Court to examine the Commissioner's terms of reference and his impugned decisions in the light of the facts alleged in the motion - The Supreme Court of Canada held that it is not the duty of the court to review all of the proceedings of the Commissioner - See paragraphs 37 to 39 and 89 to 91.

ADMINISTRATIVE LAW - TOPIC 6358
Judicial review - Evocation - Scope of remedies available - Quebec Code of Civil Procedure, Arts. 846-850 - The Supreme Court of Canada held that, where the mandate of a Commissioner under the Public Inquiry Commission Act, R.S.Q. 1964, c. 11, is successfully challenged only in part, a restrictive staying order could be issued staying only those parts

of the mandate successfully challenged and permitting the balance to be pursued - See paragraphs 44 to 49 and 96 to 101.

ADMINISTRATIVE LAW - TOPIC 6409

Judicial review - Prohibition - Time for application - The Supreme Court of Canada stated that prohibition is properly applied for at the outset of impugned proceedings - See paragraphs 4, 56.

ADMINISTRATIVE LAW - TOPIC 7904

Public inquiries - Status of - The Supreme Court of Canada held that a Commissioner under the Public Inquiry Commission Act, R.S.Q., 1964, c. 11, was an agent of the executive of the provincial government and did not have the independence of a court - See paragraphs 25 and 77 - The Supreme Court of Canada held that the Commissioner was not the equivalent of a judge of the Superior Court, notwithstanding that s. 7 of the Public Inquiry Commission Act confers upon a commissioner "all the powers of a judge of the Superior Court" - See paragraphs 40 to 42 and 92 to 94.

ADMINISTRATIVE LAW - TOPIC 7924

Public inquiries - Creation of - Jurisdiction - A Commissioner appointed by the Province of Quebec under the Public Inquiry Commission Act, R.S.Q. 1964, c. 11, was given the power to investigate certain criminal acts allegedly committed by the R.C.M.P. and other police forces and to investigate the methods of operation and investigation by the R.C.M.P. relating to the incidents - The Commissioner issued a subpeona to the Solicitor General of Canada requiring production of documentary material relating not only to the incidents in question, but also to the operation of the R.C.M.P in general - The mandate of the Commissioner and the subpoena were challenged - The Supreme Court of Canada held that the mandate and powers of the Commissioner were limited to the provincial jurisdiction over the administration of justice under s. 92(14) of the British North America Act - The Supreme Court of Canada held that the Commissioner could investigate specific criminal activities, including those by the R.C.M.P., but could not extend his inquiry to the administration and operation of the R.C.M.P. in general - See paragraphs 16 to 23, 68 to 75, 106 to 116 and 118 to 128.

CONSTITUTIONAL LAW - TOPIC 544

Powers of legislatures - Limitations on powers of provincial

legislature - Compulsory regulation of federal Crown - A Commissioner appointed by the Province of Quebec under the Public Inquiry Commission Act R.S.Q. 1964, c. 11, to investigate criminal activities by the R.C.M.P. issued a subpoena to the Solicitor General of Canada to produce documents relating to the activities of the R.C.M.P. - The subpoena was challenged - The Supreme Court of Canada held that the Solicitor General or any other Minister of the Crown in right of Canada in his official capacity could not be compelled to appear, testify and produce documents by the Commissioner appointed pursuant to provincial legislation under the provincial power over the administration of justice in the Province - The Supreme Court of Canada held that a provincial legislature cannot in the valid exercise of its power subject the Crown in right of Canada to any compulsory regulation - See paragraphs 26 to 34 and 78 to 86.

CONSTITUTIONAL LAW - TOPIC 7402

Enumeration in s. 92 of British North America Act - Administration of justice - British North America Act, 1867, s. 92(14) - Extent of subject matter - A Commissioner appointed by the Province of Quebec under the Public Inquiry Commission Act, R.S.Q. 1964, c. 11, was given the power to investigate certain criminal acts allegedly committed by the R.C.M.P. and other police forces and to investigate the methods of operation and investigation by the R.C.M.P. relating to the incidents - The Commissioner issued a subpoena to the Solicitor General of Canada requiring production of documentary material relating not only to the incidents in question, but also to the operation of the R.C.M.P. in general - The mandate of the Commissioner and the subpoena were challenged - The Supreme Court of Canada held that the mandate and powers of the Commissioner were limited to the provincial jurisdiction over the administration of justice under s. 92(14) of the British North America Act - The Supreme Court of Canada held that the Commissioner could investigate specific criminal activities, including those by the R.C.M.P., but could not extend his inquiry to the administration and operation of the R.C.M.P. in general - See paragraphs 16 to 23, 68 to 75, 106 to 116 and 118 to 128.

EVIDENCE - TOPIC 4143

Witnesses - Privilege - Privileged topics - Official secrets - State or public documents - S. 41 of the Federal Court Act, R.S.C. 1970, 2nd Supp. c. 10, provided for the

privilege from production as evidence of certain categories of government documents upon the affidavit of a Minister of the federal Crown - The Supreme Court of Canada held that s. 41 was applicable to all courts in Canada, both provincial and federal - See paragraphs 36 and 88 - The Supreme Court of Canada held that the obtaining of the documents elsewhere than from the Minister did not render the affidavit of the Minister under s. 41 ineffective in protecting the documents from production - See paragraphs 43 and 95.

EVIDENCE - TOPIC 4143

Witnesses - Privilege - Privileged topics - Official secrets - State or public documents - The Solicitor General of Canada resisted a subpoena of a Commissioner appointed by the Province of Quebec under the Public Inquiry Commission Act, R.S.Q. 1964, c. 11, and gave an affidavit under s. 41 of the Federal Court Act claiming privilege for the documents sought by the Commissioner - The Supreme Court of Canada held that, if the affidavit of the Solicitor General could be attacked, it could only be attacked before a court, which the Commissioner was not - See paragraphs 40 to 42 and 92 to 94.

INJUNCTIONS - TOPIC 103

Proceedings not subject to injunctions - Legal proceedings - The Supreme Court of Canada held that an injunction was not available to restrain legal proceedings - See paragraph 4 and 56.

MASTER AND SERVANT - TOPIC 4265

Duties of servant - Duty of confidentiality - Interference by employer - The Supreme Court of Canada held that, where an employee owes confidentiality to a third party, his employer cannot compel the employee to breach that duty - See paragraphs 43 and 95.

PRACTICE - TOPIC 4158

Discovery - Discovery of Crown - The Supreme Court of Canada stated that at common law the Crown could not be compelled to give discovery - See paragraphs 30 to 32 and 82 to 84.

Summary:

This case arose out of a motion by the Attorney General and the Solicitor General of Canada for the issuance of a writ

of evocation against Jean Keable, a Commissioner appointed by the Province of Quebec under the Public Inquiry Commission Act, R.S.Q. 1964, c. 11. The Commissioner was given the power to investigate certain illegal acts allegedly committed by the R.C.M.P. and other police forces and to investigate the methods of operation and investigation of the R.C.M.P. relating to the incidents. The Commissioner issued a subpoena to the Solicitor General of Canada requiring production of documentary material relating not only to the incidents in question, but also to the operation of the R.C.M.P. in general. The Solicitor General and the Attorney General of Canada moved for the issuance of a writ of evocation against the Commissioner on the grounds that the subject matter of the inquiry as it related to the administration of the R.C.M.P. was beyond the scope of provincial powers and that decisions on the Commissioner respecting scope of the inquiry and the documents required to be produced by the Solicitor General were invalid.

The Quebec Superior Court in a judgment unreported in this series of reports dismissed the application on the ground that the Commissioner was not a court and was therefore not amenable to evocation. On appeal the Quebec Court of Appeal in a judgment unreported in this series of reports allowed the appeal and ordered the issuance of a writ of evocation against the Commissioner. The Court of Appeal also ordered the Commissioner to suspend all proceedings. The Commissioner and the Attorney General of the Province of Quebec appealed.

The Supreme Court of Canada allowed the appeal in part and imposed a suspension of the proceedings of the Commissioner only with regard to those parts of his mandate and actions which the Supreme Court of Canada found ultra vires. See paragraphs 44 to 49 and 96 to 101.

The Supreme Court of Canada held that the mandate and powers of the Commissioner were limited to the provincial jurisdiction over the administration of justice under s. 92 (14) of the British North America Act. The Supreme Court of Canada held that the Commissioner could investigate specific criminal activities, including those by the R.C.M.P., but could not extend his inquiry to the administration and operation of the R.C.M.P. in general. See paragraphs 16 to 23, 68 to 75, 106 to 116 and 118 to 128.

The Supreme Court of Canada held that the Solicitor General of Canada or any other Minister of the Crown in right of

Canada in his official capacity could not be compelled to appear, testify and produce documents by the Commissioner appointed pursuant to provincial legislation for the purpose of inquiring into matters concerning the administration of justice in the province. The Supreme Court of Canada held that a provincial legislature cannot in the valid exercise of its power subject the Crown in right of Canada to any compulsory regulation. See paragraphs 26 to 34 and 74 to 86.

The Supreme Court of Canada held that under s. 41 of the Federal Court Act, R.S.C. 1970, 2nd Supp., c. 10, a Minister of the federal Crown could by affidavit assert privilege on the basis of national security for government documents subpoenaed by the Commissioner, notwithstanding that the documents related to specific criminal acts and the circumstances surrounding them. [See paragraphs 35 to 43 and 87 to 95].

CASES JUDICIALLY NOTICED:

Three Rivers Boatman v. Canada Labour Relations Board, [1969] S.C.R. 607, appld. [paras. 4, 56].

Bell v. Ontario Human Rights Commission, [1971] S.C.R. 756, appld. [paras. 4, 56].

Guay v. Lafleur, [1965] S.C.R. 12, dist. [paras. 5, 57].

St. John v. Fraser, [1935] S.C.R. 441, dist. [paras. 5, 57].

Cotroni v. The Quebec Police Commission (1977), 18 N.R. 541; [1978] 1 S.C.R. 1048, appld. [paras. 5, 57].

Commission of Inquiry into the Police Department of Charlottetown (1977), 12 Nfld. & P.E.I.R. 80; 25 A.P.R. 80; 74 D.L.R.(3d) 422, appld. [paras. 17, 69].

Re Public Inquiries Act (1977), 12 Nfld. & P.E.I.R. 80; 25 A.P.R. 80; 74 D.L.R.(3d) 422, appld. [paras. 17, 69].

Kelly & Sons v. Mathers (1915), 23 D.L.R. 225, ref'd to. [paras. 17, 69].

Attorney General for the Commonwealth of Australia v. Colonial Sugar, [1914] A.C. 237, appld. [paras. 18, 70].

Di Iorio v. Warden of the Montreal Jail (1976), 8 N.R. 361; [1978] 1 S.C.R. 152, appld. [paras. 19, 71, 105, 117].

Faber v. The Queen (1975), 6 N.R. 1; 8 N.R. 29; [1976] 2 S.C.R. 9, appld. [paras. 19, 71, 105, 117].

R. v. Cotte (1873), L.R. 4 P.C. 599, appld. [paras. 19, 71].

Cock v. Attorney General (1908), 28 N.Z.L.R. 405, dist. [paras. 20, 72].
McGee v. Pooley, [1931] 4 D.L.R. 475, dist. [paras. 21, 73].
Lymburn v. Mayland, [1932] A.C. 380, dist. [paras. 21, 73].
Attorney General of Saskatchewan v. Attorney General of Canada, [1949] A.C. 110, appld. [paras. 23, 75].
Her Majesty in Right of Alberta v. C.T.C. (1977), 2 A.R. 539; 14 N.R. 21; [1978] 1 S.C.R. 61, appld. [paras. 26, 78].
Re Pacific Western Airlines Ltd. (1977), 2 A.R. 539; 14 N.R. 21; [1978] 1 S.C.R. 61, appld. [paras. 26, 78].
Quebec North Shore Paper v. C.P. Ltd. (1976), 9 N.R. 471; [1977] 2 S.C.R. 1054, appld. [paras. 27, 79].
R. v. Richardson, [1948] S.C.R. 57, appld. [paras. 28, 80].
Gauthier v. The King (1917), 56 S.C.R. 176, appld. [paras. 29, 81].
R. v. Snider, [1954] S.C.R. 479, dist. [paras. 30, 82].
La Société Les Affréteurs Réunis and The Shipping Controller, [1921] 3 K.B. 1, appld. [paras. 30, 82].
Crombie v. The King, [1923] 2 D.L.R. 542, appld. [paras. 31, 83].
R. v. Lanctot (1941), 71 Qué. K.B. 325, appld. [paras. 32, 84].
Cahoon v. Le Conseil de la Corporation des Ingénieurs, [1972] R.P. 209, appld. [paras. 39, 91].
Duncan v. Cammell Laird & Co. Ltd., [1942] A.C. 624, ref'd to. [paras. 40, 92].
Conway v. Rimmer, [1968] A.C. 910, ref'd to. [paras. 40, 92].
Attorney General of Quebec v. Farrah (1978), 21 N.R. 595, appld. [paras. 41, 93].
Farrah v. Attorney General of Quebec and Transport Tribunal (1978), 21 N.R. 595, appld. [paras. 41, 93].
Re Royal Commission and Ashton (1975), 64 D.L.R.(3d) 477, appld. [paras. 41, 93].
Rogers v. Secretary of State, [1972] 2 All E.R. 1057, appld. [paras. 41, 93].
Batary v. Attorney General for Saskatchewan et al., [1965] S.C.R. 465, consd. [paras. 107, 119].

STATUTES JUDICIALLY NOTICED:

British North America Act, 1867, ss. 91(27) [paras. 106, 118]; 92(14) [paras. 22, 74, 106, 118]; 96 [paras. 41, 93].
Department of the Solicitor General Act, R.S.C. 1970, c. S-12, s. 4 [paras. 23, 75].
Federal Court Act, R.S.C. 1970, 2nd Supp., c. 10, s. 41

[paras. 38, 87].
Officials Secrets Act, R.S.C. 1970, c. O-3, s. 4 [paras. 43, 95].
Public Inquiry Commission Act, R.S.Q. 1964, c. 11, s. 7 [paras. 41, 93].
Quebec Code of Civil Procedure, Arts. 758 [paras. 4, 56]; 846-850 [paras. 2, 54]; 846 [paras. 45, 97]; 847(2) [paras. 37, 89]; 848 [paras. 45, 48, 97, 100].
Royal Canadian Mounted Police Act, R.S.C. 1970, c. R-9 [paras. 23, 75].

COUNSEL:
GERALD TREMBLAY and RODOLPHE BILODEAU, for the appellant The Attorney General of Quebec;
MICHEL DECARY and JEAN-PIERRE LUSSIER, for the appellant Mr. Jean Keable;
JOSEPH NUSS, Q.C., and G.H. WAXMAN, for the respondent The Attorney General of Canada;
MICHEL ROBERT and LOUYSE CADIEUX, for the respondent the Solicitor General of Canada;
PIERRE LAMONTAGNE, Q.C., and VICTORIA A. PERCIVAL, for the third party The Commissioner of the Royal Canadian Mounted Police;
J.D. Watt, D.W. Mundell, Q.C., and L.E. WEINRIB, for the intervenant Attorney General of Ontario;
H. HAZEN STRANGE, Q.C., and PATRICIA L. CUMMING, for the intervenant Attorney General of New Brunswick;
M. Samphir and B.W. DREVER, for the intervenant Attorney General of Manitoba;
LOUIS LINDHOLM, for the intervenant Attorney General of British Columbia;
S. KUJAWA, Q.C., and K.W. MacKAY, for the intervenant Attorney General of Saskatchewan;
ROSS PAISLEY, Q.C., and W. HENKEL, Q.C., for the intervenant Attorney General of Alberta.

This case was heard on May 23, 24, 25 and 26, 1978, at Ottawa, Ontario, before MARTLAND, RITCHIE, SPENCE, PIGEON, DICKSON, BEETZ, ESTEY and PRATTE, JJ., of the Supreme Court of Canada.

On October 31, 1978, the judgment of the Supreme Court of Canada was delivered and the following opinions were filed:

PIGEON, J. - see paragraphs 1 to 52 (English language version); 52 to 104 (French language version);
ESTEY, J. - see paragraphs 105 to 116 (English language version); 117 to 128 (French language version);

PRATTE, J. - see paragraphs 129 to 131 (English language version); 132 to 134 (French language version).

MARTLAND, RITCHIE, DICKSON and BEETZ, JJ., concurred with PIGEON, J.

SPENCE, J., concurred with ESTEY, J.

1 PIGEON, J.: This is an appeal from a judgment of the Court of Appeal of Quebec reversing the judgment of Hugessen, J., of the Superior Court and ordering the issuance of a writ of evocation [removal] against Jean Keable, one of the appellants in this Court, also ordering him to suspend all proceedings as inquiry commissioner and to transmit to the office of the Superior Court the record in the case and all the exhibits connected therewith. Kaufman, J.A., dissenting in part, would have issued a restricted staying order.

2 The proceedings were instituted by a motion to a judge of the Superior Court under articles 846-850 C.C.P. for the issuance of a writ of evocation [removal] against appellant Jean Keable in his capacity of commissioner, appointed under the *Public Inquiry Commission Act* of the Province of Quebec (R.S.Q. 1964, c. 11). It was alleged that the subject matter of the inquiry being related to the administration of the Royal Canadian Mounted Police was beyond the scope of provincial powers and that some decisions of the Commissioner respecting the scope of the inquiry and the documents required to be produced by the Solicitor General of Canada were invalid.

Availability of evocation

3 In the Superior Court, Hugessen, J., dismissed the application on the basis that the Commissioner was not a Court and therefore not amenable to evocation [removal]: [Translation] "Respondent commissioner is not a court and will become one only when and to the extent that he decides to impose penalties in the exercise of his ancillary powers."

4 The Court of Appeal was unanimous in rejecting that view. Under s. 7 of the *Public Inquiry Commission Act*, a commissioner has "with respect to the proceedings upon the hearing, all the powers of a judge of the Superior Court in term". Relying on this provision the commissioner has issued subpoenas to the Solicitor General of Canada and rendered decisions requiring him to produce a number of documents

pertaining to the administration of the Royal Canadian Mounted Police. In so acting, the Commissioner was claiming to exercise some powers of a court against the Solicitor General. The latter could not be required to wait until he was sentenced for contempt in order to challenge the validity of the orders and of the Commission itself if he had good legal grounds to dispute their validity. The writ of evocation [removal] under the present Code of Civil Procedure is the equivalent of *certiorari* and prohibition combined: *Three Rivers Boatman v. Canada Labour Relations Board*, [1969] S.C.R. 607. Prohibition is properly applied for at the outset of the impugned proceedings: *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756. It was suggested that an injunction would have been the proper remedy but, under article 758 C.P.C., "an order of injunction can in no case be granted to restrain legal proceedings".

5 Much was sought to be made of such cases as *Guay v. Lafleur*, [1965] S.C.R. 12, and *St. John v. Fraser*, [1935] S.C.R. 441, in which applications to restrain the proceedings of a commission of inquiry were dismissed on the basis that these were administrative not judicial proceedings, but those were applications made by persons whose actions were being investigated and against whom no judicial power was being exercised. Such is not the case here. Assuming the Commissioner's report will not amount to any judicial or quasi-judicial determination, what is presently in issue is the validity of strictly judicial acts: the compulsion of witnesses to testify and to produce documents. It is conclusively established by the recent judgment of this Court in *Cotroni v. The Quebec Police Commission* (1977), 18 N.R. 541; [1978] 1 S.C.R. 1048, that the validity of the conviction of a witness for contempt by a commissioner with similar powers is subject to judicial review. The Court of Appeal was plainly right in holding that this was not the only possible remedy and that evocation [removal] was available to challenge the validity of the Commissioner's mandate, subpoenas and orders on jurisdictional and constitutional grounds.

The mandate

6 The Commissioner's terms of reference as determined by provincial orders in council 1968-77, 2936-77, 2986-77 and 3719-77 are as follows:

[TRANSLATION]

(a) to investigate and report on all the circumstances

surrounding the search carried out during the night of October 6 to 7, 1972 at 3459 St. Hubert Street in Montreal, as well as any previous or subsequent events that might be related thereto, and the conduct of all persons involved in the search or in a previous or subsequent event that might be related thereto, and, without restricting the generality of the foregoing:

(i) the closing of the investigation files that had been opened in the Montreal Urban Community Police Department following the complaints that were filed, shortly after the search, by the three organizations whose premises had been searched;

(ii) the discrepancy in the different versions that were given of this search;

(iii) the disposal of the documents that were seized during the search;

(iv) the collaboration of the R.C.M.P., the Quebec Police Force and the Montreal Urban Community Police Department with the Department of Justice during the investigation that was launched after the existence of this search became publicly known;

(v) the methods used during this search and the frequency of their use;

(b) to investigate and report on any circumstances and any previous or subsequent events that might be related to the following acts, as well as the conduct of all persons involved in the following acts and events:

(i) the illegal entry made during January 1973 into premises in which computer tapes were kept, containing a list of the members of a political party;

(ii) setting fire to a farm known as "Petit Québec Libre" in Sainte-Anne-de-la-Rochelle on May 9, 1972;

(iii) a theft of dynamite in Rougemont in the spring of 1972;

(c) to investigate and report on the methods used during the acts referred to in paragraph (b) and the frequency of their use;

(d) to make recommendations on the measures to be taken to ensure that any illegal or reprehensible acts the Commission uncovers will not be repeated in future;

The subpoenas

7 The list of documents called for in the subpoena issued September 28, 1977, to the Solicitor General of Canada included the following:

[TRANSLATION]

Concerning the search (opération bricole) made during the night of October 6 to 7, 1972 in the premises located at 3459 St. Hubert Street in Montreal, occupied by the Agence de presse libre du Québec, the Mouvement pour la défense des prisonniers politiques du Québec and the Coopérative de déménagement du 1er mai;

PLEASE BRING WITH YOU:

I. The originals of all files or documents in your possession prepared by the R.C.M.P., the Quebec Police Force or the Montreal Urban Community Police Department, or any other person, relating to opération bricole, and, without restricting the generality of the foregoing:

1. All operation reports in your possession;

2. All analysis reports on the documents seized;

3. The notebooks, analysis reports and operation reports and records of the R.C.M.P. members who took part in the operation;

. . . . .

7. All analysis reports on the Mouvement pour la défense des prisonniers politiques du Québec, the

Agence de presse libre du Québec and the Coopérative de déménagement du ler mai prior to October 7, 1972;

8. All reports on technical projects (electronic eavesdropping) concerning the Mouvement pour la défense des prisonniers politiques du Québec, the Agence de presse libre du Québec and the Coopérative de déménagement du ler mai prior to October 7, 1972;

9. The microfilms of the documents seized at 3459 St. Hubert in Montreal during the night of October 6 to 7, 1972;

10. The files on the Mouvement pour la défencs des prisonniers politiques du Québec, the Agence de presse libre du Québec and the Coopérative de déménagement du ler mai, as given to Messrs. Robert Samson and Guy Bonsant when they were assigned to these movements;

11. All photographs and all negatives of photographs taken by a member of the R.C.M.P. during the night of October 6 to 7, 1972, and while the documents seized at the residence of Mr. Jean-Claude Brodeur were being examined;

12. All written correspondence or written reports of oral communication between January 1, 1972 and September 28, 1977:

- among the various police forces;

- within these same police forces;

- with the Quebec Department of Justice;

- or with the Solicitor General of Canada;

. . . . .

16. The originals of all files or documents concerning the following subjects:

(a) The allegations concerning break and entry into the home of Louise Vandelac on October 24, 1972;

(b) The allegations concerning the theft of Louise Vandelac's handbag at her residence during the night of October 25, 1972;

(c) The interrogation of a member of the Agence de presse libre du Québec who used Louise Vandelac's motorcycle between October and December 1972;

(d) The use and discovery of microphones at 2074 Beaudry Street, in Montreal (November 1973);

17. All instruction manuals as well as all written instructions, administrative policies and documents in effect during October 1972, and any amendments, concerning:

(a) all rules respecting the operation of the R.C.M.P.'s Security Service;

(b) The opening, keeping, disposal and/or destruction of any file, document or daily notebook for members of the R.C.M.P.;

(c) The conducting of all police operations, including investigations, searches, electronic eavesdropping, shadowing, surveillance and so on;

(d) The rules of ethics of the members of the R.C.M.P.;

(e) The pattern of authority among the members of different levels of the R.C.M.P.;

(f) List of all cases where reports must be made by members to their superiors;

(g) List of all cases where an authorization is required by superior officers;

(h) The functioning of a joint operation among different police forces, particularly in the case of operations taking place on the territory of the Montreal Urban Community where the R.C.M.P., the Quebec Police Force and the Montreal Urban Community Police Department are all involved at the same time;

(i) The operation of internal communications, including the operation of the Telex system;

II - The originals of any files or documents, not specifically mentioned in this request, but which you believe would be useful for the work of the Commission under its mandate, and in particular any documents in any file whatsoever that might reveal the existence [and] use of methods similar to those that are the subject of this investigation and/or that might reveal the frequency of use of such similar methods.

8 On November 11 a further subpoena was served upon the Solicitor General with an amended list of documents which I do not find necessary to cite. There were also, within a few days, further subpoenas covering the three following lists:

[TRANSLATION]

I - The original of a memorandum to which the Prime Minister of Canada, Mr. Trudeau, referred on June 2, 1977 in a statement in the House of Commons (*Hansard*, pages 6207-6208);

II - Concerning an investigation known to have begun on or about June 1, 1977 under the direction of Messrs. Nowlan and/or Quintal and/or other persons: all reports, including the files and documents appended, prepared for one or more of these persons, or any other person, concerning allegations of acts said to be illegal or reprehensible and committed within the territory of Quebec;

III - All files and documents concerning the setting fire to a farm known as "Petit Québec Libre" in Sainte-Anne-de-la-Rochelle on May 9, 1972 as well as all files and documents concerning a theft of dynamite in Rougemont in the spring of 1972.

Regarding the electronic eavesdropping carried out at 3459 St. Hubert Street in Montreal:

1. A written authorization or a written report of an oral authorization given by Mr. Jean-Pierre Goyer to Mr. John Starnes and/or other persons, on or

about November 3, 1972;

2. Any other written authorizations or any other written reports of oral authorizations given by Mr. Jean-Pierre Goyer or Mr. John Starnes and/or other persons.

I - The originals of all files or documents in your possession prepared by the R.C.M.P., the Quebec Police Force or the Montreal Urban Community Police Department, or any other person, on the following subjects or events mentioned in a letter dated May 28, 1976 from Commissioner J. Nadon to the Hon. Warren Allmand, Solicitor General of Canada, and forwarded by the latter on May 31, 1976 to the Hon. Fernand Lalonde, Solicitor General of Quebec, to wit:

1. In January 1970, Daniel Cohn-BENDIT, a revolutionary known around the world, arrived in Montreal, where he stayed with a former F.L.Q. member, Bernard MATAIGNE.

2. In June of the same year, two (2) Quebec terrorists were trained in a guerilla camp in Jordan to act as assassins once they returned to Quebec.

3. In October 1970, James Richard CROSS and Pierre LAPORTE were kidnapped and the latter was subsequently assassinated. In the first communiqué from the Liberation Cell, the F.L.Q. demanded the release of the terrorists in prison (political prisoners).

4. During the same period searches revealed that Pierre VALLIERES, one of the ideological leaders of the F.L.Q., had sent a letter to Jacques LARUE LANGLOIS on June 26, 1978, advising him to proceed with the kidnapping of political figures. Later VALLIERES admitted he was guilty of this criminal offence with which he was charged.

5. Toward the end of 1971 the latter stayed in hiding to avoid being charged with sedition. After four (4) months he came out of hiding, stating that "in theory" the violent actions of guerillas were ineffective and reckless.

6. On February 9, 1972, 90 sticks of dynamite were

found in a room in the Laurentian Hotel in Montreal.

7. In May 1972 the Montreal Urban Community Police Department arrested Christian LEGUERRIER, who confessed at that time that a group was making plans, giving rise to the suspicion that there might be selective assassinations and kidnappings (and in particular your file D-928-2372 and a report dated May 31, 1972).

8. On September 19, 1972 the R.C.M.P. informed the Solicitor General of Canada that Marcel GUERIN, Donald LACOSTE, Hélène LACASSE, Jacques BEAULNE and Jean-Luc ARENE were planning to commit criminal acts with a view to obtaining the release of the alleged political prisoners (and in particular, your file D-909-2-D-6 and the report dated September 19, 1972).

9. On September 26, 1972 Jacques BEAULNE, André BEAULNE, Pierre DORAIS, Donald McINNES, Renald LEVESQUE, Roger VINCENT, D'Arcy ARCHAMBAULT and André LAFOND were preparing an airplane hijacking, for the same purpose (and in particular, your file D-926-113-D-1-3 and a report dated September 26, 1972).

II - The files and documents on "DISRUPTIVE TACTICS", and in particular those classified in file D-938-Q-25.

The Solicitor General's affidavit

The affidavit submitted to the Commissioner by the citor General in its final form under date October 13, included the following statements:

[TRANSLATION]

3. I have taken cognizance of a subpoena addressed to me as Solicitor General of Canada by the Commissioner of the said Commission and dated September 28, 1977.

4. The said subpoena, as amended by an oral order of the Commissioner dated October 6, 1977 requires *inter alia* the files or documents of the R.C.M.P. concerning an operation known as "Opération Bricole", and requires in particular the production of the following files and documents:

(a) All analysis reports on the Mouvement pour la défense des prisonniers politiques du Québec, the Agence de presse libre du Québec and the Coopérative de déménagement du ler mai from January 1, 1972 to September 28, 1977;

(b) All reports on technical projects (electronic eavesdropping) concerning the Mouvement pour la défense des prisonniers politiques du Québec, the Agence de presse libre du Québec and the Coopérative de déménagement from January 1, 1972 to September 28, 1977;

(c) The files on the Mouvement pour la défense des prisonniers politiques du Québec, the Agence de presse libre du Québec and the Coopérative de déménagement du ler mai, as given to Messrs. Robert Samson and Guy Bonsant when they were assigned to these movements;

(d) The originals of all files or documents concerning the following subjects:

(i) The allegations concerning break and entry into the home of Louise Vandelac on October 24, 1972;

(ii) The allegations concerning the theft of Louise Vandelac's handbag at her residence during the night of October 25, 1972;

(iii) The interrogation of a member of the Agence de presse libre du Québec who used Louise Vandelac's motorcycle between October and December 1972;

(iv) The use and discovery of microphones at 2074 Beaudry Street, in Montreal (November 1973).

5. Before receiving the said subpoena I have already, through my solicitors, produced before the Commission the R.C.M.P. files entitled "Opération Bricole", except for certain documents contained in a list attached hereto as Appendix 1.

