File No.: CT-2007-001
Registry Document No.:

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

IN THE MATTER OF an application by Sears Canada Inc. for an order pursuant to section 103.1 granting leave to make application under section 75 of the *Competition Act*;

BETWEEN:

SEARS CANADA INC.

Applicant

- and -

PARFUMS CHRISTIAN DIOR CANADA INC. & PARFUMS GIVENCHY CANADA LTD.

Respondents

SUPPLEMENTARY REPRESENTATIONS OF THE RESPONDENTS

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These submissions are provided in response to questions posed to counsel at the conclusion of the oral hearing on Wednesday, March 14, 2007.

I. Reference to section 75(2) and transcripts of the Standing Senate Committee on Banking, Trade and Commerce support the submission that the phrase "substantially affected in his business" contained in Section 75(1)(a), refers to the entirety of an applicant's business

1. This is so because Section 75(2) was intended to create an exception to the general requirement that the refusal to supply a product must substantially affect the entire business. Section 75(2) permits a party to demonstrate that the refusal to supply a separate trademarked product can give rise to a remedy if that single product occupies such a dominant position in the market that it affects the ability of the applicant to carry on business in a class of articles and that the loss of that class of articles would in turn substantially affect the applicant's business.

2. This is confirmed by the following testimony of Mr. R.M. Davidson, Senior Deputy Director of Investigation and Research, Bureau of Competition Policy, before the Standing Senate Committee on Banking, Trade and Commerce where he states:

> First of all, you have to establish whether the product Kodak is dominant in the class of articles. Kodak is dominant in the film business. The second question is: Are you substantially affected in your business because you cannot get that and because that class of product is so important that, if you cannot get the dominant product in that class of business you are in great difficulty? There are two aspects: Is the brand article dominant in its class? Is that class important to your business?
>
> Canada, Senate, *Proceedings of the Standing Committee on Banking, Trade and Commerce*, 13th Parl., No. 35 (23 April 1975) at page 18 (Supplementary Representations of the Respondents, Tab 1)

3. In this case it is not contended by the applicant that the trademarked products are dominant in their class of business. In fact, the evidence put forward by the applicant is to the contrary as set out in paragraphs 31 through 34 of our initial written representations.

4. The fact that Section 75(1) was never intended to apply to the current situation is confirmed by the following testimony of Mr. Davidson given on the same date:

> Well, that is right, but in order for the denial of supply to substantially affect his business that product or class of product must be important to his business. If it is only one out of a thousand different products, it cannot substantially affect his business, even if the product he seeks is dominant in its class.
>
> *Ibid.*

5. The fact that the statute was not intended to be interpreted in the manner suggested by Sears is confirmed by Professor Stanbury. He notes that instead of "substantially affected", the words initially proposed for the predecessor to section 75(1) were "adversely effected". The substitution of the phrase "substantially affected" was intended to raise the threshold for the offence.

> W.T. Standbury, *Business Interests and the Reform of Canadian Competition Policy*, 1971-1975, (Toronto: Carswell/Methuen, 1977) at 185 (Supplementary Representations of the Respondents, Tab 2)

6. Professor Stanbury then quotes the Minister in relation to these sections stating in reference to what is now is Section 75(2):

> In supporting his amendment, Mr. Ouellet said,
>
> > "There is only a very small number of sectors where one firm so dominates its industry that, without supplies of its branded lines, a dealer cannot stay in business".
>
> *Ibid.* at 186

7. It is clear from reference to Mr. Davidson's testimony that these legislative provisions were never intended to operate so that a diverse and ubiquitous retailer such as Sears could obtain the relief sought in this proceeding against non-dominant suppliers such as the respondents. This is supported, as well, by the previously cited existing case law.

8. It is well established that extrinsic materials such as legislative debates or testimony before Senate Committees may be used to aid in determining the background, context and purpose of legislation, so long as it is relevant and not inherently unreliable. The Supreme Court of Canada has affirmed that "the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court".

> *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at 483-485 (Supplementary Representations of the Respondents, Tab 3)
> *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para. 31 (Supplementary Representations of the Respondents, Tab 4)

9. The Competition Tribunal has also affirmed that legislative history, Parliamentary debates, and similar material may properly be considered when interpreting a statute. In fact, the Tribunal previously considered testimony before the Standing Committee on Finance, Trade and Economic Affairs in its interpretation of "usual trade terms".

> *B-Filer Inc. v. The Bank of Nova Scotia*, (2006) Comp. Trib. 42 at paras. 188-190

DATED at Toronto, Ontario, this 15th day of March, 2007.

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FIRST SESSION—THIRTIETH PARLIAMENT

1974-75

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 35

WEDNESDAY, APRIL 23, 1975

Fifteenth Proceedings on:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

(Witnesses: See Minutes of Proceedings)

28844—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

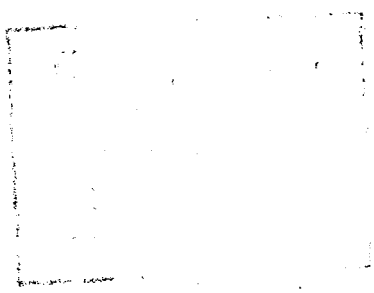
The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	McIlraith
Desruisseaux	Molson
Everett	*Perrault
*Flynn	Sullivan
Gélinas	Walker—(19)
Haig	

**Ex officio* members

(Quorum 5)



Order of Reference

Extract from the Minutes of the Proceedings of The Senate, October 16, 1974:

"With leave of the Senate,

The Honourable Senator Hayden moved, seconded by the Honourable Senator McDonald:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon any bill relating to competition in Canada or to the *Combines Investigation Act*, in advance of the said bill coming before the Senate, or any matter relating thereto;

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination; and

That the papers and evidence received and taken on the subject in the preceding session be referred to the Committee.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, April 23, 1975
(48)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade & Commerce met this day at 9:30 a.m.

Subject: "The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto".

Present: The Honourable Senators Hayden *(Chairman)*, Beaubien, Buckwold, Connolly *(Ottawa West)*, Cook, Everett, Flynn, Haig, Macdonald *(Cape Breton)*, Macnaughton and Molson. (11)

Present, not of the Committee: The Honourable Senator Heath. (1)

In Attendance: Mr. R. J. Cowling and Mr. John F. Lewis, C.A., Advisors.

WITNESSES:

DEPARTMENT OF CONSUMER AND CORPORATE AFFAIRS:

Bureau of Competition Policy:

Mr. Robert J. Bertrand, Assistant Deputy Minister and Director of Investigation and Research;

Mr. R. M. Davidson, Senior Deputy Director of Investigation and Research;

Mr. G. D. Orr, Director, Services Branch; and

Mr. W. P. McKeown, Deputy-Director, Legal.

The Committee, together with the witnesses, proceeded to further discuss the Interim Report of the Committee dated March 19, 1975, together with certain proposed amendments as prepared by the Advisory Staff.

At 12:30 p.m. the Committee adjourned to the call of the Chairman.

ATTEST

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, April 23, 1975

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to examine and consider the advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, on the last occasion there were a number of items which were not dealt with. We omitted to deal with one. I thought we would consider that first. It concerns bid-rigging. The other items are due diligence, as a matter of defence, and reviewable practices. There are several short items such as interim injunction, indictment vis-à-vis summary conviction, and jurisdiction of Federal Court.

Senator Connolly: What was the last item?

The Chairman: Jurisdiction of Federal Court. Let us start with bid-rigging.

Mr. R. J. Cowling, Special Counsel to the Committee: I assume our witnesses have read what the report says about that. It is on page 10. It is brief. The committee's recommendation is quite simple. It is based on the minister's proposed amendments tabled in December. It would simply eliminate the necessity of getting the advance acceptance of the person calling for the tenders—in effect, a joint venture type of bid. It seemed to the committee that the requirement to obtain this acceptance would be confusing and time-consuming. Have you any comment to make on that?

Mr. Robert J. Bertrand, Assistant Deputy Minister and Director of Investigation and Research, Bureau of Competition Policy, Department of Consumer and Corporate Affairs: I think it is a valid point and a valid observation which the committee has made. There might be some incidental effect that could be beneficial—

Senator Connolly: I am afraid we are not hearing you back here. What point are you discussing?

Mr. Bertrand: Section 32.2, bid-rigging. The amendments which the minister proposed in December call for acceptance by the person calling the bid for a joint venture to be exempt, not to covered. Your committee has recommended that the acceptance requirement be dropped.

I said it was a valid point, and we have outlined that the acceptance would only cause inconvenience. There are also other aspects. Acceptance could create difficulty, in that we are leaving it to the discretion of the person calling the bid to say whether an activity is or is not an offence.

Another aspect that could be considered is that if someone, or two parties, agree among themselves in advance, they might at that point have committed an offence, although they rely on future acceptance, and there might be nothing they can do about it if it is not accepted afterwards.

I understand this acceptance provision is causing concern, and my minister has been reviewing the report of your committee. He has not yet reached a conclusion on whether or not to follow your recommendation.

So far as I am concerned, personally, I would say that the acceptance requirement is not essential to the proper functioning of the section and it could probably be dropped without making that section less effective.

Senator Connolly: Where is our recommendation on that point?

Mr. Cowling: It appears at page 33:10 of the Interim Report, about the middle of the page in the left-hand column.

The Chairman: As I understand what you have said, Mr. Bertrand, you are satisfied that the amendment as proposed is fair and does not take away from the purpose that the department was seeking in the original draft.

Mr. Bertrand: That is correct, Mr. Chairman.

The Chairman: The next item is due diligence.

Mr. Cowling: I think we dealt with sport last time.

Senator Molson: Somewhat, yes.

The Chairman: Perhaps we should review the question of sport today for a few moments, or are you so satisfied with the result last night, Senator Molson, that you have nothing to add today?

Senator Molson: I thought there was a certain amount of restraint of trade between those two teams last night, Mr. Chairman. It went on a little too long, but the end result, I thought, was acceptable. It was a result of free competition, I think.

The Chairman: You think there was a good level of competition?

Senator Molson: I thought there was a very good level of competition, Mr. Chairman.

The Chairman: So, there is no assistance that you think could be given by any amendment to this bill that would add to the level of competition?

Senator Molson: Not this morning.

The Chairman: Perhaps there is some in relation to the consumers, the persons who attend the games.

Senator Molson: Just as a matter of interest, the announced attendance at last night's game was 16,400, which is about 2,000 down for the Forum. It holds 18,500.

Mr. Cowling: I might add that during the debate on this clause in the Commons committee last night the debate was interrupted several times in order to announce the scores of the games that were played last evening.

Senator Cook: I thought perhaps the debate was interrupted to announce the lack of a quorum.

The Chairman: Well, that is a legitimate interest, a public interest.

The next item is due diligence. The committee has discussed the question of due diligence at some length and has made some recommendations in that respect. I would invite you now, Mr. Bertrand, to comment on the proposals which the committee has made.

Mr. Bertrand: The matter of due diligence in respect of an honest error was raised by a number of associations, Mr. Chairman. Taking as an example the misleading advertising provisions, let us assume that an advertisement, because of a clerical error, is misleading, and further assuming that the company responsible for that advertisement exercised due diligence, and as a result of that advertisement the consumer is misled and suffers a loss or damages there are two alternatives: we must decide whether the "damages" should be borne by the consumer, or by the company that put out the advertisement. The consumer, of course, had nothing to do with putting out the advertisement. Consumers are innocent parties. If we choose the due diligence approach, we are saying that the consumer should suffer the loss or damages; if we choose the strict liability provisions, we are saying that the company making the mistake should pay.

Senator Connolly: Then you have a third case involving an intermediary between the consumer and the producer, such as the newspaper publishing the advertisement. We deal with this in our Interim Report.

Mr. Bertrand: In the case of a newspaper, there is a defence under section 37.3, which appears on page 37 of the bill.

Senator Connolly: In that case, then, we should have referred to section 37.3 of the bill in our Interim Report as it relates to newspaper publishers. At page 33:11 of the Interim Report, at the bottom of the left-hand column, we say:

> A newspaper publisher who published a misleading advertisement in good faith would also have a defence.

Mr. Bertrand: Yes. The only thing we ask of the newspaper publisher is that he maintains on record the name and address of the other party and that he accepted the representations for the advertisement in good faith.

Senator Connolly: That is the defence we refer to at the bottom of page 33:11.

The Chairman: Yes.

Senator Cook: I am a little confused, Mr. Chairman. I can quite see that in the case of a mistake the consumer should be reimbursed. However, I thought we were talking about an offence—

Mr. Bertrand: I am just laying the groundwork. Let us assume that the consumer should be indemnified in some manner. That indemnification could be achieved in different ways. The consumer could be given the right of action to recover damages or to have the contract rescinded. However, in most instances the amount of damages suffered by each consumer might be very small. It might not be worth proceeding with an action for recovery. In such cases, could we not say that the state could recover for the benefit of the state and all consumers in Canada the damages suffered by a number of consumers, bearing in mind that the damages would be very minimal in respect of each individual consumer? If we follow that assumption, we are saying we should opt for the strict liability provisions, and the fine or penalty imposed by the court should, in some respect, be a measure and correspond to the collective damages suffered by consumers. That is one ground on which we could justify the strict liability approach.

Senator Cook: It seems to me you have put forward an argument for the defence of due diligence. When there are only small damages suffered in each case, it is beyond me why somebody who has exercised due diligence, or can prove due diligence, should be fined.

Mr. Bertrand: If the damages amount to $1 in each case and one million consumers are affected, are the damages still small?

Senator Cook: There is still no *means rea*.

The Chairman: Mr. Bertrand, it seems to me that we are ranging pretty far afield. The whole question is the strict liability imposed by the provisions of the bill. I have read, as I am sure you and most members of the committee have, the working paper put out by the Law Reform Commission on the question of strict liability, and they have taken the pros and cons of both sides of this question, so we are not really getting into any new territory now. All we are saying is that a person who took reasonable care and applied himself with due diligence should be able to raise that as a defence. An employee may be the person who has violated some instruction and done the particular thing complained of, but then you charge the owner or the employer or the company. If the employer establishes he has exercised reasonable care to avoid this kind of situation, why should he be guilty in any event and left without any basis on which he can present his case? The only basis he has left is to offer his explanation in mitigation of sentence, and yet you are dealing with a person who is innocent of the offence. With strict liability you make him liable, you make him guilty, and he has no defence he can offer.

Mr. G.D. Orr, Director, Services Branch, Bureau of Competition Policy, Department of Consumer and Corporate Affairs: The Law Reform Commission stated explicitly that it is directed to personal liability and not corporate liability. This is explicitly stated.

The Chairman: I know that the Law Reform Commission deals with the individual. There is still a volume to come on corporations, but there is no reason why we cannot anticipate that principle.

Mr. Cowling: And, of course, individuals are liable under the Combines Investigation Act as well as corporations.

Mr. Orr: But the major difficulty that arises with a large corporation is that it is quite capable of having a paper

system that will reflect due diligence. At the same time, the performance will not match the paper system.

Senator Molson: What does that mean, if I may ask? What is a paper system?

Mr. Orr: You may issue instructions to all your employees, and they may even have to sign a book that they have read all the rules, but at the same time the performance, the delivery of what is promised in their advertisements, does not in fact take place.

The Chairman: Mr. Orr, is this what you are saying? You are drawing a line between the individual and the corporation. Let us deal with it on that basis. Do I assume from what you have said that as far as the individual is concerned this doctrine of due diligence as a matter of defence is a proper thing to provide?

Mr. Orr: May I put it another way? With a small, individual enterprise, when a man does something in his store it is he who does it.

The Chairman: But if he is the one who does it, how can he raise a defence of due diligence?

Mr. Orr: Quite. The proposed defence probably is not likely to do him very much good.

The Chairman: No, but it may do a lot of people a lot of good if they apply themselves diligently to comply with the law and because, through no fault of their own, the event they are trying to guard against still happens and they are charged, but they have no defence even though they apply themselves. I am not trying to put you in a corner, Mr. Orr, but I want to know where we start. You were the one who was attempting to differentiate between individuals and corporations.

Mr. Orr: I have raised the point that there is a difficulty in the case of very large corporations.

The Chairman: Let us take the individuals first. Do you not think the individual who can establish due diligence, that he acted with reasonable care, should not be subject to strict liability, but should have the opportunity to defend himself? If he does not succeed he will be convicted.

Mr. Orr: May I suggest that the defence for the individual person who acts with due diligence is already there in the provision that says if his supplier gives him some false information it is the supplier who is subject to the penalty.

The Chairman: I don't follow that, Mr. Orr. You will have to point out to me where that is, because it is a strict liability offence under Part V.

Mr. Orr: True, but I believe it is in section 36(3) of the bill, the provision we were discussing last week.

The Chairman: Section 36(3) deals with pyramid selling, does it not?

Mr. Orr: This is subsection (3) on page 31. This protects the man who receives information from another person, and it is the other person who is deemed to have made the representation to the public.

The Chairman: Which subsection do you say does that?

Mr. Bertrand: Subsection (3) says:

> Every one who ... supplies to a ... retailer ... any material ... that contains a representation—
>
> That is misleading representation—
>
> —shall be deemed to have made that representation to the public.

We are looking at the person who has supplied misleading material.

The Chairman: But that does not cover the situation we are talking about. We are talking about the situation where an individual is operating a business, he has a staff, and the regulations and instructions and so on clearly show, as the witness can establish, that he has established due diligence and care. Notwithstanding that, somebody does something, makes a misrepresentation, or does some other thing in relation to the merchandise, which is an offence, but the owner, who may have had nothing to do with what has been done by the employee, is not able to raise that defence.

Mr. Orr: I believe that in the case of an unincorporated firm we can proceed only against the person who made the representation, unless we can show that he did it on the instructions of his employer.

The Chairman: You know, Mr. Orr, I have said this many times, but maybe I should repeat it again. I am not questioning what your practice may be.

Mr. Orr: This is what we can do in court.

The Chairman: As I have said to a lot of other people, if you can give me a guarantee that you will always be there and always in charge of the policy and the administration, that would be all right.

Mr. Orr: I apologize, Mr. Chairman, I did not make myself clear. I do not believe we could show that the person who is in charge of an unincorporated firm was guilty of the offence when it was not shown that he had directed the employee to make the representation.

The Chairman: I can't follow you. I understand the words you say but I can't follow you.

Senator Cook: It seems to me that there is a tendency more and more for the legislature to take things out of the hands of the judiciary. You have a case where there is a judge appointed, he has heard all the evidence, but the legislature says, when an accused man has the defence of due diligence, that the judge cannot consider it. Why? Why should not the legislature leave it to the judge, to the judiciary, to make a reasonable examination of the matter and say, "Yes, I do not think you have tricked me. I think in all the circumstances you have exercised due diligence"?

The Chairman: That is right, Senator Cook. I am not being too critical of the presentation you are making. You see, what is being assumed is that if you provide a defence of due diligence that is going to defeat the whole purpose of the act; everyone is going to be able to appear innocent and pure. Now, due diligence as a defence is not intended to do that. It is intended to distinguish between the person who is innocent and the person who is not. The defence of strict liability takes you to the case where, innocent or guilty, you are fined, you are convicted, you have no defence you can put forward.

Senator Cook: Due diligence does not protect the reckless man, the careless man, the indifferent man; he will not be acquitted under due diligence.

The Chairman: No, but he should have the opportunity.

Senator Cook: Sure.

Senator Everett: If there were no due diligence clause, what would happen in the case of, say, resale price maintenance, in obtaining redress?

Mr. Bertrand: Due diligence is not applicable to resale price maintenance. It applies just simply to misleading advertising.

Senator Everett: I asked the question because in our recommendation we think resale price maintenance should be taken out. Mr. Bertrand says that due diligence does not apply.

Mr. Cowling: I think Mr. Bertrand was expressing his own view there. What he was saying was that if there is to be a defence of due diligence, then in his opinion it should be limited to the misleading advertising type of offence. The committee has suggested in its report that it should also apply to certain other sections, including the resale price maintenance, but obviously I would personally concede that the misleading advertising provisions are the more important ones.

Senator Everett: I would like to settle that.

Mr. Bertrand: Once you prove or have a case on price maintenance, it is very difficult to see that due diligence was a defence.

Senator Everett: That is the point I was making. It would be very difficult for a supplier to move to maintain prices and then, say, use the defence of due diligence.

The Chairman: Then he could not succeed in his defence.

Senator Everett: I do not think he could, but it seems to me that that would be something to exclude from our recommendation.

The Chairman: Why? Even on the language you have used, you said it would be "difficult." So what? There is the possibility that some person who is charged, even on price misrepresentation or price fixing, would have a defence that he had proceeded with reasonable care.

Mr. Cowling: I think the reason it was suggested there, Senator Everett, was because there have been new amendments to the resale price maintenance section—you can suggest a price, but you must make it clear in the advertisement, or whatever, that it is only a suggested price, and so on—let us say, with that clarification.

Senator Everett: That is advertising.

Mr. Cowling: No.

Senator Everett: Is that resale price maintenance?

Mr. Cowling: That is in the resale price maintenance, too. Let us say that that clarification, somehow, by an honest error, was omitted, then the accused could rely on the due diligence defence in those circumstances.

Senator Everett: Could we hear Mr. Bertrand on that point, Mr. Chairman?

The Chairman: I thought we had, but I don't mind hearing him again.

Senator Everett: Maybe it did not permeate my skull.

Mr. R. M. Davidson, Senior Deputy Director of Investigation and Research; Bureau of Competition Policy, Department of Consumer and Corporate Affairs: Mr. Chairman, I think that in making that suggestion, if the supplier knows the law and he makes a suggestion as to the resale price to the customer, it is very difficult to see how he could—in fact, in my view, it is impossible to say that he could have exercised due diligence and not taken steps in that simple act to make it clear that it was only a suggested price. It does not demand any effort on his part, really, at all. If he makes the suggestion, he knows the law and he has to make clear the suggestion.

Senator Connolly: How do you make it clear? We hear advertisements, we see advertisements.

Senator Everett: Senator, we are dealing with a narrow part of the proposal at the moment—that is, resale price maintenance; because once you exclude the problem of resale price maintenance, then I think you are dealing for the most part with misleading advertising.

Senator Connolly: What you want to do is exclude the advertising?

Senator Everett: No. I can identify with the committee's recommendations on the due diligence matter in relation to everything but resale price maintenance. The resale price maintenance is the one that gives me trouble because under the other areas the injured consumer can proceed under the Sale of Goods Act, I suppose, or even under the common law, for redress.

The Chairman: It may be you would like to rephrase the original statement that you made. What you said was that it would be "difficult" to apply due diligence as a defence in a case of resale price maintenance. That surely is not the test. The test is whether a defence of due diligence should be available or not. If the party will have difficulty in proving it, it is no reason why it should not be there. Somebody may be able to provide such a defence. I do not think it is part of our job to speculate on all the possibilities or on the difficulties. Is it a reasonable thing that that provision should be made there?

Senator Everett: Reading the section on resale price maintenance, I think it is not reasonable.

The Chairman: That is your view.

Senator Everett: That is my view. On the other areas, so far as I can tell, the defence of due diligence is reasonable. That is the only area in which I cannot see it applying.

Mr. Cowling: It was represented to us by somebody who appeared before the committee—and in looking over the brief just now, they make a case for several or the other sections, but I notice that the brief seems to be a little bit silent on the resale price maintenance provisions, although in their summary they suggest that it should apply.

Mr. Davidson: There is a famous case in the United States in which a judgment was given by Justice Learned Hand, which involved an aluminum company. He said in the judgment that nobody monopolizes by accident. It seems to me that that same opinion ought to apply here. Nobody price maintains by accident. It is very simple for the person, if he is suggesting a price, to say so.

Mr. Cowling: I would not want to be sidetracked, though, on the resale price maintenance point, because I think it is very important in the other sections that we

were talking about, especially on misleading advertising. For example, if we could go back to Mr. Orr's example of the individually owned store, let us take the "sale above advertised price" section, for example, which is the new section 37.1. I am referring to page 50E of the blue book. Let us say an individual storeowner himself, not through a clerk or employee but himself, went around putting the price on certain kinds of goods with a rubber stamp which had moveable rollers, and by a mistake put the figure 30 cents on instead of 90 cents, for example. Surely the consumer should not be entitled to take advantage of that. You were talking about the damage caused to the consumer. It seems to me that if there has been an honest error this simply should be pointed out to the consumer and he should not be entitled to take advantage of it.

For example, if parties agree to something and then in the written contract a mistake occurs, you can have the contract performed. The mistake is not held against the party against whose interests the mistake has been made. I think the same thing should apply here.

Senator Connolly: I am not clear on what Senator Everett is trying to get at. So far we have been talking about the defence of due diligence in cases where, through inadvertence, advertisements have in fact been misleading. We are talking about the case where there has been a mistake which results in a possible contract and, as Senator Everett suggested, there should be a defence of due diligence there. I think it would be helpful if Senator Everett could give us a concrete example of what he means in respect of price maintenance and the defence of due diligence.