6. I have examined the R.C.M.P. filed entitled "Opération Bricole" and the documents mentioned in the appendix to this affidavit.

7. I have further examined the R.C.M.P. files and documents relating to the documents mentioned in subpara-

graphs (c) and (d) (i), (ii), (iii) and (iv) of paragraph 4 of this affidavit. I have also examined the R.C.M.P. files and documents relating to the documents mentioned in subparagraphs (a) and (b) of paragraph 4 of this affidavit for the period from January 1, 1972 to September 28, 1977.

8. I know and in fact believe that the documents and files mentioned in paragraph 7 above and in the attached appendix were prepared and are kept in the strictest secrecy, as part of current and ongoing investigations in all regions of Canada into matters of extreme importance for national security.

9. To allow any of the documents mentioned in paragraph 7 and the attached appendix to be produced, or the contents of any one of them to be disclosed in testimony, would seriously jeopardize the effectiveness of the current and ongoing investigations being carried out by the R.C.M.P.'s Security Service, and might thwart the operations being conducted by the R.C.M.P.'s Security Service in accordance with the mandate it has been given by the Government of Canada.

10. In particular, production of the documents mentioned in paragraph 7 and the attached appendix, or disclosure of their contents, would reveal quite specifically certain sources of information, certain methods of collecting information, the personnel involved in investigations and the scope of these investigations, and this could only have consequences injurious to these investigations, which the Government of Canada decided were necessary in the interest of national security.

11. For all these reasons I am of the opinion, and I certify under s. 41(2) of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, that the production or discovery of the files and documents mentioned in paragraph 7 of this affidavit and the attached appendix, or any one of them, would be injurious to national security.

12. I therefore object to the production of these files and documents and the disclosure of their contents by a member of the R.C.M.P., or by any person having one of these documents in his possession either lawfully or unlawfully or having had access to them on occasion, or as the result of an exchange of information between

the R.C.M.P. and the various police forces, including the Quebec Police Force and the Montreal Urban Community Police Department.

The Commissioner's orders

10 The conclusions of the decision given by the Commissioner on October 18, 1977, after considering the affidavit and the submissions of counsel for the Solicitor General were as follows (numbers added for convenience as agreed at the hearing):

[TRANSLATION]

The Commission:

1. *CONSIDERS* that it is a court within the meaning of s. 41(2) of the *Federal Court Act* with regard to present and former members of the R.C.M.P., employees and former employees of the Government of Canada and federal government politicians;

2. *CONSIDERS* that it is not a court with regard to all its other witnesses; an affidavit from the Solicitor General of Canada under s. 41(2) is not effective against it in such cases;

3. *REJECTS* affidavits P-6 and P-7 as not being in accordance with the Act;

4. *ACCEPTS* affidavit P-40 as regards the R.C.M.P. files and documents that were not produced before the Commission by the R.C.M.P., the Quebec Police Force or the Montreal Urban Community Police Department; the same applies to the contents of Appendix 1 of affidavit P-40; it will refuse discovery and production without any examination of the documents;

5. *AUTHORIZES* counsel for the Solicitor General to be present, solely for the purpose of helping the Commission fulfill its obligation arising from the filing of affidavit P-40 during the in camera hearings at which evidence will be given by present and former members of the R.C.M.P., employees and former employees of the Government of Canada and federal government politicians;

6. *ACKNOWLEDGES* that counsel for the Solicitor General

of Canada have the same rights as any counsel appearing before it during public hearings;

7. *REJECTS*, even assuming that it constitutes a court with regard to all its witnesses - an assumption which is denied - those parts of affidavit P-40 concerning non-production and non-disclosure of:

- the R.C.M.P. files and documents produced before the Commission by the Q.P.F. or the M.U.C.P.D. and marked as follows: "This document is the property of the Government of Canada. It must be classified as a SECRET document and its contents may not be circulated in whole or in part without the author's prior consent";

- the R.C.M.P. files and documents sent to the Q.P.F. or the M.U.C.P.D. that were produced before the Commission by the Q.P.F. or the M.U.C.P.D. and not marked as being the property of the Government of Canada;

- the telexes of reports on the electronic eavesdropping carried out by the R.C.M.P. at 3459 St. Hubert Street in Montreal that were sent to the M.U.C.P.D and produced before the Commission by the M.U.C.P.D.;

- certain parts of a document prepared by Mr. Fernand Tanguay of the M.U.C.P.D. that was filed before the Commission as Exhibit P-38;

- the analysis reports on the documentation seized from the M.D.P.P.Q., the A.P.L.Q. and the Coopérative de déménagement du ler mai, prepared during the months following the search and produced before the Commission;

- certain documents referred to in affidavit P-40 as reports on technical projects (electronic eavesdropping) produced before the Commission by the M.U.C.P.D. as Exhibit H-15 and made public as P-34 and P-35;

8. *INVITES* the representatives of the Solicitor General of Canada to make the representations they consider appropriate under article 3.2 of the Commission's rules

of practice and procedure.

11 The conclusions of the motion for a writ of evocation [removal] take exception to paragraphs 2, 5 and 7 of the above conclusions. They also challenge in its entirety a further decision of the Commissioner issued November 1st, 1977, in the following terms:

[TRANSLATION]

On October 20, 1977 one of the Commission's counsel, Mr. Michel Décary, asked Mr. Claude Brodeur, a member of the R.C.M.P., the following question:

Were you aware that members under your authority, your command, participated in illegal operations or activities? (October 20, 1977, volume 29, p. 18).

Various representations having been made, the Commission decided to suspend the examination of Mr. Brodeur and to make a final ruling on the objection on November 1, 1977.

The evidence adduced in *The Queen v. Coutellier, Beaudry & Cobb*, which the Commission examined with the authorization of the Attorney General of Quebec, and that gathered by the Commission itself, indicate:

(A) That the witness was personally involved in the circumstances surrounding the search made during the night of October 6 to 7, 1972 at 3459 St. Hubert Street in Montreal;

(B) That the witness was personally involved in certain previous or subsequent events that might be related to the circumstances surrounding the search or the search itself;

(C) That consequently the Commission must examine his behaviour as a person involved in the search or in a previous or subsequent event that might be related to the circumstances of the search or to the search itself.

It should be mentioned that among the specific points which the Commission is to investigate and report on, the Lieutenant-Governor in Council specifically mentioned:

The methods used during this search and the frequency of their use.

The word "method" means "way of acting with regard to someone else" and refers to behaviour, conduct, manner of acting or method to be followed to obtain a result.

The evidence already reveals some of the methods used during the search carried out at 3459 St. Hubert Street in Montreal, but our inquiry should not stop there. What is at the very heart of the methods used, and characterizes the entire operation or the conduct of the police in this matter, is the fact that the police acted illegally.

The question asked is aimed directly at ascertaining the existence and frequency of use of the illegal methods employed on other occasions and the frequency of their use. This question falls squarely within the Commission's mandate.

The Commission accordingly orders you, Mr. Brodeur, to answer the following question:

Were you aware that members under your authority, your command, participated in illegal operations?

12 Finally exception is taken to a decision of the Commissioner given December 5, 1977, the conclusions of which read:

[TRANSLATION]

The Commission:

REQUIRES the production before it of a written authorization or a written report of an oral authorization given by Mr. Jean-Pierre Goyer to Mr. John Starnes and/or other persons on or about November 3, 1972, as well as of any other written authorizations, or any other written reports of oral authorizations, given by Mr. Jean-Pierre Goyer to Mr. John Starnes and/or other persons regarding the electronic eavesdropping carried out at 3459 St. Hubert Street in Montreal;

REQUIRES the production before it of the files and documents concerning "disruptive tactics", and in particular

those classified in file D-938-Q-25;

Requires the production before it of all files, including the documents, statements, depositions and reports, connected with the investigation known to have begun on or about June 1, 1977 under the direction of Messrs. Nowlan and/or Quintal and/or other persons, prepared for one or more of these persons or any other person, concerning allegations of acts said to be illegal or reprehensible and committed in the territory of Quebec;

ORDERS the Solicitor General of Canada, under all penalties provided for by the Act, to give it the said files and documents on December 12, 1977 at 2:00 p.m. in room 5.15 of the Courthouse, 1 Notre Dame Street East, in Montreal;

INVITES the representatives of the Solicitor General of Canada to make any representations they consider appropriate under article 3.2 of the Commission's rules of practice and procedure after giving it the said documents.

The allegations

13 In respect of all the above, the motion for a writ of evocation [removal] includes the following main allegations:

[TRANSLATION]

26. Moreover, respondent Keable is giving his mandate an unconstitutional interpretation, which is *ultra vires* the powers of the Quebec Legislature, in that he is inquiring into and intends to inquire into the following subjects:

(a) the operating rules of the R.C.M.P.'s Security Service;

(b) the Security Service organization, including the pattern of authority among the various levels;

(c) the methods of collecting information, such as:

(i) technical or electronic sources;

(ii) human sources, recruiting, information and payment;

(iii) searches;

(iv) interviews with subjects of interest;

(v) infiltration;

(vi) surveillance and shadowing;

(d) the system of classifying files on individuals and the movements of and rules governing the management of the files;

(e) the operation of internal communications and communications among the various police forces;

(f) internal disciplinary investigations, and in particular the investigation conducted by Superintendent Nowlan during June 1977;

(g) the relations between the Commissioner of the R.C.M.P. and the Director General of Security and senior officials of the Solicitor General's Department, the Prime Minister of Canada's s Office, the Cabinet, the Solicitor General of Canada and the Cabinet Committee on Security;

(h) the kidnapping of James Cross, the kidnapping and assassination of Pierre Laporte, the visit of Cohn-Bendit to Canada, an alleged escape plot in 1972, an alleged airplane hijacking plot in 1972 and other subjects related to the 1970 October crisis and the acts of terrorism between 1963 and 1973;

(i) interception of mail for purposes of counter-espionage or anti-subversion;

. . . . . .

31. The inquiry conducted by respondent may lead to breaches of the *Official Secrets Act* by the witnesses, and confronts members and former members of the R.C.M.P. with multiple and contradictory obligations: the obligation to give answer to respondent, the obligations

under the *R.C.M.P. Act* and the obligations under the *Official Secrets Act*;

32. The inquiry conducted by respondent encroaches upon the function of the federal commission of inquiry into the R.C.M.P.'s Security Service, negates the precautions for confidentiality taken by the federal government in the direction of this commission, and in general this investigation conducted by respondent usurps the authority and functions of a commission validly created by the Governor in Council in the exercise of his mandate.

The constitutional questions

14 On the appeal to this Court an order was made stating the constitutional issues raised in the form of the five following questions:

1. Are the Orders-in-Council 1968-77, 2736-77, 2986-77 and 3719-77, in whole or in part, ultra vires the Province of Quebec?

2. Are the powers of a commissioner appointed under provincial legislation for the purpose of inquiring into matters concerning the administration of justice in the Province limited by the distribution of legislative powers as provided for in the *British North America Act*?

3. If members of a federal institution, namely, the Royal Canadian Mounted Police, be involved in allegedly criminal or reprehensible acts, does a commissioner appointed under provincial legislation for the purpose of inquiring into matters concerning the administration of justice in the Province have the right, while conducting an inquiry into the circumstances surrounding the commission of said acts, to inquire into:

   a) the federal institution, namely, the Royal Canadian Mounted Police,

   b) the rules, policies and procedures governing the members of the institution who are involved;

   c) the operations, policies and management of the institution;

d) the management, operations, policies and procedures of the security service of the Royal Canadian Mounted Police;

and to make recommendations for the prevention of the commission of said acts in the future?

4. Can the Solicitor General of Canada or any other Minister of the Crown in Right of Canada, in his official capacity, be compelled to appear, testify and produce documents by a commissioner appointed pursuant to provincial legislation for the purpose of inquiring into matters concerning the administration of justice in the Province?

5. Does a Minister of the Crown in Right of Canada, in his official capacity, have the constitutional power to prevent by means of affidavit or otherwise, the production of documents demanded by a commissioner appointed pursuant to provincial legislation for the purpose of inquiring into matters concerning the administration of justice in the Province, when such documents may relate to the commission of allegedly criminal or reprehensible acts, to circumstances surrounding such acts, or to the frequency of their occurrence?

The interventions

Inverventions have been filed on behalf of the Attorneys eneral of Ontario, New Brunswick, Manitoba, British Columbia, askatchewan and Alberta, generally supporting the appeal in arying degree. Leaving aside for the moment the question ised by the dissenting judge in the [illegible] of Appeal - the tent of a staying order - I propos[illegible] merits considering the constitutional qu[illegible] king the first three together.

The validity of the Comm

Although unanimously of the legations required the issuance emoval], the Court of Appeal wa at the Commission's mandate was wers.

not

In support of this conclu[illegible] whole

that there was no constitutional restriction on the possible scope of such an inquiry. It was contended that there was nothing to prevent a provincial government from ordering, in the public interest, an investigation into any subject whatever, just as any university or private institution can. The short answer to this contention is that this is not an inquiry of the same kind; it is being made, not by resorting only to generally available sources of information, but by compelling the attendance of witnesses to testify under oath and to produce documents. Such powers are not available to a commission set up by virtue of the royal prerogative, they depend on statutory authority, in the present case, on the *Inquiries Act* under which this Commission was established. A provincial statute cannot be effective beyond the constitutional limits of a provincial legislature's authority. In *Reference, re: Commission of Inquiry into the Police Department of Charlottetown* (1977), 12 Nfld. & P.E.I.R. 80; 25 A.P.R. 80; 74 D.L.R. (3d) 422, Nicholson, C.J. P.E.I., said after referring to *Kelly & Sons v. Mathers* (1915), 23 D.L.R. 225) (at p. 84 Nfld. & P.E.I.R., A.P.R. page 424 D.L.R.):

> This statement of Perdue, J.A., with which I agree, is to the effect that the Lieutenant-Governor in Council of a Province has power, apart from the *Public Inquiries Act*, to issue a commission to investigate matters which fall strictly within one of the classes of subjects assigned exclusively to the provincial Legislatures by s. 92 of the *British North America Act, 1867*, but that such a power by itself would not by itself entitle the commissioner or persons named to compel the attendance of witnesses or to administer oaths.

18 This is in accordance with what Viscount Haldane has said in *Attorney General for the Commonwealth of Australia v. Colonial Sugar*, [1914] A.C. 237, at page 257):

> A Royal Commission has not, by the laws of England, any title to compel answers from witnesses, and such a title is therefore not incidental to the execution of its powers under the common law.

19 On the other hand, it appears to me that the majority opinion in *Di Iorio v. Warden of the Montreal Jail* (1976), 8 N.R. 361; [1978] 1 S.C.R. 152, is conclusive of the validity of the Commission's mandate to the extent that it is for an inquiry into specific criminal activities. I can see no basis for a distinction between such an inquiry and an inquiry into "organized crime" as in *Di Iorio*, or a coroner's inquiry

into a criminal homicide as in *Faber v. The Queen* (1975), 6 N.R. 1; 8 N.R. 29; [1976], 2 S.C.R. 9, or a fire marshal's inquiry into arson as in *Regina v. Coote* (1873), L.R. 4 P.C. 599. Notwithstanding all the arguments submitted by counsel for the Solicitor General of Canada, I find myself bound by authority to hold that such inquiries come within the scope of "The Administration of Justice in the Province".

20 Reference was made to the judgment of the Court of Appeal of New Zealand in *Cock v. Attorney General* (1908), 28 N.Z.L.R. 405. I do not find the decision of great interest, it merely turns on the proper construction of the relevant *Commissions of Inquiry Act*. In the present case, no question arises as to the extent of the legislation under which the inquiry was ordered. The issue is as to the extent of the province's legislative authority over this inquiry.

21 Reference was also made to the judgment in *McGee v. Pooley*, [1931] 4 D.L.R. 475, where an injunction was issued to restrain a security frauds investigation on the basis that this was an inquiry into a criminal matter. That case is of no authority: it rests on views which are not in accordance with the decision of the Privy Council rendered the following year in *Lymburn v. Mayland*, [1932] A.C. 380.

22 Great stress was laid by the appellants as well as by intervenants on Dickson's, J., statement in *Di Iorio*, at page 392 N.R., p. 208 S.C.R. that, "A provincial commission of inquiry, inquiring into any subject, might submit a report in which it appeared that changes in federal laws would be desirable". This was said *obiter* in a case concerning an inquiry into organized crime. As previously noted, the basis of the decision was that such an inquiry into criminal activities is within the proper scope of "The Administration of Justice in the Province". The intended meaning of the sentence quoted is not that a provincial commission may validly inquire into any subject, but that any inquiry into a matter within provincial competence may reveal the desirability of changes in federal laws. The commission might therefore, whatever may be the subject into which it is validly inquiring, submit a report in which it appeared that changes in federal laws would be desirable. This does not mean that the gathering of information for the purpose of making such a report may be a proper subject of inquiry by a provincial commission.

23 I thus must hold that an inquiry into criminal acts allegedly committed by members of the R.C.M.P. was validly

ordered, but that consideration must be given to the extent to which such inquiry may be carried into the administration of this police force. It is operating under the authority of a federal statute, the *Royal Canadian Mounted Police Act*, (R.S.C. c. R-9). It is a branch of the Department of the Solicitor General (*Department of the Solicitor General Act*, R.S.C. c. S-12, s. 4). Parliament's authority for the establishment of this force and its management as part of the Government of Canada is unquestioned. It is therefore clear that no provincial authority may intrude into its management. While members of the force enjoy no immunity from the criminal law and the jurisdiction of the proper provincial authorities to investigate and prosecute criminal acts committed by any of them as by any other person, these authorities cannot, under the guise of carrying on such investigations, pursue the inquiry into the administration and management of the force. The doctrine of colourability is just as applicable in adjudicating on the validity of a commission's term of reference or decisions as in deciding on the constitutional validity of legislation. As Viscount Simon said in *Attorney General for Saskatchewan v. Attorney General for Canada*, [1949] A.C. 110, at page 124: "you cannot do that indirectly which you are prohibited from doing directly".

24 The words [TRANSLATION] "and the frequency of their use" at the end of paragraph a) as well as the words [TRANSLATION] "and the frequency of their use" at the end of paragraph c), of the Commissioner's mandate, do not contemplate an inquiry into criminal acts but into the methods used by the police forces. Those are essential aspects of their administration and therefore, to the extent that those words relate to the R.C.M.P., what they purport to authorize is beyond provincial jurisdiction to inquire into. That this is the intended scope of the inquiry is apparent from the subpoenas which call for the production of all operating rules and manuals. For similar reasons, I would hold that paragraph d) is invalid in so far as it relates to the R.C.M.P. This paragraph pertaining to recommendations, following as it does provisions contemplating an inquiry into the regulations and practices of the R.C.M.P., is clearly intended to invite, *as a purpose of the inquiry*, recommendations for changes in such regulations and practices. Inasmuch as these are the regulations and practices of an agency of the federal government, it is clearly not within the proper scope of the authority of a provincial legislature to authorize such an intrusion by an agent of a provincial government.

25 Counsel for the appellants took exception to the state-

ment by Paré, J.A., that [TRANSLATION] "a commission of inquiry ... is merely an extension of the executive branch, which it serves and to which it reports". It was contended that a commission's status was like that of a court, one of independence towards the executive. In support of this contention, reference was made to the report of the Royal Commission on some spying activities dated June 27, 1946, in which, at page 683, reference is made to *Clokie & Robinson, Royal Commissions of Inquiry* pages 150-151. It should, however, be noted that at page 87 the authors of this book have written:

> ... A "crown-appointed" or "royal" commission is only in a formal sense a monarchial weapon; in practice it is quite clearly and undeniably an agency of ministers who possess a majority in the House of Commons.

The Solicitor General not a compellable witness

I do not find it necessary to review at great length he numerous authorities cited on the fourth constitutional uestion. Because, at common law, a commission of inquiry has power to compel the attendance of witnesses and to require e production of documents, any jurisdiction for such purposes pends on statutory authority, and it seems clear that provincial legislation cannot be effective by itself to confer ch jurisdiction as against the Crown in right of Canada. the recent case of *Her Majesty in right of Alberta v. C.T.C.* 977), 2 A.R. 539; 14 N.R. 21; [1978] 1 S.C.R. 61, Laskin, J., said with the concurrence of all but two of the other mbers of the Court (at page 550 A.R., p. 32 N.R., p. 72 C.R.):

> ... a Provincial Legislature cannot in the valid exercise of its legislative power, embrace the Crown in right of Canada in any compulsory regulation.

In *Quebec North Shore Paper v. C.P. Ltd.* (1976), 9 N.R. ; [1977] 2 S.C.R. 1054, Laskin, C.J., said, speaking for full Court, (at page 481 N.R. page 1063 S.C.R.):

> ... It should be recalled that the law respecting the Crown came into Canada as part of the public or constitutional law of Great Britain, and there can be no pretence that that law is provincial law. In so far as there is a common law associated with the Crown's position as a litigant it is federal law in relation to the

> Crown in right of Canada, just as it is provincial law in relation to the Crown in right of a Province, and is subject to modification in each case by the competent Parliament or Legislature. . . .

28 In *R. v. Richardson*, [1948] S.C.R. 57, Estey, J., said with reference to the Ontario *Highway Traffic Act* barring any action after the expiration of twelve months from the time the damages were sustained:

> ... this statutory provision enacted by the province does not specifically mention His Majesty and therefore would not be effective against His Majesty in the right of the province and much less against His Majesty in the right of the Dominion. ...

29 In *Gauthier v. The King* (1917), 56 S.C.R. 176, Anglin, J., as he then was, said (at page 194):

> ... Provincial legislation cannot *proprio vigore* take away or abridge any privilege of the Crown in right of the Dominion. ...

30 Appellants submit that the decision of this Court in *Regina v. Snider*, [1954] S.C.R. 479, means that a minister of the Crown is a compellable witness at a trial and they point out that under s. 7 of the provincial *Act* a Commissioner has "all the powers of a judge of the Superior Court in term". This enactment cannot, at least towards federal authorities, have the effect of making an inquiry the legal equivalent of a trial. Such an inquiry is rather in the nature of a discovery and it seems to be well established that, at common law, the Crown enjoys a prerogative against being compelled to submit to discovery. In *La Société Les Affréteurs Réunis and The Shipping Controller*, [1921] 3 K.B. 1, Darling, J., said (at page 15):

> ... But even if the statement of Rigby L.J. was an *obiter dictum*, this Court is entitled to have regard to it and must look at it in order to see whether or not it lays down a principle which appears to be the right one. What he said was: "I have got to administer the law; the law is that the Crown is entitled to full discovery, and that the subject as against the Crown is not (1897) 2 Q.B. 384, 395." It was stated in *Tomline v. The Queen*, 4 Ex. D. 252, that the Crown does not owe discovery to the subject. I think Rigby, L.J., was saying no more than that. There is thus a

definite decision of the Court of Exchequer that the Crown is not bound to give discovery to the subject, and the opinion of a Lord Justice in the Court of Appeal recognizing that decision, and that decision and opinion are sufficient authority for this Court to recognize the rule which they lay down as the law of the land, unless it is convinced that it cannot be so. Rigby, L.J., goes on: "That is a prerogative of the Crown, part of the law of England, and we must administer it as we find it. ..."

31 In *Crombie v. The King*, [1923] 2 D.L.R. 542, Masten, J., said (at page 546):

... But, though discovery is a remedy merely, yet none the less the right of the Crown to refuse discovery is a matter of prerogative right: ...

32 In *R. v. Lanctot* (1941), 71 Qué K.B. 325, Bond, J., said (at page 332):

It would appear, accordingly, from the authorities - a few of which I have referred to - that the Crown cannot be compelled to give discovery. ...

33 Counsel for the appellants suggested that this question did not appear to have been raised initially as part of the Solicitor General's objections to the Commissioner's demands. Be that as it may, the point is raised in one of the constitutional questions set down in this Court, and was explicitly dealt with in the Court of Appeal where Paré, J.A., said:

[TRANSLATION]

I am therefore of the opinion that the provincial statute on commissions of inquiry, and the powers a commissioner is given under this statute, cannot bind the Crown in right of Canada, and respondent Commission cannot exercise against a Minister of the Crown in right of Canada the powers it is given by sections 7, 9, 10 and 11 of this statute. It should be emphasized in this regard that the subpoenas ordering the Solicitpr General to appear and produce the required documents are not addressed to him personally but in his capacity as Solicitor General of Canada. In fact this could not have been otherwise, since it is only in this

capacity that he has control of the documents required.

34 I would therefore answer question 4 in the negative.

The Crown privilege

35 The last constitutional question relates to the extent of the Crown privilege claimed in the interest of national security. This brings up for consideration the provisions of s. 41 of the *Federal Court Act* which reads:

> 41.(1) Subject to the provisions of any other Act and to subsection (2), when a Minister of the Crown certifies to any court by affidavit that a document belongs to a class or contains information which on grounds of a public interest specified in the affidavit should be withheld from production and discovery, the court may examine the document and order its production and discovery to the parties, subject to such restrictions or conditions as it deems appropriate, if it concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the public interest specified in the affidavit.
>
> (2) When a Minister of the Crown certifies to any court by affidavit that the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada, discovery and production shall be refused without any examination of the document by the court.

36 Although this enactment is in the *Federal Court Act*, the wording makes it clearly applicable to "any court". This makes it applicable not only to the provincial courts which are, in the main, courts of general jurisdiction, federal and provincial, but also to any official invested with the powers of a court for the production of documents. I would in this respect make the same reasoning as for the availability of evocation: whenever the Commissioner claims to exercise such powers he is subject to the provisions applicable to a court in respect of those powers.

37 Counsel for the appellants pointed out that the Commissioner does not deny that he is subject to the application of s. 41 of the *Federal Court Act*. However, he has claimed

the right to decide to what extent the Solicitor General's objections made by affidavit should be upheld, and the Court was invited by counsel to examine all the documents filed with the motion, including the complete transcript in thirty volumes of all of the proceedings at the inquiry. In my view, such an exhaustive examination of the voluminous exhibits filed with the motion and therein referred to does not come within the scope of the task assigned to the judge called upon to decide whether a writ of evocation should issue. Under the two-step procedure contemplated by the *Code of Civil Procedure*, the duty of the judge at the first hearing is described as follows, in article 847 C.C.P., second paragraph:

> The judge to whom the motion is presented cannot authorize the issuance of a writ of summons unless he is of opinion that the facts alleged justify the conclusions sought.

38 In my view this enactment does not require a full examination of all the proceedings of the Commissioner. It is sufficient to examine his terms of reference and his impugned decisions in the light of the facts alleged in the motion in order to determine whether, taking for the moment those facts as established, the issuance of the writ is justified. It is not the duty of the Court at this juncture to review all the proceedings of the Commissioner in order to decide immediately to what extent the allegations of the motion are proved or disproved by the complete record.

39 In my view, the effect of the above quoted enactment is correctly stated by Deschênes, J.A., as he then was, in *Cahoon c. Le Conseil de la Corporation des Ingénieurs*, [1972] R.P. 209, as follows (at pages 212-3):

> [TRANSLATION]
>
> It must therefore be held that, in performing its duty under Art. 847(2) C.C.P., the Court is fully entitled to refer to the documents that have been filed in support of the motion, provided however that these are authentic documents or exhibits the accuracy of which is not in dispute between the parties. *A fortiori* the Court may have recourse to them where, as here, the applicant incorporates them into his motion and extracts from them passages which he introduces into his actual allegations.

Obviously, the judge hearing the motion for authorization to issue the writ should not decide prematurely the merits of the case, on the basis of his examination of the documents produced by the applicant. However, he may draw from them the conclusions he feels are necessary in order to ascertain whether "the facts alleged justify the conclusions sought" (Art. 847(2) C.C.P.).

40 No question is raised as to the constitutional validity and applicability of s. 41, and I find it unnecessary to review the well known decisions of the House of Lords in *Duncan v. Cammell Laird & Co. Ltd.*, [1942] A.C. 624, and *Conway v. Rimmer*, [1968] A.C. 910, in which somewhat different views were taken of the nature of the privilege in question at common law. Parliament has subsequently enacted explicit provisions which spell out the law for Canada and the affidavit submitted to the Commissioner was obviously made under subsection 2 of s. 41. There was much discussion at the hearing whether such an affidavit is really conclusive or may somehow be challenged. I do not find it necessary to decide this point because, if such an affidavit can be challenged this may be done only before a court of competent jurisdiction and a commissioner is not such a court and does not enjoy the powers of such a court.

41 Section 7 of the provincial Act purports to confer upon a commissioner "all the powers of a judge of the Superior Court in term" but this cannot make him a superior court, as this is something a provincial legislature cannot do by reason of s. 96 of the *B.N.A. Act* (see the recent judgment of this Court in *Attorney General of Quebec v. Farrah* (1978), 21 N.R. 595.) The Commissioner does not enjoy the status of a superior court, he has only a limited jurisdiction. His orders are not like those of a superior court which must be obeyed without question; his orders may be questioned on jurisdictional grounds because his authority is limited. Therefore his decisions as to the proper scope of his inquiry, the extent of the questioning permissible, and the documents that may be required to be produced, are all open to attack, as was done before the Ontario Divisional Court in *Re Royal Commission and Ashton* (1975), 64 D.L.R.(3d) 477. In that case this was done by stated case under some specific provisions of the Ontario *Public Inquiries Act*. In the absence of similar provisions in Quebec, evocation is the proper remedy, just as *certiorari* was found proper by the House of Lords in *Rogers v. Secretary of State*, [1972] 2 All E.R. 1057).

42 Because a commissioner has only limited authority he enjoys no inherent jurisdiction, unlike superior courts which have such jurisdiction in all matters of federal or provincial law unless specifically excluded. It is by virtue of this inherent jurisdiction that superior courts have a general superintending power over federal as well as provincial authorities, as held in *Three Rivers Boatman (supra)*. It is unnecessary to decide in the present case whether any possible attack against an affidavit made under s. 41(2) of the *Federal Court Act* comes within the exclusive jurisdiction conferred upon the Trial Division of the Federal Court by s. 18 of that Act, because I find it clear that any jurisdiction for entertaining such attack can only be found in a superior court. The Commissioner is therefore bound to accept the affidavit as submitted unless it is set aside by a competent court.