Senator Everett: What I am referring to is the recommendation of the committee that the defence of due diligence be available in seven areas: promotional allowances; misleading advertising; representations as to reasonable tests; double ticketing; sale above advertised price; promotional content; and resale price maintenance. Our recommendation should exclude the defence of due diligence in the case of resale price maintenance, because it is difficult for a supplier—I might even go so far as to say impossible for a supplier—

The Chairman: Haven't you?

Senator Everett: I haven't but I might amend it. If we are going to start splitting hairs then I would go so far as to say that it is impossible for a supplier to maintain retail prices and have available to him the defence of due diligence.

That aside for the moment, when we move to the other six recommendations I am of the opinion that the defence of due diligence should be available for the reason that, if someone is offended or is damaged in these six areas, he does have the redress in the civil courts. He can get a recision of the contract or he can get damages. I do not think in that case that it is good law to say that the defence of due diligence is not available.

The Chairman: Now that we have your point clearly stated, may I point out to you that we are not settling our final report now? This is an interim report. Therefore, what the committee may ultimately come up with is a matter for the committee to decide. I know what your view is, but I should point out to you that the language of this particular section does not permit, as I read it, a mistake as a defence. What it says is this:

> —in the absence of any evidence that the person making the suggestion, in so doing, also made it clear to the person to whom the suggestion was made that he was under no obligation to accept the suggestion—

This is a particular defence by which he could escape a liability if this could be established. But suppose the explanation the man has is that it was an honest mistake. Why should he not have the opportunity of asserting that?

Senator Cook: Perhaps the easy way to settle this would be if the minister would agree to use due diligence for the first six and we could give him the last one.

Mr. John F. Lewis, C.A., Advisor to the Committee: Mr. Chairman, in several of the representations to this committee a very important point was brought up in connection with imported articles in the various sections. The importer, according to the sections, is the man who is liable. It is not the manufacturer in the foreign country. Quite often the importer uses due diligence to ascertain that representations in warranties and so on are acceptable and reasonable. Perhaps he even makes tests. If he takes reasonable steps to ensure that the representations are fair and acceptable and then at a later date finds that the representations were overstated and were wrong, nevertheless, he would be liable.

Similarly, in connection with price maintenance, many of the imported articles contain advertising material, brochures, which mention or suggest the retail price. You can see that regularly on television programs from the United States. The Canadian wholesaler might and would take reasonable steps to make sure that that was taken out or was changed or was overprinted. However, an employee might have been given instructions to do certain things.

Senator Everett: That would not result in an offence under the resale price maintenance sections.

Mr. Lewis: I think the point that is being discussed is that he would not have the defence of due diligence in a case like that. If his employee did not expunge the suggested retail price on every piece of advertising material, it would be the employer who would be responsible.

Senator Everett: The case you have given would never become a case.

The Chairman: Why?

Ssenator Everett: Because the section is not offended. Perhaps we could ask Mr. Bertrand to comment.

Mr. Bertrand: The section would say that if you have a suggested retail price there is nothing wrong with it. It starts to be wrong when you say to a person, "You either obey that suggested retail price or you are cut off".

Mr. Davidson: In the case of important articles, if the inscription bears a price but does not say "suggested price only", all the importer has to do is send a letter to the retailer saying that this is simply a suggested price. He does not have to have his employees overprint the thing. He simply sends a letter to the customer saying that these goods can bear a marked price, but that it is a suggested price only.

The Chairman: Mr. Davidson, if I were giving advice to people in those circumstances, I would advise them to overprint and not to take any chances.

Mr. Davidson: That would do no harm, but it certainly would not be required if you could prove that the letter

had been sent to the retailer saying, "It is a suggested price only".

The Chairman: But some particular articles which have been advertised may have suggested prices on them when they are imported. Those suggested prices may be higher than the suggested prices at which they are being offered in Canada, or they may be lower. Now, inadvertently, or by mistake, some of these might get out to the trade without any correction being made. Do you suggest that in those circumstances there would not be any prosecution?

Mr. Cowling: Let us suggest that the overprinter ran out of ink for a period while these things were being put through, and a few got out in that way.

Mr. Davidson: If you are only talking about a suggested price, there is nothing wrong.

Mr. Cowling: I am talking about the warning which he is obliged to put on the imported product. The imported product comes with a suggested retail price. Under the act, as amended, he is also obliged to point out clearly that that is only a suggested price, so that it might require some additional wording on the wrapper, or whatever. As I say, let us assume that the printing machine failed to print on a number of these things. Would that not be an honest mistake?

Mr. Davidson: He only has to point out to the retailer that it is merely a suggested price only. It does not have to appear on the article.

The Chairman: Supposing he honestly fails to catch the error in the facts as I stated them to you. It is all very well for you to say that all he has to do is send a letter, but supposing he does not catch the mistake.

Mr. Davidson: The mistake does not matter. He does not offend the law.

The Chairman: If the suggested retail price is either higher or lower, on the imported article, than the price at which that article is selling in Canada?

Mr. Davidson: It does not matter. It is not the price at which the retailer is selling, necessarily. It is only a suggested price.

Senator Macnaughton: What happens in the case where the letters are not delivered?

Senator Beaubien: That is every day now.

Senator Macnaughton: He is automatically guilty.

The Chairman: Well, I think we have Mr. Davidson's viewpoint, and also that of Mr. Orr, Mr. Bertrand, Senator Everett, Senator Connolly, Senator Cook, Senator Macnaughton, our counsel and myself. I think we could talk a lot more, but we might not advance the situation any, because most individuals, even including myself, appear to have a firm view as to the need or the lack of it. I think we will have to let it stand at that, and when we finally get the bill and we are studying it in committee on second reading, we can review the situation at that time; but as of now I would say the various members of the committee that I have named, and the panel appearing before us, have expressed their viewpoints, and those who disagree have a right to disagree.

Mr. Bertrand: Mr. Chairman, for the record, may we draw your attention to subsection (5) of section 38, in the bill, which says:

> (5) Subsections (3) and (4) do not apply to a price that is affixed or applied to a product or its package or container.

With regard to the problem that you mentioned, namely, that the person making the suggestion must make it clear, that little part does not apply, and then you follow under the general rule.

Mr. Cowling: That still does not answer Senator Macnaughton's suggestion that the letter, or whatever it is, for example, got lost in the mail, or failed to be delivered. That may sound unimportant, but it is really what we are talking about when we are dealing with the whole field of due diligence. We are talking about these seemingly little things which could cause a great liability.

Mr. Bertrand: Senator Macnaughton's point is taken care of by the Post Office Act, which says that once a letter is mailed it is deemed to be received.

Senator Macnaughton: But then you would come along and say that knowing that I faced this difficulty, during the midnight I burned the oil and prepared all these letters and put them in my files, and I have no receipt, I have nothing. It is a matter of my own good faith. I sent the letters out, and but it is a question of a strike at the post office.

Mr. Bertrand: It is a question of evidence. Can you prove you mailed those letters? Your secretary can at least come over and say, "Yes, I mailed them".

The Chairman: I would take a witness with me to the mail box. Would one witness be enough? Or would I have to take two, or three, or six to the mail box with me to show them what it was, ans let them read the letter, and then put it in the mail box, so as to establish what I did?

Mr. Bertrand: Senator, you were a practising lawyer—you still are—and you know the practice in law firms. Your secretary could be a very good witness, saying that the letter has been mailed. It is exactly the same. It is just a question of the credibility of the witness.

Senator Molson: I can think of a lot of difficulties with regard to that, though, Mr. Chairman. Your secretary very often does not do all the mailing. In most big offices the mail is thrown in a basket, is picked up, goes to a mailing room, goes through a number of steps, and finally ends up in a bag, when it is taken and put out in the street, is picked up by the postal department, and in due course it disappears. However, there is nobody, as far as I am concerned, in many cases, who can actually say that the letter was mailed.

The Chairman: That is right. I can speak for the practice in large offices. I know there is a mailing department. There are people there who are responsible for it. All the secretary has to do is to type the letter; the boss man then has to read it and sign it, or sometimes the secretary is authorized to sign it. It is then put into a certain place in the office, the mailing staff collect it, and it becomes completely impersonal after that. I see this in the building where we are located. I see men toting large canvas bags, dragging them along the floor somewhere, to the nearest post office. You are asking us to lean on a very weak reed when you say that the secretary can testify. I would say

that unless it is a very small office that is not the way it goes.

I am wondering whether, even in your own division the secretary goes out and mails every letter. I am sure you have a mailing department and a mailing service. I know in a lot of government departments they do, because when you say to them, "Well, can you recover this letter which you have addressed to me, because I am here, and give it to me here?" the reply is, "Well, it is in the chain of the mailing service, and we cannot get it back. It has to go through."

While I appreciate what you have said by way of explanation, I do not think it adds anything to the situation.

However, is there anything more on due diligence, Mr. Cowling?

Mr. Cowling: I do not think so, Mr. Chairman.

The Chairman: Well, there is certainly nothing more from Senator Everett, because he has agreed with the application of due diligence as an offence to all the other items we have listed.

Senator Everett: That is correct.

The Chairman: And that is a pretty high percentage of achievement.

Mr. Cowling: I think the next item would be interim injunctions, because I believe we dealt with the resale price maintenance defences on the last day.

The Chairman: Yes.

Mr. Cowling: Interim injunctions are dealt with on page 33:12 of the interim report. The thrust of the committee's recommendation is to retain interim injunctions, since they may be necessary in certain cases, but provide a liability on the Crown if it turns out that the interim injunction was not warranted, and caused somebody damage. That is the rule that would apply to an ordinary citizen who sought and obtained an interim injunction against somebody. I think the thrust of the committee's recommendation was that there was no reason for the same rule not to apply to the Crown.

The Chairman: There is no reason why the Crown should not pay, just like anybody else. That is clause 29(1) of the bill, is it not?

Mr. Bertrand: Page 11.

Mr. Cowling: We have prepared a specific amendment with respect to that point, which is in the bundle of amendments which was distributed last day.

Senator Connolly: It was in that bundle?

Mr. Cowling: That is right, senator. Unfortunately, the pages of that bundle are not numbered, but it is the fourth page from the end. It simply reads as follows:

> The Crown is liable for the damage caused to any person by the issue of an injunction under subsection (1) unless such person is convicted or condemned, as the case may be pursuant to the proceedings referred to in subsection (6).

Senator Connolly: That is the drift of the recommendation in the report.

The Chairman: What is your comment, Mr. Bertrand?

Mr. Bertrand: You must realize that in some circumstances it might be desirable to have an interim injunction in order to prevent the commission of an act, or an offence if the offence were committed under that act, which would cause such an injury that no adequate remedy under any section of the act could be provided. With respect to the need for the interim injunction, you must realize that when an application is about—

The Chairman: I do not wish to interrupt you, but we are not discussing the need for an interim injunction.

Mr. Cowling: We have acknowledged that.

The Chairman: We have acknowledged that, but we are discussing the question of the failure of the ground or basis for the application for an interim injunction in the subsequent proceedings, as a consequence of which the person against whom the interim injunction was obtained was damaged. To the extent he can prove that damage, he should have a right to recourse. I know that in an individual case that right is available.

Mr. Bertrand: Yes. In my opinion that would be a precedent in terms of the liability of the Crown in such respect.

Mr. Cowling: That is why we provide a specific amendment, because in my opinion at any rate it would not fall under the Crown Liability Act. Therefore it would require a special provision. However, it seemed to me that it was an eminently fair provision. The suggestion would not interfere in any way with the administration of the act. It is simply giving someone who has been wronged by the use of an interim injunction a recourse.

Senator Cook: Would they have the defence of due diligence?

The Chairman: Do you mean, would the Crown have that defence?

Senator Connolly: I would give the Crown the due diligence defence, sure.

Mr. Bertrand: May we ask the counsel for the committee if there is not a possibility under the ordinary rules of procedure in the Federal Court Act that the court can make it a condition of granting the injunction that the Crown take responsibility for any damage suffered? Would it not be within the power of the court under that act?

Mr. Cowling: That would mean that a representative of the Crown would have to enter into an undertaking in favour of the respondent in the injunction proceedings. I wonder whether a representative of the Crown can do so without specific statutory authorization? I do not know that the court could authorize him to do so.

Mr. Bertrand: No, but could the court not make it a condition, saying it will grant the injunction, but on certain conditions?

Mr. Cowling: We are still faced with the question of Crown liability and in view of the principle that the Sovereign can do no wrong I would have grave doubts that a court without any statutory authorization could do anything of that nature.

Mr. Bertrand: Could the court not also make a condition of appeal?

Senator Cook: You are not imposing responsibility on the Crown.

The Chairman: We have the provisions of the Crown Liability Act now. The manner in which to make sure that this provision would be legally effective, that is Crown liability in this case, is to deal with it by statute.

Senator Cook: To remove any possible doubt.

The Chairman: Yes. Is there anything more, Mr. Bertrand?

Mr. Bertrand: This is a constitutional question and I am not really familiar with the relationship between the Senate and the House of Commons in terms of any commitment on the fund and to what extent that amendment would be—

The Chairman: Do you mean as to whether the Senate has constitutional authority to do this?

Mr. Bertrand: It is just for my own information, Mr. Chairman.

Senator Cook: That does not impose payment of money, except if the Crown assumes the responsibility.

The Chairman: No, the House of Commons does not have to accept it. There is a certain peril in that, of course. If we insist and they do not wish to accept it, where do we end up?

Mr. Cowling: Almost eny legislation involves the expenditure of money by the Crown.

Senator Cook: You are thinking of our right to impose an obligation on the Crown to expend money?

Mr. Bertrand: Yes.

Senator Cook: It only has to expend money if it has done wrong.

The Chairman: Why should it not?

Mr. Cowling: It is an interesting diversion, anyway.

The Chairman: It is interesting to speculate, but there are a number of answers. One is that we believe we have the authority and, at least, we are in as good a position as is the House of Commons to decide whether we are right or wrong. The courts might be the ultimate place of decision, but it does seem to be a matter that should be decided ty the authorities rather than going to the Supreme Court of Canada on a reference.

Mr. Cowling: Perhaps, as Prince Charles is in the city today, we might ask him whether he would agree to accept this responsibility on behalf of the Crown!

Senator Macnaughton: He would certainly agree with us, because he is a member of the House of Lords.

Mr. Bertrand: In my opinion, your suggestion that the Crown should be liable for damage merits an in-depth study.

The Chairman: It certainly merits very serious consideration.

Mr. Bertrand: I would also suggest that in that case not only the Combines Investigation Act would have to be considered but all other legislation, in order to ensure some form of uniformity and to establish whether it would be government policy to maintain that uniformity throughout and not make an exception with respect to the combines legislation.

Senator Cook: We must start somewhere, so let us start with this legislation.

The Chairman: The courts have broken out in that direction and, while at a higher level the cause of action has not been maintained, as the court broke out in a direction of this type, ultimately the point will be successfully made. It has been done under the Income Tax Act on special investigations and, while in the particular case I believe the Court of Appeal in British Columbia set aside the judgment of the trial court, there is some very pertinent comment in the judgments which would be well worth while reading in the area of what would be tantamount to an abuse of the special authority given. Here we say there are perfectly proper cases in which interim injunctions are justified if the Crown subsequently succeeds in proving the allegations. However, if allegations are made by the Crown and in that sense are not supported in the subsequent trial they were not entitled to the interim injunction. We say they can have that authority, but on terms similar to those set for an individual in any proceedings who applies for an interlocutory injunction. If he does not succeed, he has exposed himself to damages that the other party may have suffered.

Senator Cook: And so he should if the other party suffered damages; why should it not recover?

Senator Connolly: Except that it is against the Crown. It has to be provided. The general rule is that the Crown is not responsible. Mr. Bertrand, you must have had some specific cases in mind when you drafted this section. What kind of situation did you envisage when you provided that the Crown could seek an interim injunction as outlined here?

Mr. Bertrand: It was mainly a merger provision, a merger between two corporations—where injury to competition might cause difficulty once a merger is consummated.

Senator Connolly: Perhaps it is invidious to use examples, but there is the present situation, which everyone knows, concerning the proposed take-over by Power Corporation of Argus. That is the kind of situation where a provision like this might be invoked.

The Chairman: There might be a case where a merger, if carried through, would lead to a monopoly.

Mr. Bertrand: Even less than a monopoly. There could be injury to competition.

The Chairman: Yes. That should be the basis. After the thing has been done, it would be too late. There have been cases where an application has been made for an injunction to stay proceedings until the question had been determined. We are not questioning the right to apply for an interim injunction. The Crown has to use its own judgment on that. But if it does not succeed in proving the circumstances on which it based its application, we say it should be accountable for the damages resulting, the same as an individual might be.

Mr. Cowling: There might be no damages, but if there were it should be accountable.

Senator Macnaughton: Could I make a suggestion that a copy of the judges' remarks in that B.C. case be circulated to the members here? It is extremely interesting. It involves a political and legal principle.

The Chairman: I think that is an excellent idea. I have had occasion recently to read those judgments. They are quite a commentary on the viewpoint of the judges in relation to this very aspect which we are now discussing.

Senator Macnaughton: We might even send copies to our witness.

The Chairman: We might even send a copy to Mr. Davidson. We would not like him to feel neglected.

Mr. Davidson: Mr. Chairman, there is one other major area where consideration should be given to the use of an interim injunction. That is the area of predatory practices, where, is some circumstances at least, unless you have some means to hold the status quo, the complainant may be dead before any remedy is available. If, for example, a powerful company sells at a very low price in only one area where it has a small rival—it discriminates, in other words, geographically and sells only in that one area—by the time the ordinary inquiry and court proceedings were completed—

Senator Connolly: On the injunction?

Mr. Davidson: No; in the ordinary way—the affected small company might be out of business.

The Chairman: Mr. Davidson, without intending to be overly facetious, for most people, if they had any guarantees in relation to what you said, by the Crown getting an interim injunction, their life would be extended. I am sure there are a lot of people who would be prompted, with an assurance of that kind of guarantee, to apply for an interim injunction. I think we have taken this one as far as we can go. Mr. Bertrand sees some value and merit, but he does not say, "Yes, we buy this particular phrasing." He feels rather that the court should attach a condition. Frankly, as a lawyer, I see difficulty in a court attaching a condition of liability that the Crown be subject to paying damages. In the face of the Crown Liability Act, even though you wrote that provision, did your idea go so far as to say we should write into this bill a provision that the judge, on issuing an interim injunction at the instance of the Crown, must provide as a condition that the Crown accepts responsibility for damages if it fails to make a case? That is merely saying in a little different way what we have said.

Mr. Bertrand: I would rather, as an alternative, consider your suggestion that the court may impose a condition. Not that it must.

The Chairman: Where would you put it—in this bill?

Mr. Bertrand: I think it could be subject to further study. My first impression would be that it could be put in that section.

The Chairman: You cannot make it effective unless you make some statutory provision.

Mr. Bertrand: That would have to be considered. Unless you assure me that it is essential, that due to the Crown's Liability Act, the court cannot impose that condition on its own, as a result of the Federal Court Act, I would have to do further research on this.

The Chairman: Well, we know your views. What is the next item?

Mr. Cowling: The next item is the indictment versus summary conviction question.

The Chairman: You have read that, Mr. Bertrand?

Mr. Bertrand: Yes.

The Chairman: It seems to make sense to me. Very often the Crown proceeds by way of indictment because the investigations have taken a length of time and the period limited in the Criminal Code for summary procedure has run out. We say there should be no limitation. There is no limitation on the time when you can prefer an indictment, and there should not be any limitation on the time, notwithstanding the Criminal Code, when you can proceed summarily.

Mr. Bertrand: I think so, except that you might find that a segment of the economy, a member of the public, might object to have the period extended over six months.

Mr. Cowling: I think I know what Mr. Bertrand is getting at. He is quite right. In the suggested statutory amendment which we provided, there should be added that it would not apply—

Senator Connolly: Where do you want to add that?

Mr. Cowling: Right at the end of the amendment to subsection 5. By new subsection 5 there would be a provision saying that the section of the Criminal Code, which says that summary conviction matters must be commenced within six months, does not apply to proceedings in respect of any offence that is declared by this act to be punishable on summary conviction.

What Mr. Bertrand is getting at is that there are certain offences under the Combines Act which are punishable only on summary conviction, and the proposed amendment would not apply to this. The intention was to make it apply to those offences where there was an alternative of indictment or summary conviction. Is that the point that you are getting at, Mr. Bertrand?

Mr. Bertrand: Yes.

The Chairman: It would only be applicable to the provisions of this bill.

Mr. Cowling: That is correct.

The Chairman: And would deal only with situations where there would be an alternative of indictment or summary proceedings under this bill.

Mr. Bertrand: You say in your report that the degree of punishment does not accord, practically speaking, as a choice, in the determination of the penalty—

Mr. Cowling: That is another point.

Mr. Bertrand: —and, as such, it does not make any difference. The only difference is the procedure in court.

Mr. Cowling: I think you are right. I have searched through the offences under the act, and I do not believe that there is provision for a longer prison term than five years. Am I right in that?

Senator Connolly: That is in respect of an indictable offence.

Mr. Cowling: Yes. Therefore, the Criminal Code provision which says that unless there is a mandatory prison sentence of at least five years—I have forgotten exactly what it is—the judge has the discretion to impose a lighter sentence, even a fine rather than imprisonment, notwith-

standing that the Combines Investigation Act says, that the individual is liable to two years' imprisonment.

It may be that the necessity of this kind of amendment is not so serious, but we perhaps have to look forward to the day when the act may be amended to increase the penalties. One can conceive of an amending bill coming along to increase the prison term from two years to five years.

Mr. Bertrand: The discretion will still lie with the court to impose a lesser sentence, unless there is a minimum penalty provided.

Mr. Cowling: That is what I mean.

The Chairman: We can achieve that at this stage. We can provide that the suggestion we are making would only be in cases where there are alternative procedures. In other words, if it is by indictment or by way of summary conviction, the punishments can be stipulated accordingly. An indictable proceeding is a more serious one and is supposed to be used in respect of more serious offences.

Mr. Cowling: Notwithstanding the fact that a judge might have the right under the Criminal Code to impose a less severe penalty, when a case comes before the court and is proceeded with by way of indictment rather than summary conviction, there is an entirely different atmosphere that pervades the entire trial, and it might be that the judge would feel that because the Crown had elected to proceed by way of indictment rather than summary conviction, that he ought not to use his discretion to impose a lesser penalty. I think Mr. Bertrand would agree with that.

Senator Connolly: You are saying that if the Crown decides to proceed by way of indictment, the judge is more or less constrained, in a general way, to impose the higher penalty.

Mr. Cowling: Not constrained in the legal sense.

Senator Connolly: I realize that, but the atmosphere is such that he is pushed in that direction. The whole affair is given the appearance of being much more serious than if it were proceeded with by way of summary conviction.

Mr. Cowling: That is what I understand from my friends who practice criminal law.

Senator Connolly: I think we have always understood that to be the case.

The Chairman: We have thrashed out the pros and cons of that particular item. The next item is the jurisdiction of the Federal Court, which is dealt with in section 46 of the bill.

Mr. Cowling: I do not know whether Mr. Bertrand wants us to lead off on this particular item. It is a fairly straightforward point. It is either acceptable or not acceptable. The point has been made quite strongly in practically all the briefs that have been presented to this committee that an accused should retain the right to be tried in the ordinary criminal courts. The Federal Court of Canada, of course, is not an ordinary criminal court. As the act presently stands, it makes the jurisdiction of the Federal Court conditional upon the consent of the accused. That may have been for constitutional reasons. However, for some reason Bill C-2 would remove the necessity of obtaining the consent of the accused and simply leave it open to the Attorney General to proceed in the Federal Court without the necessity of obtaining the consent of the accused.

The thrust of our recommendation is, in effect, to put it back the way it is in the act as it stands now.

Senator Connolly: I am wondering whether the purpose of drafting it in this way was, in effect, to get trials under this act away from the provincial court system and into the Federal Court because it is a specialized field and because the provincial court system is crowded with matters that do not involve a specialty of this kind.

The Chairman: All proceedings under this branch of the law up to now, Senator Connolly, have taken place in the provincial courts.

Senator Connolly: That is true, but what I am asking, Mr. Chairman, is whether or not this is an attempt to get them out of the provincial courts and into the Federal Court and making the judges of the Federal Court more expert in this field than might normally be the case in the provincial court system.

The Chairman: I do not think that is a very sound principle for moving these cases from the provincial courts to the Federal Court.

Senator Connolly: I am not enunciating it as such, Mr. Chairman. I am simply asking whether this was the reasoning behind it.

Mr. Bertrand: That is the main aspect of the proposal, Senator Connolly. The number of cases proceeded with under the Combines Investigation Act is, of course, dependent upon the number of offences which we can investigate and prepare for court. We have a relatively small staff, so the number of cases proceeded with every year is not very large. We feel that if those trials were concentrated in the hands of the Federal Court, the judges of that court would soon develop an expertise that would be unmatched in Canada, and one that would take years and years to build up in other court systems in Canada.