The Official Secrets Act

43 A special point has been made with reference to some documents for which the Solicitor General's affidavit claims Crown privilege in the interest of national security but which the Commissioner has obtained from other witnesses. The Commissioner was of the view that the claim of privilege by affidavit was ineffective. In the present case, those documents had been entrusted by R.C.M.P. officers to members of police forces under provincial authority. These documents were classified as secret and stamped as such. They were communicated under obligation to preserve their confidentiality. Counsel for the Commissioner sought to defend his decision to make some of those documents public over the Solicitor General's objection, not only on the basis that the affidvait became ineffective when the Commissioner managed to get the documents from other sources, but also on the basis that any obligation of confidentiality assumed by members of police forces under provincial authority disappeared in the face of orders given by their provincial superiors. I find this an untenable contention. Even apart from the provisions of the *Official Secrets Act*, an employee's duty of obedience towards his employer does not mean that the latter has any power to compel his employee to act in breach of a duty of confidentiality. The medical director of a hospital cannot release a doctor from his obligation of confidentiality towards his patient; only the latter may release him from his duty. Section 4 of the *Official Secrets Act* makes it clear that it is the duty of every person who has in his possession information entrusted in confidence by a government official and subject to the Act, to refrain from communicating it to

any unauthorized person. No special form is prescribed for bringing this duty to the attention of all concerned. The Commissioner certainly could not brush aside the objection because it was raised by affidavit and after he had obtained possession of the documents. Whether these were in fact subject to the Act will have to be decided on the merits.

The Staying Order

44 As previously mentioned, the Court of Appeal when ordering the issue of the writ also directed that all proceedings in the inquiry be suspended. Kaufman, J.A., dissenting on that point said:

> I would therefore allow the appeal in part, quash the judgment *a quo*, and order that a writ do issue, enjoining the Respondent and his staff to transmit to the Superior Court, within 15 days from the date of this judgment, all documents, including transcripts of the argument and evidence, which relate to information given by the R.C.M.P. to other persons and which were produced by them before the Commission. I would also enjoin the Respondent and his staff from utilizing in any form or manner the contents of these documents; nor should the Respondent and his staff attempt to obtain this information by *viva voce* evidence or any other means.

45 The majority felt that, in the circumstances, a general staying order was preferable. The reasons for this conclusion were expressed as follows by Monet, J.A.:

> [TRANSLATION]
>
> The provisions of Art. 858 C.C.P., which apply to all cases of evocation provided for in Art. 846 C.C.P., are drafted in general terms and do not confer, at least expressly, the power to "suspend the proceedings in part".
>
> Even if the Superior Court has this power - something on which I am not expressing an opinion - the interests of justice, in the circumstances of the case under review, do not require that a dividing line be drawn, the accuracy of which may be subject to interpretation on the question of which part of the proceedings should be suspended. Rather than imposing on respondent és qualités the duty to decide this questior it would be better for the Superior Court to evoke the

matter and rule on the merits.

46 After lodging their appeal to this Court, the appellants moved for an order limiting the suspension of the inquiry as suggested by Kaufman, J.A. This motion was unanimously dismissed by judgment of the full Court dated March 21, 1978. The Chief Justice expressed our unanimous opinion as follows:

> ... There are serious jurisdictional and constitutional questions involved in the appeal, questions to which the Quebec Court of Appeal was sensitive, and I think the proper course is not to truncate its order for the issue of a writ of evocation and for suspension of the Keable Commission's proceedings prior to the determination of the appeal proper.

47 No other conclusion was possible at that time, if only because the Commissioner's mandate was challenged in its entirety. Having, however, come to the conclusion that the attack fails save in some respects, the question must now be considered in a new light. The conclusion of this Court on the validity of the mandate is, although pronounced in appeal from interlocutory proceedings, a final judgment on that point because this is a pure question of law. Questions of fact remain to be decided only in respect of the issues other than the validity of the Commissioner's mandate.

48 The majority decision in the Court of Appeal was based on a sound exercise of judicial discretion in a case like this. However, the issue as to the validity of the Commissioner's mandate has now been disposed of. It is therefore necessary to consider whether the whole inquiry should remain suspended while some secondary issues are being litigated on the merits. At first sight, article 848 of the *Code of Civil Procedure* would appear to contemplate a complete suspension of proceedings because it reads:

> 848. The writ introductive of suit is addressed to the opposite party and to the court, judge or functionary, and it orders the suspension of all proceedings and the transmission to the office of the Superior Court, within the delay fixed, of the record in the case and all the exhibits connected therewith.

49 It must however be noted that what is the "case" is not specified. It is clear that when the validity of the Commissioner's mandate was in issue, the "case" was the whole

inquiry. But now that this issue is being disposed of by the judgment on this appeal, does the remaining "case" include anything more than the specific decisions of the Commissioner under attack, the subpoenas to the Solicitor General and R.C.M.P. documents including the transcript of the argument and evidence relating thereto? I fail to see any reason for construing article 848 as preventing the Court from so defining the "case". I would therefore allow the appeal for the purpose of issuing a restricted staying order.

Conclusions

50 For those reasons, I would allow the appeal in part and answer the constitutional questions stated in this case as follows:

Question 1: Yes, to the following extent as concerns the Royal Canadian Mounted Police, namely: In paragraph a), the words "et la fréquence de leur utilisation" (and the frequency of their use); in paragraph c), the words "ainsi que la fréquence de leur utilisation" (and the frequency of their use); and paragraph d).

Question 2: Yes.

Question 3: No.

Question 4: No.

Question 5: yes.

51 I would direct that the suspension of proceedings ordered by the Court of Appeal be limited to proceedings in respect of matters relating to the parts of the Commissioner's mandate found to be *ultra vires* in the answer to the first constitutional question and to the decisions of the Commissioner under attack, to the subpoenas to the Solicitor General and to R.C.M.P. documents including the transcript of the argument and evidence relating thereto and that such decisions, subpoenas and documents be the record of the inquiry ordered to be transmitted to the prothonotary of the Superior Court.

52 There shall be no order as to costs.

53 PIGEON, J.: Ce pourvoi attaque un arrêt de la Cour

Newfoundland Supreme Court, Trial Division
Goodridge, J.
July 11, 1978.

ADMINISTRATIVE LAW - TOPIC 6407
Judicial review - Prohibition - Limited to judicial or quasi-judicial functions - The Newfoundland Supreme Court, Trial Division, held that prohibition did not lie against the appointment of an investigating inquiry by the Lieutenant Governor, because the commission's functions were not judicial or quasi-judicial - See paragraphs 12 to 17.

ADMINISTRATIVE LAW - TOPIC 7961
Public inquiries - Powers - General - The Newfoundland Supreme Court, Trial Division, held that, where the City of St. John's Act, R.S.N. 1970, c. 40, s. 320 provided for the appointment of a commission to investigate the finances and administration of the City, a commission could be appointed to investigate only a specific portion of the City's finances and administration - See paragraphs 24 to 28.

ADMINISTRATIVE LAW - TOPIC 7964
Public inquiries - Powers - Limitation on grant of powers - Petition - The Newfoundland Supreme Court, Trial Division, held that, where a petition requests the appointment of a commission to investigate a part of the finances and administration of the City of St. John's under s. 320 of the City of St. John's Act, R.S.N. 1970, c. 40, the commission which is appointed may not be given powers in excess of those requested in the petition - See paragraphs 19 to 23 and 29.

Summary:
This case arose out of a petition to the Lieutenant Governor for the appointment of a commission to investigate the construction and costs of the Municipal Parking Garage of the City of St. John's pursuant to s. 320 of the City of St. John's Act. The Lieutenant Governor appointed a commission to conduct the investigation. The City applied for a writ of prohibition prohibiting the commission from conducting its investigation on the ground that the commission was improperly appointed and lacked jurisdiction.

The Newfoundland Supreme Court, Trial Division, dismissed the application on the ground that prohibition did not lie, where the commission's functions were not judicial or quasi-judicial in nature.

CASES JUDICIALLY NOTICED:
R. v. Electricity Commissioners, [1924] 1 K.B. 171, appld. [para. 12].
Godson v. The Corporation of The City of Toronto, [1890] S.C.R. 36, appld. [para. 13].
Re B and Commission of Inquiry re Department of Manpower and Immigration (1976), 60 D.L.R. (3d) 339, appld. [para. 14].

STATUTES JUDICIALLY NOTICED:
City of St. John's Act, R.S.N. 1970, c. 40, s. 320 [para. 2].
Interpretation Act, R.S.N. 1970, c. 182, s. 17 [para. 25].

COUNSEL:
DONALD W.K. DAW, Q.C., and GERALD LANG, Q.C., for the City;
JAMES A. NESBITT, Q.C., Amicus Curiae;
DEREK GREEN, Amicus Curiae.

This case was heard on July 6, 1978, at St. John's, Newfoundland, before GOODRIDGE, J., of the Newfoundland Supreme Court, Trial Division.

On July 11, 1978, GOODRIDGE, J., delivered the following judgment:

1 GOODRIDGE, J.: On May 26, 1978, the Lieutenant Governor in Council appointed Hugh O'Neill, Raymond J. Halley and David Adey to be a commission (the "Commission")

> (i) to investigate the construction and costs of the said Municipal Parking Garage, all matters arising therefrom, and all such other matters as may be necessary to enable you to report upon the finances and administration of the City; and
>
> (ii) to report your findings and conclusions with such recommendations for legislation or otherwise as you may deem proper.

2 The Commission was purportedly appointed pursuant to the authority of the *City of St. John's Act*, in particular Section 320 which reads as follows:

> "The petition of the Lieutenant Governor in

of the City alleging that there is need of an impartial investigation of the finances and administration of the City, the Lieutenant-Governor in Council may appoint a commission of three persons to investigate the finances and administration.

3 It will be quickly noted that the authority of the Lieutenant-Governor in Council to appoint such a commission depends upon the existence of a petition

(a) addressed to the Lieutenant-Governor in Council;

(b) by one of

(i) the Mayor;

(ii) the Council; and

(iii) ten ratepayers;

(c) alleging the need for an impartial investigation of the finances and administration of the City; and

(d) to appoint a commission to conduct such investigation.

4 These are express requirements of the legislation.

5 The recital to the instrument creating the Commission reads as follows:

> WHEREAS by petition the Council of the City of St. John's alleges that there is need of an impartial investigation into the finances and administration of the City arising out of matters relating to the construction and costs of the building known as the Municipal Parking Garage.

6 The City of St. John's now applies to the Court for a writ of prohibition prohibiting the Commission from conducting the investigation on the grounds that the conditions precedent upon which the statutory authority contained in Section 320 of the *City of St. John's Act* might be exercised did not exist and that for that reason the Commission is without jurisdiction to conduct the investigation.

7 In actual fact according to the affidavits and documents filed in support of the application, there was no petition by the City Council to the Lieutenant-Governor in Council but rather a letter by the City Manager to the Minister of Municipal Affairs and Housing which contained no allegation of the need for an impartial investigation of the finances and administration of the City. Counsel for the City urged upon me to uphold his position on this basis as well as upon the other points which he argued. While I do not intend to suggest that his arguments in this respect were without merit, I feel that there is a more important question to be dealt with which avoids the necessity of providing an answer to his argument on these points, which are purely formal in nature and which a court would be reluctant to employ to prohibit the investigation of the Commission unless it had no choice.

8 Apart from that I query whether in an application of this nature I can go behind the instrument creating the Commission to determine whether or not the conditions precedent to the exercise of the statutory authority had come into existence. I raise this point without proposing to offer any answer to the same.

9 The issue before me is to be found on the face of the instrument itself. While reciting that the petition of the City Council alleges that there is need of an impartial investigation into the finances and administration of the City arising out of matters relating to the construction and costs of the building known as the Municipal Parking Garage, it appoints a Commission, not only to conduct such an investigation but also in its own words "to investigate . . . all such other matters as may be necessary to enable you to report upon the finances and administration of the City . . .".

10 The questions before me are twofold.

1. Assuming the Commission to have been appointed by an act which was ultra vires the Lieutenant-Governor in Council, may the operations of the Commission be restrained by a writ of prohibition.

2. If so, was the act ultra vires.

11 A third question, not really before me but which really caused all the difficulty here might be expressed as follows:

3. May the Lieutenant-Governor in Council in exercising the power

a Commission to investigate a part only of the City's finances and administration.

12 On the first question the remedy of prohibition may issue whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially acts in excess of its legal authority. That is the basic philosophy underlining prohibition applications and it was stated by Atkin, L.J., in the case of *R. v. Electricity Commissioners*, [1924] 1 K.B. 171, at pages 204 to 205.

13 In the case of *Godson v. The Corporation of the City of Toronto*, Sir W.J. Ritchie, C.J., dealt with a situation where prohibition was sought against a judge appointed to hold an inquiry into certain apparent contractual irregularities in the City of Toronto's administration. The case is reported in [1890] S.C.R. 36 and the following passage appears at page 40:

> The object of such inquiry was simply to obtain information for the council as to their members, officers and contractors, and to report the result of the inquiry to the council with the evidence taken, and upon which the council might in their discretion, if they should deem it necessary, take action. The county judge was in no way acting judicially; he was in no sense a court; he had no powers conferred on him of pronouncing any judgment, decree or order imposing any legal duty or obligation whatever on the applicant for this writ, nor upon any other individual. The proceeding for prohibition in this case was, therefore, wholly unwarranted, . . .

14 This case was followed and the question of prohibition was discussed thoroughly in the case of *Re B and Commission of Inquiry re Department of Manpower and Immigration* (1976), 60 D.L.R. (3d) 339. A review of that case will clearly reveal that the investigation of a commission of enquiry may not be restrained by prohibition unless it has authority to affect the rights of others and the duty to act judicially.

15 The Commission purportedly established by the Lieutenant-Governor in Council is clearly not such a body. Its duty is to investigate, report and recommend. There is no established practise that the recommendations would be acted on as in the case of recommendations of the Rent Control Board under the old *Rent Restriction Act*. It has no

authority to affect the rights of others, either directly or indirectly.

16 It is true that in the course of its investigation, it may be required to act judicially in such a manner as to affect the rights of others, as in dealing with witnesses and privileged evidence, for example. To the extent that any such act was reviewable, it would have to be dealt with on an ad hoc basis.

17 The remedy of prohibition is a special remedy available through the inherent jurisdiction of the court to oversee the conduct of lower judicial or quasi-judicial tribunals. There is no jurisdiction on a prohibition application to provide other relief and for that reason the application before me must fail.

18 Having decided that, any comments I might make on questions two and three are purely obiter dicta.

19 However, as the issue of question two was thoroughly canvassed in argument, I feel free to comment on it.

20 Dealing, therefore, with the second question one does not have to read very far to see that the Lieutenant-Governor in council very clearly exceeded its statutory authority. On the very face of the instrument by which it purported to create the Commission it appears that the petition received by it was limited in its terms to a petition for the appointment of a Commission to investigate the finances and administration of the City insofar as they pertain to the Municipal Parking Garage. According to the recital and according to the original letter put in evidence which purports itself to be a petition, the City neither asked for nor wanted a Commission to investigate its finances and administration and unless and until it did and petitioned accordingly, the Lieutenant-Governor in Council had no statutory authority to appoint such a Commission and when it did so it acted outside its powers.

21 Whether or not the Lieutenant-Governor in Council has authority to appoint a commission to investigate a part only of the City's finances and administration, it is clear on the wording of Section 320 that the Lieutenant-Governor in Council has two choices:-

(a) to refuse to appoint a commission;

(b) to appoint a commission with statutory powers [illegible] the petition - but [illegible] to the [illegible] itself).

22 Here, the Lieutenant-Governor in Council has appointed a commission to do more than the City petitioned for. There was no petition to appoint a commission to investigate the finances and administration of the City, but rather a petition to investigate the finances and administration of the City [illegible] the Board of Parking Garage. There is a great difference between the two.

23 Apart from any formal defects in the petitioning, the Lieutenant-Governor in Council purported to appoint a commission having broader powers than requested. There was no statutory authority to do this and, as I said, the Lieutenant-Governor in Council acted ultra vires.

24 As to the third and perhaps most crucial question, I have to consider whether a statutory power to appoint a commission to enquire into the City's finances and administration embodies within its meaning the power to appoint a commission to enquire into specified areas of the City's finances and administration.

25 In support of the proposition that it does, I am referred to Section 17 of the *Interpretation Act*:

> 17. Every Act and every regulation and every provision of an Act or regulation shall be deemed remedial and shall receive such fair, large, and liberal construction and interpretation as best ensures the attainment of the objects of the Act, regulation, or provision according to its true intent, meaning and spirit.

26 The object of Section 320 is to enquire into the City's finances and administration where a need to do so is alleged. It must be construed as the intent of the legislature that the scope of the enquiry ought to be limited to the extent of the need. When an isolated need arises, it is not to be expected that all of the City's finances and administration are to be investigated.

27 To hold otherwise would be to impose a huge obligation on the Commission when the intent was that it should enquire into a specified area only. At the same time, the Commission

cannot ignore that obligation and have regard to the intent only.

28 The words, of course, must be sufficient to give effect to this intent. Section 17 of the *Interpretation Act* permits me to provide a 'fair, large and liberal construction'. In this particular case, the language of the *City of St. John's Act*, in my opinion, authorizes the Lieutenant-Governor in Council to appoint a Commission to enquire into specified areas of the City's finances and administration.

29 It is clear to me that the exercise of the authority of Section 320 is discretionary. The Lieutenant-Governor in Council may accept or reject the petition but if it accepts the petition it must by the language of the Act limit the scope of the investigation to that specified in the petition. It may not make the investigative powers of the Commission broader than the petition specified.

30 In fairness to the Lieutenant-Governor in Council I feel that the City Council should have used a form of petition addressed to the Lieutenant-Governor in Council, made the necessary allegations and specified the area to be investigated, following the language of the Act to the extent possible. In this manner the advisors to the Lieutenant-Governor in Council may know exactly what is sought and grant or deny the petition on these terms.

31 While both parties knew what was wanted, the formal requirements were ignored.

32 This order, of course, accomplishes nothing. While finding that I cannot grant a writ of prohibition, I at the same time say that the Lieutenant-Governor in Council acted ultra vires and if this is so the Commission is impotent.

Application dismissed.

Editor: D.C.R. Olmstead
egj

in trespass does not mean that it is without remedy if those entering upon the premises engage in unlawful acts or *interfere with the rights of the owner or with the rights of others who have an equal right to be there.* The remedy would be in nuisance, not in trespass. In the instant case there is evidence indicating the *appellants may have engaged in acts interfering with the rights of the owner and of others lawfully using the premises resulting in damage to the respondent.* The Court has been advised by learned counsel for the respondent that as the trade dispute between Loblaw Groceteria Co. Ltd. and its employees has been settled, the respondent does not intend to proceed further with its action. If it were not for this situation, *I would give consideration to construing the pleadings as an action in nuisance*: *vide Mann v. Saulnier* (1959), 19 D.L.R. (2d) 130.

(Italics here are mine.)

This latter statement seems applicable because the situation created by the picketing sought to be enjoined here is preventing the unionized employees of customers or others desiring to come to give and pick up merchandise or place orders at the plaintiff's places of business in Saskatoon and Regina and the transporting of merchandise from such places of business by unionized employees of transport companies and it is doing so as effectively as if some physical barrier had been created by the defendants around the plaintiff's places of business certainly sufficiently to prevent it from carrying on its normal and lawful business at such places. This, in my opinion, would bring the situation within the scope of the situation envisaged by the learned Chief Justice in this quotation from his judgment.

There is no labour dispute between the employees of the plaintiff (or of Northern Electric Company Limited working on the plaintiff's premises in Regina and Saskatoon being picketed) or any union representing such employees. This makes the situation even clearer that the actions of the defendants in such great interference with the right of the plaintiff to carry on its lawful business should be subject to injunction as unlawful to the extent set out in the judgment of Johnson, J., given herein on June 5th last. There will therefore be an order in the terms of the said order.

Order accordingly.

LANDREVILLE v. THE QUEEN

Federal Court, Trial Division, Pratte, J. December 11, 1973.

Courts — Jurisdiction — Declaratory judgments — Whether Court has jurisdiction to issue declaratory judgment devoid of legal effect but having practical utility to party seeking remedy.

The Court has jurisdiction to make a declaration that will have no effect in law but which will, as a practical matter, serve a useful purpose. Accordingly, where the plaintiff, a former superior Court Judge, seeks a declaration that the appointment of a Commissioner under the *Inquiries Act*, R.S.C. 1952, c. 154 (now R.S.C. 1970, c. I-13), to inquire into and advise whether certain dealings of the plaintiff constituted misbehaviour in his official capacity as a Judge or whether by such dealings he proved himself unfit for the proper exercise of his judicial duties, was *ultra vires* in that it was not authorized by the *Inquiries Act*, and a declaration that the Commissioner, in conducting the inquiry and in making his report, failed to act judicially, acted in excess of his jurisdiction and failed to act in accordance with the principles of natural justice, the declaration could be granted by the Court in the circumstances alleged by the plaintiff. Even though the declaration can have no legal effect since the inquiry was conducted and the report made many years ago, the plaintiff will be entitled to proceed with his action if he shows that the declarations will contribute to the restoration of his reputation which is alleged to have been greatly damaged by the report, that they may persuade the authorities to compensate him for damages incurred by him as a result of the inquiry, and that they will serve the public interest by making it known that the conduct of a superior Court Judge is not subject to investigation under the *Inquiries Act*.

[*Merricks et al. v. Nott-Bower et al.*, [1964] 1 All E.R. 717, **folld**; *Guaranty Trust Co. of New York v. Hannay & Co.*, [1915] 2 K.B. 536; *Mellstrom v. Garner et al.*, [1970] 2 All E.R. 9, **refd to**]

Royal Commissions — Report — Nature — Commission having no power to make decision — Report having no legal effect — Certiorari does not lie to quash report.

[*R. v. Statutory Visitors to St. Lawrence Hospital, Caterham, Ex p. Pritchard*, [1953] 2 All E.R. 766; *R. v. Ontario Labour Relations Board, Ex p. Kitchener Food Market Ltd.* (1966), 57 D.L.R. (2d) 521, [1966] 2 O.R. 513; *The Queen v. Board of Broadcast Governors et al., Ex p. Swift Current Telecasting Co. Ltd.* (1962), 33 D.L.R. (2d) 449, **refd to**]

DETERMINATION of certain questions of law before trial.

Gordon F. Henderson, Q.C., and *Y. A. George Hynna*, for plaintiff.

I. G. Whitehall and *Paul Betournay*, for defendant.

PRATTE, J.:—The parties to this action have agreed to submit three questions of law for determination before trial.

The plaintiff's declaration reads as follows:

1. The Plaintiff is a Solicitor residing and carrying on the practice of his profession in the City of Ottawa, in the Judicial District of Ottawa-Carleton, Province of Ontario.

2. The Plaintiff was appointed a Judge of the Supreme Court of Ontario on the 10th day of October, 1956, and carried out his duties as a Judge of that Court until the month of June, 1967.

3. Letters Patent bearing date the 2nd day of March, 1968, purported to appoint the late Honourable Ivan C. Rand (hereinafter

referred to as "the Commissioner") a Commissioner whose duties as set out in the said Letters Patent were to:—

"(a) inquire into the dealings of the Honourable Mr. Justice Leo A. Landreville with Northern Ontario Natural Gas Limited or any of its officers, employees or representatives, or in the shares of the said Company; and

"(b) advise whether, in the opinion of Our Commissioner, anything done by Mr. Justice Landreville in the course of such dealings constituted misbehaviour in his official capacity as a judge of the Supreme Court of Ontario or whether the Honourable Mr. Justice Landreville has by such dealings proved himself unfit for the proper exercise of his judicial duties;".

4. The said Letters Patent purported to be issued pursuant to the Order-in-Council P.C. 1966-128 approved on the 19th day of January, 1966. The said Order-in-Council purported to be passed under Part I of the *Inquiries Act*, being Chapter 154 of the Revised Statutes of Canada, 1952. The Plaintiff asks leave to refer to the said Letters Patent and Order-in-Council at the trial of this action. The conduct of a judge of a Superior Court cannot be the subject of an inquiry under the *Inquiries Act* and, for this and other reasons, the Order-in-Council is ultra vires and void.

5. The Commissioner proceeded to make an Inquiry and held public hearings on eleven days during the months of March and April, 1966.

6. On August 11, 1966, the Commissioner made a report to His Excellency. The Plaintiff asks leave to refer to the said Report at the trial of this action.

7. In conducting the said Inquiry and in making the said Report, the Commissioner failed to act judicially, acted outside of, and in excess of, any jurisdiction which he possessed and failed to act in accordance with the principles of natural justice in the following and other respects:

(a) Instead of confining his Inquiry and Report to the matters into which he was by the Letters Patent directed to inquire, he entered upon inquiry as to irrelevant matters and made in his Report findings as to irrelevant matters and statements as to the character and personality of the Plaintiff which are damaging to him;.

(b) He introduced in his Report statements of fact as to which there was no evidence, drew improper conclusions from such statements of fact to the detriment of the Plaintiff and further he appended to his Report a lengthy document said to have been issued by the Law Society of Upper Canada containing statements and expressions of opinion damaging to the Plaintiff, which document was inadmissible in evidence, was not properly proved and had been issued without the Law Society having given the Plaintiff any opportunity to be heard;

(c) He made the Report in violation of the terms of Section 13 of the *Inquiries Act* in that at the conclusion of hearing testimony the Commissioner stated that he adjourned the hearing and reserved his opinion and thereafter he made his Report without giving to the Plaintiff reasonable, or any, notice of the charge or charges of misconduct which the Commissioner was of opinion had been established

and without allowing the Plaintiff full, or any, opportunity to be heard in person or by counsel in regard thereto;

(d) In such further and other respects as may appear from a reading of the said Letters Patent, the said Report and all records, proceedings, papers and transcripts of evidence relating to the said Inquiry.

8. The making and the existence of the said Report have caused and continue to cause injury and damage to the Plaintiff and infringe his rights to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit.

The Plaintiff claims as follows:

(a) A Declaration that the appointment of the said Commissioner was not authorized by the *Inquiries Act* and that consequently the said Report is null and void;

(b) A Declaration that, if the said Commissioner was validly appointed to hold an Inquiry and make a Report, which the Plaintiff denies, the said Report made by the Commissioner on August 11, 1966, should be removed into this Court to be quashed by reason of the matters set out in paragraph 7 of this Declaration;

(c) That a Writ of Certiorari be issued removing into this Court the said Report and all records, proceedings, papers and transcripts of evidence relating to the said Inquiry and to quash the said Report;

(d) His costs of this proceeding;

(e) Such further and other relief as the Plaintiff may be entitled to and as to this Court may seem meet.

The three questions of law that the parties have agreed to submit to the Court are the following:

1. Whether this Honourable Court has jurisdiction to issue a Writ of Certiorari against Her Majesty the Queen;
2. Whether this Honourable Court has jurisdiction to quash the report of the Royal Commission appointed by letters patent bearing date the 2nd day of March, 1966;
3. Whether this Honourable Court has jurisdiction to grant a declaration in the circumstances alleged in the Statement of Claim herein;

Before going any further, two observations are in order. The first relates to the prayer for relief in the plaintiff's declaration; the second concerns the questions submitted for preliminary determination.

A. *The prayer for relief.* At first sight, it would seem that subparas. (b) and (c) of the prayer for relief relate to the same remedy. In both these subparagraphs, the plaintiff seems to claim the issue of a writ of *certiorari*. However, as it is unlikely that the plaintiff actually wanted to claim the same relief twice, I think that subpara. (b) of the prayer for relief should not be construed literally. I will therefore assume that in subpara. (b) the plaintiff claims a declaration that the

Commissioner, for the reasons set out in para. 7 of the declaration, conducted his inquiry irregularly and that his report should be quashed.

B. *The questions submitted for determination.* When an application such as the present one is made, the Court is not bound to determine the questions submitted by the parties. Rule 474 of the *Federal Court Rules*, SOR/71-68, reads in part as follows:

> *Rule 474*(1) The Court may, upon application, if it deems it expedient so to do,
>
> (a) determine any question of law that may be relevant to the decision of a matter,

In the present case, I will not answer the first of the three questions submitted. In my view, it is not expedient to determine in this case whether the Court has jurisdiction to issue a writ of *certiorari* against Her Majesty the Queen. Even if the Court had that jurisdiction, it is my opinion, as I will mention later, that *certiorari* does not lie in this case.

I shall now turn to the two remaining questions.

1. *Has the Court jurisdiction to quash the report of the Royal Commission?*

The answer to this question is in the negative. The report of a Royal Commission does not have any legal effect. Once made, it is a mere document which, by the very nature of things, the Court cannot obliterate.

For the same reason, *certiorari* does not lie in this case. The Royal Commission had no power to make a decision and it is well established that *certiorari* only lies to quash something which is a determination or a decision: *R. v. Statutory Visitors to St. Lawrence Hospital, Caterham, Ex p. Pritchard*, [1953] 2 All E.R. 766; *R. v. Ontario Labour Relations Board, Ex p. Kitchener Food Market Ltd.* (1966), 57 D.L.R. (2d) 521, [1966] 2 O.R. 513; *The Queen v. Board of Broadcast Governors et al., Ex p. Swift Current Telecasting Co. Ltd.* (1962), 33 D.L.R. (2d) 449.

2. *Has the Court jurisdiction to grant a declaration in the circumstances alleged in the plaintiff's declaration?*

This question refers to the "jurisdiction" of the Court. The meaning of the term "jurisdiction", when applied to a Court of justice, was considered by Bankes, L.J., in *Guaranty Trust Co. of New York v. Hannay & Co.*, [1915] 2 K.B. 536 at p. 567:

> The term appears to be used in a double sense, sometimes as referring to a case where the matter in dispute is such that it is impossible for any Court, or sometimes for a particular Court, to entertain it; as for instance where a Court is asked to enforce an agreement which is made void by statute, or, as in *Barraclough v. Brown*, [1897] A.C. 615, where exclusive jurisdiction had been given by a statute to a Court other than that in which the application was made; and sometimes as referring to a case where the particular Court refused to entertain some matter in dispute on the ground that it was not matter proper or convenient for it to adjudicate upon.

In the present case the "jurisdiction" of the Court to grant declaratory relief, in the first sense of the term, is not challenged. It is common ground that in a proper case the Court has jurisdiction to grant declaratory relief in an action brought against the Crown or the Attorney-General. What is here in question is the "jurisdiction" of the Court in the second sense of that term. In that sense, it is frequently said, for instance, that the Court does not have the jurisdiction to make declarations on purely hypothetical issues. (See Zamir, *The Declaratory Judgment*, Stevens & Sons Ltd., 1962; *Mellstrom v. Garner et al.*, [1970] 2 All E.R. 9 at p. 10.)

The plaintiff, according to my interpretation of his declaration, seeks two declarations: first, that the appointment of the Commissioner was "*ultra vires*" and, second, that the Commissioner did not conduct the inquiry as he should.

Counsel for the defendant challenged the "jurisdiction" of the Court to make these declarations on the ground that they would have no effect. The inquiry was conducted and the report was made many years ago. In these circumstances the question of the validity of the appointment of the Commissioner or of the irregularities he might have committed in the conduct of the inquiry are purely academic. The Court is empowered, said counsel, to grant declaratory relief; but in the present case the making of the declarations sought would not afford any relief to the plaintiff. In support of his submission, counsel referred me to the following authorities: *Guaranty Trust Co. of New York v. Hannay & Co.*, [1915] 2 K.B. 536; *Maerkle et al. v. British & Continental Fur Co., Ltd.*, [1954] 3 All E.R. 50; *Hugh W. Simmons Ltd. v. Foster*, [1955] 2 D.L.R. 433, [1955] S.C.R. 324; *Charleston et al. v. MacGregor et al.* (1957), 11 D.L.R. (2d) 78, 23 W.W.R. 353, 76 C.R.T.C. 208.

Counsel for the plaintiff retorted that the declarations sought would greatly benefit the plaintiff. He stressed the fact that, as alleged in the declaration, the plaintiff's reputation had been greatly damaged by the report of the Commissioner. A declaration that the Commissioner had conducted his inquiry in disregard of the principles of natural justice would,

counsel said, contribute to restore the plaintiff's reputation. As to the declaration concerning the invalidity of the Commissioner's appointment it would also, argued counsel, benefit the plaintiff since he thought it likely that such a declaration would incite the authorities to compensate the plaintiff for the damage suffered by him as a consequence of the inquiry; counsel also said that it was in the public interest that it be known that the conduct of a Judge of a superior Court cannot be the subject of an inquiry under the *Inquiries Act*, R.S.C. 1952, c. 154 [now R.S.C. 1970, c. I-13].

These contradictory submissions can be briefly summarized. Counsel for the defendant argued that the declarations sought could not be made because they would not have any legal effect. Counsel for the plaintiff contended that these declarations could be made because they would, from a purely practical point of view, be beneficial to the plaintiff.

The question to be answered is therefore whether this Court has jurisdiction to make a declaration on a legal issue in a case where the declaration would be devoid of legal effects but would likely have some practical effects. This question was considered by Lord Denning, M.R., and by Salmon, L.J., in *Merricks et al. v. Nott-Bower et al.*, [1964] 1 All E.R. 717. The two plaintiffs in that case were police officers. In 1957, following a report made by an inspector, they had been transferred from one subdivision of the metropolitan police to another. In 1963, more than six years after their transfer, they brought an action seeking declarations that the transfers had been made without regard to the Police Regulations and without regard to the principles of natural justice. The defendants moved to strike out the statement of claim on the ground that the relief claimed by way of declarations was of no effect. The Court of Appeal dismissed this motion. The following observations made by the Master of Rolls at p. 721 deserve to be cited:

> Then it is said: Accepting that view, what is the relief claimed? All that is claimed is a series of declarations, all of them to the effect that the transfer was made without regard to the regulations and without regard to the principles of natural justice. It is asked: What use can such declarations be at this stage, when the transfer took place six and a half years ago? What good does it do now? There can be no question of re-opening the transfers. The plaintiffs have been serving in these other divisions all this time. They cannot be transferred back to Peckham. On this point we have been referred to a number of cases which show how greatly the power to grant a declaration has been widened in recent years. If a real question is involved, which is not merely theoretical, and on which the court's decision gives practical guidance, then the court in its discretion can grant a declaration. A good instance is the recent case on the football transfer system decided by Wilberforce, J., *Eastham v. Newcastle United Football Club. Ltd.* [1963] 3 All E.R. 139. Counsel for the plaintiffs said that, in this particular case, the declaration might be of some use in removing a slur which was cast against the plaintiffs by the transfer. He also put it on the wider ground of the public interest that the power to transfer can only be used in the interests of administrative efficiency and not as a form of punishment. He said that it would be valuable for the court so to declare. Again on this point, but without determining the matter, it seems to me that there is an arguable case that a declaration might serve some useful purpose. We cannot at this stage say that the claim should be rejected out of hand.

As to Salmon, L.J., he had this to say on the same subject at p. 724:

> It is said: Even if the plaintiffs' rights under the regulations were infringed, what good could the remedies which are claimed by the plaintiffs do them? Can they benefit by these declarations? If a plaintiff seeks some declaration in which he has a mere academic interest, or one which can fulfil no useful purpose, the court will not grant the relief claimed. In this case, however, again without deciding the point in any way, it seems to me clearly arguable that, if the declarations are made, they might induce those in authority to consider the plaintiffs' promotion, there being some evidence that the alleged transfers by way of punishment have prejudiced, and whilst they remain will destroy, the plaintiffs' chances of promotion. Again, it has been vigorously argued by counsel on behalf of the defendants that, even if the transfers had been used by way of punishment, still there was no breach of the regulations since the regulations confer an absolute unfettered power to transfer for any reason. If this declaration were to be made, it would make plain for the benefit of the whole Metropolitan Police Force that, contrary to the argument addressed to this court on behalf of the defendant, the present Commissioner, the regulations do in law prohibit a transfer by way of punishment.

From this, I infer that the Court has the jurisdiction to make a declaration which, though devoid of any legal effect, would, from a practical point of view, serve some useful purpose.

For these reasons, I am of the opinion that, in the circumstances alleged in the plaintiff's declaration, the Court in its discretion could grant the declaration sought.

The costs of this application shall be in the cause.

Order accordingly.

[1] McIntyre, J.: This appeal involves consideration of the term "a court of competent jurisdiction" in s. 24(1) of the **Canadian Charter of Rights and Freedoms** and as well of the procedure to be employed in seeking a remedy under that section.

[2] My brother Lamer in his reasons for judgment has set out the facts regarding the history of the proceedings and events before the Preliminary hearing commenced and I need not repeat them here. I will, however, briefly review the proceedings which took place in the various courts leading up to the appeal to this Court. At the commencement of the preliminary hearing before Judge Baker in the Provincial Court (Criminal Division) for the County of Middlesex, and before any evidence was heard, a preliminary motion was made by the accused, the appellant before us, on two bases, namely, that the proceedings by reason of delay amounted to an abuse of process and should on that account be stayed, and that the appellant's right under s. 11(b) of the **Charter**, to be tried within a reasonable time, had been violated and the proceedings were amenable to a remedy under s. 24(1). Judge Baker received evidence by affidavit and held, that he had no jurisdiction to deal with the common law concept of abuse of process but that he, sitting as a judge conducting a preliminary hearing, was a court of competent jurisdiction under s. 24(1) of the **Charter**. He concluded that s. 24(1) raised a substantive matter and was not, therefore, retrospective. He dismissed the motion.

[3] A motion was then made in the motions court in London before Osborne, J. The motion sought an order in the nature of prohibition to prohibit Judge Baker, or any other provincial court judge, from proceeding with the preliminary hearing and it sought as well an order in the nature of certiorari quashing the information, together with a remedy under s. 24(1) of the **Charter** alleging an infringement of the accused's rights under s. 11(b) of the

[1] M. le juge McIntyre: Le présent pourvoi requiert l'examen de l'expression "un tribunal compétent" qui figure au par. 24(1) de la **Charte canadienne des droits et libertés** et celle de la procédure à suivre pour obtenir une réparation en vertu de cette disposition.

[2] Puisque mon collègue le juge Lamer, dans ses motifs de jugement, fait l'historique des procédures et des événements antérieurs à l'enquête préliminaire, point n'est besoin de le refaire ici. Je me propose cependant de passer brièvement en revue les procédures qui ont eu lieu devant les différentes juridictions jusqu'à ce pourvoi. Au début de l'enquête préliminaire devant le juge Baker de la Cour provinciale du comté de Middlesex (Division criminelle) et avant qu'aucune preuve n'ait été entendue, l'accusé, l'appelant en cette Cour, a présenté une requête préliminaire comportant deux allégations: selon la première, en raison du délai, les procédures étaient abusives et devaient en conséquence être suspendues, et, selon la seconde, il y avait eu atteinte au droit conféré à l'appelant par l'al. 11b) de la **Charte** d'être jugé dans un délai raisonnable, ce qui donnait ouverture à une réparation en vertu du par. 24(1). Sur la foi des affidavits produits devant lui, le juge Baker a conclu qu'il n'avait pas compétence pour examiner le concept des procédures abusives en **common law**, mais que, en tant que juge à l'enquête préliminaire, il était un tribunal compétent au sens du par. 24(1) de la **Charte**. Concluant que le par. 24(1) soulevait une question de fond et n'avait donc pas d'effet rétroactif, le juge Baker a rejeté la requête.

[3] On a ensuite présenté au juge Osborne de la cour des requêtes de London une requête visant à obtenir une ordonnance de la nature d'une prohibition qui aurait empêché le juge Baker ou tout autre juge de la cour provinciale de continuer l'enquête préliminaire. La requête sollicitait également, en plus d'une ordonnance de la nature d'un certiorari qui aurait annulé la dénonciation, une réparation en vertu du par. 24(1) de la **Charte** au

Charter.

Osborne, J., expressed the view that Judge Baker, as a preliminary hearing judge, was a "court of competent jurisdiction" under s. 24(1) of the **Charter**. He nevertheless concluded on a consideration of the merits that there had been no unreasonable delay. He dismissed the motion.

[4] An appeal was taken to the Ontario Court of Appeal under s. 719 of the **Criminal Code**. The appeal under that section could apply only to the prerogative portion of the case, that is, the refusal of the application for an order of prohibition and certiorari. The Court of Appeal declined to express an opinion as to whether Judge Baker, as a preliminary hearing judge, was a court of competent jurisdiction, but they were not persuaded that Osborne, J., was in error on the merits and they dismissed the appeal.

[5] In the result, as these proceedings stand prior to the resolution of this appeal, the matter is to be returned to the provincial court for the completion of the preliminary. Since I have come to the conclusion that both Judge Baker and Mr. Justice Osborne reached the right result (though as will appear in my view for the wrong reasons), a simple dismissal of the appeal with nothing further would dispose of the matter. The question of a "court of competent jurisdiction" under s. 24(1) of the **Charter** is, however, one of importance and one which has given concern to courts at all levels in the country. While it is generally wise not to deal with issues not directly raised, it appears to me that the question must be considered in this appeal and dealt with.

[6] To begin with, it must be recognized that the jurisdiction of the various courts of Canada is fixed by the Legislatures of the various provinces and by the Parliament of Canada. It is

motif qu'on aurait porté atteinte aux droits de l'accusé garantis par l'al. 11b) de la **Charte**.

Selon le juge Osborne, le juge Baker, en sa qualité de juge à l'enquête préliminaire, constituait un "tribunal compétent" au sens du par. 24(1) de la **Charte**. Un examen au fond l'a néanmoins mené à la conclusion qu'il n'y avait pas eu de délai déraisonnable et il a rejeté la requête.

[4] Appel a été interjeté devant la Cour d'appel de l'Ontario en vertu de l'art. 719 du **Code criminel**. Or, l'appel fondé sur cette disposition ne pouvait attaquer que le refus d'accorder des brefs de prérogative, c'est-à-dire le refus d'accorder la prohibition et le certiorari demandés. La Cour d'appel s'est abstenue d'exprimer une opinion sur la question de savoir si le juge Baker, en tant que juge à l'enquête préliminaire, était un tribunal compétent, mais elle n'a pas été convaincue que le juge Osborne avait commis une erreur sur le fond. L'appel a donc été rejeté.

[5] Par conséquent, sous réserve de ce qui pourra être décidé en cette Cour, l'affaire doit être renvoyée à la cour provinciale pour que l'enquête préliminaire puisse être menée à terme. Étant donné ma conclusion que le juge Baker et le juge Osborne ont rendu la bonne décision (quoique, à mon avis, comme on va pouvoir le constater, pour les mauvaises raisons), il suffirait simplement en l'espèce de rejeter le pourvoi sans en dire davantage. Toutefois, la question de savoir ce qui constitue un "tribunal compétent" au sens du par. 24(1) de la **Charte** est importante et a préoccupé tous les degrés de juridiction du pays. Quoiqu'il soit en règle générale sage de ne pas traiter de points qui ne sont pas directement en litige, il me semble qu'en l'espèce il faut examiner et trancher la question.

[6] En premier lieu, on doit reconnaître que la compétence des différentes juridictions canadiennes est fixée par les législatures des provinces et par le Parlement du Canada.

not for the judges to assign jurisdiction in respect of any matters to one court or another. This is wholly beyond the judicial reach. In fact, the jurisdictional boundaries created by Parliament and the Legislatures are for the very purpose of restraining the courts by confining their actions to their allotted spheres. In s. 24(1) of the **Charter** the right has been given, upon the alleged infringement or denial of a **Charter** right, to apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. The **Charter** has made no attempt to fix or limit the jurisdiction to hear such applications. It merely gives a right to apply in a court which has jurisdiction. It will be seen as well that it prescribes no remedy, but leaves it to the court to find what is appropriate and just in the circumstances.

Il n'appartient nullement aux juges d'attribuer à tel ou tel tribunal compétence relativement à certaines questions. Cette fonction se trouve complètement en dehors du ressort des tribunaux. De fait le Parlement et les législatures ont délimité la compétence des tribunaux pour précisément les tenir en bride en limitant leurs actions aux domaines qui sont les leurs. Le paragraphe 24(1) de la **Charte** confère le droit, en cas de violation ou de négation alléguée d'un droit garanti par la **Charte**, de s'adresser à un tribunal compétent pour obtenir la réparation que ce tribunal estime convenable et juste eu égard aux circonstances. La **Charte** ne fait aucune tentative de fixer ou de circonscrire la compétence pour entendre de telles demandes. Elle ne fait qu'accorder un droit de s'adresser à un tribunal compétent. Nous verrons en outre qu'elle ne prescrit pas la réparation, mais laisse au tribunal le soin de déterminer ce qui est convenable et juste eu égard aux circonstances.

[7] The questions then arise as to which of the courts are courts of competent jurisdiction within the meaning of s. 24(1) of the **Charter** and what is the nature of the remedy or remedies which may be given. In attacking these problems, that of jurisdiction and that of remedy, the courts are embarking on a novel exercise. There is little, if any, assistance to be found in decided cases. The task of the court will simply be to fit the application into the existing jurisdictional scheme of the courts in an effort to provide a direct remedy, as contemplated in s. 24(1). It is important, in my view, that this be borne in mind. The absence of jurisdictional provisions and directions in the **Charter** confirms the view that the **Charter** was not intended to turn the Canadian legal system upside down. What is required rather is that it be fitted into the existing scheme of Canadian legal procedure. There is no need for special procedures and rules to give it full and adequate effect.

[7] Il faut donc se demander quels sont les tribunaux compétents au sens du par. 24(1) de la **Charte** et quelle est la nature de la réparation ou des réparations qui pourront être accordées. En abordant le problème de la compétence et celui de la réparation appropriée, les tribunaux font oeuvre de pionniers. La jurisprudence ne leur est que de peu pour ne pas dire d'aucun secours. Leur tâche consistera simplement à insérer la demande dans le régime existant de compétence des tribunaux afin d'essayer de fournir une réparation directe conformément au par. 24(1). Il s'agit là, selon moi, d'un point qu'il ne faut pas perdre de vue. L'absence dans la **Charte** de dispositions et de directives touchant la compétence confirme le point de vue selon lequel celle-ci n'était pas censée provoquer le bouleversement du système judiciaire canadien. Au contraire, elle doit s'insérer dans le système actuel de la procédure judiciaire canadienne. Point n'est besoin de procédures et de règles particulières pour lui donner son plein et entier effet.

[8] A great many **Charter** questions will arise in criminal cases such as the one before us. My comments will be confined to such cases. The **Criminal Code** sets up the framework for the disposition of criminal matters with respect to both indictable and summary conviction offences. A summary conviction court, as defined in s. 720 of the **Code**, presided over by a justice or magistrate as defined in s. 2 of the **Code**, is provided for the disposition of summary conviction matters at first instance. For indictable offences, the **Code** creates both a superior court of criminal jurisdiction (s. 2), which has jurisdiction to try any indictable offence (s. 426), and a court of criminal jurisdiction, as defined in s. 2 of the **Code**, which has a lesser jurisdiction in the trial of indictable offences and which includes a magistrate or judge acting under Part XVI of the **Code**. These courts, together with the summary conviction courts, deal with all criminal proceedings under the **Criminal Code** at first instance. In addition, where an accused charged with an indictable offence elects trial other than before a magistrate, a preliminary hearing is held in accordance with Part XV of the **Code**. This occurred in the case at bar. Faced with this choice of courts, where does the aggrieved person seek a s. 24(1) remedy?

Magistrate sitting at preliminary hearing

[9] The preliminary hearing magistrate, now ordinarily a provincial court judge, finds his jurisdiction in Part XV of the **Criminal Code** of Canada. He is given jurisdiction to conduct the inquiry and in the process he must hear the evidence called for both parties and all cross-examination. He is given procedural powers under ss. 465 and 468 of the **Code**, including a power to direct the trial of an issue as to fitness to stand trial. His principal

[8] Un grand nombre de questions relatives à la **Charte** se poseront dans des affaires criminelles comme celle dont nous sommes présentement saisis. Mes observations se limitent aux affaires de ce genre. Le **Code criminel** prévoit les modalités de règlement des affaires criminelles, qu'il s'agisse d'actes criminels ou d'infractions punissables sur déclaration sommaire de culpabilité. Une cour des poursuites sommaires, terme défini à l'art. 720 du **Code**, présidée par un juge de paix ou un magistrat au sens de la définition figurant à l'art. 2 du **Code**, a été constituée pour connaître en première instance des infractions punissables sur déclaration sommaire de culpabilité. Pour les actes criminels, le **Code** crée une cour supérieure de juridiction criminelle (art. 2) ayant compétence pour juger tout acte criminel (art. 426) ainsi qu'une cour de juridiction criminelle, définie à l'art. 2 du **Code**, qui est investie d'une compétence moindre à l'égard des actes criminels et qui comprend un magistrat ou un juge agissant sous l'autorité de la Partie XVI du **Code**. Ces tribunaux, ainsi que les cours des poursuites sommaires, traitent en première instance de toutes les procédures criminelles intentées en vertu du **Code criminel**. De plus, lorsqu'une personne accusée d'un acte criminel choisit d'être jugée autrement que par un magistrat, une enquête préliminaire a lieu conformément à la Partie XV du **Code**. C'est ce qui est arrivé en l'espèce. Devant un tel choix de tribunaux, auquel la personne lésée peut-elle s'adresser pour obtenir une réparation en vertu du par. 24(1)?

Le magistrat à l'enquête préliminaire

[9] La compétence du magistrat à l'enquête préliminaire (généralement de nos jours un juge de la cour provinciale) découle de la Partie XV du **Code criminel** du Canada. Il a compétence pour mener l'enquête et, ce faisant, il est tenu d'entendre la preuve produite par les deux parties ainsi que tous les contre-interrogatoires. Ses pouvoirs en matière de procédure, conférés par les art. 465 et 468 du **Code**, comprennent le pouvoir d'ordon-

powers are conferred in s. 475. After all the evidence has been taken, he may commit the accused for trial if, in his opinion, the evidence is sufficient, or discharge the accused if, in his opinion, upon the whole of the evidence no sufficient case is made out to put the accused on trial. He has no jurisdiction to acquit or convict, nor to impose a penalty, nor to give a remedy. He is given no jurisdiction which would permit him to hear and determine the question of whether or not a **Charter** right has been infringed or denied. He is, therefore, not a court of competent jurisdiction under s. 24(1) of the **Charter**. It is said that he should be a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2). In my view, no jurisdiction is given to enable him to perform this function. He can give, as I have said, no remedy. Exclusion of evidence under s. 24(2) is a remedy, its application being limited to proceedings under s. 24(1). In my view, the preliminary hearing magistrate is not therefore a court of competent jurisdiction under s. 24(1) of the **Charter**, and it is not for courts to assign jurisdiction to him. I might add at this stage that it would be a strange result indeed if the preliminary hearing magistrate could be said to have the jurisdiction to give a remedy, such as a stay under s. 24(1), and thus bring the proceedings to a halt before they have started and this in a process from which there is no appeal.

ner que soit tranchée la question de savoir si l'accusé est en état de subir son procès. L'article 475 lui attribue ses principaux pouvoirs. Lorsque toute la preuve a été recueillie, il peut renvoyer l'accusé pour subir son procès s'il estime que cette preuve est suffisante ou encore libérer l'accusé s'il juge la preuve insuffisante pour justifier le renvoi à procès. Il n'a pas compétence pour prononcer l'acquittement ou pour déclarer coupable, ni pour imposer une peine, ni encore pour accorder une réparation. Il n'a pas non plus la compétence qui l'autoriserait à entendre et à juger la question de savoir s'il y a eu violation ou négation d'un droit garanti par la **Charte**. Il s'ensuit donc qu'il n'est pas un tribunal compétent au sens du par. 24(1) de la **Charte**. Or, on soutient qu'il devrait l'être pour écarter des éléments de preuve en vertu du par. 24(2). Selon moi, on ne lui a pas attribué la compétence pour exercer cette fonction. Il n'est pas habilité, je le répète, à accorder de réparation. L'exclusion d'éléments de preuve en vertu du par. 24(2) est une réparation qui ne peut être obtenue que dans le cadre d'une instance visée au par. 24(1). À mon sens, le magistrat à l'enquête préliminaire n'est donc pas un tribunal compétent au sens du par. 24(1) de la **Charte** et il n'appartient à aucun tribunal de lui confier la compétence. Il convient d'ajouter ici que le résultat serait bien étrange si l'on pouvait dire que le magistrat à l'enquête préliminaire avait compétence pour accorder une réparation, telle une suspension des procédures en vertu du par. 24(1), arrêtant ainsi les procédures avant même qu'elles ne commencent, et ce par une décision non susceptible d'appel.

Courts exercising criminal jurisdiction other than the provincial superior court

[10] These courts, which include by definition a magistrate under Part XVI of the **Criminal Code** and, for purposes of this discussion, magistrates and summary conviction courts, will deal with by far the greatest number of criminal cases. For practical purposes

Les tribunaux autres que la cour supérieure provinciale ayant compétence en matière criminelle

[10] Ce sont ces tribunaux, qui englobent par définition un magistrat visé par la Partie XVI du **Code criminel** et, aux fins de la présente analyse, les magistrats et les cours de poursuites sommaires, qui seront saisis du plus grand nombre d'affaires

most of the criminal work at first instance is done in these courts; therefore, most of the applications for a remedy under s. 24(1) of the **Charter** will be made to them. These courts will be courts of competent jurisdiction, where they have jurisdiction conferred by statute over the offences and persons and power to make the orders sought. It is to be hoped that trial judges will devise, as the circumstances arise, imaginative remedies to serve the needs of individual cases. Such remedies must remain, however, subject to constitutional restraint, that is, they must remain within the ambit of criminal powers. A claim for a remedy under s. 24(1) arising in the course of the trial will fall within the jurisdiction of these courts as a necessary incident of the trial process. There will be an exception where a claim for prerogative relief in the nature of prohibition, certiorari, mandamus or other prerogative matter is raised. Such a claim would fall within the sole jurisdiction of the superior court. Where such relief is sought, or where a claim for relief, if granted, would involve interference in proceedings before another court, there would be no jurisdiction in the non-superior court of criminal jurisdiction.

criminelles. Du point de vue pratique, la plupart des affaires criminelles seront entendues en première instance par ces tribunaux-là. Par conséquent, la majorité des demandes de réparation fondées sur le par. 24(1) de la **Charte** leur seront adressées. Ces tribunaux constitueront des tribunaux compétents chaque fois que la loi leur confère compétence à l'égard des infractions et des personnes en question et les autorise à rendre les ordonnances demandées. Il est à espérer que les juges du procès sauront, le cas échéant, faire preuve d'imagination en inventant des réparations adaptées aux besoins de chaque cas. Toutefois, ces réparations n'en demeurent pas moins assujetties aux restrictions imposées par la **Constitution**, c'est-à-dire qu'elles doivent relever du pouvoir en matière criminelle. Une demande de réparation en vertu du par. 24(1) présentée au cours du procès sera du ressort de ces tribunaux en tant qu'accessoire nécessaire du procès. Il y a cependant une exception lorsqu'on a recours aux brefs de prérogative de la nature d'une prohibition, d'un certiorari, d'un mandamus, ou autre moyen de prérogative. Toute demande de ce genre relève de la compétence exclusive de la cour supérieure. Quand une telle réparation est sollicitée ou qu'une demande de redressement, si on y faisait droit, entraînerait une intervention dans des procédures devant un autre tribunal, seule la cour supérieure de juridiction criminelle a compétence.

Provincial superior court

[11] In each province and in the territories the superior court has been created by statute. This court has generally been given all the historic jurisdiction and power of the high court in England and in all matters arising between the Crown and subject and subject and subject. The jurisdiction of the superior court is derived from the creating statutes and the common law and from its nature as a superior court, a court in which jurisdiction is generally presumed. This court will always be a court of competent jurisdiction under s. 24(1)

La cour supérieure provinciale

[11] Chaque province et les territoires sont de par la loi dotés d'une cour supérieure. D'une manière générale cette cour a hérité de la compétence et du pouvoir historiques de la Haute Cour d'Angleterre relativement à tous les litiges entre Sa Majesté et ses sujets ainsi qu'entre sujets. La compétence de la cour supérieure dérive des textes législatifs qui l'ont créée, de la **common law** et de sa qualité de cour supérieure, tribunal dont la compétence est généralement présumée. Il s'agit d'une cour qui sera toujours un tribunal compétent au

of the **Charter** at first instance, that is to say, in cases where the issue arises in matters proceeding before it or where the proceeding originated in that court because of the absence of another forum with jurisdiction. The superior court will, of course, continue to have jurisdiction as a reviewing court where prerogative claims are advanced. The superior court jurisdiction will not displace that of other courts of limited jurisdiction. Considerations of convenience, economy and time will dictate that remedies under s. 24(1) will ordinarily be sought in the courts where the issues arise. Save for cases originating and proceeding in the superior court, resort to it will be necessary only where prerogative relief is sought.

Procedure

[12] Problems have arisen in connection with the procedure to be followed relating to **Charter** remedies and some confusion has existed in various courts. As has been said on many occasions, the **Charter** was not enacted in a vacuum. It was created to form a part -- a very important part -- of the Canadian legal system and, accordingly, must fit into that system. It will be noted at once that s. 24(1) gives no jurisdictional or procedural guide. This absence makes it clear that the procedures presently followed must be adapted and used for the accommodation of applications for relief under s. 24(1).

Pre-trial motions

[13] There will be occasions when it will be advisable to move for relief under s. 24(1) of the **Charter** before trial. In my view, however, it is by no means necessary to erect a new procedural scheme for this purpose. The pre-trial motion and its near relative,

sens du par. 24(1) de la **Charte** en première instance, c'est-à-dire dans des affaires où la question litigieuse est soulevée dans le cadre d'une instance devant cette cour ou lorsque la procédure a été engagée devant elle parce qu'il n'y avait pas d'autre tribunal compétent. Bien entendu, la cour supérieure continuera d'avoir compétence en matière de recours de prérogative. La compétence de la cour supérieure ne viendra pas supplanter la compétence limitée d'autres tribunaux. Des considérations de commodité, d'économie et de temps feront que les réparations demandées en vertu du par. 24(1) le seront normalement aux tribunaux devant lesquels les questions ont pris naissance. Mis à part les instances introduites devant la cour supérieure et instruites par elle, il ne sera nécessaire de s'adresser à elle que pour obtenir un bref de prérogative.

La procédure

[12] Des problèmes se sont posés quant à la procédure à suivre en ce qui concerne les réparations offertes par la **Charte** et une certaine confusion existe devant différentes juridictions. Comme il a été souligné à maintes reprises, la **Charte** n'a pas été adoptée dans le vide. Elle a été créée pour former une partie, une partie très importante, du système juridique canadien et, en conséquence, elle doit s'insérer dans ce système. On peut constater immédiatement que le par. 24(1) ne contient pas d'indications relatives à la compétence ou à la procédure. Il découle nettement de cette omission que les procédures présentement suivies doivent être adaptées et appliquées aux demandes de réparation fondées sur le par. 24(1).

Les requêtes préalables au procès

[13] Dans certains cas, il sera souhaitable de présenter une demande de réparation en vertu du par. 24(1) de la **Charte** avant le procès. Selon moi, toutefois, il n'est pas du tout nécessaire de créer à cette fin un nouveau régime de procédure. La requête préa-

the preliminary motion or preliminary objection, are well-known in the law and may be employed in seeking s. 24(1) relief once an indictment has been preferred. Pre-trial motions may be made to quash the indictment for defect in substance or in form (s. 510 of the **Criminal Code**), to sever counts in an indictment (s. 520(3) of the **Code**), for particulars of the indictment (s. 516 of the **Code**), and to sever trials of co-accused (s. 520(3) of the **Code**). The general practice of the courts has been to encourage such applications to be brought early so that preliminary matters may be disposed of at the outset, particularly when they are of such nature that they may affect the validity of the proceedings. This principle has been given statutory recognition in s. 529 of the **Code**, which provides in ss. (1) that an objection to a count of an indictment for a defect apparent on its face shall be taken by a motion to quash before plea and thereafter only by leave of the court. A similar provision relating to summary conviction matters was found in s. 732 of the **Code**. This subject is conveniently dealt with in **Canadian Criminal Procedure** (4th Ed.), Salhany, at pp. 209-210. In my view, no great difficulty will be encountered in including in the legal armory a pre-trial motion for s. 24(1) **Charter** relief, subject to the existing practice for other motions. It may be that occasions will arise where a trial judge may find it necessary in dealing with a s. 24(1) application to receive viva voce evidence on the question raised to enable him to dispose of the application. In my view, it would be within the discretionary power of a trial judge to follow this practice where, in his view, it was necessary. For the purpose of a pre-trial motion for s. 24(1) relief, the claimant may institute his motion at any time before plea and at any time after he has received or become entitled to receive the indictment or information. Where a court has not been ascertained for trial by committal, election, summons, preferment or arraignment, the application could be made to the superior court for prerogative relief.

lable ainsi que la procédure voisine, la requête préliminaire ou le moyen préliminaire, sont bien connues en droit et on peut y avoir recours pour demander une réparation en vertu du par. 24(1) dès qu'un acte d'accusation a été présenté. Des requêtes préalables peuvent tendre à obtenir l'annulation de l'acte d'accusation pour un vice de fond ou de forme (art. 510 du **Code criminel**), à obtenir un procès distinct pour chaque chef mentionné dans un acte d'accusation (par. 520(3) du **Code**), à obtenir des détails relatifs à l'acte d'accusation (art. 516 du **Code**) et à obtenir des procès distincts pour chaque coaccusé (par. 520 (3) du **Code**). En règle générale, les tribunaux encouragent les parties à présenter rapidement ces demandes afin que les questions préliminaires puissent être réglées dès le début, surtout lorsque celles-ci sont de nature à pouvoir vicier les procédures. Ce principe est reconnu par la loi à l'art. 529 du **Code**, qui, à son par. (1), porte qu'une objection à un des chefs d'un acte d'accusation, pour un vice de forme apparent à sa face même, doit être présentée par requête en annulation, avant le plaidoyer, et, par la suite, seulement sur permission de la cour. Une disposition analogue relative aux affaires sommaires figure à l'art. 732 du **Code**. On trouve une étude utile de ce sujet dans **Canadian Criminal Procedure** (4th Ed.), Salhany, aux pp. 209 et 210. À mon avis, il n'y aura pas de difficulté majeure à inclure dans l'arsenal juridique une requête préalable visant à obtenir une réparation en vertu du par. 24(1) de la **Charte**, requête qui serait assujettie à l'usage présentement applicable aux autres requêtes. Il se peut qu'un juge du procès, saisi d'une demande fondée sur le par. 24(1), puisse parfois trouver nécessaire de recevoir des témoignages de vive voix sur la question soulevée afin d'être en mesure de statuer sur la demande. À mon avis, le juge du procès jouit du pouvoir discrétionnaire d'agir ainsi chaque fois qu'il l'estime nécessaire. L'appelant peut présenter sa requête préalable visant à obtenir une réparation en vertu du par. 24(1) à n'im-

porte quel moment avait le plaidoyer et après qu'il a reçu ou qu'il est en droit de recevoir l'acte d'accusation ou la dénonciation. Lorsque le tribunal où le procès aura lieu n'a pas été établi par le renvoi à procès, par l'exercice d'un choix, par sommation, par la présentation d'un acte approprié ou par interpellation, la demande de bref de prérogative pourrait être adressée à la cour supérieure.