The only comment I can make about your committee's objection in respect of the well established rule as to burden of proof, and other matters which distinguish criminal trials from civil trials, is that those rules are not difficult to comprehend, bearing in mind the calibre of judges we have in the Federal Court of Canada. They are no more difficult to understand by Federal Court judges than they are by provincial court judges.

The Chairman: Mr. Bertrand, throughout the years the direction of the criminal work has been in the provincial courts, and they have inherited in the procedures of the provincial court system quite a know-how. Even new judges seem to pick up that know-how very quickly. What you are proposing is to embark on an education program in another court, the very name of which indicates it succeeded the Exchequer Court and was designed to deal with federal matters.

I am not prepared to offer any comment as to the constitutionality of giving the administration of the criminal law to the Federal Court. Whether that would, in effect, set up a court for the administration of the criminal law, I do not know. It seems to me that the provincial courts are the logical courts to handle these offences, and have been so recognized.

Why the sudden change? The only explanation we are given is, "Well, to educate another body of judges." I am sure the time of the Federal Court could be better spent on matters properly within its jurisdiction than in being edu-

cated in the processes of criminal law, especially when we have a court available that has been made use of for many, many years and is the basic court for the administration of the criminal law.

Mr. Bertrand: May I suggest, Mr. Chairman—and perhaps your experience will confirm this—that cases under the Combines Investigation Act are complex, lengthy, and require not only an understanding and deep knowledge of criminal law and the rules of evidence, but also a comprehensive understanding of the basic economics underlying each case. In proving a market to the court, it is not only a question of the burden of proof, but also a question of understanding the economics behind it and to be able to really appreciate the testimony of expert witnesses in the field. He should be able to understand and really appreciate an expert witness, on the basis of economic theory and analysis put forward of a certain definition of a market. Looking at past experience it will be found that provincial court judges may only once in their lifetime, maybe never, have to consider a case under the Combines Investigation Act. They very seldom would have to deal with that. I suggest there is a difference between a combines case and a merger case, and even the sophisticated combination cases that are developing.

The Chairman: Are you suggesting that the Federal Court is a better court, even though it has had no experience in the field, than the provincial courts which have had experience?

Mr. Bertrand: I am not saying it is a better court.

The Chairman: Is that not the only basis on which we should consider making a change?

Mr. Bertrand: I am saying that it would be as good a court, and that is what this bill provides. The attorney could come before the Federal Court and before a provincial court; it is a concurrent jurisdiction.

The Chairman: What you are saying is that the untested quality of the Federal Court is at least as good as the tested quality of the provincial court.

Mr. Bertrand: When you say it is untested, may I draw your attention to the fact that there have been cases under the Combines Investigation Act in the Federal Court, and from an analysis of those cases and the judgments it can be said that its decisions are as good as those of the provincial court.

Senator Flynn: I feel I must come to the rescue of the witness. I think what he is saying is that the experience of the provincial court is so diluted that it amounts to nothing, and what he wants is to have a court that will have only a certain number of judges, who will have more experience after a few years. I think there is an argument there. I am not discussing the constitutionality.

The Chairman: Or the merit.

Senator Flynn: Or the merit. I think there is a good point in the perspective the witness has been using. Diluted between, let us say, 350 judges all across Canada, what does it amount to?

The Chairman: What you are saying is that my question was a loaded question.

Senator Flynn: Possibly.

The Chairman: Mr. Bertrand understands that. I think we have gone as far as we can on this item.

Senator Buckwold: I have one question before we pass from that. Mr. Bertrand, why did you indicate that an individual had a right of choice but no one else had? What was the rationale behind that, following your previous argument?

Mr. Bertrand: I think in the case of an individual you would find that under the act it could be the misleading advertising provision and so on, where they are more likely to be individuals.

Senator Buckwold: I agree, but there are cases in which large businesses could possibly be involved.

Mr. Bertrand: I think in the case of an individual there is a jury choice; in the case of a corporation you do not have that choice.

Senator Buckwold: I am trying to relate that to your argument on the "superiority" of the Federal Court.

Mr. Bertrand: I did not say "superiority." I say it is at least concurrent.

Senator Buckwold: You still have not answered my question. I gather that the individual has this jury right and a corporation does not. However, I am still trying to reconcile that with your previous statements, and I find it difficult.

Senator Cook: I understand you mean an individual can have a jury, but you cannot have that in the Federal Court.

Mr. Cowling: Perhaps I should have made this clear in my opening remarks. Even under the bill the individual retains the right; or should we say that consent still has to be obtained from an individual to proceed in the Federal Court.

Senator Connolly: But you cannot have a jury in the Federal Court.

Mr. Cowling: No.

Mr. Bertrand: If you relate the Federal Court to my previous argument in respect of corporations, our experience, and what would be anticipated, is that important and large cases, under mainly the combines merger provisions, would involve corporations.

The Chairman: Perhaps we should reserve our look at this and our consideration of it until such time as you enlarge the scope of this bill when you are dealing with monopolies and mergers.

Mr. Bertrand: We are dealing with it now, Mr. Chairman. Phase 2 will provide for that.

The Chairman: I am talking about phase 2, which has been mentioned quite often but which we have not seen.

Mr. Bertrand: You will presumably see it in time.

Senator Cook: It is going to be worse than phase 1.

The Chairman: Maybe that will be the time to consider fully what the course should be. However, if there is no further comment we will pass to the next item, which is the reviewable practices.

Senator Alan A. Macnaughton (*Acting Chairman*) in the Chair.

Senator Connolly: Are we now having distributed to us amendments under the heading "Practices Reviewable by the Commission"?

Mr. Cowling: That is correct. These are specific drafting amendments that have been prepared. They are only suggested drafts.

Senator Connolly: This is reflected in the report on page 33.8 and so on?

Mr. Cowling: That is right.

The Acting Chairman: Have you something to say with regard to each one, Mr. Cowling?

Mr. Cowling: Looking at the specific amendments, the first one that you see, because it is an amendment that must be made to the definition section of the act in clause 1 of the bill, has to do with the definition of "product." Amongst the amendments tabled by the minister in December was a suggested amendment here. This goes back to the much discussed question of whether a brand name can be considered a product for the purposes, for example, of the refusal to deal provisions; in other words, whether a retailer's or somebody else's failure to get a supply of a specific brand name should give jurisdiction to the commission. The minister clarified that in his amendment by saying that it would only be where that particular brand name was so dominant in the field that the man could not carry on his business in that line of product. The principal difficulty the committee had with the minister's amendment was with the phrase "in that line of products," because section 31.2 talks about the effect on his business as a whole, so it seems. The minister's refinement of that would be to take it down to some part of his business; for example, the toothpaste shelf in a drug store as opposed to the effect failure to get a certain brand of toothpaste would have on his operations as a whole.

Mr. Davidson: I think it is important to keep in mind with respect to the refusal to deal provision that there are really four gateways or four tests that a complainant would have to satisfy before there was any possibility of a remedy. The first is that he has to be substantially affected in his business, so that rules out this issue about the toothpaste, because nobody is really selling mostly toothpaste. He has to meet, first, the test of being substantially affected in his business. Secondly, it must be proved that the reason he is unable to get supplies is because of insufficient competition among suppliers of the product in the market. Thirdly, that he is willing and able to meet the usual trade terms. And, fourthly, that the product is in ample supply. In order to meet all those conditions, he has quite a burden.

Senator Everett: I think the fourth is ample supplies of product. I think you mentioned ample supplies twice.

Mr. Davidson: The first is that he is substantially affected in his business; the second, that the reason he cannot obtain supplies is insufficient competition; the third, that he is willing and able to meet the trade terms; and the fourth is that there is ample supply.

Mr. Cowling: May I interrupt there, Mr. Davidson? On the first point, whether it is his business as a whole that must be affected or whether it is just the toothpaste shelf, I would have agreed with you except that the minister's proposed amendment reads as follows, in part, that he has affected "the ability of a person to carry on business in that class of articles", and that seemed to me to be cutting down quite substantially the provision in section 31.2.

Senator Everett: Is that 31.2(2) that you just read?

Senator Connolly: No, it is an amendment to it.

Mr. Cowling: That is correct, that is the minister's proposed new 31.2(2).

Senator Connolly: Is it too long to read that whole amendment, because we do not have it in our text?

Senator Salter A. Hayden *(Chairman)* in the Chair.

Mr. Cowling: It reads as follows:

> For the purposes of this section an article is not a separate product in a market only because it is differentiated from other articles in its class by a trademark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless he has access to the article so differentiated.

My point is that the words "in that class of articles" seem to me to be inconsistent with the words "a person is substantially affected in his business" which one finds in what would now become paragraph 31.2(1)(a).

Mr. Davidson: There are two questions there. One is the definition of the product, whether it is sufficiently important as to substantially affect the ability of a person to carry on business in that class of articles. Is the product we are talking about sufficiently important to affect his business, his ability to carry on in that class of articles? The second question is: Is that class of article so important to his business that, if he is not able to supply that class of product, then he is substantially affected in his business? Subsection (2) there is just a definition of the product, but he still has to meet the test of being substantially affected in his business.

The Chairman: We have spent a lot of time on this, Mr. Davidson, in considering it. There is a preliminary question that I left at the close of the last day's meeting for Mr. Bertrand to deal with, but we will come to that in a minute.

It seems to me that you have got two situations under section 31.2(a).

> Where on application by the Director, the Commission finds that
>
> (a) a person is adversely affected in his business.

That is one situation. I can understand it.

> Or is precluded from carrying on business

That is not "his business" but "business," any business that he might want to go into,

> due to his inability to obtain adequate supplies of a product anywhere in a market on the usual trade terms.

So we just concentrated on that one paragraph. You are dealing with two situations. One is a situation where a man is engaged in business, carrying on business, and there are some supplies he feels he needs for his business. That brings me to the point that Senator Buckwold raised right at the beginning of our hearings—that is, a man may be in the camera business and the class of article that he does not carry may be a Kodak. He goes out and tries to

buy Kodak cameras and he cannot buy othem. Then he complains to the director and says he is adversely affected in his business. But what was "his business"? Was his business cameras? His business is not selling Kodak cameras, which is a specialty article—and it is not even called a camera; it is called a Kodak.

You recall, Senator Buckwold, you were the one who raised this point. Now, are we dealing with generic terms or what are we dealing with? Certainly, it is not clear. What we are trying to do is to make it clear.

Mr. Davidson: Mr. Chairman, that is the intention of that subsection (2). It is intended to encompass not just the situation of Kodak cameras, because there are a lot of competing cameras, and you can carry on a photographic business without Kodak cameras.

The Chairman: Certainly.

Mr. Davidson: But it is almost certainly impossible to carry on a photographic business without Kodak colour film, because Kodak colour film is overwhelmingly dominant. It is true that you can get something—I think, to use the expression which was proposed in one amendment—"functionally competitive." You could get Ilford film, Ilford colour film, but nobody buys Ilford colour film.

Mr. Cowling: It might be just as good.

Mr. Davidson: It might be.

Mr. Cowling: It might help the competition if the camera store had to buy Ilford.

Mr. Davidson: The camera store would not survive if it could not supply Kodak colour film, because the Canadian market demands something like that.

Mr. Cowling: But isn't it suggesting that Kodak will become bigger and bigger until it finally ends up as the only film supplier in the country? That is exactly what this bill is trying to avoid.

Mr. Davidson: It seems to me that there is a logical gap there. All this bill is doing is saying that if a man who has all the qualifications needs a particular product to survive in his business and if the reason he cannot get it is the lack of competition among suppliers, then there is a possible remedy for him in this legislation. It does not say that he cannot handle Ilford film or Fuji film. The point is that unless he can get Kodak colour film he cannot really be in the photographic business.

Senator Buckwold: To carry the point further, really what you are doing is creating Kodak as the monopoly film. There are companies who buy Agfa film because they cannot get Kodak and, therefore, Agfa is doing business. But you may rest assured that if those companies could get Kodak—because Kodak does not sell to their distributors—they could saturate the market, and therefore you are going to kill the competition and that is the very point that is being raised.

Mr. Davidson: In this legislation there is nothing stopping anybody handling these competing films.

Senator Buckwold: Why would they buy it if they could get Kodak? Under the law they can get Kodak.

Senator Everett: Because they do in fact buy competing films and most suppliers do handle more than just Kodak.

Senator Buckwold: But Kodak is the key. The others are there perhaps for esoteric reasons or personal preferences, but the film which people want is Kodak.

Mr. Davidson: With respect to the theory that you get more competition by denying remedies to people who cannot survive without Kodak, you are not going to get more competition if the guy cannot really survive. He is just not going to be available to distribute Agfa film.

Senator Buckwold: You are not talking about survival. You are talking about "substantially affected."

Mr. Cowling: In that class of articles.

Mr. Davidson: Well, retailers really cannot survive without Kodak colour film. Distributors could probably do so.

Senator Buckwold: Well, there is no retailer who would not be able to get Kodak film. Retailers can find it. It is the distributors who have the problem. It is the distributor who wants Kodak but cannot get it.

The Chairman: Kodak film is available.

Senator Buckwold: But they do not sell to every distributor.

Mr. Davidson: It would be unlikely that the distributor be able to prove, or that anyone on his behalf could prove, that he was substantially affected in his business or precluded from carrying on his business without the Kodak line of films. This is so because the distributor would have the alternative of selling the other films, for which there is a demand sufficient for at least a few distributors to survive carrying those lines without the Kodak lines.

The Chairman: Mr. Davidson, according to the first part of this subsection, you start out with the person who is in a business which is substantially affected because of his inability to obtain adequate supplies. Assume that he is in the camera business and his business is operating reasonably well. However, he wants to expand and enlarge. Therefore, he wants to obtain Kodak cameras because he figures that will help his business. How does that interfere in any way with distribution? Do you not have to go further and establish that there is inadequate distribution, that the public is not being served? This is the answer I have been getting from you and Mr. Bertrand and from Mr. Orr at various times about the public interest.

Mr. Davidson: Well, there is a clear public interest in the conditions of the entry of new competition into any line of business.

The Chairman: I am not talking about new competition now. I would just like you, if you would—you do not have to—I would just like you to keep to the point here, that the businessman is operating, apparently successfully, a camera business which does not handle Kodak cameras, but he sees an opportunity to expand his business if he can obtain Kodak cameras. Where is the public interest being served there, if there is an adequate distribution to the public of Kodak film?

Mr. Davidson: If we are talking about a distributor, it could probably not be shown that he was substantially affected in his business by not being able to get the Kodak supplies because he has alternatives. There are enough people who want these alternatives that he can continue to operate a profitable business. If we are talking, however, about a retailer, he cannot really expect to survive as a

retailer without being able to supply the public's demand for Kodak film. If he cannot obtain the Kodak film, then he is very likely going to have to close up shop.

The Chairman: Suppose as an incidental to his business a drug store retailer has cameras for sale. He says that if he could sell Kodak he could do much better.

Mr. Davidson: By virtue of the thousands of products he handles in his drug store, he would have a difficult time demonstrating that he was substantially affected in his business by being unable to get one line of cameras.

Mr. Cowling: That is why I wonder why the words "in that class of articles" were in the minister's amendment.

Mr. Davidson: First of all, you have to establish whether the product Kodak is dominant in the class of articles. Kodak is dominant in the film business. The second question is: Are you substantially affected in your business because you cannot get that and because that class of product is so important that, if you cannot get the dominant product in that class of business, you are in great difficulty? There are two aspects. Is the brand article dominant in its class? Is that class important to your business?

The Chairman: If he has never handled it—

Mr. Davidson: Then it is not important to his business.

Senator Everett: Surely it is not whether the class is important but whether the article is important.

The Chairman: The way you read the wording of it, a person is substantially affected in his business due to his inability to obtain adequate supplies of a product.

Mr. Cowling: Mr. Davidson, I think it says also, speaking about the concept of dominance, that that is related to the market and not to the class of articles which he is selling.

Mr. Davidson: Well, that is right, but in order for the denial of supply to substantially affect his business that product or class of product must be important to his business. If it is only one out of a thousand different products, it cannot substantially affect his business, even if the product he seeks is dominant in its class.

The Chairman: But if he has never handled that product—

Mr. Davidson: Right.

The Chairman: The wording of this section would appear to entitle him to complain.

Mr. Davidson: Yes, but he would have even more difficulty proving that he was substantially affected in his business by being unable to get it if he never even handled it.

The Chairman: Therefore the language should be absolutely clear in this provision to make sure, and certainly it is not clear judging by the representations we have made, that one of the purposes they are afraid of is that if a man is in a business and handles cameras, then if he sees a line of Kodak, for example, which would enhance his business, he is entitled to complain and entitled to be heard by the Commission, and the Commission might make an order.

Mr. Davidson: In the case of the Kodak camera, it is unlikely that the Commission would make an order, because the Kodak camera is not dominant in its line in the same way that Kodak colour film is. There are alternatives to Kodak cameras which are very popular in this country, but that does not apply to the colour film.

The Chairman: You say it is unlikely. Frankly, I find those words irritating. In effect, you are really putting yourself on the judge's bench or on the commissioner's bench in deciding how they are going to interpret a set of facts. We have to read the words and see what the interpretation is.

Mr. Davidson: Mr. Chairman, the reason these things are not prohibitions is that the significance of the practice depends upon the context in which it is found. You have to rely, therefore, on bringing to bear the judgment of an expert body on the subject. The refusal to deal is not prohibited. There is a remedy for it available only under certain circumstances.

Mr. Cowling: But the Commission is obliged to follow the guidelines set forth in the act, and if it does not I suppose the department can appeal to the Federal Court.

Senator Everett: There is one area that bothers me in subsection (a). Let us take the case of the drug store that wanted the camera. You say that he probably could not pass the test of being substantially affected in his business, because this would not be a substantial part of his business; but if the same man were not in the drug store business and decided he wanted to handle cameras, he would be preculded from carrying on business. At least, it seems to me that that is an interpretation that could be made of that section. In other words, it would be easier to get through the eye of the needle if you were not in business than if you were. I wonder if that is the intention.

Mr. Davidson: I am not sure that I understood the factual situation, but if you are not in business, and you want to get into the camera business as a camera specialist, you probably could do so without the Kodak cameras. You could probably depend on Leica, and all the Japanese brands, and so on. I doubt that anyone could make the case that unavailability of Kodak cameras would stop him from conducting a photographic business.

Senator Connolly: It is a matter of fact.

Mr. Davidson: That is right.

Senator Everett: Let us take the situation of a restaurateur who wants to handle film at his cash counter. He would not be substantially affected in his business if he could not get the film, but if the same man says, "I would like to get a counter at a restaurant, a portion of which I will lease, with the purpose of selling Kodak film," would he not be precluded from carrying on business?

The Chairman: It looks as though you have a point there, Senator Everett.

Mr. Davidson: Would this be a separate business in the restaurant?

Senator Everett: Yes. Suppose the restaurateur cannot get in under that section because his business is not substantially affected, and so he says to his son, "Look, I will lease to you two feet of the counter and the shelving behind. You get the film." Because he would be precluded from carrying on business he could get around it that way.

Mr. Davidson: Well, it sounds as if the son is not really in business, though. It is still part of the restaurant business.

The Chairman: He does not have to be in business, though.

Senator Everett: Well, say he leases it to a third party, then.

Mr. Davidson: If he leases it to a third party, and it is a viable, independent business, I think the rules would apply, if he is precluded from carrying on that independent business because he cannot get supplies, for the reason that there is lack of competition among supplies, and because of those other three conditions.

The Chairman: But take Senator Everett's point. The language is, "he is precluded from carrying on business—" not any particular business, but "business" "—due to his inability to obtain adequate supplies of a product." That is any product. This is the kind of a case, as I understood it, that Senator Everett was putting up to you. I do not think the answers you have been giving so far deal with that. I do not think this part has any place in that paragraph, because what it appears to cover is the case where a man wants to establish a business, he looks around and says, "If I handle a Kodak camera, that will be a good, profitable business," and then goes to try and get supplies but cannot get any with which to start that business. The "precluded" part in this section does not deal with an existing business.

Mr. Davidson: But the conditions for the remedy still apply. He has to be precluded from being able to start business. If he cannot get supplies under those four conditions—

The Chairman: May I interrupt you at that point? Right there we are getting away from the purpose of this competition bill. Obviously, if he has an urge to start a business there may be enough businesses in that area already that you cannot support. Is the public interest suffering because this man cannot get into a business and sell Kodak cameras?

Senator Everett: I have nothing against that, Mr. Chairman, I am afraid, because that is what the competitive economy is all about. We are not attempting to exclude people from going into business.

The Chairman: No. I said, when he picks on a particular line, and I thought that was the extent to which your example went.

Senator Everett: My example was more to the point that it was easier to obtain supplies if you were not in business.

The Chairman: You mean under the provisions of this bill?

Senator Everett: Yes. That is the way it looks to me. If you were in business you might have difficulty, and if you were not in business it would be easier.

Senator Buckwold: Could I extend this a little further? I can foresee a tremendous problem, expecially in the franchise field. A fellow decides he wants to open up a Colonel Sanders' chicken establishment. He is not in business yet, but he would like to get this francise, because he sees two or three stores operating, they are very profitable, and there is not really much competition: they are the leaders in the field, with perhaps one other such dealer, but he wants a Colonel Sanders' franchise. Under this act you may say there was inadequate competition. That is quite possible. You are precluding him from going into business. He is being stopped because he cannot get that franchise. There is a whole series of such things. I can imagine that in the whole franchise field there could be a very serious problem.

Mr. Davidson: I think it would be impossible to prove that the reason he could not get the franchise was because there was inadequate competition among suppliers, because there is any number of fast food operators. The fact that he cannot get a Colonel Sanders' franchise does not satisfy, at all, in my view, the condition that the reason must be that there is inadequate or insufficient competition among suppliers in the market.

Senator Buckwold: You feel, then, that there would be no pressure on the company to give him that franchise.

Mr. Davidson: There are too many alternatives. That is what distinguishes the Kodak film industry.

Senator Buckwold: Let us go to the distributor level. Here I am perhaps opening up a field that is somewhat different. Manufacturers generally have distributors across the country unless they are selling the product themselves. They have people who distribute their line in a given geographical area. Very often this is a dominant line. I do not want to mention any particular names, although that would be easy enough. In that case, how could a manufacturer refuse to open another distributor?

Mr. Davidson: Maybe he could not, if it is really a dominant line. I am not sure what the factual situation is. It sounds like a case where, if it is really a dominant line, and all of these conditions are satisfied, the complainant might well have a serious case.

Senator Buckwold: What you are really leading to is a breakdown in the distributor system. Is that not quite possible?

Mr. Davidson: No, because there are not all that many sectors of the economy where one firm dominates.

Senator Buckwold: I think there are. You can name products that are such leaders in the field that new people, if they are aware of it, can move in and say, "I would like to get part of that franchise area." I can see a fair amount of problems there.

The Chairman: Senator Buckwold, may I interrupt? There is a point that might be dealt with now that I raised with Mr. Bertrand the other day. The opening words of this paragraph are, "Where, on application by the director, the commission finds that..." The question I left with Mr. Bertrand last day was, what motivates the director? Presumably there is a complaint from somebody who is not able to get supplies. What does the director do? It says, "Where, on the application by the director the commission finds...". Now, how is the complaint investigated? Is it simply that the director is in the position of being a conduit pipe? Somebody complains and he passes it on to the commission? I asked Mr. Bertrand if he could clarify that for me. Obviously it cannot be under the other provisions in the bill, where six people can get together and complain. That is in relation to another offence under Part V of the bill. Is there not something missing here?

Mr. Bertrand: Yes. Mr. Chairman, I would like to draw your attention to clauses 3 and 4 of the bill, at page 5, the

application for inquiry. Under section 7, regarding any six persons resident in Canada who are of the opinion that grounds exist for the making of an order by the Commission under Part IV.1, a citizen's complaint would be available to set this in motion.

The Chairman: That means, then, that one complaint by one supplier is not sufficient and he must get five others to join with him.

Mr. Bertrand: Whether it is insufficient is another question, because clause 4 amends paragraphs 8(b) and (c), providing that whenever the director has reason to believe that:

> grounds exist for the making of an order by the Commission under Part IV.1,—

That means that when the director has reason to believe that there is ground for application for an order it is put under inquiry. The mechanics of an inquiry under the Combines Investigation Act are then available and could start with a complaint by one individual and a preliminary investigation by my officers following that complaint to establish whether there are grounds and reasons to believe that.

The Chairman: Under the provision on page 5, to which you first made reference, a single complainant could not make application.

Mr. Bertrand: No, six are needed. A single complainant would have to communicate with me explaining the situation. I would then ask my officers to investigate and determine whether there was reason to believe there were grounds for an order under Part IV.1. That would be a preliminary investigation. If they determine there that the complaint was unfounded and there were no grounds for an application to the commission, that would close the inquiry.

The Chairman: Does this involve all the provisions of the act?

Mr. Bertrand: I believe so, but I do not expect it would be necessary in most instances. All the necessary information for an application could be provided through a return of information, or through hearings before the commission.