Appeals

[14] Criminal appeals by a person convicted of an indictable offence are provided for in the **Criminal Code** in s. 603 to the Court of Appeal, in ss. 618 and 620 to the Supreme Court of Canada, and in s. 719 in respect of the prerogative matters involving mandamus, certiorari or prohibition. It has long been settled law that there is no right of appeal in criminal matters, save as provided by statute, and the **Code** in s. 602 reinforces this proposition by providing that "No proceedings other than those authorized by this Part [Part XVIII -- appeals, indictable offences] and Part XXIII [extraordinary remedies -- certiorari, habeas corpus, mandamus and prohibition] shall be taken by way of appeal in proceedings in respect of indictable offences".

Les appels

[14] Le **Code criminel** prévoit qu'une personne déclarée coupable d'un acte criminel peut interjeter appel. En effet, à l'art. 603 il s'agit d'appels à la Cour d'appel; les art. 618 et 620 autorisent les pourvois à la Cour suprême du Canada et l'art. 719 porte sur des appels en matière de mandamus, de certiorari ou de prohibition. Il est depuis longtemps bien établi en droit qu'il n'y a aucun droit d'appel en matière pénale, sauf dans la mesure où un texte législatif le prévoit: l'art. 602 du **Code** vient renforcer cette proposition en prévoyant que "Nulle procédure autre que celles qui sont autorisées par la présente Partie [Partie XVIII - appels, actes criminels] et la Partie XXIII [recours extraordinaires - certiorari, habeas corpus, mandamus et prohibition] ne doit être intentée par voie d'appel dans des procédures concernant des actes criminels".

[15] Again, it must be observed that the **Charter** is silent on the question of appeals and the conclusion must therefore be that the existing appeal structure must be employed in the resolution of s. 24(1) claims. Since the **Charter** has conferred a right to seek a remedy under the provisions of s. 24(1) and since claims for remedy will involve claims alleging the infringement of basic rights and fundamental freedoms, it is essential that an appellate procedure exist. There is no provision in the **Code** which provides a specific right to appeal against the granting, or the refusal, of a **Charter** remedy under s. 24(1), but appeals are provided for which involve questions of law and fact. The **Charter**, forming part

[15] Il faut encore souligner que la **Charte** est muette sur la question des appels et on doit donc conclure que c'est le système actuel des appels qui doit servir au règlement de demandes fondées sur le par. 24(1). Puisque la **Charte** confère un droit de demander une réparation en vertu du par. 24(1) et que de telles demandes comporteront des allégations de violation de libertés et de droits fondamentaux, l'existence d'une procédure d'appel est indispensable. Aucune disposition du **Code** ne prévoit expressément un droit d'en appeler d'une décision accordant ou refusant une réparation visée par le par. 24(1) de la **Charte**, mais des appels sur des questions de droit et de fait sont toutefois autorisés. La

of the fundamental law of Canada, is therefore covered and the refusal of a claim for **Charter** relief will be appealable by a person aggrieved as a question of law, as will be the granting of such relief by the Crown. The appeal will follow the normal, established procedure. When the trial is completed, the appeal may be taken against the decision or verdict reached and the alleged error in respect of the claim for **Charter** relief will be a ground of appeal.

[16] The question has been raised as to whether there can be something in the nature of an interlocutory appeal in which a claimant for relief under s. 24(1) of the **Charter** may appeal immediately upon a refusal of his claim and before the trial is completed. It has long been a settled principle that all criminal appeals are statutory and that there should be no interlocutory appeals in criminal matters. This principle has been reinforced in our **Criminal Code** (s. 602 (supra)) prohibiting procedures on appeal beyond those authorized in the **Code**. It will be observed that interlocutory appeals are not authorized in the **Code**. The question was the subject of the judgment of the Ontario Court of Appeal in **R. v. Morgentaler, Smoling and Scott** (1984), 6 O.A.C. 53; 41 C.R. (3d) 262. Brooke, J.A., wrote the judgment of the court (Brooke, Lacourciere and Tarnopolsky, JJ.A.) and concluded that interlocutory appeals in respect of refusals of **Charter** remedies under s. 24(1) were not open. In that case the accused, who were charged with conspiracy to procure an illegal abortion, before trial brought a motion to quash or stay the indictment, in the form of a claim that the proceedings were an abuse of process, alleging that s. 251 of the **Code** was contrary to the **Canadian Charter of Rights and Freedoms** and the **Canadian Bill of Rights** and other non-**Charter** relief. The motion was refused by the trial judge and the accused appealed before the trial was completed. The Court of Appeal quashed

Charte en tant que composante du droit fondamental du Canada n'y échappe donc pas et, de même qu'une personne lésée pourra porter en appel le rejet d'une demande de réparation en vertu de la **Charte** en tant que question de droit, de même Sa Majesté pourra interjeter appel si cette réparation est accordée. L'appel se déroulera selon la procédure normale établie à cette fin. A l'issue du procès, il sera loisible de faire appel de la décision ou du verdict et l'erreur qui aurait été commise relativement à la demande de réparation en vertu de la **Charte** constituera un moyen d'appel.

[16] On a posé la question de savoir s'il peut y avoir quelque chose de la nature d'un appel interlocutoire grâce auquel le requérant en vertu du par. 24(1) de la **Charte** pourrait, en cas de rejet de sa demande, en appeler immédiatement et avant la fin du procès. Selon un principe bien établi, les seuls appels permis en matière criminelle sont prévus par la loi et il ne devrait pas y avoir d'appels interlocutoires dans les affaires criminelles. Ce principe se trouve renforcé par notre **Code criminel** (art. 602, précité) qui interdit les procédures d'appel qui ne sont pas autorisées par le **Code**. Soulignons que celui-ci ne prévoit pas d'appels interlocutoires. Or, cette question a été jugée par la Cour d'appel de l'Ontario dans l'arrêt **R. v. Morgentaler, Smoling and Scott** (1984), 6 O.A.C. 53; 41 C.R.(3d) 262. Le juge Brooke, qui a rédigé les motifs de la cour (les juges Brooke, Lacourcière et Tarnopolsky), a conclu qu'il n'y avait aucune possibilité d'appels interlocutoires des refus d'accorder une réparation en vertu du par. 24(1) de la **Charte**. Dans cette affaire, les accusés, qui étaient inculpés de complot en vue de procurer un avortement illégal, ont présenté préalablement au procès une requête en annulation ou suspension de l'acte d'accusation en raison du caractère censément abusif des procédures et parce que l'art. 251 du **Code** allait à l'encontre de la **Charte canadienne des droits et libertés** et de la **Déclaration canadienne des droits**. La requête

the appeal. Brooke, J.A., reviewed the authorities on the question and concluded that neither s. 24(1) of the **Charter** nor s. 52(1) of the **Constitution Act, 1982** conferred any right of appeal nor any jurisdiction in the Court of Appeal to hear one. He was clearly of the view that the pursuit of **Charter** remedies must be in accordance with existing practice in Canadian courts. His view on this point is conveniently summarized, at p. 271 C.R., where he said:

"The meaning to be ascribed to the phrase 'court of competent jurisdiction' in s. 24(1) of the **Charter** has been the subject of consideration in a number of cases. The weight of authority is that s. 24(1) does not create courts of competent jurisdiction, but merely vests additional powers in courts which are already found to be competent independently of the **Charter**. We agree with Mr. Doherty that a court is competent if it has jurisdiction, conferred by statute, over the person and the subject matter in question and, in addition, has authority to make the order sought. The court presided over by Parker, A.C.J.H.C., was the court of competent jurisdiction to which the accused could apply under s. 24(1). It has declared that the rights and freedoms guaranteed to the accused by the **Charter** have not been infringed or denied by charging them under the section of the **Criminal Code** upon which the count in the indictment was founded. Section 24(1) does not purport to create a right of appeal or bestow appellate powers on this or any other court. Rather it authorizes those courts which have statutory appellate jurisdiction independent of the **Charter** to exercise the remedial power in s. 24(1) in appropriate cases when disposing of appeals properly brought before the court."

tendait en outre à l'obtention d'autres redressements non fondés sur la **Charte**. Déboutés de leur requête par le juge du procès, les accusés ont interjeté appel avant la fin du procès. Cet appel a été rejeté par la Cour d'appel. Le juge Brooke, après avoir passé en revue la jurisprudence et la doctrine pertinentes, a conclu que ni le par. 24(1) de la **Charte** ni le par. 52(1) de la **Loi constitutionnelle de 1982** ne conféraient de droit d'appel, pas plus qu'ils n'habilitaient la Cour d'appel à entendre un appel. De toute évidence, le juge Brooke a estimé que les demandes de réparations prévues par la **Charte** doivent se conformer à l'usage existant des tribunaux canadiens. Son point de vue à cet égard est commodément résumé à la p. 271 (C.R.) de ses motifs en ces termes:

[TRADUCTION] "La question du sens à prêter à l'expression 'tribunal compétent' au par. 24(1) de la **Charte** a été étudiée dans plusieurs décisions. La jurisprudence penche nettement vers l'opinion selon laquelle le par. 24(1) ne crée pas de tribunaux compétents, mais a simplement pour effet d'investir de pouvoirs supplémentaires les tribunaux qui ont déjà compétence indépendamment de la **Charte**. Nous sommes d'accord avec M^e^ Doherty qu'un tribunal est compétent s'il possède une compétence ratione personae et ratione materiae, conférée par la loi, et s'il détient en outre le pouvoir de rendre l'ordonnance sollicitée. La cour présidée par le juge en chef adjoint Parker était un tribunal compétent auquel les accusés pouvaient s'adresser conformément au par. 24(1). Ce tribunal a déclaré que le fait d'avoir été inculpés en vertu de l'article du **Code criminel** sur lequel était fondé le chef d'accusation énoncé dans l'acte d'accusation ne constituait pas une violation ou une négation des droits et libertés garantis aux accusés par la **Charte**. Le paragraphe 24(1) ne crée aucun droit d'appel ni n'attribue à cette cour ni à aucun autre tribunal des pouvoirs en matière d'appel. Au contraire, il autorise les tribunaux dotés d'une compétence d'appel dé-

coulant de la loi indépendamment de la **Charte**, à exercer, le cas échéant, le pouvoir réparateur du par. 24(1) dans les cas appropriés en tranchant les appels dont ils se trouvent légitimement saisis."

In my view, Brooke, J.A., in this passage has correctly stated the law on this question.

Selon moi, le juge Brooke énonce correctement dans ce passage le principe de droit applicable.

[17] He also dealt with an argument raised by counsel, to the effect that s. 52(1) of the **Constitution Act, 1982** could provide a basis on which could be based a right of appeal and jurisdiction for the court to hear an appeal from an interlocutory motion where a constitutional issue was raised in a criminal case. This argument found support in the Manitoba case of **Re Bird and Peebles and R.** (1984), 27 Man. R.(2d) 241; 12 C.C.C. (3d) 523 (Man. C.A.). In that case persons charged before the trial court sought an order declaring two sections of the **Criminal Code** to be invalid as infringing their **Charter** rights. The motion was dismissed and the trial ordered to proceed. The accused persons appealed to the Manitoba Court of Appeal (Hall, Matas, Philp, JJ.A.). The Court of Appeal would not accept that the court had no jurisdiction, but it decided that it would be inappropriate to hear the appeal. Matas, J.A., said, at pp. 530-531 C.C.C.:

> "Accordingly, for the reasons set out above, I would not accept the Crown's submission that this court does not have jurisdiction to hear the appeal but would grant the Crown's motion to quash the appeal on the ground that it would not be appropriate to allow the appeal to go forward."

[17] Le juge Brooke a en outre examiné l'argument de l'avocat voulant que le par. 52(1) de la **Loi constitutionnelle de 1982** pouvait fonder un droit d'appel et en même temps habiliter la cour à entendre un appel d'une requête interlocutoire lorsqu'une question constitutionnelle est soulevée dans une affaire criminelle. À l'appui de cet argument on a invoqué l'arrêt manitobain **Re Bird and Peebles and R.** (1984), 27 Man. R.(2d) 241; 12 C.C.C. (3d) 523 (C.A. Man.). Dans cette affaire, des personnes inculpées devant la juridiction de première instance ont demandé une ordonnance qui aurait déclaré invalides deux articles du **Code criminel** parce qu'ils portaient atteinte à leurs droits garantis par la **Charte**. La requête a été rejetée et on a ordonné la continuation du procès. Les accusés en ont appelé à la Cour d'appel du Manitoba (les juges Hall, Matas, Philp). Bien qu'elle eût refusé de conclure qu'elle n'avait pas compétence, la Cour d'appel a décidé qu'il ne serait pas approprié qu'elle entende l'appel. Le juge Matas a dit, aux pp. 530 et 531 C.C.C.:

> [TRADUCTION] "Par conséquent, pour les motifs exposés précédemment, je rejette l'argument de la poursuite selon laquelle cette cour n'a pas compétence pour entendre l'appel; je suis toutefois d'avis d'accueillir sa requête en annulation de l'appel pour le motif qu'il ne serait pas approprié de permettre que celui-ci suive son cours."

Brooke, J.A., declined to agree with counsel that Matas, J.A., must be taken to have concluded that s. 52(1) of the **Constitution Act, 1982** provides a right

L'avocat a fait valoir qu'on devait conclure que, de l'avis du juge Matas, le par. 52(1) de la **Loi constitutionnelle de 1982** prévoit un droit d'appel

of appeal whenever a constitutional issue arises in a criminal case. He said, at p. 273 C.R.:

> "It may be that the court was concerned that it should not foreclose the **Constitution Act** as a possible basis for jurisdiction if there were circumstances where there was no lower court which was a court of competent jurisdiction to which to apply for a remedy if rights and freedoms guaranteed by the **Charter** were refused or denied. That is not this case. There is a right of appeal to the Court of Appeal and jurisdiction in this court to hear an appeal by these accused in the event that they are convicted and, of course, the constitutional issue may well form a ground of such appeal if the accused are so advised. Moreover, there are strong policy reasons against interrupting the trial process with appeals to the Court of Appeal. The Court of Appeal for Manitoba recognized this in **Bird**, supra. The policy reasons are well known and need not be repeated here. For example, see the judgment of MacDonald, J.A., in **R. v. Cranston** (1983), 60 N.S.R. (2d) 269; 128 A.P.R. 269 (C.A.).
>
> "In the result, then, we agree with the submissions of Crown counsel that neither s. 24(1) of the **Charter** nor s. 52(1) of the **Constitution Act** of themselves give any right of appeal to this court or jurisdiction in this court to hear this appeal."

chaque fois qu'une question constitutionnelle se pose dans une affaire criminelle, mais le juge Brooke a écarté ce point de vue, en disant:

> [TRADUCTION] "Il se peut que la cour se soit attachée à ne pas exclure la **Loi constitutionnelle** comme un fondement possible de compétence dans l'hypothèse où il n'y aurait aucun tribunal compétent de degré inférieur auquel on pourrait demander réparation pour une violation ou une négation de droits et libertés garantis par la **Charte**. Telle n'est toutefois pas la situation en l'espèce. Il y a un droit d'appel devant la Cour d'appel et celle-ci a compétence pour entendre un appel formé par ces accusés s'ils sont reconnus coupables et, bien entendu, la question constitutionnelle pourra fort bien être alors un moyen d'appel si cela est conseillé aux accusés. De plus, il y a des puissantes raisons de principe de ne pas interrompre le déroulement du procès par des appels devant la Cour d'appel. C'est ce qu'a reconnu la Cour d'appel du Manitoba dans l'arrêt **Bird**, précité. Les raisons de principe susmentionnées sont bien connues et n'ont pas besoin d'être répétées ici. Voir par exemple, les motifs du juge MacDonald dans l'arrêt **R. v. Cranston** (1983), 60 N.S.R.(2d) 269; 128 A.P.R. 269 (C.A.).
>
> "En définitive donc, nous retenons les arguments de l'avocat de la poursuite selon lequel ni le par. 24(1) de la **Charte** ni le par. 52(1) de la **Loi constitutionnelle** n'ont en eux-mêmes pour effet d'accorder un droit d'appel à cette cour ou de donner à celle-ci compétence pour entendre le présent appel."

I am in respectful agreement with Brooke, J.A. With deference to the view expressed by Matas, J.A., insofar as it may be said to recognize a right in a person to appeal to the Court of Appeal on an interlocutory basis from a refusal by the trial court of a **Charter** claim before the completion of the trial, and jurisdiction in the Court of Appeal to hear it, I would reject it. I

Je suis respectueusement d'accord avec le juge Brooke. Avec égards pour l'opinion du juge Matas, dans la mesure où l'on peut dire qu'il reconnaît un droit d'interjeter appel à la Cour d'appel, par une procédure interlocutoire et avant que le procès ne soit terminé, d'un rejet par la juridiction de première instance d'une demande fondée sur la **Charte**, et dans la me-

find support for this view in **Re Laurendeau and R.**, [1983] C.A. 223; 9 C.C.C. (3d) 206 (Que. C.A.), and in the judgment of Craig, J.A., in **Re Ritter et al. and R.** (1984), 11 C.C.C. (3d) 123 (B.C.C.A.). Esson, J.A., for the majority, considered a question not dealt with by Craig, J.A. He said, at p. 136:

> "There is, however, another issue to be considered ... That question is whether a right of appeal has been conferred under provincial legislation which, in this province, is the **Court of Appeal Act**, 1982 (B.C.), c. 7."

He then said, after referring to **In re Fred Storgoff**, [1945] S.C.R. 526, and **Re Turangan and Chui and R.** (1976), 32 C.C.C. (2d) 254n (B.C.C.A.), at p. 137:

> "The question is: do the **Code's** limitations upon rights of appeal apply to **Charter** issues which are raised in respect of indictable offences?"

[18] A similar argument was raised in the case of **Morgentaler**, supra, and dealt with in summary terms by Brooke, J.A., at p. 274:

> "Finally, Mr. Manning contends that jurisdiction may be found in the **Judicature Act**, particularly ss. 2 and 28. On the hearing of the preliminary motion we rejected this submission because this appeal arises in the context of criminal proceedings and s. 602 of the **Criminal Code** is exhaustive of appellate remedies with respect to the offence with which the accused are charged. The **Judicature Act** has no application in the circumstances: **R. v. Forget** (1982), 35 O.R. (2d) 238; 65 C.C.C. (2d) 373 at 374-75 (Ont. C.A.)."

sure où l'on peut dire qu'il reconnaît à la Cour d'appel compétence pour entendre cet appel, je suis d'avis de la rejeter. Ce point de vue est étayé par l'arrêt **Laurendeau c. Procureur général du Québec**, [1983] C.A. 223; 9 C.C.C.(3d) 206 (C.A. Qué.), et par les motifs du juge Craig dans l'arrêt **Re Ritter et al. and R.** (1984), 11 C.C.C.(3d) 123 (C.A.C.-B.). Le juge Esson, qui a rédigé les motifs de la majorité, s'est penché sur une question qui n'a pas été abordée par le juge Craig. À la page 136, le juge Esson fait les observations suivantes:

> [TRADUCTION] "Il y a toutefois une autre question à examiner ... Il s'agit de la question de savoir si un droit d'appel a été conféré par la loi provinciale, en l'occurrence la **Court of Appeal Act**, 1982 (C.-B.), chap. 7."

Le juge Esson se réfère alors aux arrêts **In re Fred Storgoff**, [1945] R.C.S. 526, et **Re Turangan and Chui and R.** (1976), 32 C.C.C.(2d) 254n (C.A.C.-B.), puis il ajoute, à la p. 137:

> [TRADUCTION] "On doit se demander si les restrictions qu'impose le **Code** aux droits d'appel s'appliquent à des questions relevant de la **Charte** soulevées à l'égard d'actes criminels."

[18] Un argument semblable avancé dans l'affaire **Morgentaler**, précitée, a été sommairement rejeté par le juge Brooke à la p. 274:

> [TRADUCTION] "En dernier lieu, M^e^ Manning prétend que **The Judicature Act**, particulièrement ses art. 2 et 28, est attributive de compétence. À l'audition de la requête préliminaire, nous avons rejeté cet argument parce que l'appel a pris naissance dans le cadre de procédures criminelles et il n'y a pas d'autres possibilités d'appel à l'égard de l'infraction dont les accusés sont inculpés que celles autorisées par l'art. 602 du **Code criminel**. The **Judicature Act** ne s'applique pas en l'espèce: **R. v. Forget** (1982), 35 O.R.(2d) 238; 65 C.C.C.(2d) 373, aux pp. 374 et 375 (C.A. Ont.)."

I see no essential difference between the Ontario statute and the British Columbia **Court of Appeal Act** in this respect and I agree that the provisions of s. 602 of the **Criminal Code**, being exhaustive of appellate remedies with respect to criminal offences, would preclude the possibility of another appeal under any other statute. Legislation regarding criminal appeals falls clearly within the ambit of federal legislative authority. In my view, it is clear that the issue raised in the case at bar arose in a criminal case. Where an accused person invokes a provision of the **Charter** in a criminal case, the question of its application and effect is clearly criminal law within federal jurisdiction.

Je ne vois aucune différence importante à cet égard entre la loi ontarienne et la **Court of Appeal Act** de la Colombie-Britannique et je suis d'accord que l'art. 602 du **Code criminel**, du fait qu'il prévoit d'une façon exhaustive les possibilités d'appel en ce qui concerne les infractions criminelles, exclurait tout autre appel fondé sur un autre texte législatif. Le pouvoir de légiférer relativement aux appels en matière criminelle relève clairement du fédéral. À mon avis, il est clair que la question en l'espèce a été soulevée dans une affaire criminelle. Or, lorsqu'un accusé invoque une disposition de la **Charte** dans une affaire criminelle, la question de son application et de son effet relève incontestablement du droit criminel qui est du ressort fédéral.

[19] The argument has been raised that to adopt the view that an unsuccessful claimant for relief under s. 24(1) of the **Charter** must await the outcome of the trial to pursue his appeal is to introduce needless delay into the process of providing **Charter** remedies. It is argued that these applications deal with fundamental rights and freedoms and accordingly should have priority. This argument rests, in my view, on two fallacies. The first is the assumption implicit in the argument that the claimant is entitled to a remedy. The second is that allowing an interlocutory appeal will get a remedy for him more quickly than the ordinary process of the court.

[19] On a soutenu que l'adoption du point de vue selon lequel une personne déboutée de sa demande de réparation fondée sur le par. 24(1) de la **Charte** doit attendre l'issue du procès pour interjeter appel entraînerait des retards inutiles dans le processus réparateur de la **Charte**. Ce type de demandes, prétend-on, porte sur des libertés et des droits fondamentaux et doit en conséquence passer en priorité. Cet argument est à mon sens doublement faux. En premier lieu, il tient pour acquis que le réclamant a droit à une réparation. En second lieu, il suppose qu'un appel interlocutoire, s'il était autorisé, constituerait un moyen plus rapide que les voies de recours judiciaires ordinaires pour obtenir une réparation.

[20] It must be remembered that everyone who claims **Charter** relief will not necessarily get what he seeks. There will be successful claims and unsuccessful claims, and in respect of each claim the question of breach of the right and entitlement to relief will have to be dealt with. This is true of all rights, **Charter** and non-**Charter**. If we recognize some priority arising out of an allegation of a breach of a **Charter** right so that it is somehow lifted from the ordinary flow of cases and given a special right of immediate interlocutory appeal, I fear that the

[20] Il faut se rappeler que toutes les personnes qui demandent un redressement en vertu de la **Charte** ne l'obtiendront pas nécessairement. Certaines d'entre elles réussiront et d'autres encore seront déboutées et pour chaque demande il faudra déterminer s'il y a eu violation d'un droit et s'il y a lieu d'accorder une réparation. Ainsi en est-il de tous les droits, ceux conférés par la **Charte** comme les autres. Si nous devions reconnaître à une allégation de violation d'un droit garanti par la **Charte** une espèce de statut prioritaire qui

confusion which would result would far outweigh any benefit which successful individuals would achieve. Furthermore, there is no guarantee that an interlocutory appeal will accelerate the process. Rather, experience has shown that the interlocutory motion or appeal has all too frequently been the instrument of delay. In my view, it does not follow that interlocutory appeals will hasten the process. They are far more likely to delay the disposition of cases and would themselves tend to prolong the proceedings involved in the determination of **Charter** infringement. The history of this case affords an example.

Jurisdiction

[21] It has been argued in academic journals that any breach of a **Charter** right is jurisdictional in nature: see Morris Manning, at p. 478, in **Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act 1982** (Toronto 1983), and Alan Gold, **Annual Review of Criminal Law** (Toronto, Carswell 1982), pp. 27-28. A contrary view has been expressed in other writings: see J.C. Levy, **The Invocation of Remedies Under the Charter of Rights and Freedoms: Some Procedural Considerations** (1983), 13 Man. L.J. 523, at pp. 539-40, and E.G. Ewaschuk, **The Charter: An Overview of Remedies** (1982), 26 C.R. (3d) 54, at pp. 70-71. As I understand the argument, it would be that where unreasonable delay is found to have occurred in the course of the prosecution of an offence, the court before which the proceeding is taken will thereby have been deprived of jurisdiction to deal further with the case and the prosecution would come to an end. I reject this view. Section 24(1) of the **Charter** has stated clearly that when a **Charter** right is infringed or denied, a person may apply to a court of competent jurisdiction for such remedy as

la sortirait en quelque sorte du flot ordinaire des affaires et qui donnerait un droit spécial d'appel interlocutoire immédiat, je crains que la confusion qui en résulterait serait bien loin d'être compensée par l'avantage qu'en tieraient les personnes qui obtiendraient gain de cause. De plus, rien ne dit qu'un appel interlocutoire aurait pour effet d'accélérer le processus. Au contraire, l'expérience démontre qu'une requête ou un appel interlocutoire occasionne bien trop souvent des délais. À mon avis, il ne s'ensuit pas que des appels interlocutoires permettraient de gagner du temps. En fait, il est beaucoup plus probable que ces appels ralentiraient le règlement de litiges et tendraient eux-mêmes à prolonger les procédures visant à établir s'il y a eu violation de la **Charte**. Le déroulement de la présente affaire en est d'ailleurs un exemple.

La compétence

[21] Il a été prétendu dans certaines revues juridiques que tout violation d'un droit garanti par la **Charte** soulève une question de compétence: Voir Morris Manning, **Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act 1982** (Toronto 1983), à la p. 478, et Alan Gold, **Annual Review of Criminal Law** (Toronto, Carswell, 1982), aux pp. 27 et 28. D'autres auteurs ont exprimé le point de vue contraire: J.C. Levy, **The Invocation of Remedies Under the Charter of Rights and Freedoms: Some Procedural Considerations** (1983), 13 Man. L.J. 523, aux pp. 539 et 540, et E.G. Ewaschuk, **The Charter: An Overview of Remedies** (1982), 26 C.R.(3d) 54, aux pp. 70 et 71. Si je comprends bien l'argument, lorsqu'on conclut qu'il y a eu un délai déraisonnable dans la poursuite de quelqu'un pour une infraction, le tribunal saisi de l'affaire se verra de ce fait privé de compétence pour aller plus avant dans l'instruction, ce qui mettra fin aux poursuites. Je rejette cette thèse. Le paragraphe 24(1) de la **Charte** porte clairement que la victime d'une violation ou d'une négation d'un droit

the court considers appropriate and just in the circumstances. It has not specified a remedy and has not excluded the court from further participation in the matter. It has authorized the giving of an appropriate remedy by the court. This is not language from which one can infer that whenever a right is infringed in a prosecution the result must be a loss of jurisdiction by the trial court. Rather, it is language vesting the court with power to correct the situation. If one accepts this jurisdictional argument, it would be to mandate a particular result in every case and to prevent the exercise of the discretion given in s. 24(1) to give the appropriate remedy. In my view, the fact that a **Charter** right has been infringed does not of itself give rise to jurisdictional error, and I see no basis for the characterization of some **Charter** violations as jurisdictional while others are not.

conféré par la **Charte** peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances. Cette disposition ne précise pas la nature de la réparation ni n'exclut toute autre participation du tribunal dans l'affaire. Le tribunal est autorisé à donner une réparation appropriée. Ce ne sont pas des termes dont on peut déduire que chaque atteinte à un droit dans le cadre de poursuites judiciaires entraîne inévitablement la perte de compétence de la juridiction de première instance. Tant s'en faut, car les termes employés investissent le tribunal du pouvoir de rectifier la situation. Si l'on retenait cet argument relatif à la compétence, on se trouverait à autoriser un résultat particulier dans chaque cas et à empêcher l'exercice du pouvoir discrétionnaire que confère le par. 24(1) d'accorder la réparation appropriée. À mon sens, une atteinte à un droit garanti par la **Charte** ne suffit pas en soi pour entraîner une erreur de compétence, et je ne vois rien qui permet de conclure que certaines violations de la **Charte** touchent à la compétence alors que d'autres ne le font pas.