Mr. Cowling: I wonder if we could pass over some of the perhaps less important points. I am looking at the specific amendments which were distributed this morning and we have discussed some of the points on page 1. Perhaps the next most important item, Mr. Chairman, is the amendment that the committee would propose with regard to exclusive dealing, which is to be found on page 19 of the bill. It is suggested that a new subsection 3.1 be added making it clear that a legitimate franchise agreement would not be caught under the exclusive dealing powers of the commission.

Mr. Bertrand: May I ask some questions as to your approach? You are saying that the grantor of a franchise should be allowed to tell the franchisee that he will only deal with the grantor's product.

Mr. Cowling: Yes, it seems to me that in a legitimate franchise arrangement there must be some elements of exclusive dealing, market restriction and, possibly, tied selling. All three are not always necessarily present, but there is generally some degree of one or the other.

Mr. Bertrand: Yes, but for whose benefit?

Mr. Cowling: Probably for the benefit of both, including the franchisee, because if it is with respect to market restriction they say they will franchise the franchisee to operate, for instance, a restaurant and will guarantee that they will not establish another franchisee within a certain territory.

Mr. Bertrand: For whose benefit?

Mr. Cowling: For the benefit, I would say, of both parties.

The Chairman: Also for the benefit of the public.

Mr. Bertrand: I am interested in the benefit of the public in obtaining the best value and product possible.

Senator Cook: A person with a franchise trains staff and all the rest of it, so why should someone else come in and derive the benefits of that?

Mr. Bertrand: What would be wrong with it? He could put a charge on it.

Senator Cook: It does not seem very fair to those who have trained the franchisee and the staff.

Mr. Bertrand: Well, it is only if it is for their own benefit.

The Chairman: Why should it not be?

Mr. Bertrand: That is the assumption.

The Chairman: People do not engage in any activity unless they expect to come by a benefit. It has not been an offence so far as I know to operate a business for benefit. Maybe I should not be giving you ideas.

Mr. Bertrand: A franchise arrangement is devised to benefit both parties. The commission might look into such arrangements and decide they should be for the benefit of both parties, but it should also be for the safeguarding of the public.

Mr. Cowling: I would like to refer to the amendment proposed by the minister recently in the House of Commons committee with respect to this subject. That amendment seemed to relate only to one particular industry. It is not of record, except in the committee proceedings. Was that amendment tabled, Mr. Bertrand?

Mr. Bertrand: Yes, it was circulated.

Mr. Cowling: I am quoting the minister's statement at page 5, issue No. 34 of the proceedings of the House of Commons Finance, Trade and Economic Affairs Committee:

> For the purpose of subsection 4 in its application to market restriction, where there is an agreement whereby one person—the first person—supplies or causes to be supplied to another person—the second person—an ingredient or ingredients that the second person processed by the addition of labour and material into an article of food or drink, that he then sells, in association with a trade mark that the first person owns, or in respect of which the first person is a registered user, the first person and the second person are deemed in respect of such an agreement to be affiliated.

That ties in with the other provisions of the section, which say that an order cannot be made as between affili-

ates, but it seems to be aimed particularly at the soft drink situation, the bottlers.

The Chairman: But it does not deal with the franchise.

Mr. Cowling: This committee's recommendation was along the same lines, but a little broader, in that it would not confine the relief to the bottlers, but extending it to other legitimate franchise arrangements. This is why we say in the amendment that the agreement must not be one which was entered into for a purpose related to this act, so that people could not enter into franchise agreements in the hopes of evading the application of Part IV.

The Chairman: I suppose, Mr. Bertrand, it would be reasonable and fair for me to ask, having regard for the provisions of that amendment, who derives the benefits? Would you not think it would be the persons who entered into the agreement? And how would you relate those to the public interest?

Mr. Davidson: I think, Mr. Chairman, the Royal Commission on Farm Machinery, and the inquiry under the Combines Investigation Act into the tires, batteries and accessories business of service station operators—they were both major inquiries—have shown that where exclusive dealing is widespread in the industry it can have a very serious effect on the possibility of new suppliers getting into the market and getting distribution. I think perhaps Senator Everett will know about the Versatile Manufacturing Company in Winnipeg, which had a great deal of difficulty getting adequate distribution of its farm machinery because it was a short-line manufacturer—it supplied a limited number of lines. It had considerable difficulty in getting distribution, although everyone acknowledged that technically it was very innovative.

The Chairman: That was not the purpose of my question. I was referring only to the amendment which the minister tabled in the House.

Mr. Davidson: I thought you were asking about who gets the benefit.

The Chairman: Only in relation to these particular agreements, where the relationship is presumed to be that of affiliates. Now you have an agreement which obviously relates to bottlers—Coca-Cola, etc. That is the sort of thing this amendment will relieve against. I was merely twitting Mr. Bertrand for an answer he made earlier. He knows very well the answer he gave earlier. I wanted to know, in that situation, where there is what amounts to an exemption, where the benefits are distributed. Obviously there is a benefit to the parties to the agreement, and there must, in your promotion of the public interest, be a benefit to the public in order to provide this sort of exemption. Then I am simply saying, why limit it to bottlers—why not relate it to franchises?

Senator Everett: Is there anything in this section which requires a franchisor to grant a franchise?

Mr. Cowling: Perhaps under section 31.2—

Senator Everett: We are dealing with section 31.4, because that is what the amendment [illegible] Can anyone come along and force the Kentucky Fried Chicken people, under 31.4 to give them a franchise? This, in fact, deals with exclusive dealing, tied selling and market restriction, which are requirements by the franchisor on the franchisee to deal with him or not to sell into another market, or to deal with someone else he designates.

Mr. Davidson: That is perfectly correct, senator. It is all imposed by the supplier. Market restriction, exclusive dealing, and tied selling are conditions imposed by the supplier. It does not work the other way; it is not the customer seeking to impose any restrictions on the supplier.

Senator Everett: I have to disclose an interest, because I do hold a franchise. I wanted to make the point for Senator Buckwold, who, I think, was concerned with the point that if someone held a franchise, under section 31.4, if the proposed amendment were not there, someone could come along and force the franchise. That is not the effect of 31.4. Whether or not it is the effect of 31.2, I do not know. The amendment which is proposed will not protect against that, because section 31.4 does not create that problem.

Mr. Cowling: That is not so important where you have a retail outlet, such as a restaurant, with the customers coming to the store. In that case, the franchisor could simply, as you say, refuse to grant another franchise within a certain area. However, where the franchisee is involved in some kind of distribution or selling, the contractual enforcement of the market restriction aspect comes into it.

Senator Everett: What the amendment would do, in effect, would be to allow the supplier to say, "You must buy your supplies from this person, and we get a kickback."

The Chairman: I do not think it has that effect.

Senator Everett: It does. That is what tied selling is.

Mr. Cowling: The only order the commission can make under section 31.4 is an order directed to all or any of such suppliers prohibiting them from engaging in such exclusive dealing or tied selling.

Senator Everett: Exactly. One of the things that section 31.4 seeks to prevent is a supplier being able to tell the franchise holder that he must buy his supplies of certain products from Mr. "X." Is that not so?

Mr. Davidson: That is correct.

Mr. Bertrand: Assuming all of the circumstances justifying the order are present.

Senator Everett: That is right. That is what it seeks to do. The effect of the amendment would be to allow, in the case of a franchise situation, the supplier or franchisor to do that very thing.

The Chairman: You have two categories. You have the franchise holder who may not be carrying on any business. He may simply grant a franchise to X, Y and Z under which they operate. That is how I understand franchise holders to operate. In other words, the franchise holder grants rights in certain territories on certain conditions.

Senator Everett: That is correct, and the bill says that under certain circumstances he will not be able to impose those "certain conditions." The three conditions are exclusive dealing, market restriction and tied selling. It does not mean that a person can come along and force him to expand his franchise operation.

The Chairman: No, he cannot be forced to grant franchises.

Senator Everett: That is, under section 31.4

The Chairman: I think it was Mr. Davidson who said that a supplier, under the penalty section, could demand from the franchise holder the right to have an assignment of the rights, and therefore avoid the exclusive feature.

Mr. Davidson: If I said anything like that, Mr. Chairman, it was unintended. That is not the case.

The Chairman: What is your specific answer, then, to Senator Everett's point that there is nothing in this bill—

Senator Everett: No, not in the bill; there is nothing in section 31.4 to force the supplier to grant additional franchises. Senator Buckwold was making the point that under section 31.4 somebody could come along and force the supplier to grant additional franchises, unless the proposed amendment was put into the bill. The point I am making is that section 31.4 deals only with market restriction, tied selling and exclusive dealing.

Mr. Cowling: I think that is correct.

Senator Buckwold: Yes, the point is well made.

Senator everett: That might be the case under section 31.2, if all the tests of section 31.2 are met, but that is another matter.

The Chairman: The illustration we received from many of the witnesses who appeared before the committee was as follows: "If we set up a dealership in the town of Port Hope and we decide on our assessment of the situation that that town, with its population and so on, and the adjoining territory could not afford a second dealership and provide all the necessary services required for a successful operation." Yet under section 31.2 they could have trouble if they refused to grant a dealership licence.

Senator Everett: They might very well, but your amendment does not affect section 31.2. Your amendment, excluding the franchise system, only excludes the operation of section 31.4.

The Chairman: If the amendment does not, it is intended to.

Senator Everett: Is it really?

Mr. Cowling: If market restriction is not allowed to some degree—and I am talking about a situation where there is plenty of competition with regard to the particular product—

Mr. Davidson: There would be an order made.

Mr. Cowling: I am not talking about a monopoly situation. If there is plenty of competition, is there not a danger that, if people are prevented from providing, to a certain extent, for market restriction in the franchise trademark area, it will certainly encourage manufacturers and suppliers to open their own outlets, or to buy up the independent distributors and carry on the business themselves? In that way they can do whatever they like. What they are doing now is something that falls in the middle, yet it allows a certain degree of decentralization and free enterprise to be maintained.

The Chairman: They could create subsidiary companies and then have the affiliation rule apply.

Mr. Cowling: That is right. I am suggesting that perhaps the bill will encourage that kind of thing to happen, and that would be a very bad thing. Senator Everett might want to comment on that.

The Chairman: If all these things we have been discussing have this effect the manufacturer may, instead of granting dealerships, decide that whatever entity is operating in a territory will be a subsidiary of his company. In that event, when you come under affiliation the rules that are in this bill would not apply.

Mr. Davidson: The manufacturer might indeed possibly do that, but it would require an enormous investment that he does not now have to put up. It would also be done only, presumably, because it was going to be a lot more economical for him to do it.

The Chairman: That is right.

Mr. Davidson: At the present time there is no restriction on the oil companies from employing exclusive dealing practices, and indeed they do use exclusive dealing practices, but they are moving into direct distribution; they do it for reasons that appear persuasive to them. It seems to me very unlikely that manufacturers will put up a large investment with no evident economies for them deriving from this new system. In fact, there is no evidence that manufacturers respond in this kind of way. The same argument was made when resale price maintenance was prohibited; the same argument was made, that if the manufacturer were not allowed to control the price he would simply open his own stores. In theory that is a possibility, but nobody did it.

The Chairman: I am talking here about a dealer who believes, like my illustration of Port Hope—this is not what I created; this is one that is stated here—that Port Hope will support only one dealership, having regard to the amount of competition in the area. Cobourg is not too far away, and other towns are not too far away. If somebody can come along and invoke the provisions of this bill another dealership could be forced in Port Hope.

Mr. Davidson: You could not force a dealership, Mr. Chairman. There is no possibility of forcing a dealership. There is a possibility that you might force the supply of a product, but there is no way you could force anybody to have a new dealership.

The Chairman: Let us talk about a Ford dealership in Port Hope. You assume that there is no room for two of them.

Mr. Davidson: You could not force Ford to give you a dealership. In very unlikely circumstances the manufacturers might be forced to give a supply of the product.

Mr. Cowling: Would not the commission's order be tantamount to a dealership agreement?

Mr. Davidson: First of all, there is not any possibility of an order being made unless all those four conditions are satisfied. If they are satisfied, then there would be the possibility of the product being supplied.

The Chairman: What condition do you say is not likely to be satisfied?

Mr. Davidson: I say it is unlikely that you could prove that the reason you cannot get supply is because of lack of competition in the market. You would have to show that not only General Motors, Ford, Volkswagen, and so on,

would not supply, but you would have to show that for some reason the Japanese would not supply you either. It is very unlikely you could show that you could not get supplied through lack of competition in the market. The reason is that the market is too small in your illustration. That is the reason you cannot get supplies. It is not because of lack of compatition among suppliers, because if you went to Toronto you probably could get a dealership.

Senator Everett: Could I ask counsel whether section 31.4 is a separate section?

Mr. Cowling: That is right.

Senator Everett: Therefore your amendment just applies to section 31.4?

Mr. Cowling: That is right.

Senator Everett: I gathered from the way you were talking that you were also intending that it would apply to section 31.2?

Mr. Cowling: No. Section 31.2 has been dragged into the discussion to answer the point you made where somebody is forcing somebody to grant a supply.

Senator Everett: You only intended it to extend to 31.2?

Mr. Cowling: That is right.

Senator Everett: Then all we are dealing with is the exclusive dealing, selling, and marketing restriction section?

Mr. Cowling: That is correct.

Senator Connolly: What amendment are you talking about when you are talking of this? Is this the minister's amendment that was moved in the other place? Have we got a specific amendment in the new sheets?

Mr. Cowling: Yes, we do, senator, it is on page 3 of the new sheets, down at the bottom of the page. It is 3.1.

Mr. Lewis: Mr. Chairman, I do not think we should overlook some of the comments which were made in the brief presented to us concerning the benefits which arise or result to consumers through franchise agreements. If I remember correctly, these were a standard of quality, which is very important, the availability of the product, the distribution system, and the price.

Senator Cook: And the reliability of the dealer.

Mr. Lewis: The reliability of the product.

Senator Cook: The reliability of the dealer.

Mr. Lewis: This whole distribution network is a very important factor in our country. We were proposing that such valid agreements should be exempted from this particular section—as affiliated companies are in the same line.

Senator Everett: If you want to be logical, you would have to exempt it from both sections, wouldn't you?

Mr. Lewis: That point was brought up in an earlier meeting, senator.

Mr. Davidson: As I mentioned, there were these two very thorough studies—on the distribution of farm machinery and on the distribution of service station products. The conclusions of both inquiries were that the competing manufacturers had a very difficult time getting into the market, getting distribution. Some dealers who wanted to buy elsewhere—because they thought they could buy on more favourable terms elsewhere—were precluded from buying other products than those designated by their suppliers. Particularly in the tires, batteries and accessories field in the service station business at the time, the oil companies would designate a tire manufacturer. Say "Imperial designated Goodyear," the Imperial dealers would have to buy Goodyear tires and they would pay what was called an overriding commission to Imperial Oil on the purchases made by the dealers. It was clearly in Imperial Oil's interest to have that arrangement. But the dealers sometimes saw opportunities to buy tires at better prices, but were precluded from doing so by their arrangements.

Senator Everett: There is nothing in this act which would preclude the franchiser from imposing standards of quality on those purchases.

Mr. Lewis: No, there is nothing in the act that would prevent that.

Senator Everett: So the franchise holder could go and get his supplies elsewhere, but he would still have to get them in accordance with the quality imposed under the terms of the franchise.

Mr. Lewis: I would believe so.

Senator Connolly: Mr. Chairman, are the witnesses resisting the amendment that we have at the bottom of page 3?

The Chairman: I understand that they are.

Mr. Davidson: Yes, because as I read the amendment that would exclude all franchise arrangements from the application of the market restriction, exclusive dealing and tied selling provisions.

Mr. Cowling: Bona fide franchise arrangements.

Mr. Davidson: The farm machinery people are bona fide franchise operators and so are the service station operators.

Senator Connolly: In substitution for this, are you urging the amendment proposed by the minister in the committee of the other place? Or have you dealt with the subject matter?

Mr. Cowling: The one dealing with food and the processing of food?

Mr. Davidson: The minister has tabled that and, as I understand it, the expectation is that that will be voted upon in the committee in the other place.

Senator Connolly: In other words, that agrees in part with the proposal made by this committee at the bottom of page 3.

Mr. Davidson: Yes, it does in the case of food and drink franchises.

The Chairman: The amendment on page 3, to which Senator Connolly refers, would enlarge the area of the amendment proposed by the minister.

Mr. Davidson: Yes, to cover all franchises.

Senator Connolly: Our proposed amendment covers all franchises. The minister's proposal is to restrict it to franchises in respect of food and drink.

Mr. Davidson: And only with respect to market restrictions, not with respect to exclusive dealing or tied selling.

Mr. Cowling: And there are other conditions, too. That is to say, the franchisee must contribute some element of labour and material to the processing of the product.

The Chairman: Would you continue, Mr. Cowling?

Mr. Cowling: On page 4 of the amendments which were distributed this morning, honourable senators, there is a new proposed section. Many of the briefs submitted were concerned about the procedure there would be on a hearing before the Commission. This was to some extent alleviated by one of the minister's proposed amendments in December, in which he did some rearranging of the wording and made it clear that the Commission could not make any finding until after the parties had been heard. The committee was in full agreement with that. However, if you look on page 1 of the amendments this morning, you see that those words with which the committee was in full agreement have been removed. The reason for that is that the committee has suggested a more comprehensive guideline on this whole subject of procedure before the committee, and the idea would be that you could remove those words in 31.2, if you had the provision that we find on page 4. I do not think that differs in principle at all with what the minister was suggesting. It just makes it a little clearer and, furthermore, it is in the act.

The Chairman: It spells it out.

Mr. Cowling: I am not suggesting that the wording of it could not be improved or polished up. It is just a suggestion.

Senator Cook: 31.2 would still read: "Where on application by the Director and upon proof by him."

Mr. Cowling: That is right. That would cover the burden of proof aspect. Then, on page 4 you would have other matters spelled out such as the right of the party against whom an order or recommendation is to be made to receive a copy of the application and a summary of the allegations in support thereof, the right to cross-examine any witnesses that the director produced at the hearing before the commission, and that he would himself have the right to produce witnesses and documents within a reasonable delay, if he needed a delay.

Subsection 2 on page 4 would give to the supplier, before the hearing, the right to have, for example, the subpoena powers which are given to the director under the act. This would give the supplier the right to use those powers in case he needed to subpoena somebody to the hearing.

Mr. Bertrand: Mr. Chairman, with regard to a lot of those suggestions—for instance, the burden of proof—I presume that before the commission any applicant, as before a court, has to prove his case. Perhaps it would be preferable to have that outlined and spelled out in the act. I do not think, though, that the fact of spelling it out will change what is already presumed to exist; but if, as a matter of convenience, you feel it is better that way, I would not have any objection, because that would simply concretize these things in the act.

Mr. Cowling: It would concretize what you intend to do anyway.

Mr. Bertrand: Not only what we intend to do, but what the normal reaction of the commission would be.

The other aspects, the right to be heard and to cross-examine witnesses, are just principles of natural justice, and I assume that if the commission were not to follow the principles of natural justice, that would provide an occasion for right of appeal, or right of review before the Federal Court and perhaps have the decision quashed. In any event, therefore, you are back to exactly where you were, that is, to the situation of a commission considering its own position.

Senator Connolly: Or the use of a prerogative writ, perhaps.

The Chairman: This makes it clear.

Mr. Cowling: The intention was not that these provisions would be substituted for all other rules of natural justice, if there are any. That is why it starts out saying, "For greater certainty."

Mr. Bertrand: And similarly, when you say, "To be furnished within two weeks prior to the hearings, with a written summary of the nature of the order—

Mr. Cowling: That is badly worded.

Mr. Bertrand: I would like just to draw your attention to the practice of the commission. When somebody is called for hearing purposes as a witness he will be presented always with about two weeks' notice of appearance before the inquiry. Secondly, at that time, when he comes before the commission to be heard as a witness, he can always apply for a stay, or a delay, and this was the case recently in one of our recent hearings before the commission. The person called as a witness applied and said he would like to have a delay of a number of weeks because he needed that length of time to study the documents and to be prepared for the hearing, and the commission granted him that delay. If the commission did not grant it that could also be interpreted as a denial of natural justice. I think what you are suggesting is that the commission's position with regard to this sort of thing be explicitly set out in the act. You are suggesting that the position the commission has taken and would undoubtedly take in any case should be made explicit.

The Chairman: Many members of the public derive comfort and confidence when things are stated explicitly, so I do not see how there could be any objection to that. If the provisions were not so and the commission did not allow these proceedings to be followed, they would create great problems of their own, politically and in public relations and may ultimately have to proceed in the fashion provided here in any event. However, I still feel that, having regard to the briefs submitted to us and the concept in the minds of members of the public, they wish to see explicitly in writing the power and the authority.

Senator Buckwold: I would like to revert to the four standards for granting an order forcing sale. I am now wearing the hat of the consumer and suggest to you that it would be very difficult to prove the provision contained in (b) that the product was in ample supply. Do you mean amply supply domestically, or anywhere in the world? I suppose a supply could always be found somewhere, but might be completely non-competitive.

The Chairman: Do you mean if the product is in ample supply in the sense that it is available to be imported?

Senator Buckwold: It may be in ample supply for import, but not at competitive prices.

Mr. Davidson: The section deals with a particular market and one of the questions is whether there is sufficient competition among suppliers of the product in that market. Therefore, when we come to the question of whether supply is ample, we are refering to the same market. The intention, which I believe has been captured, by the language, is to preclude any would-be buyer from invoking this section if the suppliers in the market were having to ration the supply and there was clearly a shortage. The words were intended and, I believe, succeeded with the intention, to preclude the would-be buyer from in those circumstances invoking the provisions to obtain supply, because there is a physical shortage.

The Chairman: Supposing the physical shortage existed only because available sources of supply at competitive prices existed abroad?

Mr. Davidson: If the would-be buyer could obtain supply, I read the section to say that the product is in ample supply and if he can get supply there is no shortage.

The Chairman: Anywhere?

Mr. Davidson: In the market.

The Chairman: The market could be in Toronto, in Canada, or in the United States.

Mr. Davidson: But if he is a dealer and he wishes to sell some imported goods, he has obviously not got the facilities to go to Japan to obtain those articles.

Senator Buckwold: Let us consider a practical situation: Last year it was almost impossible to buy sheets in Canada, which are made here by two manufacturers. They could have been purchased in the United States, but the cost would have been much higher.

Mr. Davidson: Yes.

Senator Buckwold: I am suggesting to you that the manner in which this provision is worded makes it impossible to protect the consumer so long as any manufacturer declared that the product could be obtained somewhere else, anywhere in the world.

Mr. Cowling: Does not "ample supply" in this provision, senator, mean that the commission would not order a given supplier to supply unless that supplier had plenty of the commodity to supply?

Senator Buckwold: I can see that interpretation, but that is sometimes difficult to prove if he is anxious to sell, or widen his distribution. I just put it in as a point which I think might be something that would hamper the activities of your group in trying to get the kind of competition policy which some of us would like to see.

The Chairman: Does it not mean, senator, that if you have two or three manufacturers who occupy the market, they have arrangements under which they direct, and they have agreements with customers under which they sell the quantities, which would about match their productive capacity? If you take that situation, how do you apply and interpret this section? You have manufacturing facilities with a capacity to supply the existing market at the time a supplier makes a complaint to the directors that he is not able to get supplies. Can you say that the inability to obtain adequate supplies is because of the inadequate degree of competition?

Mr. Davidson: No, clearly not. If you are in a period when manufacturers can supply only their existing customers, because they are right up to capacity, the reason they are unable to supply the would-be buyer is not because of the lack of competition, but simply because of the lack of capacity. They would have no problem.

The Chairman: The inability to obtain adequate supplies is tied in with the fact that it is because there is lack of competition.

Mr. Davidson: That is right.

The Chairman: Obviously when another supplier wants to come into the market, and the productive capacity for the product is not great enough to take care of another dealer or businessman, the commission could not make an order. As I interpret it—I would like to know if you have a different view—does it mean that the commission could make an order prorating supplies?

Mr. Davidson: No, it does not, Mr. Chairman, because they could not make an order at all if there is a shortage.

Senator Everett: Could I follow up that point? It is an interesting point. Let us assume that no one dominates the market, that there is ample supply, and the person seeking the supply goes to one and is turned down, he goes to another, then to another, and another. In a definable market area he is turned down by everyone who can supply. My question is, does he have a case, and, if he does, which supplier is tapped?

Mr. Davidson: In reply, it is not clear. One would have to investigate to find out whether or not refusal to supply was due to inadequate competition, because normally, if there is ample supply and suppliers are competing, someone would want to sell to a new customer.

Senator Everett: There have been cases where that has not been so.

Mr. Davidson: It is conceivable that they might be competing and they did not want the supply to die. In that event, you would not be able to prove that the reason he could not get supplies was because of insufficient competition. So that test would not be satisfied and you could not get an order. You would have to prove that the reason he cannot get supply is because of insufficient competition among suppliers. You would have to have evidence that that was the reason he could not get supplies. If you did prove there was not sufficient competition, the question of who would have to supply—one or more people could be ordered to supply—is a judgment the commission would have to make.

Senator Everett: The offended party could not come along and say "I want that fellow there."?

Mr. Davidson: No.

The Chairman: I can see some difficulties in making such an order. Certainly, you could not make an order where the production capacity is full up. Therefore, of necessity you would have to find a manufacturer or supplier who had some excess capacity. Otherwise, you are asking him to prorate. If he has agreements covering his

whole production, then those agreements come into effect. Is that not right?

Mr. Davidson: That is right. If there is any sort of shortage, the commission cannot make an order at all.

Senator Heath: On that point, Mr. Chairman, have we taken this legislation and put a stencil, if you like, over such things as state-run monopolies for purchasing? I am thinking in terms of the British Columbia Petroleum Corporation or the British Columbia Liquor Control Board, and that type of thing.

Mr. Bertrand: Mr. Chairman, we discussed the position of regulated industries last week. Do you want me to go over that again?

The Chairman: We dealt with that subject at the last meeting, Senator Heath, and it is in the transcript.

Senator Heath: Thank you.

The Chairman: We now move to the question of appeals from orders of the commission.

Senator Cook: Speaking of appeals, we will soon be out of time.

The Chairman: That is why I am pushing things along. Do you have any comment, Mr. Bertrand?

Mr. Bertrand: The suggestion is to provide for appeals on the merits, facts and law. The argument that might be put forward in that respect is that if we are getting away from specialized tribunals, the commission being specialized in this area, and going into a general court for a straight appeal, we might as well go to the court first.

Mr. Cowling: Would you say that the National Energy Board, for example, or the Canadian Transport Commission are specialized tribunals. I presume that they are in the same way that the Restrictive Trade Practices Commission will become a specialized tribunal, especially under this new reviewable practices jurisdiction. In the cases I have mentioned, of course, there are appeal procedures provided in respect of the facts of the case as well as law.

Mr. Bertrand: I am not all that familiar with the National Energy Board. Is there a cabinet override—

Mr. Cowling: Yes, and that is the nature of the appeal on facts. As to an appeal on law, it is directly open to the Supreme Court, if I remember correctly, although the new Federal Court Act may have altered the procedure in that respect somewhat. The point is that there is the possibility of some kind of factual review with respect to the important decisions that these bodies make, whereas, as far as I can determine, there is absolutely no such review provided for in the case of the commission.

Mr. Bertrand: In so far as appeals on questions of law are concerned, do you see much of a difference between an appeal on a question of law and an appeal under section 28 of the act?

The Chairman: Yes, all the difference in the world. If you are asking for my view, I think section 28 is a very inadequate source of authority. All you have to do is read it to realize that. That is why we have inserted this. We have dealt with section 28 before. It has always been said that there is a right of appeal under that section, but if you read it carefully you will realize that it is very limited. Really the body being appealed from would have to behave in the oddest manner one could possibly conceive.

Mr. Cowling: I think the Chief Justice of the Federal Court has said himself that it is not really an appeal. He described it in some other way.

Mr. Bertrand: Depending on the ground. I understand the first ground is that the commission has made a mistake in a point of law, has misinterpreted the law. What is the difference between saying that the Federal Court could review if there is a mistake in law and saying there is an appeal in law to a court?

The Chairman: Except that you could have your rights of appeal in one basket.

Mr. Cowling: I would agree, there may not be that much distinction on the straight legal side; I think I would concede that.

Mr. Bertrand: You have an appeal on a question of law, and then you only have a question of appeal on a question of fact.

Mr. Cowling: That is pretty important.

Mr. Bertrand: An interpretation of fact.

The Chairman: It may present all kinds of problems to say, "I appeal on a question of law under section 28 to the Federal Court, and I appeal under section so-and-so of this bill to the Federal Court on a question of fact." It may very well be that the court dealing with the appeal wants to have full opportunity to study the law and the facts to see how the facts have been applied and interpreted in relation to the law. I should think you would want to get before the same body to deal with the whole question, and therefore you should not split your rights of appeal.

Mr. Cowling: It seems to me that there should be some possibility of factual review, as it were, hanging over the head of the commission. It might not be invoked very often, but the mere fact it was there might have an effect on the way the commission administered its duties.

Senator Cook: You are not going to appeal on a question of fact out of pure whim, because if you do you are likely to be penalized by costs, and so on, so it has its own sanctions in itself.

The Chairman: That is right.

Senator Cook: The more and more boards you have, the more and more you extend the government, I think the more and more should innocent citizens be able to go to the courts. The court should be there all the time.

The Chairman: You have raised some questions on this, Mr. Bertrand. You have not indicated whether or not you think it is a good provision in the interests of those who may be affected by orders of the commission.

Mr. Bertrand: That is right, I have not indicated that.

Senator Macnaughton: Is that an answer?

The Chairman: You have not indicated that?

Mr. Bertrand: Right.

The Chairman: What I am asking is: do you feel you can indicate it?

Mr. Bertrand: My minister would have to decide that issue. My own personal feeling is that there are some appeals on some aspects under section 28 on a question of fact, if the commission had made some gross misinterpretation of the facts, or did not find the facts, or could not justify its finding.

Mr. Cowling: Wilfully, capriciously, or something like that.

Senator Cook: Perversely.

Mr. Bertrand: There are some aspects of the facts that could be reviewed independently of the act. There remains, as you pointed out, the situation where there is simply a disagreement. On the same facts found by both courts there is a disagreement on which conclusion to reach. In that case, how far should we go? Should we have a third court, a third decision? We already have two.

The Chairman: You start off with section 28, and it imposes too great a burden on any person who wants to appeal.

Mr. Bertrand: But some of the area of the appeal on fact would be covered by that.

The Chairman: Some but not all. I do not know that it would, having regard to the basis. What is the language they use?

Mr. Cowling: Paragraph (c) says:

> based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

Mr. Bertrand: But you must say that some disagreement on the facts could be covered by that.

The Chairman: No. Your appeal would have to be based on an erroneous finding of fact that the board made in a perverse or capricious manner or without regard for the material before it. In other words, tu use an expression, they might have said "to h . . . with the fact."

Mr. Cowling: All the evidence said it was black but they said it was white.

The Chairman: How do you fit yourself into that? It would be utterly impossible?

Mr. Bertrand: I am very glad to hear that the commission will never make such a mistake, to be appealable on that one.

Senator Cook: Not the present commission, anyway.

The Chairman: With the personnel I have found, I would not think that was possible, so really it is the occasion of an appeal on fact, if I have to fit myself into that.

Mr. Bertrand: If we try to put the appeal in its proper perspective, in any event this is to be taken on the basis of fact, whatever it is. If we say it is taken to the commission, then it is an authority. If we say it is an appeal to the court, it is an authority also. A businessman himself would not be against or in favour of an appeal. To him what is important is the decision, no matter who is speaking. However, when we look at the legal profession, those are the people interested in having an appeal. I am not convinced that many of the briefs that outline the need for an appeal on the fact were not written by members of the legal profession where it is a primary concept.

Senator Cook: But when there is a need to appeal, there is a very great need.

Mr. Bertrand: But from the businessman's point of view the important thing is to get a decision.

Mr. Cowling: A lay member of the House of Commons committee the other evening was pressing very hard for an appeal. I do not think Mr. Ritchie is a lawyer.

Mr. Bertrand: I do not think so.

The Chairman: We have had laymen in our briefs saying they want a right of appeal. If they are not familiar with the law or legal procedures they see a great merit in having an escape hatch in whatever the decision is on the question at issue. But a lot of these briefs are written by lawyers.

Senator Cook: I do not think the courts should be shut out except for very clear and cogent reasons.

Mr. Cowling: Justice must be seen to be done, as they say so often.

Senator Macnaughton: Let us take the alternative and put it the other way. Let us have no appeals at all. Then we are stuck with any decision from any commission. That is not our system and I hope it never will be.

The Chairman: The commission itself should be the last to resist having any of its orders dealt with on appeal.

Senator Macnaughton: But even commissions make mistakes.

Senator Cook: Do you want the matter disposed of or do you want justice done?

Mr. Bertrand: I cannot help relating this section 28 with the similar type of provision that exists in England in matters of taxation, about the appeals from the commissioner taken to the court. The appeal there under the act is only on a question of law or on a mixed question of law and fact. It is never on fact alone. The commissioners are masters of fact. However that type of provision has been in force for a number of years now.

The Chairman: You are dealing with a subject matter that is entirely different.

Mr. Bertrand: I raise the point not because of the subject matter but because of the attitude of the tribunals, the courts, following that time. The courts over the years have developed a doctrine for jurisprudence about what is law and what is fact. When you look at those decisions, with the number of years that have followed, and try to make sense out of them, you reach the inescapable conclusion that when a court feels it has to intervene it will classify the matter as a question of law or a question of mixed fact and law.

The Chairman: I take it that your view is such that you would be personally opposed to the right of appeal we are proposing.

Mr. Bertrand: I think it would lengthen the procedure. If we are really serious about the right of appeal to the Federal Court, I would question the usefulness of the commission itself. What is the purpose of having the com-

mission if we must have all the facts reviewed and start all over again?

The Chairman: No, that is not the case. The basis of the appeal would be the transcript of the facts as presented to the commission and the commission's conclusions on those facts. The court would not be hearing the witnesses again. That would not be the basis for an appeal.

At any rate, all I am trying to do is ascertain your views. Your views are important to us and important in ways that you may not quickly realize. We have to make an assessment of how we think the provisions of this act are going to be administered, and what approach those who are in charge will take. You are the one who is going to be the director; therefore, it becomes important that we determine how we think the procedures are going to be and what the attitudes are going to be. In saying that, I intend no reflection on you.

We must weigh all these things. When we are told not to ask for an appeal on the facts, my own feeling is that that in itself would support my view that I would want an appeal. There may not be many appeals, but the right should be there.

Senator Cook: The right should be there starting off. It would be curtailed in the future, if there were abuses.

The Chairman: The courts have a very effective way of assessing costs.

Senator Macnaughton: I assume you make that last statement on the basis of your many years of trial experience.

The Chairman: I have had a lifetime of experience in courts; I have had years of litigation and years of reviewing legislation here. I always get bothered a little bit when I find the answer being made: There is no reason for appeal—in other words, that the commission would be a useless body to give this responsibility to if there were to be an appeal from its order. Frankly, that upsets me, not that that is too important so far as you are concerned. But it does affect my viewpoint.

Mr. Bertrand: Mr. Chairman, you must realize that in matters where there is to be an appeal the decision rests with the minister.

The Chairman: Well, all you had to say to me in the first place was that this was a question of policy, and I would have said, "Mr. Director, you don't have to make any further answer."

Mr. Cowling: I think we can take it that that has been said, Mr. Chairman.

The Chairman: Then we do not ask you any more questions on it. We have just told you what our viewpoint is.

Senator Macnaughton: Mr. Chairman, it has been useful to be able to talk to the Assistant Deputy in this way.

The Chairman: Yes.

Senator Machaughton: It has been a free-wheeling discussion and exchange of views, and that is helpful.

The Chairman: I do not think our attitude would be any different, even if the minister made the statement.

Senator Cook: Mr. Chairman, I think we have had a hard morning's work. If it is in order, I would move the motion of adjournment.

The Chairman: I think a motion to adjourn is in order.

I think we have finished practically everything of importance. There may be one or two things that you may wish to speak to me about, Mr. Bertrand, that we have not been able to develop, but I cannot have these people go hungry, or have you go hungry. Furthermore, there is a motion to adjourn, which is not debatable, and so we have to adjourn.

Senator Macnaughton: We could say thank you to our witnesses.

The Chairman: Yes, indeed.

The Committee adjourned.

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Business Interests and the Reform of Canadian Competition Policy, 1971-1975

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Chapter 10

The Product of the Business-Government Interaction: What Did Business Gain?

What concessions, amendments or administrative changes was business as an interest group able to obtain through its interaction with the government following the introduction of the Competition Act in June 1971? Very shortly after the Stage I amendments were introduced in November 1973, Professor Donald N. Thompson made the following observation:

> One of the rare abilities in this world is that of taking a good but controversial idea a lot of people find objectionable, and revising, rewording and reintroducing it so that it says exactly what it said before but is now embraced as being both desirable and different from what it was.[1]

Thompson argued that not only did Stage I say or promise what C-256 did but that it also went beyond it to cover professional sports, foreign laws applied in Canada and minor issues such as double ticketing. The important thing, he stated, is that "it [said] it in a way that opposition M.P.s and the media have applauded."

Perhaps because he was writing less than two weeks after Stage I was made public, Thompson did not have the opportunity to observe the full flowering of business' opposition to a number of the amendments, e.g., the civil procedures of the RTPC regarding the list of "reviewable matters." As we shall try to point out, Stage I as introduced in November 1973 represented a major improvement over C-256 from business' point of view. In addition, business was able to obtain amendments to the original Stage I proposals which further lessened the impact of the new competition policy. We shall begin by listing the "gains" by business and then we shall try to identify those proposals for change which business did *not* succeed in altering significantly.

CHANGE OF MINISTERS

Pressure by business clearly contributed to the replacement of Mr. Basford as Minister of Consumer and Corporate Affairs by Mr. Andras

just six months after Bill C-256 was introduced in the House of Commons. Mr. Basford was viewed as a strong advocate for the Competition Act and for the consumer interest. His aggressive defence of a bill which was an anathema, combined with a perceived unwillingness to accomodate business concerns in the dual role of his department, made Mr. Basford the visible symbol of all that was wrong with the policy. As one executive put it, "If you talk to Basford face to face, he makes no bones about his sincere desire to protect the consumer . . . but shows no concern for the position of business."[2] The reaction by the representations of business interest groups that have already been cited make it clear that Mr. Basford's "lateral arabesque" was seen as a victory for business.

Mr. Basford was perceived by consumers, the Consumers' Association of Canada in particular, as a good Minister of Consumer and Corporate Affairs. He introduced a number of significant consumer-oriented bills in his three and one-half years in office. The fact that business was able to have him removed could be seen as a salutary lesson for any of his successors who might be similarly inclined. In fact, subsequent ministers were much less identified with the consumer interest and went out of their way not only to be "reasonable" but also to appear to be "reasonable" to producer interests. Both Andras and Gray were in Ottawa during business' assault on the Competition Act and had a chance directly to observe the fate of Basford, who, if he was not personally popular, was respected as a hard-working, thorough and conscientious politician. Even after Basford was removed, the business community continued to press their attack on Bill C-256. Mr. Andras's assurances of significant modifications not withstanding, until two clear signals were received in the spring of 1973, business continued to press for a weakening of the legislation. With the appointment of the Director of Investigation and Research, D. H. W. Henry, to the Ontario Supreme Court in February and Mr. Gray's statement in May (formally confirmed in the House in July) that the new legislation would be broken into two parts and introduced in the form of amendments to the existing legislation, business interests realized that their representations and protests were having the desired effect. It is an interesting commentary on the identification of Basford with the consumer interest that five years after he was removed as minister, businessmen and consumers still addressed mail to him as Minister of Consumer and Corporate Affairs.

THE PROCESS OF POLICY REFORM

Business reaction to Bill C-256 strongly influenced the subsequent process of policy change. First, the reforms were split into two stages. Business had complained about the length and complexity of the

Competition Act. They said it would have too large an impact if all of the changes proposed were implemented simultaneously. The omnibus nature of the bill, they argued, meant it was impossible for business to respond realistically to what the government proposed. By bringing the changes in two smaller packages, what was a large indigestible lump became smaller "bite-size" pieces.

Second, the government dropped the idea of a completely new act and introduced its proposals as amendments to the existing statute. Familiarity with the words, administration and judicial decisions associated with the Combines Investigation Act reduced the uncertainty associated with the changes. Incrementalism was demonstrably preferred to a larger discontinuity — no matter how "rational" the changes may have been. Third, business reaction combined with twenty months of minority government and a high turnover of Ministers of Consumer and Corporate Affairs resulted in a significant *delay* in the enactment of new legislation. Had these factors not been present, Bill C-256, introduced in June 1971, could reasonably have been expected to become law by mid-1973. What we have is Stage I, the less controversial set of amendments, effective January 1, 1976[3] while Stage II was not brought before Parliament until March 16, 1977. It is unlikely that they will come into force before mid-1978. Part of the legislation was delayed about two and one-half years and the other part about five years. If business views the new provisions as a "tax" on its potential profitability, then a tax deferred is more acceptable than one immediately implemented.

Fourth, by stretching out the policy change/legislative process business was able to engage in more "consultation" with both elected and appointed officials. They had more time to make their case. Given that the resources of business are far larger than those of consumer interest groups or academics, a longer campaign benefits the business interest groups because they have superior staying power. They may win by the exhaustion of their opponents. After a long enough period theirs is the only voice the policy maker hears. This is the burden of Edelman's point when he states:

> . . . the most effective way to make a public official act as an interest wishes him to, is to assure by institutional means that he will become thoroughly acquainted with its problems as the adherents of the interest see them.[4]

In the final analysis, the business groups opposing all or part of the legislation did not want compromise; they wanted total victory. The public servants, portrayed as intransigent, were often persuaded by business' explanations of some of the untoward consequences of the original draft legislation. They were willing to change quite a number of aspects of the legislation to make it work smoothly. They "gave," by

argument or by pressure, far more than did business. To the end, many business leaders continued to see no virtue in the entire set of amendments.

Business efforts aimed at slowing down progress of the legislation through the parliamentary machinery can be reinforced by the dynamics of the legislation process itself. The minister is faced with a fight for House time, with opposition threats to filibuster (often to achieve victories in other areas) and the emotional drain of committee hearings in both the House and Senate. Toward the end of each session the inter-ministerial manoeuvering for time becomes fierce. In almost all these circumstances compromise to get the bill through, particularly in view of the total amount of time taken by the legislation in its earlier form, becomes increasingly attractive. As the total time in process lengthens, the ability to maintain intellectual and emotional commitment is reduced. After the "pressure cooker" atmosphere and exhaustion have taken their toll, the ardent advocates of reform may not recognize what has been wrought by compromise.

"UNDULY" RESTORED IN S.32

A key substantive victory for business was the reinsertion of the word "unduly" in the section dealing with conspiracies. S.16 of the Competition Act, which was to replace S.32 of the Combines Investigation Act, had eliminated the qualifying word "unduly." The *Explanatory Notes* accompanying Bill C-256 stated, "The new provisions clearly outlaw specified kinds of agreements without examining the degree of market control."[5] The effect would be to move to the U.S. approach in which price-fixing and related conspiracies are illegal per se. The decisions under the Combines Act and the Criminal Code had clearly established that price-fixing agreements were not illegal — only those which went so far as to restrict competition "unduly." In practice, the judges adopted a fairly high threshold, in terms of extensive control of the market, before holding an agreement to be illegal. In 1967, Mr. Justice Gibson in *R.* v. *Canadian Cost and Apron Supply* pointed out that the Canadian cases can be divided into two categories:[6]

1. Situations where the object of the conspiracy, or agreement contemplated that competition be completely or virtually eliminated i.e., *Weidman* v. *Shragge, Stinson-Reeb, Container Materials* and *Howard Smith.*
2. Cases in which the object contemplated was something less than virtual monopoly, but in which on the respective facts of which cases, the courts are able to reach a conclusion of undue interference with competition in violation of the statutory provision, i.e., *Electrical Contractors, Abitibi.*

While it is true that the Crown has obtained convictions in over four-fifths of the conspiracy cases it has brought, the significance of "unduly" lies in the screening of investigations before they are sent to the Department of Justice for prosecution. Unless at least one-half of the relevant market has been subject to the conspiracy, there is no point in taking the case to court. In most cases the conspirators collectively accounted for over three-quarters of the market. As two participants at the Seventh McGill Government-Industry Conference in 1972 remarked, "the argument that the 'undueness' test should be retained is a complete denial of the need for reform."[7] In the same vein Professor Milton Moore has asserted, "price agreements should be subject to a per se ban [as] . . . a necessary condition of an effective compeition policy."[8]

In addition to restoring "unduly" in S.32, the ten types of agreements or arrangements specifically prohibited by S.16 of the Competition Act were dropped and the more general wording of the existing S.32 of the Combines Act was retained. While it seems clear that S.16 was too broadly drawn, the retention of "unduly" together with the previously existing wording of S.32 represent a substantial gain for business and a defeat for consumers and others interested in an effective competition policy in Canada.

THE TRIBUNAL IS SCRAPPED

The fiercely criticized Competitive Practices Tribunal (CPT) was not found in Stage I of the amendments although it is found in both the consultants' report for Stage II and the Stage II proposed legislation, Bill C-42.[9] The CPT represented an attempt to utilize civil procedures in what, traditionally, had been a strictly criminal approach. "The Compeition Act envisage(d) the transfer from [the] courts to the Competitive Practices Tribunal of all but the matters that are prohibited outright."[10] The tribunal was to deal with mergers, specialization, franchise and export agreements, price discrimination, promotional allowances, exclusive dealing and tying arrangements and refusal to deal. These were described as "important matters requiring sophisticated economic and business analysis."[11] Elements of the CPT and its civil procedures can be found in the matters reviewable by the existing Restrictive Trade Practices Commission upon the application of the Director of Investigation and Research.[12] The Competition Act would have permitted any person materially affected by practices under the jurisdiction of the tribunal to take his case directly to that body without first obtaining the permission of the commissioner (i.e., the renamed Director). Under the Stage I amendments, only the Director may initiate cases before the RTPC.

The reviewable matters which may be brought before the RTPC

are: refusal to sell, consignment selling, exclusive dealing, tied selling, market restrictions and the application of foreign judgments, laws or directives which are contrary to the Canadian public interest. The commission is empowered to issue cease and desist orders when it makes an adverse finding. The constitutionality of this section of the ameded act is likely to be challenged before long.[13] If the RTPC is ruled to be constitutionally valid, or at least not challenged, and if it is given jurisdiction over mergers, monopolies, price discrimination and export and specialization agreements as part of the Stage II amendments, then it would appear that the government obtained many of the main elements of the CPT in a different form. If this occurs, Thompson's observation quoted above will be valid for this part of competition policy at least.

THE STING OF PRIVATE CIVIL ACTIONS IS REDUCED

S.55 of the Competition Act provided that persons who suffered loss or damage as a result of a violation of the act or a failure to obey an order of the tribunal could sue for an amount equal to *double* the damage proved to have been suffered by them. As well, S.80 permitted the court to award double damages, upon application of those injured, in addition to the usual criminal penalties. Pressure by business resulted in S.31.1 of the amended Combines Investigation Act, which provides for single damages plus costs in private *civil actions only.* The potential penalty to business for violating the law was thus significantly reduced.[14] We should point out that the amended act does provide that the record of successful criminal proceedings and any evidence given in such proceedings is evidence in the civil suit. The Senate Committee on Banking, Trade and Commerce in its *Interim Report* proposed that Stage I should be amended "to make it clear that 'record of proceedings' is not to include transcripts of testimony given or documents or other exhibits produced in the criminal proceedings."[15] Fortunately, this was not done for it would have effectively vitiated the provision.

"CREDULOUS MAN" TEST ELIMINATED

Business was able to obtain the removal of the "credulous man" test in misleading advertising offences proposed in Bill C-256 [S.20(5)]. While the "credulous man" test had been accepted in at least one case,[16] it represented an obvious example of over-reaching in Bill C-256. Philosophically hard to defend, it was a needless irritation to the business community. Business did not succeed in eliminating the words "materially misleading representation," the "general impression" test, and the broadened concept of "deemed representation" to the public, which includes the salesperon's oral representations. Many of these

concepts are already part of provincial consumer protection or trade practices legislation, e.g., the B.C. Trade Practices Act.

BID-RIGGING PROVISION WEAKENED, IDENTICAL TENDERS DROPPED

S.16(2) of the Competition Act provided that evidence of identical tenders was evidence of price fixing which, in turn, was declared to be illegal per se. This very useful provision, under the pressure of business, was eliminated in favour of a much more modest one relating to bid rigging alone.

S.32.2 makes bid rigging an indictable offence and subject to a fine at the discretion of the court and/or imprisonment for up to five years. Bid rigging is defined to be (a) an agreement among potential bidders for one or more of them not to submit a bid, or (b) an agreement to submit bids arrived at by collusion. Two exceptions are made: (a) and (b) are not illegal if such agreements are made known to the person (firm) calling for bids, or if the agreement not to bid or as to the amount of the bid is between affiliated companies as defined in the act [S.38.7 and 38.7(1)].