[22] There will no doubt be cases where the claim for relief under s. 24(1) of the **Charter** will be based on an allegation of jurisdictional error in respect of which prerogative relief in the superior court could be available. The two avenues to seek relief, that is, to the court in which the issue arises for an appropriate remedy under s. 24(1), or to the superior court for prerogative relief where the jurisdictional grounds exist, will remain open but must be kept separate and applied according to circumstances. All **Charter** violations and infringements will not be jurisdictional. Remedies which may be ordered are not limited to prerogative remedy, that is, certiorari, prohibition and mandamus. These, of course, may be given where grounds for such relief, according to the law and practice which has grown up concerning them, are present. Otherwise, the remedy will be what the court considers appropriate and just under s. 24(1) of

[22] Il y aura sans aucun doute des cas où une demande de réparation en vertu du par. 24(1) de la **Charte** sera fondée sur une allégation d'erreur de compétence pouvant donner droit à un bref de prérogative devant la cour supérieure. Deux voies de recours s'offrent. On peut demander au tribunal devant lequel la question a pris naissance une réparation convenable en vertu du par. 24(1) ou on peut demander à la cour supérieure un bref de prérogative lorsque c'est la compétence qui est en cause. Toutefois, ces recours doivent rester séparés l'un de l'autre et appliqués en fonction des circonstances. Ce ne sont pas toutes les violations et transgressions de la **Charte** qui toucheront à la compétence. Les réparations pouvant être ordonnées ne se limitent pas aux brefs de prérogative, c'est-à-dire le certiorari, la prohibition et le mandamus. Bien sûr, il est possible d'accorder ces redressements lorsque cela est jus-

the **Charter**.

Remedies

[23] What remedies are available when an application under s. 24(1) of the **Charter** succeeds? Section 24(1) again is silent on the question. It merely provides that the appellant may obtain such remedy as the court considers "appropriate and just in the circumstances". It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion. No court may say, for example, that a stay of proceedings will always be appropriate in a given type of case. Although there will be cases where a trial judge may well conclude that a stay would be the appropriate remedy, the circumstances will be infinitely variable from case to case and the remedy will vary with the circumstances.

Disposition

[24] In the case at bar the claimant says that his trial has been unreasonably delayed. It was on this basis that he moved before the preliminary hearing magistrate at the commencement of the preliminary for relief under s. 24(1) of the **Charter**. This motion was refused. The appellant then brought a motion before Osborne, J., in the High Court of Ontario claiming prohibition and as well **Charter** relief alleging delay and abuse of process. Osborne, J., refused the motion. He found that there was no unreasonable delay. An appeal was taken to the Court of Appeal under s. 719 of the **Criminal Code**. This was dismissed

tifié selon les principes de droit et l'usage qui s'y appliquent, sinon la réparation sera celle que le tribunal estime convenable et juste comme le prévoit le par. 24(1) de la **Charte**.

Les réparations

[23] Quelle réparation peut-on obtenir lorsqu'il est fait droit à une demande fondée sur le par. 24(1) de la **Charte**? Là encore le par. 24(1) n'apporte pas de réponse. Il ne fait que prévoir que l'appelant peut obtenir la réparation que le tribunal estime "convenable et juste eu égard aux circonstances". Il est difficile de concevoir comment on pourrait donner au tribunal un pouvoir discrétionnaire plus large et plus absolu. Ce large pouvoir discrétionnaire n'est tout simplement pas réductible à une espèce de formule obligatoire d'application générale à tous les cas, et les tribunaux d'appel ne sont nullement autorisés à s'approprier ce large pouvoir discrétionnaire ni à en restreindre la portée. Aucun tribunal ne peut dire par exemple que la suspension d'instance conviendra toujours dans un certain type de cas. Certes, il y aura des affaires où le juge du procès pourra fort bien conclure que la suspension d'instance constitue la réparation appropriée, mais les circonstances varieront de façon infinie d'un cas à l'autre et la réparation accordée variera en conséquence.

Le dispositif

[24] En l'espèce, le demandeur prétend que son procès a été retardé de façon déraisonnable. C'est le motif qu'il a avancé pour demander au magistrat, au début de l'enquête préliminaire, une réparation en vertu du par. 24(1) de la **Charte**. Cette demande a été rejetée. Puis, invoquant le retard des procédures et le caractère abusif de celles-ci, l'appelant a saisi le juge Osborne de la Haute Cour de l'Ontario d'une requête visant à obtenir une prohibition ainsi qu'une réparation en vertu de la **Charte**. Le juge Osborne a rejeté la requête. Selon lui, il n'y avait pas eu de retard déraisonnable.

by the Court of Appeal, which found no error in the proceedings below. While the motion of the appellant included a claim for non-prerogative relief under the **Charter**, the appeal under s. 719 of the **Criminal Code** could only apply to the prerogative portion of the application. That is all that is before this Court. The dismissal by Osborne, J., of the claim for prohibition and certiorari is sustainable because the preliminary hearing magistrate, having no jurisdiction to grant s. 24(1) relief, could not be said to have exceeded his jurisdiction in refusing to do so. It follows then, in my opinion, that this appeal must be dismissed with the result that the matter must be returned to the provincial court for the completion of the preliminary hearing. It may well be that there has been unreasonable delay in the proceedings and, as a consequence, the claimant is entitled to relief on that basis. This is a matter for the trial judge. If he is committed for trial, he will be free to seek his remedy in that forum.

Appel a été interjeté devant la Cour d'appel en vertu de l'art. 719 du **Code criminel**. Celle-ci a conclu que les procédures attaquées n'étaient pas entachées d'erreur et a en conséquence rejeté l'appel. Quoique la requête de l'appelant ait visée notamment à l'obtention d'une réparation en vertu de la **Charte** autre qu'un bref de prérogative, l'appel fondé sur l'art. 719 du **Code criminel** ne pouvait porter que sur la partie de la requête qui demandait un bref de prérogative. C'est là l'unique question dont cette Cour se trouve saisie. La décision du juge Osborne de rejeter la demande de prohibition et de certiorari est maintenue parce qu'on ne saurait prétendre que le magistrat à l'enquête préliminaire, étant donné qu'il n'était pas autorisé à accorder une réparation en vertu du par. 24(1), a outrepassé sa compétence en refusant de donner cette réparation. Il s'ensuit donc, selon moi, que ce pourvoi doit être rejeté et que l'affaire doit en conséquence être renvoyée à la cour provinciale pour que l'enquête préliminaire puisse être terminée. Il se peut bien qu'il y ait eu un délai déraisonnable dans les procédures par suite de quoi le demandeur a droit à un redressement. Cette question doit toutefois être laissée à l'appréciation du juge du procès. Si le réclamant est renvoyé à procès, il lui sera alors loisible de demander une réparation fondée sur le retard déraisonnable.

.....

.....

[25] La Forest, J.: The facts and issues in this case fully appear in the opinions of my colleagues, McIntyre and Lamer, JJ., and I, therefore, propose to set forth my own views on such of these as it appears necessary in the briefest possible compass.

[25] M. le juge La Forest: Les faits et les questions en litige font l'objet d'un exposé complet dans les motifs de mes collègues les juges McIntyre et Lamer. Je me propose en conséquence de présenter le plus brièvement possible ma propre opinion sur chacun des points à l'égard desquels cela semble nécessaire.

[26] I agree with my colleagues that a preliminary hearing magistrate is not a "court of competent jurisdiction" within the meaning of s. 24(1) of the

[26] Je suis d'accord avec mes collègues qu'un magistrat qui préside une enquête préliminaire n'est pas un "tribunal compétent" au sens du par.

plaintiff chose not to delay the trial by asking for such concessions. Under these circumstances, I abridge the time requirement in order that the costs of the defendant include reasonable sums for the report of experts used at trial, whether or not delivered to plaintiff five days before trial. I therefore order that the defendant have costs on a party-and-party scale against the plaintiff in accordance with these reasons.

Under the *Judicature Act*, there is a substantial difference between the interest that the plaintiff will receive before judgment and the interest rate after judgment. At the time of arguing this case before me, counsel had not considered this matter and at their request, I specifically reserve the question of the deemed date of my judgment until I have heard argument from counsel. The deemed date may be one of three dates:

1. The date on which my reasons for judgment were released originally; or
2. The date on which these reasons with regard to costs are released; or
3. The date of the reasons for judgment released with regard to the question of the deemed date of judgment.

Order accordingly.

RE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 204 AND BROADWAY MANOR NURSING HOME et al. and two other applications

Ontario Court of Appeal, Brooke, Dubin, Houlden, Goodman and Robins JJ.A.
October 22, 1984.

Courts — Jurisdiction — Divisional Court — Application for judicial review — Applicant seeking declaration that provincial public sector compensation restraint legislation invalid because contrary to Charter of Rights — Divisional Court statutory court having jurisdiction to grant declaration only in relation to exercise, refusal to exercise, or proposed or purported exercise of statutory power — Applicant attacking constitutional validity of statutory powers conferred on Inflation Restraint Board not exercise, refusal to exercise, or proposed or purported exercise of statutory power — Divisional Court not having jurisdiction to hear application — Inflation Restraint Act, 1982 (Ont.), c. 55 — Judicial Review Procedure Act, R.S.O. 1980, c. 224, s. 2(1), para. 2.

Cases referred to

Re Lamoureux and Registrar of Motor Vehicles et al., [1973] 2 O.R. 28, 32 D.L.R. (3d) 678, 10 C.C.C. (2d) 475, 20 C.R.N.S. 254

Administrative law — Judicial review — Privative clauses — Ontario Labour Relations Board — Interpretation by board of general public enactment —

Principle of curial deference not applying — Board's interpretation subject to judicial review — Inflation Restraint Act, 1982 (Ont.), c. 55, s. 13(b).

Cases referred to

Re Libby, McNeill & Libby of Canada Ltd. and United Automobile, Aerospace & Agricultural Implement Workers of America et al. (1978), 21 O.R. (2d) 362, 91 D.L.R. (3d) 281; revg on other grounds *loc. cit.* O.R. p. 340, D.L.R. p. 259; *McLeod et al. v. Egan et al.*, [1975] 1 S.C.R. 517, 46 D.L.R. (3d) 150, 5 L.A.C. (2d) 336*n*, *sub nom. United Steelworkers, Local 2894 v. Galt Metal Industries Ltd.*, 74 C.L.L.C. para. 14,220, 2 N.R. 443; *Volvo Canada Ltd. v. Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), Local 720*, [1980] 1 S.C.R. 178, 99 D.L.R. (3d) 193, 33 N.S.R. (2d) 22, 27 N.R. 502

Employment — Labour relations — Collective agreement — Duration — Statute continuing terms and conditions of collective agreements — Whether collective agreements themselves continued — Inflation Restraint Act, 1982 (Ont.), c. 55, s. 13(b).

Statutes — Interpretation — Statute continuing terms and conditions of collective agreements — Whether collective agreements themselves continued — Inflation Restraint Act, 1982 (Ont.), c. 55, s. 13(b).

Part II of the *Inflation Restraint Act*, 1982 (Ont.), c. 55, concerns public sector compensation restraint and extends certain public sector compensation plans beyond the dates on which they would otherwise have expired. Section 13 of the Act provides that "the terms and conditions of . . . (*b*) every collective agreement that includes a compensation plan, shall . . . continue in force without change for the period for which the compensation plan is extended or made subject to this Part." Section 13(*b*) continues the terms and conditions of the collective agreements but not the agreements themselves. Hence, when the expiry date in the agreement has passed, another union is free to seek certification as replacement for the incumbent union. Hence also, one party to an agreement is entitled to compel the other party to bargain in good faith.

Cases referred to

Re Haldimand-Norfolk Regional Health Unit and Ontario Nurses Ass'n et al. (1981) 31 O.R. (2d) 730, 120 D.L.R. (3d) 101, [1981] C.L.L.C. para. 14,085; revd [1983] 2 S.C.R. 6, 150 D.L.R. (3d) 193, 48 N.R. 329

Constitutional law — Charter of Rights — Interpretation — Inappropriate for court to express opinion on Charter where no Charter issue arising.

Law Society of Upper Canada v. Skapinker (1984), 9 D.L.R. (4th) 161, 11 C.C.C. (3d) 481, 8 C.R.R. 193, 53 N.R. 169, **folld**

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 1, 2(*d*), 7, 24(1)
Fire Departments Act, R.S.O. 1980, c. 164, s. 7(2)
Hospital Labour Disputes Arbitration Act, R.S.O. 1980, c. 205
Inflation Restraint Act, 1982 (Ont.), c. 55, ss. 3(4), 8(1), 9, 10(*a*), (*b*)(ii), 11, 13(*b*), 14, 15, 21, 36
Judicial Review Procedure Act, R.S.O. 1980, c. 224, ss. 1(*f*), (*g*), 2(1)

Labour Relations Act, R.S.O. 1980, c. 228, ss. 5(4), (5), 79, 106(1), 108
Police Act, R.S.O. 1980, c. 381, s. 35(2)
School Boards and Teachers Collective Negotiations Act, R.S.O. 1980, c. 464, ss. 10(1), (3), 27, 60(1)(*a*), (*f*)
Statutory Powers Procedure Act, R.S.O. 1980, c. 484

APPEALS and CROSS-APPEALS from a judgment of the Divisional Court, 44 O.R. (2d) 392, 4 D.L.R. (4th) 231, (1) setting aside a decision of the Ontario Labour Relations Board, (2) upholding a decision of the Education Relations Commission and (3) declaring s. 13(*b*) of the *Inflation Restraint Act, 1982* (Ont.) inoperative.

J. Sack, Q.C., and *J. K. McDonald*, for Service Employees International Union, Local 204.

W. R. Herridge, Q.C., for Christian Labour Association of Canada.

D. J. M. Brown, Q.C., for Ontario Labour Relations Board.

Douglas K. Gray, for Durham Board of Education.

Maurice A. Green, for Ontario Secondary School Teachers' Federation, District 17.

D. K. Laidlaw, Q.C., and *J. J. Colangelo*, for Education Relations Commission.

Ian G. Scott, Q.C., *Paul J. J. Cavalluzzo* and *Chris G. Paliare*, for Ontario Public Service Employees' Union.

John J. Cavarzan, Q.C., and *Blenus Wright*, Q.C., for Attorney-General of Ontario.

Graham R. Garton, for Attorney-General of Canada, intervenor.

BY THE COURT:—This Court has heard argument in appeals and cross-appeals against orders made by the Divisional Court on October 24, 1983, in each of the above-styled applications for judicial review: 44 O.R. (2d) 392, 4 D.L.R. (4th) 231. The three applications were argued consecutively before the same panel of judges of that court. The majority of the court held that s. 13(*b*) of the *Inflation Restraint Act*, 1982 (Ont.), c. 55 ("the Act"), was invalid because it infringed the freedom of association guaranteed by s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* ("the Charter"). Galligan J. dissented. He interpreted s. 13(*b*) of the Act differently than the majority and held that the constitutional issue did not arise. He went on and said that if he was wrong in this conclusion then he agreed that s. 2(*d*) of the Charter had been infringed.

The judgments of the Divisional Court were pronounced in three applications for judicial review brought pursuant to the

Judicial Review Procedure Act, R.S.O. 1980, c. 224. The issue in each of these applications was said to turn on the legal effect of Part II of the Act. The Act had received royal assent on December 2, 1982, and came into force retroactively on September 21, 1982. Part II of the Act concerns the public sector compensation restraint and extends certain public sector compensation plans beyond the date which they would otherwise have expired. Section 13 of the statute provides:

> 13. Notwithstanding any other Act except the *Human Rights Code, 1981* and section 33 of the *Employment Standards Act*, but subject to section 14, *the terms and conditions of*,
>
> . . . . .
>
> (*b*) every collective agreement that includes such a compensation plan,
>
> shall, subject to this Part, continue in force without change for the period for which the compensation plan is extended or made subject to this Part.

(Emphasis added.)

As stated by Galligan J. in his reasons for judgment, each application was concerned with the legal effect of the Act. This involved in each application two basic considerations:

(1) the interpretation to be given to Part II of the Act and particularly s. 13(*b*) thereof, and

(2) whether the Act in whole or in part violates the Charter.

There was also an application made by the Attorney-General of Ontario for an order in the third-styled application (OPSEU application), quashing the application of the Ontario Public Service Employees Union ("OPSEU") for judicial review.

Background

In the first-styled application, Local 204 of the Service Employees International Union ("the Service Employees Union") sought judicial review of a decision of the Ontario Labour Relations Board dated January 31, 1983, by which the board held that the Act made untimely the union's application for certification made under s. 5(4) of the *Labour Relations Act*, R.S.O. 1980, c. 228. This application had been made to displace the incumbent union, Christian Labour Association of Canada.

In the second-styled application, the Durham Board of Education sought judicial review of a decision of the Education Relations Commission dated May 20, 1983, which held that the Act did not suspend its jurisdiction to make a determination pursuant to s. 60(1)(*f*) of the *School Boards and Teachers Collective Negotiations Act*, R.S.O. 1980, c. 464 ("Boards and Teachers Negotiation Act").

In the third-styled application OPSEU sought a declaration that the Act is *ultra vires* in that it violates rights and freedoms guaranteed by the Charter. This union is said to represent approximately 75,000 public sector workers.

The three Divisional Court judges who heard these three applications delivered separate reasons.

In the Service Employees Union application, the Divisional Court ordered that the decision of the Ontario Labour Relations Board dated January 31, 1983, be set aside and declared s. 13(*b*) of the Act to be invalid. By orders dated November 14, 1983, this Court granted leave to the Attorney-General of Ontario, the Christian Labour Association of Canada, and the Ontario Labour Relations Board to appeal from this order and gave leave to the Service Employees Union to cross-appeal from the order upon the ground that the majority of the Divisional Court erred in its interpretation of the Act and in particular s. 13(*b*) thereof.

In the Durham Board of Education application the Divisional Court ordered that the application be dismissed and, accordingly, upheld the decision of the Education Relations Commission dated May 20, 1983. By order dated November 14, 1983, this Court granted leave to the Attorney-General of Ontario and the Durham Board of Education to appeal from this order. It further granted leave to the Ontario Secondary School Teachers' Federation, District 17, to cross-appeal against the decision of the majority of the Divisional Court, dated October 24, 1983, concerning the interpretation of s. 13(*b*) of the Act.

In the OPSEU application the Divisional Court ordered:

(1) that the application of the Attorney-General of Ontario for an order quashing the application for judicial review be dismissed;

(2) that s. 13(*b*) of the Act be declared invalid;

(3) that in all other respects the application for judicial review be dismissed.

By order dated November 14, 1983, this Court granted leave to the Attorney-General for Ontario to appeal from this order and granted leave to OPSEU to cross-appeal from the order.

The various appeals and cross-appeals for which leave was given were heard at the same time by this Court.

The Divisional Court's jurisdiction to hear the OPSEU application

We turn first to the issue of whether or not the Divisional Court had jurisdiction to deal with the application of OPSEU in the circumstances.

By application for judicial review dated February 24, 1983, OPSEU applied to the Divisional Court for an order declaring the Act *ultra vires*, in whole or in part, on the ground that it contravened ss. 2(*d*) and 7 of the Charter. Counsel on behalf of the Attorney-General of Ontario, by letter dated March 1, 1983, advised counsel for the applicant that, in his opinion, the Divisional Court had no jurisdiction to hear the application as it did not fall within s. 2 of the *Judicial Review Procedure Act*, but rather, that the proper procedure to obtain the relief claimed was by way of an action in the Supreme Court of Ontario. Notwithstanding the objections of the Attorney-General, OPSEU elected to proceed with the application for judicial review.

By notice of motion dated September 15, 1983, returnable on the hearing of the application for judicial review, the Attorney-General sought an order quashing the application for judicial review. The Divisional Court directed that the application for judicial review and the motion to quash be heard together.

The Divisional Court dismissed the application to quash. Galligan J. (concurred in by O'Leary J. and Smith J. on this point) said [at pp. 415-6 O.R., pp. 254-5 D.L.R.]:

> Clearly, since it is a statutory court, the Divisional Court only has that jurisdiction which is conferred by statute. Pursuant to s. 2(1), para. 2, the court has power to grant declaratory relief in relation to the exercise, refusal to exercise, or proposed or purported exercise of statutory power.
>
> It is my opinion that the Act itself proposes that certain statutory powers conferred by it be exercised. By Part I, the Act creates the Inflation Restraint Board and gives it what might be called organizational powers. Parts II and III grant extensive power to the board over salaries and certain prices in the public sector. To me it is an inescapable conclusion that when the Legislature grants statutory power to a board it proposes that the board exercise that power. And I think it can be fairly inferred that a board to whom statutory power is given proposes to exercise that power.
>
> The suggestion that in order for this court to have jurisdiction the union should have made an application to the board under s. 14 of the Act or waited until an employer did so and then come to this court seeking prohibition upon exactly the same grounds as this application is made, namely that the Act is *ultra vires*, seems to me to be a waste of time and effort, dilatory and in short pointless.
>
> I am of the opinion that the Act proposes the exercise of statutory power by the board. It seems to me a very worthwhile exercise of this court's jurisdiction to decide whether or not the Act that conferred that power is *ultra vires*.
>
> It is therefore my view that this court has jurisdiction to entertain this application and I propose to deal with it on its merits.

In the application for judicial review, the Divisional Court made an order that s. 13(*b*) of the Act was invalid.

To grant declaratory relief to the applicant, the Divisional Court must be a court of competent jurisdiction: s. 24(1) of the Charter. It is common ground that to meet this requirement, the court must have jurisdiction, independently of the Charter, to grant the remedy sought. Did the Divisional Court have jurisdiction, independently of the Charter, to make an order declaring s. 13(*b*) of the Act invalid? We are respectfully of the opinion that it did not.

The Divisional Court is a statutory court and has only the jurisdiction conferred upon it by statute. The relevant statute for this case is the *Judicial Review Procedure Act*, and the pertinent sections of that Act are the following:

1. In this Act,

. . . . .

(*f*) "statutory power of decision" means a power or right conferred by or under a statute to make a decision deciding or prescribing,

(i) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or

(ii) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether he is legally entitled thereto or not,

and includes the powers of an inferior court;

(*g*) "statutory power" means a power or right conferred by or under a statute,

(i) to make any regulation, rule, by-law or order, or to give any other direction having force as subordinate legislation,

(ii) to exercise a statutory power of decision,

(iii) to require any person or party to do or to refrain from doing any act or thing that, but for such requirement, such person or party would not be required by law to do or to refrain from doing,

(iv) to do any act or thing that would, but for such power or right, be a breach of the legal rights of any person or party.

2(1) On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may, notwithstanding any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.

2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

The *Judicial Review Procedure Act* created a single form of proceeding, called a "notice of application for judicial review" for obtaining relief which was formerly obtained in five different kinds of proceedings, namely, applications for orders in the nature of *mandamus*, prohibition and *certiorari*, and certain actions for declarations and injunctions. The purpose of this Act was to eliminate the difficulties encountered in selecting the correct form of proceeding and to overcome certain technical problems, such as the inability to join an application for an order in the nature of *certiorari* with an action for a declaration: see D. W. Mundell, Q.C., *Manual of Practice on Administrative Law and Procedure in Ontario* (1972), at pp. 39-42. The power to grant relief that an applicant would be entitled to in an application for *mandamus*, prohibition or *certiorari* is not limited to the exercise, refusal to exercise or proposed or purported exercise of a statutory power. However, the power to grant relief that could have been obtained in an action for a declaration or an injunction is so limited: s. 2(1) of the *Judicial Review Procedure Act*; *Re Lamoureux and Registrar of Motor Vehicles et al.*, [1973] 2 O.R. 28, 32 D.L.R. (3d) 678, 10 C.C.C. (2d) 475. The question that must be answered, therefore, is whether the declaration that was sought by OPSEU in the present case relates to the exercise, refusal to exercise or proposed or purported exercise of a statutory power?

There was clearly no exercise or refusal to exercise a statutory power. Counsel for OPSEU submitted, however, that there was a "proposed or purported exercise" of a statutory power sufficient to give jurisdiction to the Divisional Court. His argument was to this effect. The Inflation Restraint Board is a statutory body created by the Act to administer and enforce the provisions of the Act. The board may act with or without an oral hearing: s. 3(4) of the Act. If it holds an oral hearing, the *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484, applies, except that the board is not required to give reasons: s. 3(4). The Act confers certain powers on the board; for example, by s. 14, the board is given power to determine the amount of increase in compensation rates to which the members of a compensation plan are entitled, and by s. 21 it is given power to make various kinds of orders where it determines that a compensation plan does not comply with the Act and that the administrator of the plan is implementing, has implemented or is likely to implement an increase in compensation that does not comply with the Act. The Inflation Restraint Board is thus a statutory board which has had powers conferred on it by the Act.

The application for judicial review by OPSEU related to two matters:

(a) the constitutionality of the Act, and

(b) the constitutionality of certain statutory powers conferred on the board.

In regard to (a), OPSEU, in its application for judicial review, sought to restrain the board from enforcing those parts of the legislation which were found to be unconstitutional. If the whole Act was found to be unconstitutional, there would, of course, be nothing to restrain since the board would be the creation of a nullity. If, however, only certain parts were found to be unconstitutional, the court was asked to restrain the board from enforcing those parts. In regard to (b), OPSEU attacked the constitutional validity of certain specific statutory powers conferred upon the board. For instance, OPSEU contended that s. 14 of the Act was invalid because it conferred an overly broad discretion upon the board which could lead to arbitrariness and inequality of treatment.

Counsel supplemented the above legal arguments with a number of practical policy considerations. He submitted, for example, that the important issues of public law raised by the application for judicial review were ideally suited for resolution by the Divisional Court. There was no necessity for *viva voce* evidence, the application being based primarily on legislative rather than adjudicative facts. The issues raised were so complex that a three-judge tribunal was preferable for their determination. Moreover, two other related applications for judicial review, in which the Divisional Court clearly had jurisdiction, were being heard by the Divisional Court at the same time. If there had been an actual exercise of the statutory powers conferred by the Act, he argued, the Divisional Court in an application for judicial review would undoubtedly have had jurisdiction to make the declaration that s. 13(*b*) was invalid. Since this application raises the same kind of issue and seeks the same kind of relief that would have been sought in that kind of application, the Divisional Court should, it was contended, be held to have jurisdiction.

While the hearing of OPSEU's application would unquestionably be a practical and convenient method of proceeding, practicality and convenience, as counsel for the Attorney-General of Ontario pointed out, do not confer jurisdiction on a court. With respect, we think that the submissions advanced by OPSEU do not meet the critical issue, namely: Is there a "proposed or purported exercise of a statutory power" by the board?

The Concise Oxford Dictionary under the verb "propose" gives

the following definitions: ". . . propound . . . intend, propose (to do, doing)", and under the verb "purport" it gives the following: ". . . profess, to be intended to seem (to do) . . .". Without attempting an exhaustive definition, it seems to us that for a "proposed" exercise of a statutory power, there must be a matter pending before the body which has been given the power together with clear evidence of an intention on the part of the body to exercise the power. For a "purported" exercise of a statutory power, there must be a professed or attempted exercise of the power, which for some reason falls short of constituting an actual exercise of the power. Applying these definitions to the facts of this case, there was clearly no proposed or purported exercise of a statutory power by the Inflation Restraint Board with respect to OPSEU. What OPSEU was doing in its application for judicial review was attacking the constitutional validity of statutory powers conferred upon the board, not the proposed or purported exercise of those powers. In our opinion, therefore, the Divisional Court had no jurisdiction to hear such an application in these circumstances.

In any event, the Divisional Court did not find the entire Act or the statutory powers conferred by the Act to be *ultra vires*, rather it concluded that s. 13(*b*) of the Act was invalid. It will be obvious that the jurisdiction conferred on the board by the Act is not in any way dependent upon s. 13(*b*) of the Act and no powers are conferred on the board by s. 13(*b*).

The appeal of the Attorney-General will be allowed, the order below set aside and in its place there will be an order quashing the application for judicial review. The appellant, the Attorney-General, will be entitled to his costs here and below. The cross-appeal of OPSEU will be dismissed without costs. There will be no other order as to costs as to this application.

The other appeals

The provisions of s. 13(*b*) of the Act are set out above. The interpretation of s. 13(*b*) is a fundamental issue in both of the appeals in the Service Employees International Union case and the Durham Board of Education case.

The decision of the Ontario Labour Relations Board, dated January 31, 1983, set aside applications for certification by Locals 204 and 210 of the Service Employees Union. The facts underlying those applications were that on November 16, 1982, Local 204 applied to the Ontario Labour Relations Board for certification as bargaining agent for a bargaining unit composed of employees of a

nursing home known as Broadway Manor. The applicant submitted documentary evidence of membership on behalf of a majority of employees in the bargaining unit. At the time of the application, the employees were represented by the Christian Labour Association of Canada ("CLAC"). CLAC had entered into a collective agreement which by its terms was to expire on December 31, 1982. The duration clause of the agreement read as follows:

> This agreement shall be effective on the first day of January, 1981 and shall remain in effect until December 31, 1982, and for further periods of one year, unless notice shall be given by either party of the desire to delete, change or amend any of the provisions contained herein within the period from ninety days to thirty days prior to the renewal date. Should neither of the parties give such a notice this agreement shall renew from year to year.

If the application for certification had been allowed it would have permitted the employees to change their bargaining agent from CLAC to Local 204.

Section 5(4) of the *Labour Relations Act* provides:

> 5(4) Where a collective agreement is for a term of not more than three years, a trade union may, subject to section 61, apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the agreement only after the commencement of the last two months of its operation.

Local 204's application was made during the last two months of the collective agreement and would, therefore, have been a timely application in the absence of the Act. In normal circumstances the Ontario Labour Relations Board would have directed that there be a representation vote among the employees in the bargaining unit. On November 23, 1983, however, the incumbent union requested that the representation vote be postponed or, if taken, that the ballot-boxes be sealed pending submissions to the board regarding the effect of Bill 179, the Act, which was then pending before the Ontario Legislature. On December 3, 1982, the board ordered that the ballot-boxes be sealed pending such submissions. The same submissions and events took place in connection with the application for certification by Local 210 with respect to the employees at Fiddick's Nursing Home Limited.

On January 7, 1983, a hearing was held before the board with respect to the application for certification. CLAC submitted that the certification application was untimely due to the passage of the Act and, in particular, s. 13 thereof. The Act was passed into law on December 15, 1982. By s. 36 thereof it is deemed to have come into force on September 21, 1982. CLAC submitted that the effect of the Act was to extend the collective agreement and therefore

rendered the applications for certification untimely under s. 5(4) of the *Labour Relations Act* which required such application be brought within the last two months of the operation of the collective agreement.