The most important implication of 32.2 is that bid rigging becomes an offence per se, and is not subject to the qualifying word "unduly" of S.32. This removes the necessity to define "the market" and to prove that the conspirators in the bid-rigging scheme had sufficient control to establish that competition had been lessened unduly. It is also important to interpret 32.2 in conjunction with the fact that *services* are now within the orbit of the act, unless they are specifically regulated by a provincial schedule. In the *Beamish*[17] case, for example, the Crown failed to sustain its case because the Ontario Court of Appeal ruled that the rigged tenders for the supply and installation of road surfacing materials (sand, gravel, stone chips and asphalt) were predominately contracts for work and labour. As services, such contracts were not within the purview of the Combines Investigation Act. In a similar case a few years later, the Crown did not prosecute following an RTPC report.[18]

As enacted, the provisions relating to bid rigging represent an improvement over the previous state of affairs if one uses the argument that "half a loaf is better than none." However, 32.2 represents a substantial retreat from what was proposed in the Competition Act in 1971. S.16(2) of Bill C-256 provided that the existence of *identical tenders* was evidence of price fixing, which in turn was declared to be illegal per se. S.32.2 does not really attack the problems of identical tenders — unless the Crown can show that the identical bids were arrived at by collusion. This is a difficult task. Seldom does the evidence of collusion accompany the submission of tenders and fall out of one of the bidder's envelopes[19] nor is it apparent that all bids were typed on the same

typewriter.[20] By far the largest number of cases of identical bids do not occur as a result of overt collusion.[21] Instead, they occur in the context of a highly concentrated industry producing a homogeneous product, usually sold to a fairly small number of buyers. In addition, it is frequently the case that the flow of transactions is "lumpy," i.e., a few major purchases each year (often by tender) account for a good proportion to total industry volume. This problem has long been recognized by the Director of Investigation and Research.[22]

When he appeared before the House of Commons Standing Committee on Public Accounts on December 6 and 9, 1963, the Director observed that identical tenders were common in chemicals, construction materials, electrical equipment and supplies, iron and steel products, paper and paper products, petroleum products and a wide variety of other products purchased by federal, provincial, and local governments and their agencies.[23]

S.32.2 does nothing to ameliorate this problem, nor does any other element in the Stage I amendments. Apparently, non-collusive tendering can have some credulity-straining results. In 1963 Hydro Quebec received six identical bids of $14,394,537.12 for 4,800 miles of aluminum cable steel reinforced. Because he could not prove collusion, the Director discontinued this inquiry and others relating to numerous cases of identical bids in the wire and cable industry.[24]

In summary then, S.32.2 advances a modest behavioural remedy for what is fundamentally a structural problem. Only inept conspirators are likely to get caught while the basic problem remains. The change from S.16(2) of the Competition Act to S.32.2 must be classed as a victory for producer interests over consumers.

INDUSTRY AMENDMENTS

As Stage I moved through the parliamentary committees, specific industries were able to insert amendments beneficial to their interests. S.31.4(5)(c) has been described as "the Canadian Tire amendment." It prevents the application of orders by the RTPC in respect of exclusive dealing, market restrictions or tied selling to multiple product "franchise" operations such as Canadian Tire, Shoppers Drug Mart, Becker Milk Stores, McDonald's, IGA grocery stores and others. The key phrase in the section is "multiplicity of products obtained from competing sources of supply and a multiplicity of suppliers." The section does not, therefore, exempt the national oil companies operating through a large number of service station lessees.[25]

S.31.4(7) prevents the application of orders made by the RTPC in regard to market restriction agreements of franchise bottlers or franchise food outlets. The pressure for this amendment, referred to as

"the bottlers amendment," came from the Canadian Soft Drink Bottlers' Association which presented its brief to every member of Parliament. Most of the bottlers are local businessmen who hold an exclusive territorial franchise for a brand name product.

The effect of the bottlers amendment will be to preserve local or regional monopolies for the brand name soft-drink bottlers, e.g., Coca-Cola, Canada Dry and Pepsi Cola. While competition, primarily of the non-price variety, will continue to exist between the brand name bottlers, the effect of the amendment will be to reduce the total number of direct competitors in any given market. This will make oligopolistic coordination on price and other variables easier. The final result is most unlikely to benefit consumers.

The real estate industry, through the Canadian Real Estate Association was able to have S.32(6) inserted into the act. It provides that "the court will not convict the accused if it finds that the conspiracy combination, agreement or arrangement [under S.32] relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public. . . ." This amendment, which applies to all service industries, could be used to establish significant barriers to entry — typically in the form of exaggerated educational requirements.[27] The result could well be a restriction in number of competitors and in the range of quality/price combinations available to the public. The effect of most professions or would-be professions is to over-protect the public in the name of ethical standards and professional competence for which the proxy used is formal education. Over-protection occurs when the poorer members of society are prevented from purchasing lower price/lower quality services which, in fact, would meet their needs wholly or in part.

Security dealers and underwriters were able to extend the scope of S.4.1 from that first proposed in the Stage I amendments to what was enacted. Originally, the exemptions from S.32 and S.38 applied only to syndicates formed by security dealers to underwrite new issues. As enacted, it permits agreements between the issuer and those involved in the primary distribution and extends to secondary distribution "where such agreement or arrangement has a reasonable relationship to the underwriting of a specific security." This qualification is likely to be interpreted broadly, thus potentially reducing competition among dealers in the secondary market. No doubt S.4.1 will be a boon to the members of the Investment Dealers' Association who worked so hard to have the government accept this amendment.

S.18 of the Competition Act proposed to strengthen greatly the prohibition of resale price maintenance in the Canadian law. Subsection 4 specificaly prohibited "the placing by a producer or a supplier . . . of a price or suggested price on the commodity or its container by direct

application or by attaching thereto a ticket . . . unless, in the case of suggested retail price, the suggested price is so expressed as to make it clear to any person to whose attention it comes, that it is a suggested price only and that the commodity may be sold at a lesser price." In the Stage I legislation the prohibitions against suggested resale prices, "unless it is clear . . ." etc., "do not apply to a price that is affixed or applied to a product or its package or contained" per S.38(5). The reasons for this exemption were given by George Orr, a senior official of the Department of Consumer and Corporate Affairs:

> There were representations from people who had pre-pricing done for them on the articles they wanted to sell, such as products sold by rack jobbers. This can be much more efficiently done in the factory. If the change had not been made, it would have been impossible to do that sort of thing.[28]

Conservative M.P. Bill Kempling recognized the benefit of permitting the practice.

> The manufacturer cannot direct the selling price. All he is suggesting is that this is a retail price, and in fact it is very useful in retail selling and in wholesale selling as well where the suggested retail price is used as a basis for discounts.[29]

With this amendment we can chalk one up for producers able to pre-ticket their merchandise. The power of suggested resale prices is not to be underestimated. Many merchants, particularly small ones, will sell at the pre-ticketed or suggested price. Resale price maintenance will be fostered.

Newspaper publishers were successful in having S.32(2)(f) inserted in the final bill. It permits agreements among competitors to restrict advertising or promotion "other than a discriminatory restriction directed against a member of the mass media." The minister admitted that the amendment modifying a section in the previous act "follows numerous representations designed to prevent its utilization against one or many information media."[30] Mr. Kempling wanted to be sure "this is as a result of the newspaper people's brief. . . ."[31] Mr. Ouellet assured him it was.

REFUSAL TO DEAL DEFENCES REINSTATED

S.18 of the Competition Act would have eliminated the four defences to a charge of refusal to deal (to enforce resale price maintenance), which had been inserted in the act in 1960 by the Conservative government of John Diefenbaker. The defences were not to be found in the Stage I amendments as introduced in Parliament on November 6, 1973. Nor were they part of the thirty amendments proposed by the Minister of

Consumer and Corporate Affairs on December 3, 1974. The four defences, which became S.38(9) (loss leader selling, bait-and-switch, misleading advertising and inadequate level of servicing) were restored by the House Committee on Finance, Trade and Economic Affairs in its final report to the House on June 5, 1975. The defences were reinserted into the Combines Act upon the motion of Norman Cafik, parliamentary secretary to the minister and a member of the committee, on the final day and evening of hearings on June 3, 1975. Speaking to the amendment, the Minister, Mr. Ouellet stated, "This is something that had been suggested by various groups, more particularly by the Senate committee, and we feel that it would be a constructive amendment."[32] Asked by a committee member if the amendment was in reply to requests from various groups of small wholesalers, the minister pointed out that loss leader selling was an issue which would be in the Stage II legislation. He went on to say, "However, since there is already in the act this S.38(5), which deals partly with this matter as one of the means of defence, we thought it might perhaps be better not to interfere with the act for the time being. Therefore, although we are not doing all we could to favour these wholesalers who are asking for a more basic revision of the act, we are at least not changing the existing act."[33]

By this action, Mr. Ouellet converted what could have been a gratifying victory into a defeat for the forces of competition.

REFUSAL TO DEAL: THE CHOICE OF ADJECTIVES AND THE EXEMPTION OF SPECIFIC BRAND NAMES

Refusal to deal is one of the reviewable matters subject to civil procedures by the Restrictive Trade Practices Commission. In the Stage I legislation as originally proposed, S.31.2 read in part

> where, on application by the Director, the Commission finds that (a) a person is *adversely affected* in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms . . . [the Commission may recommend the removal or reduction in the relevant tariffs or it may make an order a supplier to accept the firm as a customer].

In his list of thirty amendments, the minister amended the italicized words to read "substantialy affected," saying it was done "with the intention of clarifying the threshold below which the section would have no possible application."[34] What he meant was that the threshold for an offence to be created was being raised. This will give producers using periodic refusal to supply as device to discipline their customers into resale price maintenance more room with which to employ their weapon without committing an offence. This change was recommended by the

Senate committee in its *Interim Report*,[35] but the Senate wanted to go even further by deleting the words "or is precluded from carrying on business" so that the section would not be vailable to those who had never been in business.

In the *Interim Report* of the Senate committee studying the Stage I legislation Senator Hayden noted, "there has been considerable debate as to whether the Commission should make an order under the refusal to deal provisions with respect to a particular brand name product."[36] The minister included as one of his amendments S.31.2(2), which provides that failure to obtain supplies of a single brand name product would not constitute grounds for an order under these provisions unless that particular brand name was so dominant in the market that failure to obtain it would substantially affect the ability of the person to carry on business in that class of articles. In supporting his amendment, Mr. Ouellet said, "There is only a very small number of sectors where one firm so dominates his industry that, without supplies of his branded lines, a dealer cannot stay in business."[37] One can think of cases where a firm's business could be substantially affected, yet the producer engaging in refusal to deal does not have an "article so differentiated [that it] occupies such a dominant position in that market. . . ." Consider the case of Kodak colour film; it is clearly the leading brand name. While there are competitors, e.g., Fuji, Ilford, GAF, a photo dealer's inability to obtain Kodak film could seriously affect his film sales and overall viability.

S.31.2 was further weakened with the addition of ss.(3) which defined trade terms as "terms in respect of payment, units of purchases and reasonable technical and servicing requirements." The first two aspects can be determined objectively by examination of purchase/sales records. The latter two, being much more subjective, might well be used as a successful defence to refusal to deal. Although the minister, in proposing this amendment, said, "This change makes clear that the commission will not order supply where the would-be buyer fails to meet such reasonable standards as are imposed on competing dealers in respect of the matters mentioned,"[38] the "gateway," at face value, is broader than he indicated.

ABUSE OF INTELLECTUAL AND INDUSTRIAL PROPERTY

As introduced on November 3, 1973 the Stage I legislation contained a provision which would have included copyrights and registered industrial designs in S.29 which prohibits and provides remedies for the abuse of patents and trademarks. The minister's amendments returned the section to *status quo ante*. The justification was that when Stage I was introduced the anticipated revision of the Patent Act and the Trade

Marks Act was "some considerable distance off." Because of the delay in passing Stage I, the amendments to the other acts were not far off, "it appears to be more appropriate to amend the underlying legislation first before amending the abuse provisions of the Combines Act."[39] The minister also pointed out that all statutory monopolies would be reviewed in Stage II under the issue of monopolization. Canadian business was no doubt pleased to hear the minister say that, "one of the consequences of the delay, however, is that the Combines Act will continue to have no direct application to copyright or registered industrial design."[40]

PYRAMID AND REFERRAL SELLING

In the original Stage I legislation both pyramid and referral selling schemes were banned outright. The minister, in his amendments, softened these provisions by inserting S.36.3(4) and 36.4(4), which exempted from the prohibition schemes "licenced or otherwise permitted by or pursuant to an act of the legislature of a province."

DUE DILIGENCE DEFENCE

In response to pressure from business interests the strict liability for misleading advertising representations in S.36 and 36.1 was dropped and S.37.3(2), the "due diligence" defence, inserted.

THE CORPORATE VEIL RESTORED

While they extol individualism and personal responsibility for success and failure, Canadian executives do not like to be charged with combines offences. In this the Crown has been most accommodating, seldom laying charges against individuals if there is a corporate entity available to "take the rap." S.73(7) and (8) of the Competition Act proposed to pierce the corporate veil and to recognize the fact that corporations are merely legal entities and that only natural persons are capable of conspiring to fix prices, engaging in resale price maintenance, arranging mergers and ordering the publication of misleading advertising messages. These sections provided:

> (7) Where a company has been convicted of an offence under this section
>
> (a) every director of the company, and
>
> (b) every officer, servant or agent of the company who was in whole or in part responsible for the conduct of that part of the business of the company that gave rise to the offence,

> is a party to the offence unless he satisfies a court that he had no knowledge of any of the acts constituting the offence and could not reasonably be expected to have had such knowledge and that he exercised reasonable diligence to prevent the commission of such an offence.
>
> (8) Where an offence under this section is committed by a person who, in respect of the business in the course of which the offence was committed and at the time the offence was committed, was the servant or agent of another person, that other person is a party to the offence unless he satisfies a court that he had no knowledge of the acts constituting the offence and could not reasonably be expected to have had such knowledge and that he exercised reasonable diligence to prevent the commission of such an offence.

Not surprisingly business executives were not anxious to be subject to these strictures. Their protests were loud, sufficiently so that the government conveniently omitted any provision relating to the legal responsibility of officers and/or directors for acts "committed by their corporations" in the Stage I amendments. In doing so, the government continued to support the myth that corporations, not individuals, commit illegal restraints of trade.

Let us now look at the results of the business-government interaction over competition policy up to and including the Stage I amendments as passed by Parliament from a different perspective. What did business as an interest group *not* succeed in eliminating?

THE GAINS FOR CONSUMERS DEPEND UPON STAGE II

As much as they may have wished to stay with the *status quo ante*, business could not persuade the government that no additional competition legislation was required. There are some gains in Stage I but the delivery of real benefits to consumers will depend upon the constitutionality of the civil damages provisions and the civil procedures inherent in the matters reviewable by the RTPC and the effectiveness of the administration and enforcement of the legislation. For example, even a large increase in the number of convictions for misleading advertising, if they result in fines of $100, $200 or $500, will hardly disprove the proposition that "crime pays."[41]

Just how far the government was able to move in spite of the strong opposition of business will also depend a great deal on what is enacted in Stage II. What is proposed in the Skeoch-McDonald report would represent a desirable improvement in the existing policies toward mergers, monopolization, and administration and enforcement. In this author's opinion, however, what is proposed does not go far enough.[42] The proposals by Neil J. Williams[43] with respect to consumer class actions are highly desirable. The reform of the existing merger section is absolutely imperative. The decisions in *Canadian Breweries*[44] and *B.C.*

Sugar[45] had the effect of allowing the Crown to attack successfully (perhaps), only the merger of the last two firms in an industry. The Supreme Court's unanimous decision in November 1976 in the *K. C. Irving* case[46] has totally nullified the merger and monopoly provisions of the existing Combines Investigation Act.[47]

The Director's attempt to operate a "jaw bone" anti-merger policy through his stated position on merger law and his program of compliance (with respect to mergers) are admissions of the fact that Crown could not wield the statutory provisions with any effect.[48]

CIVIL PROCEDURES

As we have noted above, some elements of the civil procedures have been introduced in the form of matters reviewable by the RTPC. However, they may only be placed before the commission by the Director, not by persons directly affected by one of the restrictive practices as contemplated in Bill C-256. The commission's powers are modest. It can only issue cease and desist orders. The effectiveness of such orders, like the Prohibition Orders now obtainable under S.30 of the act, depend upon the ability of the Director and his staff to enforce them. Single-damage civil actions by affected persons will assist the Director when an order has not been obeyed. But while the number of cease and desist orders will pile up, the enforcement capabilities of the Bureau of Competition Policy will not likely grow apace. The Director should publish a list of firms already subject to prohibition orders to permit firms and individuals to, in effect, assist him in the enforcement of the act. Unless the cost of committing combines offences is vastly increased, rational, profit seeking executives will knowingly violate the act.

AN INCREASE IN MAXIMUM PENALTIES

The maximum penalties in the form of fines and imprisonment have been increased for misleading advertising. For proceedings by indictment the penalties are unchanged — a fine at the discretion of the court or five years' imprisonment or both. For proceedings by summary conviction (except in the case of double ticketing) the ceiling on fines is increased to $25,000 and the ceiling on imprisonment to one year.

Misleading advertising fines have been increasing in the last few years, but they only infrequently have exceeded $5,000. An analysos of the cases decided in 1974/75 indicated that the total fine (all counts) in S.36 cases (misleading price advertising) was $200 or less in eleven of the seventeen cases. In four cases it was in the $201-$400 range and in two it was between $401 and $1,000. Of the sixty-four S.36 cases (false advertising), in twenty the total fine was $400 or less, in twenty-nine it

was between $401 and $1,000. In only six cases was the fine $5,000 or more. There were four fines of $5,000, one of $8,000 and one of $20,000, the last being two counts at $10,000 each. The largest fine on record was levied on Benson and Hedges in March 1973.[41] Reversing the usual order, the judge fined them $2,500 on the first count and $25,000 on the second. As Table 10-1 indicates, the average fine in misleading advertising cases has been low. For S.36 offences it was only $229 in 1973, rising to $296 in 1975. For S.37 offences, the average was $1,347 in 1973 (raised significantly by the Benson and Hedges case), but in 1975 it had fallen to $1,081.

In the case of conspiracies (S.32) the government proposed a $1,000,000 maximum fine in place of a fine at the discretion of the court and this was enacted. How this could be an improvement from the Crown's point of view is hard to see. It has been suggested that indicating a seven-figure maximum fine may have a desirable psychological effect on Canadian judges. The largest fine until april 1977, on a single count, was $125,000. On april 13, 1977 Canadian General Electric was fined $300,000, Westinghouse Canada $150,000 and GTE Sylvania $100,000 in the *Large Lamp* case.[50]

The average fine per firm in eight bonspiracy cases decided between 1970 and 1975 was only $13,758. If the two cases with the largest fines are removed, the average falls to $8,149 — just slightly more than the average fine per firm in the twenty-one cases decided between 1960 and 1969.[51]

Business was able to eliminate the provision of a maximum fine of $2,000,000 and/or imprisonment for up to five years for second or subsequent S.32 convictions from the amendments as enacted. Bill C-256 had also provided that previous convictions under S.32 or S.411 or 498 of the Criminal Code would count in determining the number of previous convictions.

CONSTITUTIONALITY NOT TESTED

Despite repeated requests, business interest groups did not succeed in their attempts to have Bill C-256 or the Stage I amendments referred to the Supreme Court of Canada for a ruling on their constitutional validity. In the House committee, Conservative M.P. Sinclair Stevens pressed the minister very hard[52] for an amendment which would have required the government refer S.31.1 and Part IV.1 of the legislation (the provisiosn for private civil actions and all civil procedures before the RTPC) to the Supreme Court of Canada to test their constitutionality.[53] The amendment also provided the sections affected would not come into force until ruled *intra vires* by the Supreme Court.

A study by S. G. M. Grange (since appointed to the Supreme Court

TABLE 10-1

Disposition of Misleading Advertising Cases, Calendar 1973, 1974 and 1975

	S.36 1973	1974	1975	S.37 1973	1974	1975
Charges laid	26	40	15	69	102	70
Acquittals	6	10	3	15	30	17
Convictions	20	30	12	54	72	53
Average fine - per case[1]	$ 229	$ 262	$ 296	$ 1,347[2]	$ 1,160	$ 1,081
Average fine/all counts	$ 191	$ 207	$ 254	$ 836[2]	$ 739	$ 486
Average fine/first count only						
• Corporations	$ 247	$ 293	$ 311	$ 888	$ 1,124	$ 1,272
• Individuals	$ 44	$ 212	$ 183	$ 532	$ 316	$ 193
• Both	$ 204[3]	$ 242[4]	$ 279	$ 711[5]	$ 890[6]	$ 807[7]
Total fines in the year	$4,575	$7,852	$3,550	$72,725	$83,525	$57,295
Prohibition orders	2	2	-	11	5	5
Other (jail only, discharge, restitution)	—	3	—	—	3	2

NOTES:

[1]Incorporates multiple counts and both individuals and corporations.

[2]In the Benson and Hedges case the firm was fined $2,500 on the first count and $25,000 on the second.

[3]Based on nineteen first count convictions.

[4]In three cases, sentences were suspended, hence there were no fines.

[5]Fines imposed in lump sum against four accused have been averaged to determine fines by count, i.e., $500 total on four counts has been treated as $125 fine first count, etc.

[6]Bases on sixty-nine first count convictions in three of which no fine was imposed.

[7]Based on fifty-one first count convictions on two of which no fine was imposed.

SOURCE:

Ms. Tandy Muir-Warden, Bureau of Competition Policy, Department of Consumer and Corporate Affairs, Ottawa.

of Ontario), published by the C. D. Howe Research Institute, casts doubt on the constitutionality of the legislation, but two other reviews of it see the legislation as within the powers of the federal government.[54]

INCLUSION OF SERVICES

One of the major elements of the Competition Act did get enacted in the 1975 amendments. That was the placing of services (including the professions) within the orbit of the Combines Investigation Act. This was done in the face of severe pressure by such groups as the Canadian Real Estate Association. To give the service industries time "to clean up their act," the application of S.32 was held up until July 1, 1976, six months after the rest of the amendments came into effect. The real impact of this amendment will depend on the extent to which the purveyors of services are able to find shelter under the umbrella of provincial regulation and remain "safe and dry" beyond the reach of the Combines Act. Until now at least, the Director has accepted the dictum of McRuer C.J.H.C. laid down in *Canadian Breweries.*

> When a Provincial Legislature has conferred on a Commission or Board the power to regulate an industry and fix prices, and the power has been exercised, the Court must assume that the power is exercised in the public interest. In such cases, in order to succeed in a prosecution laid under the Combines Act with respect to the operation of a combine, I think it must be shown that the combine has operated, or is likely to operate, so as to hinder or prevent the Provincial body from effectively exercising the powers given to it to protect the public interest. If the evidence shows that by reason of a merger the accused is given a substantial monopoly in the market, this onus, in my opinion, would be discharged.[55]

Should he successfully challenge this ruling, the Director would sharply enlarge the coverage of the act.

IMPROVED MISLEADING ADVERTISING AND DECEPTIVE PRACTICES PROVISIONS

By and large, the government succeeded in getting on the books its proposals for reform in the area of misleading advertising and deceptive practices. The "credulous man" disappeared but the injunctions against pyramid selling, referral selling, bait-and-switch, sales above advertised prices, and promotional contests moved into law. As we have pointed out, the concept of "deemed representation" was broadened, and a "general impression" test instituted.[56] The previously existing provisions, which date effectively from 1960 and mid-1969,[57] resulted in an explosion of complaints, investigation and prosecutions. For example, only 104 non-misleading advertising cases were launched between April

1960 and March 1976 while in 681 misleading advertising cases charges were laid in the same period. Some 591 of these occurred in the last six years (1970-71 to 1975-76). If a similar result follows from the new legislation, the enforcement activities of the Bureau of Competition Policy may become over-weighted by misleading advertising/deceptive practices cases at the expense of larger structural cases involving price fixing, mergers and monopolies. In the 1960s this is what occurred in the U.S. Federal Trade Commission, where the resources absorbed by the larger number of small cases involving the labelling of textiles and furs resulted in a very low level of activity in terms of significant anti-trust cases.[58]

ELIMINATION OF THE "VIRTUAL MONOPOLY" TEST

While producer interests were able to restore "unduly" to the conspiracy section, 32, the reformers did succeed in inserting S.32.1.1 into the amended act. This section extinguishes the "virtual monopoly" test in conspiracy cases which had been raised by Cartwright J. in the *Howard Smith* case decided in 1957.[59] Cartwright's view that a virtual monopoly was required before competition was restricted unduly was *not* the dominant view *before* he expressed it or without challenge *after* he stated it in 1957. For example, Manson J. in *Crown Zellerbach*, upheld on appeal, stated in 1955 that "there are no words in the statute which put the Crown under the onus of proving a monopoly or virtual monopoly."[60] In a 1960 decision, Batshaw J., in the *Abitibi* case,[61] specifically rejected the virtual monopoly concept expressed by Cartwright J., which was put before him by the defence counsel.

Manson's words were specifically adopted by Laidlaw J. A. in the Ontario Court of Appeal in the *Electrical Contractors Association of Ontario* case in 1961.[62] More recently the virtual monopoly doctrine was also rejected in *R.* v. *Aetna Insurance* (1975) by MacDonald J. A. (Cooper J. A. concurring) in the Appeal Division of the Supreme Court of Nova Scotia.[63] Despite this record, we find all three judges (in a decision written by Houlden J. A.) in the Ontario Court of Appeal in *R.* v. *Armco Canada Ltd. et al.* endorsing Cartwright J's words.[64]

In conclusion, it appears that the elimination of the virtual monopoly doctrine represents a useful, but fairly minor, victory for the pro-competition forces. The benefits of S.32.1.1 depend upon the ability of the Crown to get judges to label as "undue" conspiracies involving a smaller percentage of the relevant market than have previously been the case. The real importance of Cartwright's virtual monopoly criterion was found not so much in conspiracy cases as it was in *merger* cases.[65]

EXTRATERRITORIALITY

Finally, in response to a long history of the extraterritorial application of U.S. laws in Canada, principally the antitrust and trading-with-the-enemy laws, officials in the Bureau of Competition Policy were able to insert, in Stage I, amendments concerning the implementation of foreign judgments and the application of foreign laws and government and corporate directives in Canada (S.31.5 and 31.6). These sections were not in C-256 when it was introduced in 1971. The inclusion of these sections resulted in consumer and corporate affairs receiving the support of the Department of Industry, Trade and Commerce — for these sections at least. The extent of the benefits of these sections is hard to predict, but they should insure that the Canadian subsidiaries of U.S. multinationals will be somewhat more responsive to the Canadian policy environment.

STRENGTHENED PRICE MAINTENANCE PROVISIONS, PROBLEMS OF ENFORCEMENT

Perhaps because they did not recognize its potential, business did not make as much noise as might be expected about the change in S.38 dealing with price maintenance.[66] The keys are the words "by agreement, threat, promise or any like means, *attempt to influence upwards* or to discourage the reduction of, the price at which any other person . . . supplies . . . or advertises a product . . ." (emphasis added). Depending on the interpretation by the courts, this section could be used to attack a wide variety of activities unassailable under S.32 (conspiracies). If applied only to the usual resale price maintenance schemes, the section will not realize its full potential. The impact of the section will depend, in the first instance, on the aggressiveness with which the officials in the Bureau of Competition Policy try to use the section in a wider domain. Despite their best efforts and willingness to bring cases, they could be hamstrung by the unwillingness of the Department of Justice to prosecute cases using this line of attack. Fundamentally, the Bureau of Competition Policy is a research and investigation agency. It can only recommend prosecution of a case; it cannot proceed to the courts on its own volition. This is in sharp contrast to the United States, where the Assistant General of the Antitrust Division, Department of Justice, who also performs the investigation and research functions, can go to court on his own initiative. In Canada, the monopoly enjoyed by the Department of Justice over all federal prosecutions represents an important filter or decision point between investigation and prosecution.

In the past it is safe to say that officials in the Office of the Director of Investigation and Research have been frustrated by the diffidence and delay on the part of the Department of Justice in pressing cases.[67] Combines work forms a very small proportion of the Department of Justice's total workload. The small absolute number of such cases (excluding misleading advertising cases) in a given year means that few Crown prosecutors have much knowledge in the area or much sympathy for such prosecutions. As combines cases are often complex and involve protracted litigation, they reduce the apparent output of the Crown attorneys assigned to them.

Having to to court, a major hurdle remains — convincing a judge to apply a new interpretation of the law. Canadian judges, particularly in the area of combines law, have generally been conservative legalists. For example, in the application of economoc theory to such cases they have largely accepted the dictum, "our lady, the Common Law, is not a professed economist."[68] On this point, as with the others outlined above, the final outcome will depend most importantly on the accumulation of judicial decisions. Unfavourable decisions, if Canadian history is a guide, will remain undisturbed by remedial legislation for many years. The emasculation of the merger section of the Combines Investigation Act, which took place in 1960, with the *Beer* and *Sugar* decisions will not be remedied until at least 1978. The slow pace of reform favours the existing concentrations of social and economic power.

NOTES

[1]Donald N. Thompson, "New Competition Bill Pleases 1971 Critics," *Globe and Mail*, (Toronto) November 17, 1973.

Thompson's detailed analysis of Bill C-256 can be found in his "Competition Policy and Marketing Regulation," in Donald N. Thompson and David S. R. Leighton (eds.), *Canadian Marketing: Problems and Prospects*, Toronto, Wiley, 1973, pp. 13-43. His analysis of the Stage I amendments can be found in Donald N. Thompson, "Canada's New Competition Policy: Status and Outlook," *California Management Review*, Vol. 16, No. 4, Summer 1974, pp. 93-103.

[2]Anthony Pengelly, chairman of the Association of Canadian Advertisers quoted in the *Globe and Mail* (Toronto), October 20, 1971, p. B5.

[3]The application of S.32 to the service industries did not begin until July 1, 1976.

[4]Murray Edelman, "Governmental Organization and Public Policy," *Public Administration Review*, Vol. XII, Autumn 1952.

[5]Department of Consumer and Corporate Affairs, *The Competition Act, Explanatory Notes*, Ottawa, 1971 (mimeo) p. 76.

[6]*R. v. Canadian Coat and Apron Supply Limited et al.*, [1967] 2 Ex C.R. 53; 52 C.P.R. 189; 2 C.R.N.S. 62 at p. 80.

[7]*Competition Policy in the Context of A Canadian Industrial Strategy,* Seventh McGill Government-Industry Conference, Montreal, McGill University, Faculty of Management, 1973, p. 17, footnote 17.

[8]A. Milton Moore, "Mergers and Price Agreements," in *Canada's Competition Policy,* Ottawa, Conference Board in Canada, 1972, p. 22.

[9]L. A. Skeoch and B. C. McDonald, in consultation with M. Belanger, R. M. Bromstein, and W. O. Twaits, *Dyanmic Change and Accountability in a Canadian Market Economy,* Ottawa, Supply and Services Canada, 1976; Department of Consumer and Corporate Affairs, *Proposals for a New Competition Policy for Canada, Second Stage,* Ottawa, Supply and Services Canada, 1977, 251 pp.

[10]*Explanatory Notes, op.cit.,* p. 28.

[11]*Ibid.*

[12]See J. J. Quinlan, "The Restrictive Trade Practices Commission: Its Functions and Duties," paper presented before the Anti-trust Law Section of the American Bar Association, Montreal, August 12, 1975, mimeo, 27 pp; R. S. MacLellan. "The New Quasi-Judicial Powers of the Restrictive Trade Practices Commission Contained in the Proposed Amendments to the Combines Investigation Act — Bill C-2," paper presented to the Consumer and the Law Conference, University of Montreal, September 27, 1975, mimeo, 18 pp; and Gordon E. Kaiser, "The New Competition Law: Stage One," *Canadian Business Law Journal,* Vol. 1, No. 2, 1976, pp. 147-196.

[13]Discussions on the constitutionality of the legislation can be found in S. G. M. Grange, Q.C., *The Constitutionality of Federal Intervention in the Marketplace — The Competition Case,* Montral, C. D. Howe Research Institute, 1976; Peter W. Hogg and Warren Grover, "The Constitution the Competition Bill," *Canadian Business Law Journal,* Vol. 1, No. 2, 1976, pp. 197-228; and Robert Reid "The New Role of the Restrictive Trade Practices Commission: A Constitutional and Administrative Viewpoint," in W. T. Stanbury (ed.), *Papers on the 1975 Amendements to the Combines Investigation Act,* Vancouver, University of British Columbia, Faculty of Commerce and Business Administration, 1976, pp. 157-187.

[14]For a discussion of the importance of private civil actions in combines penalties and remedies, see W. T. Stanbury, "Penalties and Remedies Under the Combines Investigation Act, 1889-1976," *Osgoode Hall Law Journal,* Vol. 14, No. 3, 1976, pp 571-631.

[15]*Debates of the Senate,* 1st Session, 30th Parliament, Vol. 123, No. 64, March 19, 1975, p. 678.

[16]*R.* v. *Imperial Tobacco Products Limited* (1970), 64 C.P.R. 3; 2 C.C.C. (2d) 533; 16 D.L.R. (3d) 470 (Trial). Upon appeal the verdict was reversed, see [1971] 5 W.W.R. 409; 4 C.C.C. (2d) 423; 22 D.L.R. (3d) 51; 3 C.P.R. (2d) 178. Brief descriptions are contained in *Annual Report of the Director of Investigation and Research, Combines Investigation Act* for the year ended March 31, 1971 Ottawa, Queen's Printer 1971, pp. 63-64 and *Annual Report of the Director, . . .* year ended March 31, 1972, pp. 41-43.

[17]*R.* v. *K. J. Beamish Construction Company Limited et al.,* [1968] 2 C.C.C. 5.

[18]Restrictive Trade Practices Commission, *Report in the Matter of an Inquiry Relating to the Supply and Transportation of Asphalt Paving Materials in The Province of Ontario,* Ottawa, Queen's Printer, 1970.

[19]Restrictive Trade Practices Commission, *Report Relating to the Supply, Transportation and Application of Asphalt Mixes used in the Paving and Repair of Municipal Streets in the Cities of Ottawa and Eastview, Ontario and Hull, Quebec,* Ottawa, Queen's Printer, 1965.

[20]Restrictive Trade Practices Commission, *Report on an Alleged Combine in the Matter of a Call for Tenders by the Town of Duvernay for the Construction of Sewers and Water Mains,* Ottawa, Queen's Printer, 1964.

[21]For a most useful discussion see James Sherbaniuk, "Identical Bids Usually Result of Market Forces," *Financial Post,* May 5, 1973, pp. C-1 and C-2.

[22]*Annual Report of the Director of Investigation and Research, Combines Investigation Act* for the year ended March 21, 1961, Ottawa, Queen's Printer, 1961, pp. 23-24.

[23]*Ibid.,* March 31, 1974, Ottawa, Queen's Printer, 1964, pp. 11-12.

[24]*Ibid.*, March 31, 1968, Ottawa, Queen's Printer, 1968, pp. 43-46.

[25]This amendment was avidly sought by Conservative M.P. Sinclair Stevens. However, Mr. Stevens did not get all he asked for. As the minister pointed out in his testimony before the House Committee on Finance, Trade and Economic Affairs on June 3, 1975, Mr. Stevens amendment as originally proposed, "while considering very carefully whether or not it was feasible to exclude franchises from application of the section [S.34.4], the fact is that acceptance of this exclusion will cut the heart out of the proposed section" (*Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs*, Issue No. 55, June 3, 1975, p. 90).

[26]The chairman of the House committee, Robert Kaplan, referred to it as "the soft drink amendment" (*Minutes*, June 3, 1975, p. 86). Earlier in proposing the amendment, the minister said, "Representations have been received to the effect that investment made in soft drink bottling industries may be jeopardized by subsection 31.4(3) in their unique case" (*Minutes*, April 8, 1975, p. 5).

[27]See the discussion in the *Minutes*, June 2, 1975, pp. 10-19, where many of the comments were framed in terms of "codes of ethics" established by professional or industry bodies.

[28]*Minutes*, June 3, 1975, p. 57.

[29]*Ibid.*, p. 58.

[30]*Ibid.*, June 2, 1975, p. 10.

[31]*Ibid.*

[32]*Ibid.*, June 3, 1975, p. 61.

[33]*Ibid.*

[34]"Amendments and Comments to Bill C-2, An Act to Amend the Combines Investigation Act," December 3, 1974, mimeo, clause 12, p. 3. S.31.4(2) dealing with exclusive dealing or tied selling was also weakened by the insertion of the words "lessen competition substantially" which raised the threshold before the RTPC could make an order with respect to these practices.

[35]*Debates of the Senate*, March 19, 1975, p. 679.

[36]*Ibid.*

[37]"Amendments and Comments to Bill C-2" *op.cit.*, clause 12, pp.6-7.

[38]*Ibid.*, p. 7.

[39]*Ibid.*, clause 10, pp. 1-2.

[40]*Ibid.*, clause 10, p. 2.

[41]See W. T. Stanbury "Penalties and Remedies Under the Combines Investigation Act, 1889-1976," *Osgoode Hall Law Journal*, Vol. 14, No. 3, 1976, pp. 571-631.

[42]See W. T. Stanbury, "Dynamic Change and Accountability in a Canadian Market Economy: Summary and Critique," *Osgoode Hall Law Journal*, Vol. 15, No. 1, 1977 pp. 1-50. A discussion of the Stage II legislation and Bill C-42 itself can be found in the second reference in footnote 9.

[43]Neil J. Williams, "Damages Class Action Under the Combines Investigation Act," in *A Proposal for Class Action Under Competition Policy Legislation*, Ottawa, Information Canada, 1976, pp. 1-195.

[44]*R.* v. *Canadian Breweries Ltd.*, [1960] O.R. 601; 33 C.R. 1; 126 C.C.C. 133.

[45]*R. v. British Columbia Sugar Refining Company Limited et al.* (1960), 32 W.W.R. (N.S.) 577; 129 C.C.C. 7; (1962) 38 C.P.R. 177.

[46]*R.* v. *K. C. Irving Ltd. et al.* Unreported judgement, Supreme Court of Canada, November 16, 1976, Bureau of Competition Policy, mimeo 136-5.

[47]See G. B. Reschenthaler and W. T. Stanbury, "Benign Monopoly: Canadian Merger Policy and the K. C. Irving Case,", *Canadian Business Law Journal*, 1977, forthcoming.

[48]The Director's position on merger law is outlined in *Annual Report of the Director of Investigation and Research, Combines Investigation Act*, year ended March 31, 1966, Ottawa,

Queen's Printer, 1966, pp. 18-22. The program of compliance is outlined in every *Annual Report* beginning in 1964-65.

[49]See *Annual Report of the Director,* year ended March 31, 1973, p. 94.

[50]In the following cases, fines of $125,000 were levied for a single count: *R.* v. *Ocean Construction Supplies Ltd. et al.* (1975), 18 C.P.R. (2d) 166 and *R.* v. *Armco Canada Ltd. et al.* (1975), 6 O.R. (2d) 521; 21 C.C.C. (2d) 129; 17 C.P.R. (2d) 211. The fines in the *Large Lamp* conspiracy were reported in the *Star* (Toronto) April 14, 1977, p. 12.

[51]Per note 41, Table 5.

[52]*Minutes,* June 3, 1975, pp. 78-86.

[53]*Ibid.,* June 2, 1975, p. 3 for the wording of the amendment.

[54]See note 13.

[55]*R.* v. *Canadian Breweries Ltd.* [1960] O.R. 601 at 629-530.

[56]See Ronald I. Cohen "Bill C-7: Its Proposed Amendments to the Law of False Advertising," 13 C.P.R. (2d) 197 and Jacob S. Ziegel, "Legal and Managerial Problems in Implementing the Consumer Aspects of the Combines Amendment Bill; Bill C-7," 17 C.P.R. (2d) 182.

[57]S.33C (later S.36) misleading advertising with respect to price was brought into the Combines Act in 1960. S.33D (later S.37) dealing with deceptive or misleading advertising more generally was formerly S.306 of the Criminal Code before it was transferred to the Combines Act in mid-1969. Under the Criminal Code it existed in one form or another since 1917, but there was only one reported prosecution. See R. I. Cohen, "False Advertising in Canada: An Overview of Sections 33C and 33D," in McGill University, Faculty of Law, *Five Lectures on Combines Law and Policy, False Advertising in Canada, Consumer Protection,* W. C. J. Meredith Memorial Lectures, 1971, Montreal, Wilson and Lefleur, 1971, p. 118.

[58]American Bar Association, *Report of the ABA Commission to Study the Federal Trade Commission,* 1969 (including the "Separate Statement of Richard A. Posner"); E. Cox, R. Fellmeth, J. Schultz, *The Nader Report on the Federal Trade Commission,* New York, Grossman, 1969; Mark J. Green *et al., The Closed Enterprise System,* New York, Bantam Books, 1972, Chapters 10-14.

[59]*Howard Smith Paper Mills Ltd. et al.* v. *The Queen, [1957] S.C.R. 403 at p. 426.*

[60]*R. v. Crown Zellerbach Ltd. et al.* (1955) 113 C.C.C. 201 at p. 219.

[61]*R.* v. *Abitibi Power and Paper Company Limited et al.* (1961) 131 C.C.C. 201 at p. 251.

[62]*R.* v. *Electrical Contractors Association of Ontario and Dent,* (1961) 37 C.P.R. 1 at p. 37.

[63]*R.* v. *Aetna Insurance Company and 72 Other Corporations,* (1975) 22 C.C.C. (2d) 513 at pp. 546-550.

[64]*R.* v. *Armco Canada Limited et al.,* Ontario Court of Appeal unreported judgment of February 2, 1976, Bureau of Competition Policy mimeo 221-3, p. 23.

[65]See W. T. Stanbury, "The 1975 Amendments to the Combines Investigation Act: Analysis of the Provisions Relating to Virtual Monopoly, Bid Rigging and New Penalties," in W. T. Stanbury (ed.), *Papers on the 1975 Amendments to Combines Investigation Act,* Vancouver, University of British Columbia, Faculty of Commerce and Business Administration, 1976, pp. 60-62.

[66]In addition to the point outlined in the text, we should note that in the amendments to Stage I public officials were able to obtain the inclusion of credit cards in the purview of S.38. This could be a potentially valuable gain for consumers.

[67]See Paul K. Gorecki and W. T. Stanbury, *"Canada's Combines Investigation Act: Public Law Enforcement,"* paper presented at the National Conference on Competition Policy sponsored by the University of Toronto, Toronto, May 12 & 13, 1977.

[68]Sir Frederick Pollock, *The Genius of the Common Law,* New York, Columbia University Press, 1912, p. 94.

3

Her Majesty The Queen *Appellant*

v.

Henry Morgentaler *Respondent*

and

The Attorney General of Canada, the Attorney General for New Brunswick, REAL Women of Canada and the Canadian Abortion Rights Action League *Interveners*

Sa Majesté la Reine *Appelante*

c.

Henry Morgentaler *Intimé*

et

Le procureur général du Canada, le procureur général du Nouveau-Brunswick, REAL Women of Canada et l'Association canadienne pour le droit à l'avortement *Intervenants*

INDEXED AS: R. *v.* MORGENTALER

File No.: 22578.

1993: February 4; 1993: September 30.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE NOVA SCOTIA SUPREME COURT, APPEAL DIVISION

Constitutional law — Distribution of powers — Abortion — Provincial legislation prohibiting abortions outside hospitals — Whether legislation ultra vires province as being in pith and substance criminal law — Constitution Act, 1867, s. 91(27) — Medical Services Act, R.S.N.S. 1989, c. 281 — Medical Services Designation Regulation, N.S. Reg. 152/89.

In March 1989, in order to prevent the establishment of free-standing abortion clinics in Halifax, the Nova Scotia government approved regulations prohibiting the performance of an abortion anywhere other than in a place approved as a hospital as well as a regulation denying medical services insurance coverage for abortions performed outside a hospital (the "March regulations"). The government later revoked these regulations and adopted the *Medical Services Act* and the *Medical Services Designation Regulation*, which continued the prohibition of the performance of abortions outside hospitals and the denial of health insurance coverage for abortions performed in violation of the prohibition. Despite these actions, the respondent opened his clinic and performed 14 abortions. He was charged with 14

RÉPERTORIÉ: R. *c.* MORGENTALER

Nº du greffe: 22578.

1993: 4 février; 1993: 30 septembre.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA SECTION D'APPEL DE LA COUR SUPRÊME DE LA NOUVELLE-ÉCOSSE

Droit constitutionnel — Partage des pouvoirs — Avortement — Textes législatifs provinciaux interdisant les avortements en dehors des hôpitaux — Les textes législatifs échappent-ils à la compétence de la province parce que ressortissant, de par leur caractère véritable, au droit criminel? — Loi constitutionnelle de 1867, art. 91(27) — Medical Services Act, R.S.N.S. 1989, ch. 281 — Medical Services Designation Regulation, N.S. Reg. 152/89.

En mars 1989, afin d'empêcher l'établissement de cliniques d'avortement autonomes à Halifax, le gouvernement de la Nouvelle-Écosse a approuvé des règlements qui interdisaient de pratiquer un avortement ailleurs que dans un hôpital approuvé ainsi qu'un règlement excluant l'assurance-maladie pour les avortements pratiqués ailleurs que dans les hôpitaux (les «règlements de mars»). Le gouvernement a, par la suite, abrogé ces règlements et adopté la *Medical Services Act* et le *Medical Services Designation Regulation*, qui ont reconduit l'interdiction de pratiquer des avortements ailleurs que dans un hôpital et l'exclusion de l'assurance-maladie pour les avortements pratiqués en contravention de l'interdiction. Malgré ces actions, l'intimé a ouvert sa clinique et pratiqué 14 avortements. Il a été inculpé, sous 14 chefs, d'infrac-

counts of violating the *Medical Services Act*. The trial judge held that the legislation was *ultra vires* the province because it was in pith and substance criminal law and acquitted the respondent. This decision was upheld by the Court of Appeal.

Held: The appeal should be dismissed.

Classification of a law for purposes of federalism involves first identifying the "matter" of the law and then assigning it to one of the "classes of subjects" in respect of which the federal and provincial governments have legislative authority under ss. 91 and 92 of the *Constitution Act, 1867*. A law's "matter" is its true character, or pith and substance. The analysis of pith and substance necessarily starts with looking at the legislation itself, in order to determine its legal effect. The court will also look beyond the four corners of the legislation to inquire into its background, context and purpose and, in appropriate cases, will consider evidence of the actual or predicted practical effect of the legislation in operation. The ultimate long-term, practical effect of the legislation is not always relevant, nor will proof of it always be necessary in establishing the true character of the legislation. The court is entitled to refer to extrinsic evidence of various kinds provided it is relevant and not inherently unreliable. This clearly includes related legislation, and evidence of the "mischief" at which the legislation is directed. It also includes legislative history, in the sense of the events that occurred during drafting and enactment. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation. The excerpts from Hansard were thus properly admitted by the trial judge in this case. This evidence demonstrates that members of all parties in the legislature understood the central feature of the proposed law to be prohibition of the respondent's proposed clinic on the basis of a common and almost unanimous opposition to abortion clinics *per se*.

The *Medical Services Act* and *Medical Services Designation Regulation* together constitute an indivisible attempt by the province to legislate in the area of criminal law. Since they deal with a subject historically considered to be part of the criminal law — the prohibition of the performance of abortions with penal consequences — they are suspect on their face, and it is not necessary to invoke the colourability doctrine. An examination of their terms and legal effect, their history and purpose and the circumstances surrounding their

tions à la *Medical Services Act*. Le juge du procès a conclu que les textes échappaient à la compétence législative de la province parce qu'ils ressortissaient, de par leur caractère véritable, au droit criminel et il a acquitté l'intimé. La Cour d'appel a confirmé cette décision.

Arrêt: Le pourvoi est rejeté.

La qualification des lois dans le cadre du fédéralisme suppose premièrement l'identification de la «matière» visée par la loi, puis son rangement dans l'une des «catégories de sujets» relativement auxquels les gouvernements fédéral et provinciaux exercent leur autorité législative sous le régime des art. 91 et 92 de la *Loi constitutionnelle de 1867*. La «matière» d'une loi est son caractère véritable. L'analyse du caractère véritable commence nécessairement par l'examen du texte même, en vue d'en déterminer l'effet juridique. La cour tiendra également compte de la teneur même du texte ainsi que de son contexte et de son objet et, dans les cas qui s'y prêtent, elle prendra en considération l'effet pratique, réel ou prévu, de l'application du texte législatif. Les conséquences pratiques à long terme du texte ne sont pas toujours pertinentes, et il ne sera pas toujours nécessaire d'établir la preuve de ces conséquences pour déterminer le caractère véritable du texte législatif. La cour a le droit de se reporter aux types de preuve extrinsèque qui sont pertinents et qui ne sont pas douteux en soi. Ils incluent de toute évidence les textes connexes et la preuve du «mal» que le texte vise à corriger. Ils comprennent aussi l'historique du texte, c'est-à-dire les circonstances de sa rédaction et de son adoption. À la condition que le tribunal n'oublie pas que la fiabilité et le poids des débats parlementaires sont limités, il devrait les admettre comme étant pertinents quant au contexte et quant à l'objet du texte législatif. C'est donc à bon droit que le juge du procès a admis les extraits du Hansard en l'espèce. Cette preuve montre que les députés de tous les partis à l'assemblée comprenaient que l'idée maîtresse de la loi proposée était l'interdiction de la clinique de l'intimé parce que l'opposition à toute clinique d'avortement quelle qu'elle soit était générale, voire quasi unanime.