Locals 204 and 210 submitted that the Act did not extend collective agreements but only continued in operation the terms and conditions of collective agreements and that the collective agreement under consideration expired in accordance with its provisions. It was submitted, in the alternative, that if the effect of the Act was to extend collective agreements so as to deprive employees of their right to choose a bargaining agent, or collectively bargain for the period of time set forth in the provisions of the Act, such provisions were inconsistent with, or contrary to, the Charter and, accordingly, were of no force and effect.

The board held that the effect of the Act, and in particular s. 13 thereof, was to continue in force not only the terms and conditions of every collective agreement that includes a compensation plan, but also the collective agreement itself. It concluded, therefore, that the applications with which it was concerned were untimely. The board also held that the Act did not abrogate freedom of association as guaranteed by s. 2(*d*) of the Charter.

The decision of the Education Relations Commission dated May 20, 1983, reached the opposite conclusion. The facts underlying that decision were that the Durham Board of Education and Ontario Secondary School Teachers' Federation, District 17 ("OSSTF"), were parties to a collective agreement which, by its terms, covered the period September 1, 1981 to August 31, 1982. On January 29, 1982, the union gave the employer notice of its desire to negotiate a new agreement for the period September 1, 1982 to August 31, 1983. The notice was timely because s. 10(1) of the *School Boards and Teachers Collective Negotiations Act* provides that either party to an agreement may give written notice of its desire to negotiate to the other party within the month of January in the year in which the agreement expires. Meetings were held commencing in February, 1982, to attempt to conclude a new collective agreement.

Following the enactment of the Act, the Durham Board of Education took the position with the OSSTF that the effect of the legislation was to continue the collective agreement in force until August 31, 1984, and accordingly, there was no longer any legal obligation on behalf of the board of education to bargain with the OSSTF. By letter dated January 28, 1983, the OSSTF requested a determination by the Education Relations Commission pursuant to

s. 60(1)(*a*) and (*f*) of the *School Boards and Teachers Collective Negotiations Act* to determine whether or not the board was negotiating in good faith.

A hearing was held by the commission on April 17, 1983. The board of education took the position that the commission was without jurisdiction to hear the matter on the ground that s. 13 of the Act extended the agreement by one year until August 31, 1983, and accordingly, the notice given under s. 10 of the statute was untimely. By its decision of May 20, 1983, the commission held that the effect of the Act was to extend the terms and conditions of the collective agreement but not the agreement itself. It concluded, therefore, that the agreement did in fact expire on August 31, 1982, and the notice was timely. It further concluded that the Act did not terminate the statutory duties imposed on it under s. 60(1)(*f*) of the *School Boards and Teachers Collective Negotiations Act* and it had jurisdiction and was under an obligation to perform its duties set forth in that section. The section referred to reads as follows:

> 60(1) It is the duty of the Commission,
>
> . . . . . .
>
> (*f*) to determine, at the request of either party or in the exercise of its discretion, whether or not either of the parties is or was negotiating in good faith and making every reasonable effort to make or renew an agreement;

In short, the Labour Relations Board held that s. 13(*b*) of the Act extended the life of collective agreements which contained compensation plans. The Education Relations Commission held that s. 13(*b*) did not extend the life of such collective agreements. It said: "We have concluded that, by extending the terms and conditions of the collective agreement, s. 13 of The Act does not prevent contract expiry from occurring nor does it result in a new collective agreement." The board and commission gave extensive, well-considered and persuasive reasons for their conclusions. Both, however, cannot be right.

It was in this setting that the Divisional Court considered and rejected the submission by counsel on behalf of the Ontario Labour Relations Board that the decision of that board could not be the subject of judicial review. Counsel for the Ontario Labour Relations Board renewed his objection in this Court. He argued that the effect of the privative clauses in the Ontario *Labour Relations Act* had been judicially determined to preclude judicial review of the correctness of any decision of the board, whether dealing with a question of law or a question of fact, unless the

board was "acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer questions not remitted to it". Counsel submitted, therefore, that the determination of the effect of s. 13 of the Act on collective agreements governed by the *Labour Relations Act* was a determination of a question of law within the jurisdiction of the board and even if it was wrong this was a non-reviewable error of law. Reference was made, *inter alia*, to the Ontario *Labour Relations Act*, ss. 106(1) and 108; *Re Libby, McNeill & Libby of Canada Ltd. and United Automobile, Aerospace & Agricultural Implement Workers of America et al.* (1978), 21 O.R. (2d) 340 and 362, 91 D.L.R. (3d) 259 and 281; *McLeod et al. v. Egan et al.*, [1975] 1 S.C.R. 517, 46 D.L.R. (3d) 150, 5 L.A.C. (2d) 336*n*, and *Volvo Canada Ltd. v. Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.), Local 720*, [1980] 1 S.C.R. 178, 99 D.L.R. (3d) 193, 33 N.S.R. (2d) 22.

Galligan J., writing for the Divisional Court on this issue, rejected these submissions. He said at pp. 399-400 O.R., pp. 238-9 D.L.R.:

> I cannot for one moment suggest that either's interpretation of the Act was patently unreasonable. The decisions of the two tribunals are careful, thoughtful, well-reasoned and persuasive. One of my many problems with this case is that as I read each decision I am persuaded by it. The extension of curial deference to each of them would lead to unacceptable results.
>
> It seems to me that the curial deference demanded by authority ought only be extended to a tribunal when it is interpreting its Constitution or home statute. By that I mean curial deference need only be granted to the Labour Relations Board when it interprets the *Labour Relations Act*, and to the Education Relations Commission when it interprets the Boards and Teachers Negotiations Act. The Act is a statute that applies not only to workers and employers who are governed by the *Labour Relations Act* and the Boards and Teachers Negotiations Act but to many others. While it is legislation that applies only to what can loosely be called the public sector of Ontario, and not to the population of Ontario at large, I think the Act is more akin to a "general public enactment" as that term was used by Laskin C.J.C. in *McLeod et al. v. Egan et al.*, [1975] 1 S.C.R. 517, 46 D.L.R. (3d) 150, 5 L.A.C. (2d) 336*n*, than it is to the specialized and particular *Labour Relations Act* and Boards and Teachers Negotiations Act.
>
> I think we are bound by the decision of Laskin C.J.C. in *McLeod v. Egan*, *supra*, at pp. 518-9 S.C.R., pp. 151-2 D.L.R.:
>
> > "Although the issue before the arbitrator arose by virtue of a grievance under a collective agreement, it became necessary for him to go outside the collective agreement and to construe and apply a statute which was not a projection of the collective bargaining relations of the parties but a

> general public enactment of the superior provincial Legislature. On such a matter, there can be no policy of curial deference to the adjudication of an arbitrator, chosen by the parties or in accordance with their prescriptions, who interprets a document which is in language to which they have subscribed as a domestic charter to govern their relationship.
>
> . . . . .
>
> "No doubt, a statute like a collective agreement or any other document may present difficulties of construction, may be ambiguous and may lend itself to two different constructions neither of which may be thought to be unreasonable. If that be the case, it nonetheless lies with the Court, and ultimately with this Court, to determine what meaning the statute should bear. That is not to say that an arbitrator, in the course of his duty, should refrain from construing a statute which is involved in the issues that have been brought before him. In my opinion, *he must construe, but at the risk of having his construction set aside by a Court as being wrong.*"

(Emphasis added.)

> I accept, as did Grange J. in his reasons for judgment in *Re Libby, McNeill & Libby of Canada Ltd. and United Automobile, Aerospace & Agricultural Implement Workers of America et al.* (1978), 21 O.R. (2d) 340 at p. 347, 91 D.L.R. (3d) 259 at p. 266, that there is no difference in this respect between an arbitrator and a board or tribunal. I accept the principle stated by him at p. 347 O.R., p. 266 D.L.R.:
>
> "It is true that Laskin, C.J.C., was there speaking of an arbitrator's decision but I can see no difference in principle between an arbitrator and a board. Where either ventures outside his exclusive jurisdiction he must be right. If he is wrong he is not protected by any doctrine of 'the right to be wrong' nor as put by Laskin, C.J.C., in *McLeod* is there in the interpretation of a statute which is of general enactment 'any policy of curial deference to the adjudication of the Arbitrator'."
>
> Accordingly, it is my opinion that this court must render curial deference to the decision of neither tribunal. Its duty is to decide which of the two decisions was correctly made, that is, which tribunal was correct in its interpretation of the Act. It should decide that issue according to its view of the Act in the light of ordinary principles of statutory interpretation.

We agree with the decision of Galligan J. in this regard. The theory underlining the concept of curial deference has no application here. The Act is, in every sense, a general public enactment. It is not one with which either the Ontario Labour Relations Board or the Education Relations Commission was integrally or closely involved nor over which they could be said to profess any particular expertise. In the circumstances, therefore, we cannot give effect to the submissions.

The majority of the Divisional Court, Galligan J. dissenting, held that the effect of s. 13(*b*) of the Act was to extend collective agreements containing compensation plans beyond their normal expiry dates for the duration of the control period. It was the view of the majority [at p. 436 O.R., p. 275 D.L.R.] that "there is no

distinction to be drawn in light of the provisions of the *Inflation Restraint Act, 1982* between continuing in force the collective agreement and continuing in force 'the terms and conditions of' the 'collective agreement' ". In the view of the majority (O'Leary J. and Smith J.), presuming the constitutional validity of s. 13(*b*), its effect was to prevent the union (in the case of the Service Employees Union) from making a timely application for certification, and more generally, precluding resort to the procedures for collective bargaining under the *Labour Relations Act* and the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1980, c. 205.

The Divisional Court held that s. 13(*b*) was invalid because it infringed the fundamental freedom of association given under s. 2(*d*) of the Charter and its provisions did not contain reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society in accordance with the provisions of s. 1 of the Charter. In the result, the Divisional Court ordered in the Service Employees Union application that the Ontario Labour Relations Board decision be set aside and in the Durham Board of Education application that it be dismissed and thereby, in effect, affirmed the decision of the Education Relations Commission.

Galligan J., having concluded that s. 13 of the Act did not continue the collective agreement between CLAC and Broadway Manor Nursing Home in force beyond December 31, 1982, would have found the application for certification to be timely and would have allowed the application for judicial review, quashed the decision of the Labour Relations Board and remitted the matter to the board to be dealt with in accordance with his findings. Having concluded that s. 13 of the Act did not continue in force beyond August 31, 1982, the collective agreement between the Durham Board of Education and OSSTF (also so found by the Education Relations Commission) he would have found (as did the commission) that the notice given was timely, that the commission had jurisdiction to hold the hearing and accordingly, would have dismissed the application for judicial review on that ground alone.

If the opinion of Galligan J. had been a majority opinion instead of a minority opinion, there would have been no necessity to consider the Charter issue raised in the Public Service Union's application and the Durham Board of Education application. What then is the proper interpretation of s. 13(*b*) of the Act?

In interpreting the provisions of a statute it is essential that fundamental principles of statutory interpretation be applied. The applicable principles relevant to this appeal are as follows:

(1) There is no right to eliminate words contained in the statute

unless the grammatical and ordinary sense of the words leads to some absurdity, repugnancy or inconsistency with the rest of the statute. Every word in a statute should be given a meaning and the words of a statute should not be added to or subtracted from where it is not necessary to do so: see *Maxwell on the Interpretation of Statutes*, 12th ed. (1969), pp. 36-7.

(2) In order to determine the meaning of a provision of a statute it is necessary to examine the purpose and object of the statute when read as a whole in light of the mischief which that statute is intended to correct: see E. A. Driedger, *Construction of Statutes*, 2nd ed. (1983), p. 73 *et seq.*

(3) Statutes in *pari materia* should be read together unless there is a clear repugnancy: again, see *Maxwell on the Interpretation of Statutes*, 12th ed. (1969), p. 191.

Fundamental to the decision of the majority of the Divisional Court was their conclusion [at pp. 434-5 O.R., pp. 273-4 D.L.R.], that a collective agreement cannot have a life independent from all its terms and that even if it can have such an independent life,

> . . . s. 13 [of the Act], by continuing in force the terms and conditions of the collective agreement continues in force the provision of the agreement which relates to its duration. While s. 13 reads "the terms and conditions of . . . every collective agreement . . . shall . . . continue in force without change", it is implicit in those words that one term of the agreement — the date when it otherwise would have expired — is changed to the extended date provided for in the Act.

(*per* O'Leary J.)

In our view, the pertinent question for this Court to decide is whether terms and conditions of a collective agreement can be recognized as being separate and apart from the collective agreement itself. It is clear that both the courts and the Legislature have distinguished between continuing the terms and conditions of a collective agreement and the continuation of a collective agreement itself. Examples of legislative recognition of this principle are found in s. 79 of the *Labour Relations Act* and s. 27(2) and s. 10(3) of the *School Boards and Teachers Collective Negotiations Act*.

The relevant portions of s. 79 of the *Labour Relations Act* are as follows:

> 79(1) Where notice has been given under section 14 or section 53 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,
>
> (*a*) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
>
> (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
>
> (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,
>
> as the case may be; or
>
> (*b*) until the right of the trade union to represent the employees has been terminated,
>
> whichever occurs first.

The courts have recognized the distinction between the continuation in force of the terms and conditions of a collective agreement and the continuation in force of the agreement itself: see *Re Haldimand-Norfolk Regional Health Unit and Ontario Nurses Ass'n et al.* (1981), 31 O.R. (2d) 730 at pp. 737-9, 120 D.L.R. (3d) 101 at pp. 109-10, [1981] C.L.L.C. para. 14,085.

The relevant portions of s. 27 of the *School Boards and Teachers Collective Negotiations Act* are as follows:

> 27(1) If the parties do not make or renew, as the case may be, an agreement within fifteen days after the Commission has given a copy of the report of the fact finder to each of the parties, the parties may agree to refer all matters in dispute between them that may be provided for in an agreement to,
>
> (*a*) an arbitrator or a board of arbitration for determination as provided in Part IV; or
>
> (*b*) a selector for determination as provided in Part V.
>
> (2) Where, pursuant to subsection (1), the parties refer all matters remaining in dispute between them that may be provided for in an agreement to an arbitrator or a board of arbitration or refer all such matters to a selector and either of the parties submits its final offer to the selector,
>
> (*a*) the terms of the agreement, if any, in force between the parties at the time of the giving of notice of desire to negotiate pursuant to subsection 10(1) or (2), shall not be altered until an agreement is made or renewed between the parties;

Section 10(3) of that statute reads as follows:

> 10(3) Where notice has been given of desire to negotiate to make or renew an agreement, the terms and conditions of the agreement, other than a term or condition that prevents a strike, that was in force at the time of giving the notice shall not be altered until either,
>
> (*a*) an agreement or a new agreement comes into force or the agreement is renewed, as the case may be; or

(*b*) subject to subsection 27(2) and subsection 68(5), sixty days have elapsed after the Commission has made public the report of the fact finder as provided in section 26,

whichever first occurs.

In s. 79 and s. 27 and s. 10(3) set forth above, the Legislature has clearly recognized that the collective agreements to which those sections relate have expired but has, nevertheless, prescribed that terms or conditions contained therein shall not be altered during the period of time set by the legislation.

In those situations where the Legislature has intended to continue in force after the expiry date set forth in a collective agreement, not only the terms and conditions of the agreement but also the agreement itself, it has expressed such intention clearly in the relevant statute. Examples of such clear intention may be found in the *Police Act*, R.S.O. 1980, c. 381, s. 35(2), which is as follows:

35(2) Every agreement, decision or award remains in effect until the end of the year in which it comes into effect and thereafter remains in effect until replaced by a new agreement, decision or award.

The provisions found in s. 7(2) of the *Fire Departments Act*, R.S.O. 1980, c. 164, are identical to those contained in s. 35(2) of the *Police Act*.

Counsel for the Service Employees Union has correctly stated that the continuation of the terms and conditions of a collective agreement has a specialized application in collective bargaining and labour relations, namely, to enable the parties to engage in the normal process of collective bargaining while freezing the terms and conditions under which employees work. As is illustrated by the legislation referred to above and to repeat the words used by said counsel, the Legislature has used specific words to provide that the terms and conditions of a collective agreement would continue or would not be altered, notwithstanding that the collective agreement had expired.

If one applies the principle that statutes in *pari materia* should be read together unless there is a clear repugnancy and that the identical or similar language in such statutes should be interpreted in the same way, it is apparent that s. 13 of the Act should be interpreted in the same way as s. 79(1) of the *Labour Relations Act* and ss. 27(2) and 10(3) of the *School Boards and Teachers Collective Negotiations Act*, namely, that the terms and conditions of the collective agreements continue in force but not the collective agreement itself.

In our view, there is no significant difference between the

words "the terms of the agreement . . . shall not be altered" contained in s. 27(2)(*a*) and the words contained in s. 10(3) of the *School Boards and Teachers Collective Negotiations Act* and the words "the terms and conditions of . . . every collective agreement . . . shall continue in force without change . . ." contained in s. 13 of the Act.

There are other cogent reasons for reaching that conclusion. The clear and unambiguous wording of s. 13 is that the terms and conditions of every collective agreement that includes a compensation plan covered by the Act shall continue in force without change for the period for which the compensation plan is extended or made subject to Part II of the Act. It is a term of the Service Employees Union collective agreement that it remained in effect until December 31, 1982. It is a term of the Durham Board of Education agreement that it remained in effect until August 31, 1982. The literal interpretation of the words of s. 13 of the Act is that those terms continued in force, that is to say, the agreements expired on December 31, 1982 and August 31, 1982, respectively. That literal interpretation of the clear and unambiguous words of s. 13 does not lead to any absurdity, repugnancy, or inconsistency with the rest of the statute nor does it result in any frustration of the clear purpose of the statute of which more will be said later. It preserves the rights of the parties under the *Labour Relations Act* and the *School Boards and Teachers Collective Negotiations Act* to make applications for certification and to bargain collectively with respect to non-compensation terms and conditions within the time-limits prescribed by those Acts.

A further reason supporting the interpretation of s. 13 that it does not continue in force the life of the collective agreement results from the application of the principle that no words should be eliminated unless their inclusion and interpretation would lead to any absurdity, repugnancy or inconsistency with the rest of the statute or frustration of the clear purpose of the statute. If it was the intention of the Legislature that the collective agreements themselves be continued in force, as distinct from only the terms and conditions thereof, that object would have been achieved by omitting the words "the terms and conditions of" from s. 13 so that it would have read, "every collective agreement . . . shall . . . continue in force without change . . .". It would then have been made clear that the date of expiry of the collective agreements were extended *and* the terms and conditions thereof remained in force without change. The insertion of the words "terms and conditions of", which were unnecessary if it was the intention of

the Legislature to continue in force the agreement itself, strongly suggest that the Legislature did not have any such intention. The application of the principle that words included in a statute should not, except in exceptional circumstances, be treated as surplusage supports the conclusion that s. 13 does not have the effect of continuing in force the agreement itself, thereby depriving the parties of rights which they would otherwise have under the labour legislation.

Moreover, a consistent meaning should be given to words or phrases used in a statute. It is reasonable to assume that where certain words or phrases are used in one part of a statute to accomplish the Legislature's intention, the same words or phrases will be used in other parts of the statute where it is desired to accomplish the same intention. In that regard it should be noted that where the Act is concerned with compensation plans which had expired before October 1, 1982, it provided in s. 9:

> 9. Every compensation plan that, but for this section, would have expired before the 1st day of October, 1982, *shall be extended*,

Where the Act is concerned with the extension of existing compensation plans it provided by s. 11:

> 11. Every compensation plan that is in effect on the 21st day of September, 1982, to which this Part applies and that expires on or after the 1st day of October, 1982 ... *shall*,
>
> (a) ... *be extended* ...

Section 8(1) contains similar language. It reads as follows:

> 8(1) Notwithstanding any other Act, except the *Human Rights Code, 1981*, and section 33 of the *Employment Standards Act*, every compensation plan that is in effect on the 21st day of September, 1982, *shall be continued* without change to and including its scheduled expiry date.

(Emphasis added.)

It is to be noted that it is clearly stated in each of these sections that the compensation plans are extended. There is no reference to the terms and conditions of the compensation plans being extended. If it was the intention of the Legislature to extend or continue in force collective agreements including such compensation plans one would expect similar words to have been used. The fact that it did not do so supports the conclusion that it did not intend to extend or continue in force the collective agreements *per se*.

In the Service Employees Union application, it is the right of employees to be represented by a union of their choice which is in issue. In the Durham Board of Education application, it is the right of one party to a collective agreement to compel the other

party to the agreement to bargain in good faith which is in issue. A statute should not be construed or interpreted as taking away a right unless words are used which either make it explicitly clear that such was the intention of the Legislature, or which authorize the doing of something that is clearly inconsistent with the continuance of that right. *Craies on Statute Law*, 7th ed. (1971), p. 118. Furthermore, as previously indicated, it is necessary to examine the purpose and object of a statute when read as a whole in the light of the mischief which that statute is intended to correct, in order to determine the meaning of a provision of the statute, in this case s. 13 of the Act.

The purpose and object of the Act are made abundantly clear by its title: "An Act Respecting the Restraint of Compensation in the Public Sector of Ontario and the Monitoring of Inflationary Conditions in the Economy of the Province". In so far as the Act applies to employers and employees, the underlying purpose is clearly directed towards the control of compensation rates and other terms and conditions of a compensation plan during the time period covered by it. Section 15 of the Act makes it clear that the Legislature did not intend to control or regulate non-compensation terms and conditions of employment. It reads as follows:

> 15. The parties to a collective agreement that includes a compensation plan that is extended under section 11 may, by agreement, amend any terms and conditions of the collective agreement other than compensation rates or other terms and conditions of the compensation plan.

In dealing with the Service Employees Union application Galligan J. said correctly [at pp. 404-5 O.R., pp. 243-4 D.L.R.], in our view, with respect to the interpretation of s. 13:

> ... I do not think that there is explicit language in s. 13 taking away the right of workers to choose for themselves by majority vote who will be their union. Nor can I find anything in s. 13 or elsewhere in the Act authorizing the doing of anything which is clearly inconsistent with the continuing in force of that right.
>
> . . . . .
>
> I cannot see how abrogation, even temporarily, of workers' rights to choose their own bargaining agent can do anything to curb inflation ... I can go so far as to say that in my opinion the abrogation of those rights for the purpose of controlling wage raises would be absurd and unjust. I adopt what was said by Finnemore J. in *Holmes v. Bradfield Rural District Council*, [1949] 2 K.B. 1 at pp. 7-8:
>
> > "... the mere fact that the results of applying a statute may be unjust or even absurd does not entitle this court to refuse to put it into operation. It is, however, common practice that if there are two reasonable interpretations, so far as the grammar is concerned, of the words in an Act, the courts adopt that which is just, reasonable and sensible rather than one which is, or appears to them to be, none of those things".

He concluded that an interpretation of s. 13 of the Act which is just, reasonable and sensible is one that would not continue the collective agreement itself in force and, accordingly, would not interfere, *inter alia*, with the rights of workers to select their union pursuant to the provisions of the *Labour Relations Act*. The same reasoning applies with equal force, as Galligan J. held, to the right of one party to a collective agreement to compel the other party to bargain in good faith with respect to non-compensation terms and conditions of a collective agreement.

All of the aforementioned reasons constitute substantial grounds for finding that s. 13 does not continue in force the collective agreements and does not take away the rights under the statutes relied upon by the union in each case. The matter, however, is not one that is free from difficulty.

Section 14 of the Act sets out the procedure to be followed where the union and employer cannot agree, *inter alia*, on the amount of the increase in compensation rates to which members of the compensation plan included in the collective agreement are entitled under cl. 10(*a*) or subcl. 10(*b*)(ii) of the Act. The language used in s. 14 is:

> 14(1) Where *the parties to a collective agreement*,
>
> (*a*) cannot agree . . .
>
> . . . . .
>
> either party may apply . . .

The italicized words are the same words used in the first line of s. 15 of the Act. The Ontario Labour Relations Board held that the words "parties to a collective agreement" in ss. 14 and 15 referred to the original parties to an existing agreement. If that were so it would mean that s. 13 must have the effect of continuing the agreement in force, otherwise, there would be no terms and conditions to be amended under s. 15.

A further difficulty is raised by a conclusion reached by O'Leary J. He concluded that the recognition clause in the Service Employees Union collective agreement is a term or condition of the agreement which has been continued without change, even if the agreement itself is deemed to have expired. In his view, therefore, the respondent would be precluded from making a displacement application for certification.

It is of course a principle of interpretation, to be applied along with other principles already referred to, that the language of a section must be interpreted to achieve a result which is consistent with other provisions of the same Act. If the above views of the Ontario Labour Relations Board and O'Leary J. prevail, it is difficult to reconcile the interpretation of s. 13 urged upon the court by the unions with the provisions of ss. 14 and 15. The Education Relations Committee found that the words "collective agreement" used in ss. 14 and 15 referred to collective agreements existing at the time the Act was passed. Section 13 undoubtedly refers to collective agreements in effect as of the effective date of the Act. In our view, and in light of the general interpretative principle alluded to above, it is reasonable to interpret those words in ss. 14 and 15 as having the same meaning, thereby preserving the rights of employees while not interfering with the purpose of the Act.

On the basis of the conclusion reached by O'Leary J., the employer is obliged to continue to recognize the incumbent union as the bargaining agent of the employees. Although the incumbent union is the party to the collective agreement existing on the effective date of the Act, it must be borne in mind that this union is acting as an agent for the employees of an employer in a bargaining unit: see *Labour Relations Act*, s. 5 thereof. The recognition clause is for the benefit of this group of employees. It would be anomalous if the provisions of the Act were interpreted so as to deprive employees of their right to choose their bargaining agent in accordance with the *Labour Relations Act*. Such a result is not specifically provided for by the Act and, manifestly, would in no way assist in achieving the purposes of the Act. The preferable conclusion is one that creates as little interference as possible with existing rights established by the *Labour Relations Act*. Accordingly, in our view, the continuation in force of the recognition clause should be interpreted to require the employer to recognize the duly certified bargaining agent, whatever union that may be at the relevant time.

The interpretation of s. 13 accepted by the Divisional Court leads to a further anomalous result. A displacement application could only be brought during the last two months of the control period where the collective agreement between the employer and the bargaining representative was for a term of not more than three years, since such an application, pursuant to s. 5(4) of the *Labour Relations Act*, can be brought only after the commencement of the last two months of the collective agreement's operation. A displacement application could be brought, however, during the control period where the collective agreement is for a term of more than three years, since such an application, pursuant to s. 5(5) of the *Labour Relations Act*, can be brought "after the commencement of the thirty-fifth month of

the collective agreement's operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate". The interpretation sought by the applicant union avoids this anomalous situation and, accordingly, constitutes a further reason for supporting that interpretation.

The submission was also made in support of the interpretation given to s. 13 by the majority of the Divisional Court that there was no reason to allow a displacement application or for the Education Relations Commission to conduct a hearing because all terms and conditions of collective agreements were continued in force. The argument was made that s. 15 permitted changes only by agreement between the parties. That argument ignores the fact that agreement between the parties to amend non-compensation terms and conditions of a collective agreement might be more readily accomplished by bargaining in good faith between the parties. It is true that changes can be effected only by agreement. It may be, therefore, that the economic sanctions of strike and lock-out under the *Labour Relations Act* and arbitration proceedings under the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1980, c. 205, are not available to public sector employees under the Act. The fact remains, however, that the purpose of the Act can be fully achieved without hindrance by an interpretation of s. 13 which permits the parties to resort to bargaining in good faith and conciliation procedure, which may result in an agreement to amend terms and conditions of a collective agreement pursuant to s. 15 of the Act.

For the above reasons we conclude that the Labour Relations Board and the Divisional Court erred in finding that the Service Employees Union's application was not timely on the grounds that s. 13 continued in force the collective agreement there in issue.

We further conclude that the Education Relations Committee's decision that the application of the OSSTF was timely, was correct and that the majority decision of the Divisional Court in that regard in the Durham Board of Education application was in error.

We agree, however, with the order of the Divisional Court in each of those applications, although for different reasons. In the result, the appeals in each application are dismissed with costs. The cross-appeal of the Service Employees Union in its application is allowed and the cross-appeal of the OSSTF in the Durham Board of Education application is allowed but in each case without costs.

Having regard to our interpretation of s. 13 of the Act, no Charter issue arises. In *Law Society of Upper Canada v. Skapinker*, a judgment of the Supreme Court of Canada, released May 3, 1984, and as yet unreported [since reported 9 D.L.R. (4th) 161, 11 C.C.C. (3d) 481, 8 C.R.R. 193], Estey J. stated at p. 181:

> The development of the Charter as it takes its place in our constitutional law, must necessarily be a careful process. Where issues do not compel commentary on these new Charter provisions, none should be undertaken.

In the circumstances, it would not be appropriate for us to express any opinion on the Charter issues considered in the court below.

Appeals and cross-appeals disposed of accordingly.

BANK OF MONTREAL v. FACLARIS et al.

Ontario High Court of Justice, Barr J. June 22, 1984.

Bankruptcy — Property vesting in trustee — Money paid into court by bankrupt pursuant to Mareva injunction — Whether property of bankrupt.

Pursuant to an injunction restraining disposition of assets pending trial (a Mareva injunction), the defendant to an action brought by a bank paid a sum of money into court. Subsequently, the defendant became bankrupt, and the trustee in bankruptcy claimed the money.

Held, the money, though paid into court, remained the property of the defendant. The bank was not a secured creditor, and consequently the trustee was entitled to the money.

Re Charisma Fashions Ltd. (1971), 15 C.B.R. (N.S.) 207; *Re Hansard Spruce Mills Ltd.*, [1954] 1 D.L.R. 326, 10 W.W.R. (N.S.) 344, 33 C.B.R. 217, **distd**

Other cases referred to

Third Chandris Shipping Corp. et al. v. Unimarine SA, [1979] 2 All E.R. 972; *Liberty National Bank & Trust Co. v. Atkin et al.* (1981), 31 O.R. (2d) 715, 121 D.L.R. (3d) 160, 20 C.P.C. 55; *M. J. Roofing & Supply Ltd. v. Guay et al.* (1981), 130 D.L.R. (3d) 112, [1982] 1 W.W.R. 259, 40 C.B.R. (N.S.) 88, 24 Man. R. (2d) 244; *Canadian Credit Men's Trust Ass'n Ltd. v. Beaver Trucking Ltd.*, [1959] S.C.R. 311, 17 D.L.R. (2d) 161, 38 C.B.R. 1; *Avco Financial Services Realty Ltd. v. Manitou Co-operative Housing Ltd. et al.* (1975), 21 C.B.R. (N.S.) 256; *V.I. Int'l Holdings Ltd. v. Henbar Investments Ltd. et al.* (1982), 41 C.B.R. (N.S.) 304, 19 Alta. L.R. (2d) 92, 49 A.R. 84

Statutes referred to

Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 2, 50

MOTION by a trustee in bankruptcy for an order for payment out of money paid into court.

entitled "Conveyance of Timber" in *Cyclopedia of Conveyancing*, "O'Brien's Conveyancer", 8th ed. (1942), pp. 682-3.

I also respectfully doubt whether the principle of permitting extrinsic evidence to ascertain the intention of the parties where their written agreement is ambiguous applies where, as here, what is involved is not the interpretation of an "agreement" but the meaning and effect of conventional words of grant in a conveyancing instrument.

Having concluded that the timber lease was effectively assigned to the appellant, I would allow the appeal. The parties have in effect agreed that in that event the appellant is entitled to damages against the respondents for the value of the timber which he could have removed had he not been barred by the respondents. The quantity of timber has been fixed by the jury at the trial of this case. Stumpage allowances of $6 per cord for softwood and $5 per cord for hardwood have been agreed upon. Applying these figures, the appellant claims damages of $18,330, made up as follows:

2,870	cords of softwood at $6.00 per cord	$17,220
62	cords of hardwood at $5.00 per cord	310
40,000	board feet of lumber at $25.00 per 1,000	800
		$18,330

The respondents argue, however, that from this sum should be deducted the $3 per cord stumpage price which under the timber lease the appellant would have had to pay for all timber removed — or a total deduction of $8,916, leaving net damages of $9,414.

The appellant contends that the $3 per cord is merely a contractual obligation between him and his father which should be no business of the respondents. He argues that the right to receive the $3 per cord was not an incident of the lease or *profit à prendre* which passed with the fee of the land on his father's sale to the Farm Loan Board of Silverglen, but was a right personal to his father. If the obligation to pay his father $3 per cord did not itself disappear on his father's death, it was now, he suggests, at most a debt payable by him to his father's estate.

The appellant's argument is basically inconsistent with the conclusion already reached — that the timber lease is an assignable conveyancing instrument. The appellant would have us accept the validity of the assignment to him but would deny that the conveyance of the whole property to Silverglen effectively assigned to it all the owner's rights under the lease.

In my opinion, the $3 per cord fee or price was an integral part of the conveyancing of the timber rights. The grantee's right to cut and remove timber carried a duty to pay the fee to the grantor. The fee is indistinguishable from rent reserved in an ordinary lease and is itself an interest in real property. The owner of the fee has all rights in the land, including all rights incidental to the land, such as easements appurtenant to it, rights of support, rent under any leases and fees for *profits à prendre*, as are here involved. When the fee is sold, all such incidental rights go with it. When the appellant became assignee of the timber lease, he acquired the benefit but also assumed the burden.

Here the respondents, who have violated the appellant's rights and must pay damages, happen to be the beneficial successors of the grantor. In that capacity they are creditors of the appellant for the $3 per cord and entitled to set it off against the damages. We are assured by counsel that the Farm Loan Board, the legal owner of the land, has been notified of these proceedings.

It follows that the appellant is entitled to judgment against the respondents for the net amount of $9,414.

The appellant should also have costs of the trial and of this appeal, except that the respondents may set off their costs of the day in respect of the hearing by this court on January 28, 1983, of the argument of counsel on whether the damages should include the stumpage fee.

Appeal allowed.

LAW v. SOLICITOR-GENERAL OF CANADA et al.

Federal Court, Trial Division, Mahoney J. February 1, 1983.

Constitutional law — Charter of Rights — Remedies — Court of competent jurisdiction — Immigration Appeal Board court of competent jurisdiction under Charter — Immigration Act, 1976, 1976-77 (Can.), c. 52, ss. 59(1), 65(1), 72(1), 75(1) — Canadian Charter of Rights and Freedoms, s. 24(1).

Cases referred to

Prata v. Minister of Manpower & Immigration (1975), 52 D.L.R. (3d) 383, [1976] 1 S.C.R. 376, 3 N.R. 484

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 1, 7, 24(1)
Constitution Act, 1982, s. 52(1)
Criminal Code, s. 305
Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), s. 50(1)

Immigration Act, 1976, 1976-77 (Can.), c. 52, ss. 59(1), 65(1), 72(1)(*b*), 75(1), 83
Immigration Appeal Board Act, R.S.C. 1970, c. I-3, s. 21

MOTION to strike out a statement of claim.

Paul D. Copeland, for plaintiff.
Brian R. Evernden, for defendants.

MAHONEY J.:—This is a motion on behalf of the defendants to strike out the statement of claim as disclosing no reasonable cause of action as against the defendants or as otherwise an abuse of process or, alternatively, to stay proceedings pursuant to paras. 50(1)(*a*) and (*b*) of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.),[1] on the ground that the Immigration Appeal Board is currently seised with jurisdiction to determine the issue.

The essential facts pleaded in the statement of claim are that the plaintiff, a native of Hong Kong, was landed as an immigrant in Canada July 31, 1974; convicted of extortion, contrary to s. 305 of the *Criminal Code*, an offence carrying a maximum penalty of 14 years' imprisonment, on May 15, 1978; and, on November 28, 1978, ordered deported. He appealed to the Immigration Appeal Board which stayed execution of the deportation order. Successive stays were ordered. The statement of claim continues:

> 8. Pursuant to section 83 of the Immigration Act, 1976, the Minister of Employment and Immigration on the 20th day of July, 1982 and the Solicitor General of Canada on the 3rd day of August 1982 signed a Certificate certifying that in their opinion based on criminal intelligence reports considered by them that it would be contrary to the national interest for the Immigration Appeal Board in the exercise of its authority under section 75(1) of the Act or subsection 76(3) of the Act with respect to an appeal made by the Plaintiff pursuant to s. 72(1)(b) to do other than dismiss the appeal.
>
> 9. By letter dated the 10th day of August, 1982 the said Certificate was filed with the Immigration Appeal Board.
>
> 10. The Plaintiff was not informed that the Defendants were considering the Certificate under section 83 of the Immigration Act, 1976 and the Plaintiff was not given an opportunity of making any submissions in regard to any of the matters considered by the Defendants concerning that Certificate.
>
> . . . . .
>
> 12. The Plaintiff therefor claims:
>
> (a) A declaration that the Defendants are obliged to inform the Plaintiff of the general allegations against him and allow him to make submissions prior to completing a section 83 Certificate against him.

[1] 50(1) The Court may, in its discretion, stay proceedings in any cause or matter,
(*a*) on the ground that the claim is being proceeded with in another court or jurisdiction; or
(*b*) where for any other reason it is in the interest of justice that the proceedings be stayed.

> (b) A Declaration that the provisions of section 83 of the Immigration Act, 1976 are contrary to the provisions of the Charter of Rights and Freedoms.
>
> (c) A declaration that in the circumstances of his appeal at the stage that it has reached the use of the section 83 Certificate is not available to the Minister of Employment and Immigration or his representatives.
>
> (d) An order of Prohibition against the representatives of the Minister of Employment and Immigration prohibiting them from seeking to file or in any way rely upon the section 83 Certificate at any resumption of the Plaintiff's Appeal before the Immigration Appeal Board.
>
> (e) The costs of this action.

Paragraph 11 pleads facts concerning the citizenship of the plaintiff's wife and children and the status in Canada of his parents and other relatives which the defendants seek to have struck out as immaterial in any event. These facts were, presumably, pleaded to demonstrate that the appellant was entitled to recourse to para. 72(1)(*b*) of the *Immigration Act, 1976*, 1976-77 (Can.), c. 52, and, hence, the stays open to the Immigration Appeal Board in the absence of the s. 83 certificate. The defendant sought, in the alternative, to strike it out as being immaterial. I agree that it is immaterial to this action and should be struck out in any event.

The argument was directed entirely to the relief sought under paras. 12(a) and (b). No separate attack on paras. 12(c) and (d), aside from that on the statement of claim as a whole, was advanced. In seeking the relief he does under para. 12(a), the plaintiff is asking for reconsideration of the decision in *Prata v. Minister of Manpower & Immigration* (1975), 52 D.L.R. (3d) 383, [1976] 1 S.C.R. 376, 3 N.R. 484, in the light of subsequent jurisprudence and, under para. 12(b), he is asking for its reconsideration in light of the advent of the *Canadian Charter of Rights and Freedoms*.

In response to a direction from the court, plaintiff's counsel stated that the particular provisions relied on for the relief sought under para. 12(b) are s. 7 of the Charter and s-s. 52(1) of the *Constitution Act, 1982*:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> . . . . .
>
> 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of this Constitution is, to the extent of such inconsistency, of no force or effect.

Section 7 must, of course, be read in conjunction with s. 1 of the Charter which provides that the rights prescribed are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"; however, clearly, if the defence turns on that, it is not an appropriate occasion to strike out the statement of claim summarily. The reasonableness of limits, unless self-evident, requires proof.

Section 83 of the *Immigration Act, 1976*, provides:

> 83(1) Notwithstanding anything in this Act, the Board shall dismiss any appeal made or deemed by subsection 75(3) to have been made pursuant to paragraph 72(1)(*b*) or 72(2)(*d*) or pursuant to section 79 if a certificate signed by the Minister and the Solicitor General is filed with the Board stating that, in their opinion, based on security or criminal intelligence reports received and considered by them, it would be contrary to the national interest for the Board to do otherwise.
>
> (2) A certificate purporting to be signed by the Minister and the Solicitor General pursuant to subsection (1) is proof of the matters stated therein and shall be received by the Board without proof of the signatures or official character of the persons appearing to have signed it unless called into question by the Minister or the Solicitor General.

It is identical in its essentials and effect to s. 21 of the *Immigration Appeal Board Act*, R.S.C. 1970, c. I-3, which was considered by the Supreme Court of Canada in *Prata v. Minister of Manpower & Immigration, supra*. It would be a wrong exercise of discretion summarily to deny the plaintiff the opportunity to have the courts reconsider *Prata* in light of the Charter. It may, as well, otherwise be ripe for reconsideration in light of the rapid evolution of the law. The action should not be dismissed on the ground that the statement of claim discloses no reasonable cause of action.

As to whether it should be dismissed as an abuse of process, it is, I take it, axiomatic that bringing an action in a court which has no jurisdiction to deal with the issues raised is an abuse of that court's process. The relevant provisions of the law are s-ss. 59(1), 65(1), 72(1) and 75(1) of the *Immigration Act, 1976*, and s. 24(1) of the Charter, the material provisions of which follow:

The *Immigration Act, 1976*:

> 59(1) There is hereby established a board, to be called the Immigration Appeal Board, that shall, in respect of appeals made pursuant to section 72 ... have sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction, that may arise in relation to the making of a removal order ...
>
> . . . . . .
>
> 65(1) The Board is a court of record and shall have an official seal, which shall be judicially noticed.

> . . . . . .
>
> 72(1) Where a removal order is made against a permanent resident ... that person may appeal to the Board on either or both of the following grounds, namely,
>
> . . . . . .
>
> (*b*) on the ground that, having regard to all the circumstances of the case, the person should not be removed from Canada.
>
> . . . . . .
>
> 75(1) The Board may dispose of an appeal made pursuant to section 72
>
> (*a*) by allowing it;
> (*b*) by dismissing it; or
> (*c*) in the case of an appeal pursuant to paragraph 72(1)(*b*) or 72(2)(*d*), by directing that execution of the removal order be stayed.

The Charter:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The Immigration Appeal Board is, within the limits of its jurisdiction as defined by statute, a court of competent jurisdiction within the contemplation of s-s. 24(1) of the Charter. The board has, by s-s. 59(1) of the *Immigration Act, 1976*, sole and exclusive jurisdiction to hear and determine, *inter alia*, all questions of law that may arise in relation to the removal order against which the plaintiff has appealed, under s-s. 72(1), to the board. The issues raised in this action, namely, whether the law as stated in *Prata v. Minister of Manpower & Immigration* remains the law in light of subsequent jurisprudence and the Charter, are such questions of law. The board has sole and exclusive jurisdiction to determine them; this court is without such jurisdiction.

If I had not concluded that this action should be dismissed for want of this court's jurisdiction to entertain it, I should have stayed the action. It would have been in the interest of justice to do so. The board is already seised of the matter and competent to decide the issues raised in the statement of claim. The plaintiff's right of access to appellate tribunals will be substantially identical, in the circumstances, whether the initial determination is made by the board or this court.

JUDGMENT

The statement of claim is struck out and the action dismissed with costs.

Motion granted.

RE TOOR AND MINISTER OF EMPLOYMENT & IMMIGRATION

Federal Court of Appeal, Thurlow C.J., Heald J. and Verchere D.J.
February 15, 1983.

Immigration — Permanent resident — Mother and children sponsored by father — Mother stating she would return to native country when children settled — Immigration Appeal Board denying permanent resident status because applicant had no intention of taking up Canadian residence — Statement not inconsistent with intention to take up permanent residence in Canada, at least in immediate future — Board erred — Immigration Act, 1976, 1976-77 (Can.), c. 52.

Immigration — Sponsorship — Mother and children sponsored by father — Mother denied permanent residence status — Children's eligibility not dependent on mother's eligibility — Immigration Act, 1976, 1976-77 (Can.), c. 52.

Statutes referred to

Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), s. 52(c)(i)
Immigration Act, 1976, 1976-77 (Can.), c. 52, s. 84

APPEAL from a decision of the Immigration Appeal Board.

J. Aldridge, for appellant.
R. Hunter, for respondent.

The judgment of the court was delivered by

THURLOW C.J.:—This is an appeal under s. 84 of the *Immigration Act, 1976*, 1976-77 (Can.), c. 52, from a judgment of the Immigration Appeal Board signed on February 18, 1982, which dismissed the appellant's appeal and held that the refusal of a visa officer to approve the applications for landing made by Gurbachan Kaur Toor, Lehmber Singh Toor, Gurbax Kaur Toor and Jaswinder Singh Toor, was in accordance with the law.

The letter of refusal was addressed to Mrs. Gurbachan Kaur Toor. It read as follows:

> Dear Mrs Toor:
>
> This refers to your application for permanent residence in Canada which has now been carefully reviewed.

> I regret to inform you that your application has been refused as you are a member of the inadmissible class of persons described in paragraph 19(2)(d) of the Immigration Act, 1976 in that you have not fulfilled or complied with the requirements of subsection 9(3) of the Act. You have not as required by Section 9(3) of the Act, produced such documentation as was required by the visa officer to establish your admissibility under the Immigration Act, 1976 and the Immigration Regulations, 1978 including satisfactory evidence to establish that you are seeking landing in Canada.
>
> I realize that this decision will be a disappointment to you, and regret that it cannot be otherwise. It is your responsibility to notify your sponsor of this decision.

The applications of all four persons had been sponsored by the appellant in June, 1979. He is a Canadian citizen. Gurbachan Kaur Toor was represented as being his wife and the other three applicants as his children. When the applications were made and sponsored all three children were represented to be under 21 years of age.

The case discloses at p. 22 that the three children were regarded by the visa officer as accompanying dependants of Gurbachan Kaur Toor and that their applications were not processed for the purpose of verifying their relationship to the appellant or their ages. Nor was there any reference to their applications in the letter of refusal sent to Gurbachan Kaur Toor. It does not appear to have been recognized either by the visa officer or by the Immigration Appeal Board that as their applications were sponsored by the appellant as his children, their eligibility for landing was not dependent on the eligibility of their mother.

That the Immigration Appeal Board was, in the circumstances, without jurisdiction to make any order with respect to the three children was conceded in the respondent's memorandum of argument. If indeed the children's applications can be regarded as having been refused and if the board can be regarded as having had jurisdiction to deal with them, the jurisdiction could only be exercised to allow the appeal and set aside such refusal. This appeal must therefore be allowed and the judgment of the board set aside in so far as it purports to deal with the children's applications and to hold that the refusal of their applications is in accordance with the law.

In upholding the refusal of the application of the applicant's wife the board concluded:

> The Board is of the opinion from the evidence on record and adduced at the hearing of the appeal that Mrs Gurbachan Kaur Toor had no intention of taking up residence in Canada when she filed her Application for Permanent Residence and therefore finds that the refusal letter is valid and dismisses the

Crown will not be excluded pursuant to ss. 24 and 8 of the Charter.

Ruling accordingly.

RE REGINA AND BROOKS et al.

Ontario High Court of Justice, Eberle J. September 29, 1982.

Constitutional law — Charter of Rights — Enforcement of rights — Court of competent jurisdiction — Accused granted bail on certain conditions — At subsequent appearance in provincial court accused alleging they did not understand bail process and had been denied bail without just cause — Whether provincial court judge court of competent jurisdiction for purposes of determining whether accused entitled to remedy for alleged breach of right to bail as guaranteed by Charter of Rights — Canadian Charter of Rights and Freedoms, ss. 11(e), 24 — Cr. Code, s. 457.8.

Constitutional law — Charter of Rights — Reasonable bail — Accused granted bail on certain conditions on consent — On subsequent court appearance accused alleging they did not understand bail hearing and bail process — Accused unable to meet conditions of bail previously set — Whether accused denied reasonable bail without just cause — Canadian Charter of Rights and Freedoms, s. 11(e).

The accused, charged with various drug offences, were granted bail on certain conditions to which they had consented. When the accused next appeared in court, none of them had been able to meet the bail conditions and a judge of the provincial court proceeded to hold another hearing with respect to bail in which each of the accused testified and indicated that they had consented to the bail but did not really understand what they were doing and were confused about the bail process. The provincial court judge refused to permit the Crown to lead any evidence on this bail hearing and made a new bail order reducing the conditions on the ground that the accused had been deprived of their right under s. 11(*e*) of the *Canadian Charter of Rights and Freedoms*. On application by the Crown for *certiorari* to quash the bail orders, **held**, the application should be granted.

The provincial court judge was not a court of competent jurisdiction within the meaning of s. 24 of the Charter with power to grant the remedy for the alleged breach of s. 11(*e*) and accordingly he had no jurisdiction to alter the bail orders previously made. The court of competent jurisdiction within the meaning of s. 24 is a court given jurisdiction by the laws of the country and it was not Parliament's intention to give all jurisdiction in all matters to all courts. In giving a person a right to apply to a court of competent jurisdiction as s. 24 does, the section refers to and points to the court or courts of competent jurisdiction with respect to the matter that is sought to be enforced under s. 24. In this case, a judicial interim release order had been made with respect to the accused and the *Criminal Code* makes express provision for review of those orders and gives jurisdiction to do so to a county or district court or to a superior court, not to another provincial court judge. The provincial court judge's only power to review a previous bail order would be pursuant to s. 457.8(2)(*a*) or (*b*), neither of which applied in this case. Accordingly, the provincial court judge had no jurisdiction to set aside existing release orders and substitute new ones.

Further, it could not be said that the accused had been denied reasonable bail without just cause within the meaning of s. 11(*c*) of the Charter. The concept of a denial of reasonable bail without just cause requires a consideration of the circumstances of each case, the circumstances of the offence or offences alleged to have been committed as well as the circumstances of the particular accused. Whether or not the accused understood or was confused about the bail process under ordinary circumstances is not particularly relevant. Finally, the refusal of the judge to permit the Crown to lead evidence at the hearing was a denial of natural justice and itself led to a loss of jurisdiction.

Cases referred to

R. v. Garrett et al., [1907] 1 K.B. 881; *Re Siegel and The Queen* (1982), 1 C.C.C. (3d) 253, 39 O.R. (2d) 337, 29 C.R. (3d) 81; *Re Koumoudouros and Municipality of Metropolitan Toronto* (1982), 67 C.C.C. (2d) 193, 136 D.L.R. (3d) 373, 37 O.R. (2d) 656, 29 C.P.C. 99; *R. v. Lyons (No. 2)* (1982), 70 C.C.C. (2d) 1, 141 D.L.R. (3d) 376, [1982] 6 W.W.R. 2 *sub nom. R. v. Lyons, R. v. Yanover* (1982), 70 C.C.C. (2d) 376, 37 O.R. (2d) 647

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 11(*c*) and (*e*), 24(1)
Criminal Code, s. 457.8(2)(*a*) and (*b*) (rep. & sub 1974-75-76, c. 93, s. 54)

APPLICATION by the Crown for an order in the nature of *certiorari* to quash release orders.

M. R. Dambrot, for applicant.
J. J. Burke, for respondent.

EBERLE J. (orally):—An application is made by counsel for the Attorney-General for relief by way of *certiorari* with respect to certain orders made by Judge Ross in the provincial court on June 22nd, which orders had the effect of varying judicial interim release orders made three days earlier with respect to the respondents.

On June 19, 1982, the respondents, with one exception, had been granted bail on conditions. Their cases were put over until June 21st and then to June 22nd. On that day it appeared that none of them had been able to meet the conditions set in the bail. His Honour proceeded to hold a hearing with respect to bail in which each of the accused was called as a witness and it appears that the purport of the evidence was that although they had consented to the bail and terms set on the earlier date, they did not really understand what they were doing and were confused about the bail process. His Honour was not prepared to let the Crown call any evidence with respect to these matters and he made a new bail order reducing the conditions.

I said earlier that there was one exception so far as the respondents were concerned and that is the accused, LeBlanc, with respect to whom no bail hearing was held on June 19th. Accord-

ingly, the hearing held on June 22nd by Judge Ross was the only bail hearing with respect to him and counsel for the applicant abandons his application for *certiorari* with respect to LeBlanc.

The applicant takes three points. The first is that Judge Ross was not on the occasion in question a court of competent jurisdiction within s. 24(1) of the *Canadian Charter of Rights and Freedoms*. The second is that he erred in law in concluding that the respondents' rights under s. 11(*e*) of the Charter had been violated. That section reads:

> 11. Any person charged with an offence has the right
>
> . . . . .
>
> (*e*) not to be denied reasonable bail without just cause.

The third is that His Honour Judge Ross lost jurisdiction by refusing to permit the Crown to call evidence with respect to the bail.

I turn now to the first of those grounds. The authorities hold, and I am in agreement with them, that s. 24 of the *Canadian Charter of Rights and Freedoms*, in referring to a court of competent jurisdiction, is referring to a court given jurisdiction by the laws of the country. I do not think that it can be said that, by the use of those words in s. 24(1), namely, "a court of competent jurisdiction", Parliament intended to give all jurisdiction in all matters to all courts. That, it seems to me, is an interpretation going far beyond the phrase itself and the context in which it appears. It seems to me that in giving a person a right to apply to a court of competent jurisdiction, as s. 24 does, the section refers to and points to the court or courts of competent jurisdiction with respect to the matter that is sought to be enforced under s. 24.

I have been referred to two particular cases that deal with this matter. One is the case of *R. v. Garrett et al.*, [1907] 1 K.B. 881. Needless to say, it is a case which does not deal with s. 24(1) but it does deal with the phrase "court of competent jurisdiction" where it appeared in a statute of the United Kingdom and at p. 886 Collins, M.R. says:

> In my opinion the argument for the appellant breaks down, because it seems to me that the words "a Court of competent jurisdiction" were simply general words introduced in contemplation of the fact that the section does provide elsewhere for the mode of recovery, that is, in the same manner as paving expenses were recoverable under the earlier Acts and the expression "Court of competent jurisdiction" seems to me to be only a compendious expression covering every possible *Court which by enactment is made competent to entertain a claim* for the recovery of paving expenses.

(Emphasis is mine.) The italicized words are particularly apt for the case at bar. It seems to me that the principal of interpretation

expressed is applicable to s. 24(1). Since the Charter itself does not establish nor express nor designate a particular court of competent jurisdiction, one must have resort to other statutes and other laws giving courts jurisdiction. That case was quoted with approval by Mr. Justice O'Driscoll in an unreported decision of *Re Siegel and The Queen* heard on July 8, 1982 [since reported 1 C.C.C. (3d) 253, 39 O.R. (2d) 337, 29 C.R. (3d) 81]. I refer particularly to what he said in point 5 on p. 12 and on p. 20. A similar matter was discussed by Mr. Justice Catzman in the case of *Re Koumoudouros and Municipality of Metropolitan Toronto*, unreported, heard June 8, 1982, although it is not so directly in point as the other authorities [since reported 67 C.C.C. (2d) 193, 136 D.L.R. (3d) 373, 37 O.R. (2d) 656]. However, as I read his reasons, he approaches the matter in the same way. To the same effect is a decision of Mr. Justice Seaton in the British Columbia Court of Appeal in *R. v. Lyons (No. 2)*, unreported, heard August 4, 1982 [since reported 70 C.C.C. (2d) 1, 141 D.L.R. (3d) 376, [1982] 6 W.W.R. 2 *sub nom. R. v. Lyons*]. Finally, in *R. v. Yanover*, unreported, May 3, 1982, Mr. Justice Hollingwoth approaches the matter in the same way [since reported 70 C.C.C. (2d) 376, 37 O.R. (2d) 647].

Accordingly, in my view, we must look to the general law of the country to see what court is a court of competent jurisdiction to obtain the remedy appropriate in the circumstances. The circumstances were that a judicial interim release order had been made with respect to the four respondents other than LeBlanc. The *Criminal Code* makes express provision for review of those orders, and gives the jurisdiction to do so to a county or district court or a superior court.

It is argued on behalf of the respondents that in addition to the county, district and superior courts, review may be had by virtue of the provisions of s. 457.8(2)(*a*) and (*b*). However, for para. (*a*) to apply, Judge Ross would have to be the judge "before whom" the accused were "being tried" or (were) "to be tried". There is no evidence that either of those conditions were met. For para. (*b*) to apply, Judge Ross would have to be a justice presiding at the preliminary inquiry; and he was not. Accordingly, he was not a court of competent jurisdiction within the meaning of s. 24(1) of the Charter, and he did not have jurisdiction to set aside the existing release orders and substitute new ones.

That should be sufficient to dispose of the matter but I think I should say something briefly about the other two points that were argued. Was there an error of law on the face of the record? In

His Honour's view of s. 11(*e*) of the Charter, the respondents had been denied reasonable bail without just cause they did not understand and were confused about the bail process and the bail hearing that had taken place on June 19th; accordingly, their consents to the terms of bail set on that date should not be given effect to because an order made on the basis of those consents was a denial of reasonable bail without just cause. He did not permit other evidence to be called by the Crown on this issue nor did he have before him a transcript of the proceedings that had taken place on June 19th. It is my view that the basis on which His Honour acted discloses an error of law on the face of the record. It appears to me that the concept of a denial of reasonable bail without just cause in the language of s. 11(*e*) of the Charter requires a consideration of the circumstances of each case, the circumstances of the offence or offences alleged to have been committed as well as the circumstances of the particular accused person. Whether or not the accused person understood or was confused about the bail process is, in my view, in ordinary circumstances, not particularly relevant. An accused person might completely understand his bail hearing and the bail process and yet, the resulting order made might be one which denied him reasonable bail without just cause. The accused's understanding of the process would not cure that, and would be quite irrelevant. Accordingly, I am of the view that there is an error of law on the face of the record. However, I am not at all convinced that that error of law, by itself, can or should lead to *certiorari*, for many cases, binding upon me held that *certiorari* is available only where the tribunal affected has acted without jurisdiction.

On the final point raised by the applicant, namely, the argument that a loss of jurisdiction occurred as a result of the judge's refusal to allow the Crown to call any evidence on the matter before him, it seems to me very shortly that that refusal was a denial of natural justice and did lead to a loss of jurisdiction and on that ground *certiorari* would lie to quash the decision.

In the result, the application for *certiorari* to quash the orders made by Judge Ross on June 22nd with respect to the four respondents, Brooks, Thompson, Roberts and Power is granted and those orders are quashed. As a consequence of this conclusion, a matter has been raised as to what should flow, since the four respondents have been released on the orders made by Judge Ross. Counsel for the Crown proposes and it is agreeable to counsel for the respondents and seems eminently sensible to me, that my order should also provide, and it will do so, that if the four respondents do not surrender on October 25, 1982, which is the next date upon which they are scheduled to appear in court, then a bench warrant may issue for their arrest.

Application granted.

RE M AND THE QUEEN

Ontario High Court of Justice, Steele J. October 8, 1982.

Criminal law — Trial — Election by accused — Procedure — Accused electing trial by judge alone — Attorney-General then exercising right to require trial by judge and jury — Whether Attorney-General required to act fairly — Whether required to give notice to accused and allow him opportunity to make representations before making decision to require trial by judge and jury — Cr. Code, s. 498.

Constitutional law — Charter of Rights — Right to fair trial — Accused electing trial by judge alone — Attorney-General then exercising power to require trial by judge and jury — Whether accused deprived of right to fair trial by independent impartial tribunal — Canadian Charter of Rights and Freedoms, s. 11(d) — Cr. Code, s. 498.

The exercise by the Attorney-General of his discretion under s. 498 of the *Criminal Code* to require trial by judge and jury is not reviewable by the courts and the Attorney-General prior to determining whether or not to exercise that power is not required to give notice to the accused or to allow him an opportunity to make representations before the decision is made. Parliament's intent in enacting s. 498, which gives to the Attorney-General a similar power to one that he had at common law, was that he should exercise that power unfettered by the court and be responsible only to Parliament. Finally, it could not be said that the exercise of the power under s. 498 to override the accused's election and require trial by judge and jury had the effect of depriving the accused of his right under s. 11(*d*) of the *Canadian Charter of Rights and Freedoms* to a fair trial by an independent and impartial tribunal.

Re Saikaly and The Queen (1979), 48 C.C.C. (2d) 192, **apld**

Re Nicholson and Haldimand-Norfolk Regional Board of Com'rs of Police (1978), 88 D.L.R. (3d) 671, [1979] 1 S.C.R. 311, 23 N.R. 410, 78 C.L.L.C. 14,181; *A.-G. Can. v. Inuit Tapirisat of Canada et al.* (1980), 115 D.L.R. (3d) 1, [1980] 2 S.C.R. 735, 33 N.R. 304; *Re Miller and The Queen* (1982), 70 C.C.C. (2d) 129, 141 D.L.R. (3d) 330, 39 O.R. (2d) 41, 29 C.R. (3d) 153, 29 C.P.C. 159, **distd**

Other cases referred to

Re Johnson and Inglis et al. (1980), 52 C.C.C. (2d) 385, 17 C.R. (3d) 250; *Re Warren and The Queen* (1981), 61 C.C.C. (2d) 65, 22 C.R. (3d) 58

Statutes referred to

Canadian Charter of Rights and Freedoms, s. 11(*d*)
Criminal Code, ss. 464, 496, 498, 507 (am. 1974-75-76, c. 93, s. 63)

APPLICATION by the accused in the nature of *certiorari* to quash an indictment to the extent that the trial is required to be by judge and jury.