Pris ensemble, la *Medical Services Act* et le *Medical Services Designation Regulation* représentent une tentative indivisible de la part de la province de légiférer dans le domaine du droit criminel. Comme ils portent sur un sujet qui a, par le passé, été tenu pour une question touchant le droit criminel — l'interdiction de l'avortement assortie de conséquences pénales — ils sont suspects à première vue, et il n'est pas nécessaire d'invoquer la théorie du détournement de pouvoir. L'examen de leurs termes et de leur effet juridique, de

enactment leads to the conclusion that the legislation's central purpose and dominant characteristic is the restriction of abortion as a socially undesirable practice which should be suppressed or punished. Although the evidence of the legislation's practical effect is equivocal, it is not necessary to establish that its immediate or future practical impact will actually be to restrict access to abortions in order to sustain this conclusion. The legislation has an effect on abortions in private clinics virtually indistinguishable from that of the now defunct abortion provision of the *Criminal Code*, and this overlap of legal effects is capable of supporting an inference that the legislation was designed to serve a criminal law purpose. The events leading up to and including the enactment of the impugned legislation also strengthen the inference that it was designed to serve a criminal law purpose. In addition, the Hansard evidence demonstrates both that the prohibition of the respondent's clinic was the central concern of the legislature, and that there was a common and emphatically expressed opposition to free-standing abortion clinics *per se*. The concerns to which the provincial government submits the legislation is primarily directed — privatization, cost and quality of health care, and a policy of preventing a two-tier system of access to medical services — were conspicuously absent throughout most of the legislative proceedings. The impugned legislation treats of a moral issue. While legislation which authorizes the establishment and enforcement of a local standard of morality does not *ipso facto* invade the field of criminal law, interdiction of conduct in the interest of public morals was and remains one of the classic ends of the criminal law. There is thus a strong inference that the purpose and true nature of the legislation relate to a matter within the federal head of power in respect of criminal law. This inference is supported by the absence of evidence that privatization and the cost and quality of health care services were anything more than incidental concerns and by the relatively severe penalties provided for in the Act.

leur historique, de leur objet et des circonstances de l'adoption de la loi et de la prise du règlement, amène à conclure que l'objet central et la caractéristique dominante des textes législatifs sont la limitation de l'avortement en tant qu'acte socialement indésirable qu'il convient de supprimer ou de punir. Certes, la preuve de l'effet pratique des textes législatifs est équivoque, mais il n'est pas nécessaire, pour étayer cette conclusion, d'établir que son impact pratique, immédiat ou futur, sera réellement de limiter les avortements. Les textes législatifs ont sur les avortements pratiqués dans les cliniques privées un effet presque identique à celui de la disposition du *Code criminel* relative à l'avortement maintenant annulée, et ce chevauchement de l'effet juridique permet d'inférer que les textes étaient conçus pour atteindre un objectif touchant le droit criminel. L'adoption des textes législatifs contestés ainsi que les faits qui les ont précédés corroborent la conclusion qu'ils visaient un objectif touchant le droit criminel. En outre, la preuve du Hansard montre, d'une part, que l'interdiction de la clinique de l'intimé était la préoccupation centrale de l'assemblée et, d'autre part, que les cliniques d'avortement autonomes en tant que telles ont fait l'objet d'une opposition commune et catégorique. Les préoccupations auxquelles ces textes législatifs se rapportaient principalement, d'après le gouvernement provincial, — privatisation, coût et qualité des soins, opposition à l'instauration d'un système de santé à deux niveaux — ont visiblement été absentes durant la presque totalité des débats. Les textes contestés portent sur une question morale. Bien qu'une loi qui permet d'établir et d'appliquer des normes locales de moralité ne soit pas nécessairement un empiétement dans le domaine du droit criminel, l'interdiction d'un acte dans l'intérêt de la morale publique était et reste l'une des fins classiques du droit criminel. Il y a donc de fortes raisons d'inférer que l'objet et la nature véritable des textes concernent une matière relevant de la compétence fédérale en matière de droit criminel. Cette inférence est étayée par l'absence de preuve que la privatisation et le coût et la qualité des services de santé étaient davantage que des préoccupations accessoires et par la sévérité relative des peines prévues par la Loi.

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APPEAL from a judgment of the Nova Scotia Supreme Court, Appeal Division (1991), 104 N.S.R. (2d) 361, 283 A.P.R. 361, 66 C.C.C. (3d) 288, 7 C.R. (4th) 1, 83 D.L.R. (4th) 8, affirming a judgment of the Provincial Court (1990), 99 N.S.R. (2d) 293, 270 A.P.R. 293, acquitting the respondent of violating the *Medical Services Act* on the ground that the legislation was *ultra vires* the province. Appeal dismissed.

Marian F. H. Tyson and *Louise Walsh Poirier*, for the appellant.

Anne S. Derrick and *Jacqueline Mullenger*, for the respondent.

Edward R. Sojonky, Q.C., and *Yvonne E. Milosevic*, for the intervener the Attorney General of Canada.

Bruce Judah, for the intervener the Attorney General for New Brunswick.

Angela M. Costigan and *Lynn Kirwin*, for the intervener REAL Women of Canada.

Mary Eberts and *Ian Godfrey*, for the intervener the Canadian Abortion Rights Action League.

The judgment of the Court was delivered by

SOPINKA J. —

Introduction

The question in this appeal is whether the Nova Scotia *Medical Services Act*, R.S.N.S. 1989, c. 281, and the regulation made under the Act, N.S. Reg. 152/89, are *ultra vires* the province of Nova Scotia on the ground that they are in pith and substance criminal law. The Act and regulation make

Pepin, René. «Le pouvoir des provinces canadiennes de légiférer sur la moralité publique» (1988), 19 *R.G.D.* 865.

Scott, F. R. *Civil Liberties and Canadian Federalism.* Toronto: University Press, 1959.

POURVOI contre un arrêt de la Section d'appel de la Cour suprême de la Nouvelle-Écosse (1991), 104 N.S.R. (2d) 361, 283 A.P.R. 361, 66 C.C.C. (3d) 288, 7 C.R. (4th) 1, 83 D.L.R. (4th) 8, qui a confirmé un jugement de la Cour provinciale (1990), 99 N.S.R. (2d) 293, 270 A.P.R. 293, qui avait acquitté l'intimé d'avoir contrevenu à la *Medical Services Act* pour le motif que la loi échappait à la compétence législative de la province. Pourvoi rejeté.

Marian F. H. Tyson et *Louise Walsh Poirier*, pour l'appelante.

Anne S. Derrick et *Jacqueline Mullenger*, pour l'intimé.

Edward R. Sojonky, c.r., et *Yvonne E. Milosevic*, pour l'intervenant le procureur général du Canada.

Bruce Judah, pour l'intervenant le procureur général du Nouveau-Brunswick.

Angela M. Costigan et *Lynn Kirwin*, pour l'intervenante REAL Women of Canada.

Mary Eberts et *Ian Godfrey*, pour l'intervenante l'Association canadienne pour le droit à l'avortement.

Version française du jugement de la Cour rendu par

LE JUGE SOPINKA —

Introduction

Dans le présent pourvoi, il s'agit de décider si la *Medical Services Act* de la Nouvelle-Écosse, R.S.N.S. 1989, ch. 281, et son règlement d'application, N.S. Reg. 152/89, excèdent les pouvoirs de la province de la Nouvelle-Écosse parce qu'ils ressortissent, de par leur caractère véritable, au droit

it an offence to perform an abortion outside a hospital.

Between October 26 and November 2, 1989, the respondent performed 14 abortions at his clinic in Halifax. He was charged with 14 counts of violating the *Medical Services Act*. He was acquitted at trial after the trial judge held that the legislation under which he was charged was beyond the province's legislative authority to enact because it was in pith and substance criminal law. This decision was upheld by the Nova Scotia Court of Appeal. The Crown appeals from the Court of Appeal's decision with leave of this Court.

Facts and Legislation

In January 1988, this Court ruled that the *Criminal Code* provisions relating to abortion were unconstitutional because they violated women's *Charter* guarantee of security of the person: *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (*Morgentaler (1988)*). At the same time the Court reaffirmed its earlier decision that the provisions were a valid exercise of the federal criminal law power: *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616 (*Morgentaler (1975)*). The 1988 decision meant that abortion was no longer regulated by the criminal law. It was no longer an offence to obtain or perform an abortion in a clinic such as those run by the respondent. A year later, in January 1989, it was rumoured in Nova Scotia that the respondent intended to establish a free-standing abortion clinic in Halifax. Subsequently, the respondent publicly confirmed his intention to do so.

On March 16, 1989, the Nova Scotia government took action to prevent Dr. Morgentaler from realizing his intention. The Governor in Council approved two identical regulations, one under the *Health Act*, R.S.N.S. 1989, c. 195 (N.S. Reg. 33/89), and one under the *Hospitals Act*, R.S.N.S. 1989, c. 208 (N.S. Reg. 34/89), which prohibited the performance of an abortion anywhere other than in a place approved as a hospital under the

criminel. Selon la Loi et le règlement, le fait de pratiquer un avortement ailleurs que dans un hôpital constitue une infraction.

Entre le 26 octobre et le 2 novembre 1989, l'intimé a pratiqué 14 avortements à sa clinique de Halifax. Il a été inculpé, sous 14 chefs, d'infractions à la *Medical Services Act*. Il a été acquitté, le juge du procès concluant que la loi en vertu de laquelle les accusations avaient été portées échappait à la compétence législative de la province parce qu'elle ressortissait, de par son caractère véritable, au droit criminel. La Cour d'appel de la Nouvelle-Écosse a confirmé cette décision. Le ministère public en appelle de cet arrêt avec l'autorisation de notre Cour.

Les faits et les textes législatifs

En janvier 1988, notre Cour a décidé que les dispositions du *Code criminel* relatives à l'avortement étaient inconstitutionnelles parce qu'elles portaient atteinte au droit des femmes à la sécurité de leur personne garanti par la *Charte*: *R. c. Morgentaler*, [1988] 1 R.C.S. 30 (*Morgentaler (1988)*). En même temps, la Cour a confirmé sa décision antérieure selon laquelle les dispositions constituaient un exercice valide du pouvoir fédéral en matière de droit criminel: *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616 (*Morgentaler (1975)*). L'arrêt de 1988 signifiait que l'avortement n'était plus régi par le droit criminel. Ne constituait plus une infraction le fait d'obtenir ou de pratiquer un avortement dans une clinique comme celles de l'intimé. Un an plus tard, en janvier 1989, la rumeur voulait, en Nouvelle-Écosse, que l'intimé ait l'intention d'établir une clinique d'avortement autonome à Halifax. Par la suite, l'intimé a confirmé publiquement son intention.

Le 16 mars 1989, le gouvernement de la Nouvelle-Écosse a pris des mesures pour empêcher le Dr Morgentaler de réaliser son intention. Le gouverneur en conseil a approuvé deux règlements identiques, l'un en application de la *Health Act*, R.S.N.S. 1989, ch. 195 (N.S. Reg. 33/89), l'autre sous le régime de la *Hospitals Act*, R.S.N.S. 1989, ch. 208 (N.S. Reg. 34/89), qui interdisaient de pratiquer un avortement ailleurs que dans un hôpital

Hospitals Act. At the same time it made a regulation (N.S. Reg. 32/89) pursuant to the *Health Services and Insurance Act*, R.S.N.S. 1989, c. 197, denying medical services insurance coverage for abortions performed outside a hospital. These regulations are referred to collectively as the "March regulations".

On May 8, 1989, one of the interveners in the present case, the Canadian Abortion Rights Action League (CARAL), launched a court challenge to the constitutionality of the March regulations. The matter was set for hearing on June 22, 1989. The case was adjourned and ultimately dismissed for lack of standing, primarily because the same issues would be determined in the present case: *Canadian Abortion Rights Action League Inc. v. Nova Scotia (Attorney General)* (1990), 96 N.S.R. (2d) 284 (A.D.), aff'g (1989), 93 N.S.R. (2d) 197 (T.D.), leave to appeal refused, [1990] 2 S.C.R. v.

CARAL's court challenge to the March regulations was still outstanding on June 6, 1989, when the Minister of Health and Fitness introduced the *Medical Services Act* for first reading. The Act progressed rapidly through the legislature. It received third reading and Royal Assent on June 15, the last day of the legislative session. The relevant portions of the Act are as follows:

2 The purpose of this Act is to prohibit the privatization of the provision of certain medical services in order to maintain a single high-quality health-care delivery system for all Nova Scotians.

3 In this Act,

(a) "designated medical service" means a medical service designated pursuant to the regulations;

. . .

4 No person shall perform or assist in the performance of a designated medical service other than in a hospital approved as a hospital pursuant to the *Hospitals Act*.

approuvé au sens de la *Hospitals Act*. En même temps, il a pris un règlement (N.S. Reg. 32/89) en application de la *Health Services and Insurance Act*, R.S.N.S. 1989, ch. 197, excluant l'assurance-maladie pour les avortements pratiqués ailleurs que dans les hôpitaux. Ces règlements sont appelés collectivement les «règlements de mars».

Le 8 mai 1989, l'un des intervenants en l'espèce, l'Association canadienne pour le droit à l'avortement (ACDA) a attaqué devant les tribunaux la constitutionnalité des règlements de mars. L'affaire a été mise au rôle du 22 juin 1989. L'action a été ajournée, une fin de non-recevoir ayant par la suite été opposée à la demanderesse parce qu'elle n'avait pas la qualité pour agir, surtout parce que les mêmes questions seraient tranchées dans le présent pourvoi: *Canadian Abortion Rights Action League Inc. c. Nova Scotia (Attorney General)* (1990), 96 N.S.R. (2d) 284 (S.A.), conf. (1989), 93 N.S.R. (2d) 197 (1re inst.), autorisation de pourvoi refusée, [1990] 2 R.C.S. v.

La contestation judiciaire des règlements de mars par l'ACDA était encore en instance le 6 juin 1989 quand le ministre de la Santé et de la Condition physique a présenté le projet de la *Medical Services Act* en première lecture. Le projet de loi a franchi rapidement toutes les étapes. Il a reçu la troisième lecture et la sanction royale le 15 juin, dernier jour de la session. Voici les parties pertinentes de la Loi:

[TRADUCTION] **2** La présente loi a pour objet d'interdire la privatisation de certains services médicaux afin que soit maintenu un seul système de santé de qualité supérieure pour tous les habitants de la Nouvelle-Écosse.

3 Les définitions qui suivent s'appliquent à la présente loi:

a) «service médical désigné» Service médical désigné conformément au règlement;

. . .

4 Nul ne doit fournir un service médical désigné ailleurs que dans un hôpital approuvé en conformité avec la *Hospitals Act* ni aider à la fourniture d'un tel service.

5 Notwithstanding the *Health Services and Insurance Act*, a person who performs or for whom is performed a medical service contrary to this Act is not entitled to reimbursement pursuant to that Act.

6 (1) Every person who contravenes this Act is guilty of an offence and liable upon summary conviction to a fine of not less than ten thousand dollars nor more than fifty thousand dollars.

. . .

7 Notwithstanding any other provision of this Act, where designated medical services are being performed contrary to this Act, the Minister may, at any time, apply to a judge of the Supreme Court for an injunction, and the judge may make any order that in the opinion of the judge the case requires.

8 (1) The Governor in Council, on the recommendation of the Minister, may make regulations

(a) after consultation by the Minister with the Medical Society of Nova Scotia, designating a medical service for the purpose of this Act;

. . .

The Medical Society was consulted after the passage of the Act, and a list of medical services was finalized. On July 20, 1989, the *Medical Services Designation Regulation*, N.S. Reg. 152/89, was made, designating the following medical services for the purposes of the Act:

(a) Arthroscopy

(b) Colonoscopy (which, for greater certainty, does not include flexible sigmoidoscopy)

(c) Upper Gastro-Intestinal Endoscopy

(d) Abortion, including a therapeutic abortion, but not including emergency services related to a spontaneous abortion or related to complications arising from a previously performed abortion

(e) Lithotripsy

(f) Liposuction

(g) Nuclear Medicine

(h) Installation or Removal of Intraocular Lenses

(i) Eletromyography, including Nerve Conduction Studies

5 Par dérogation à la *Health Services and Insurance Act*, les personnes qui fournissent des services médicaux en contravention de la présente loi, et celles à qui ils sont fournis, n'ont pas droit au remboursement prévu dans cette loi.

6 (1) Quiconque contrevient à la présente loi est coupable d'une infraction et passible, sur déclaration de culpabilité par procédure sommaire, d'une amende d'au moins dix mille dollars et d'au plus cinquante mille dollars.

. . .

7 Malgré les autre dispositions de la présente loi, si des services médicaux désignés sont fournis en contravention de la présente loi, le ministre peut, à tout moment, demander à un juge de la Cour suprême de décerner une injonction et le juge peut rendre toute autre ordonnance qu'il estime nécessaire en l'espèce.

8 (1) Le gouverneur en conseil, sur la recommandation du ministre, peut prendre un règlement

a) après que le ministre a consulté l'ordre des médecins de la Nouvelle-Écosse, désignant des services médicaux pour l'application de la présente loi;

. . .

L'ordre des médecins a été consulté après l'adoption de la Loi et une liste définitive de services médicaux a été dressée. Le 20 juillet 1989, le *Medical Services Designation Regulation*, N.S. Reg. 152/89, a été pris, désignant les services médicaux qui suivent, pour l'application de la Loi:

[TRADUCTION]

a) arthroscopie

b) coloscopie (il est entendu que cet examen n'est pas fait au moyen du sigmoidoscope flexible)

c) endoscopie de l'appareil gastro-intestinal supérieur

d) avortement, y compris l'avortement thérapeutique, mais à l'exclusion des services d'urgence reliés à l'avortement spontané ou à des complications découlant d'un avortement pratiqué antérieurement

e) lithotriptie

f) liposuccion

g) médecine nucléaire

h) installation ou enlèvement de lentilles intraoculaires

i) electromyographie, y compris l'examen de la conduction nerveuse

The March regulations were revoked on the same day by N.S. Regs. 149-151/89. Item (d) of the new regulation continued the March regulations' prohibition of the performance of abortions outside hospitals. Section 5 of the Act continued the denial of health insurance coverage for abortions performed in violation of the prohibition.

Les règlements de mars ont été abrogés le même jour par le règlement N.S. Reg. 149-151/89. L'alinéa d) du nouveau règlement a reconduit l'interdiction de pratiquer un avortement ailleurs que dans un hôpital. L'article 5 de la Loi a reconduit l'exclusion de l'assurance-maladie pour les avortements pratiqués en contravention de l'interdiction.

Despite these actions, Dr. Morgentaler opened his clinic in Halifax as predicted. At first the clinic only provided counselling and referrals to Dr. Morgentaler's Montreal clinic. On October 26, 1989, however, Dr. Morgentaler defied the Nova Scotia legislation by performing seven abortions. He announced that he had done so at a press conference later that day. Several days later he performed seven more abortions. He was charged with 14 counts of unlawfully performing a designated medical service, to wit, an abortion, other than in a hospital approved as such under the *Hospitals Act*, contrary to s. 6 of the *Medical Services Act*. Dr. Morgentaler publicly announced his resolve to continue his activities in contravention of the Act, and on November 6, 1989 the government of Nova Scotia obtained an interim injunction under s. 7 of the Act to restrain him from further violations of the Act pending the resolution of the charges and the constitutional challenge in court: *Nova Scotia (Attorney General) v. Morgentaler* (1989), 64 D.L.R. (4th) 297 (N.S.S.C.T.D.), aff'd (1990), 69 D.L.R. (4th) 559 (N.S.S.C.A.D.), leave to appeal refused [1990] 2 S.C.R. ix.

Malgré ces actions, le Dr Morgentaler a ouvert sa clinique à Halifax comme prévu. Au début, la clinique n'a offert que des consultations et a renvoyé les patientes à la clinique montréalaise du Dr Morgentaler. Toutefois, le 26 octobre 1989, le Dr Morgentaler a défié les textes législatifs néo-écossais en pratiquant sept avortements. Il l'a annoncé lors d'une conférence de presse plus tard le même jour. Plusieurs jours plus tard, il a pratiqué sept autres avortements. Il a été inculpé, sous 14 chefs, de fourniture illégale d'un service médical désigné, savoir des avortements, ailleurs que dans un hôpital approuvé sous le régime de la *Hospitals Act*, infraction prévue à l'art. 6 de la *Medical Services Act*. Le Dr Morgentaler a fait part publiquement de sa détermination à poursuivre ses activités en contravention de la Loi et, le 6 novembre 1989, le gouvernement de la Nouvelle-Écosse a obtenu une injonction provisoire en vertu de l'art. 7 de la Loi lui interdisant de la violer de nouveau en attendant l'issue de l'instance concernant les inculpations et la contestation constitutionnelle: *Nova Scotia (Attorney General) c. Morgentaler* (1989), 64 D.L.R. (4th) 297 (C.S.N.-É. 1re inst.), conf. par (1990), 69 D.L.R. (4th) 559 (C.S.N.-É.S.A.), autorisation de pourvoi refusée, [1990] 2 R.C.S. ix.

When the case proceeded to trial in June 1990, Dr. Morgentaler did not dispute that he had performed the abortions as alleged. He argued, instead, that the Act and the regulation were inconsistent with the Constitution of Canada and consequently of no force or effect, on the grounds that they violate women's *Charter* rights to security of the person and equality and that they are an unlawful encroachment on the federal Parliament's exclusive criminal law jurisdiction. He also argued that the regulation was an abuse of discretion by

Au procès en juin 1990, le Dr Morgentaler n'a pas nié avoir pratiqué les avortements allégués. Il a soutenu plutôt que la Loi et le règlement étaient incompatibles avec la Constitution du Canada et, par conséquent, inopérants parce qu'ils violaient les droits des femmes à la sécurité de leur personne et leurs droits à l'égalité, qui sont garantis par la *Charte*, et qu'ils constituaient un empiétement inconstitutionnel sur le champ de compétence exclusif du Parlement fédéral en matière criminelle. Il a également affirmé que le règlement était

the provincial cabinet and therefore in excess of its jurisdiction.

Judgments Below

A. *Provincial Court of Nova Scotia* (1990), 99 N.S.R. (2d) 293

Kennedy Prov. Ct. J. decided to address the distribution of powers issue first and having done so, found it unnecessary to go any farther. He concluded that "the prohibition and regulation of abortion has been and remains criminal law in this country" and held, at p. 295:

> It would seem, therefore, that if the prohibition or regulation of abortion is criminal law and if Parliament, as part of its proper exercise of its exclusive criminal law-making power, may determine what is not criminal as well as what is criminal, then by restricting the performance of therapeutic abortions to hospitals the Province of Nova Scotia has trespassed into an area of Federal Government competence.

He held that he could properly look beyond the four corners of the legislation to consider extrinsic evidence of the legislative history in determining the pith and substance of the legislation. He found that the Nova Scotia government had notice in January 1989 of Dr. Morgentaler's intention to open an abortion clinic in Halifax. He reviewed the chronology of events that followed and held that it was reasonable to infer that the government believed that the *Medical Services Act* and regulation accomplished the same purpose as the March regulations. He observed that the provincial government had created a Royal Commission on Health Care Issues in 1987, with a mandate to recommend health care policy, and that the Act was passed before the Commission had rendered its report even though the Throne Speech of February 23, 1989 indicated that the government was awaiting the report. Kennedy Prov. Ct. J. also noted that the Medical Society was not consulted until after the Act was passed and that even then, according

un abus de pouvoir discrétionnaire de la part du conseil des ministres provincial et que celui-ci avait donc excédé sa compétence.

Les juridictions inférieures

A. *La Cour provinciale de la Nouvelle-Écosse* (1990), 99 N.S.R. (2d) 293

Le juge Kennedy a décidé d'étudier en premier la question de la répartition des pouvoirs et, cela fait, il a jugé inutile de pousser plus loin l'analyse. Il a conclu que [TRADUCTION] «l'interdiction et la réglementation de l'avortement ont toujours été et restent des questions de droit criminel dans notre pays» et il a déterminé, à la p. 295:

> [TRADUCTION] Il semble donc que, si l'interdiction ou la réglementation de l'avortement relèvent du droit criminel et si le Parlement, en exerçant validement son pouvoir exclusif de légiférer sur le droit criminel, peut décider ce qui est criminel et ce qui ne l'est pas, alors la province de la Nouvelle-Écosse, en limitant les avortements thérapeutiques aux hôpitaux, a empiété sur un domaine de compétence fédérale.

Il a décidé qu'il pouvait à juste titre aller au-delà de la teneur même des textes législatifs pour tenir compte de la preuve extrinsèque de leur origine législative en vue d'en déterminer le caractère véritable. Il a conclu que le gouvernement de la Nouvelle-Écosse avait appris en janvier 1989 que le Dr Morgentaler avait l'intention d'ouvrir une clinique d'avortement à Halifax. Il a examiné la chronologie des faits postérieurs et conclu qu'il était raisonnable d'inférer que le gouvernement croyait que la *Medical Services Act* et le règlement lui permettraient d'atteindre le même objectif que les règlements de mars. Il a fait observer que le gouvernement provincial a désigné en 1987 une commission royale d'enquête chargée d'étudier les questions relatives aux soins de santé et de recommander une politique en la matière, et que la Loi a été votée avant que la commission ait présenté son rapport, même si le discours du Trône du 23 février 1989 indiquait que le gouvernement attendait la publication du rapport. Le juge Kennedy a fait remarquer en outre que l'ordre des médecins n'avait été consulté qu'après l'adoption de la Loi et que, même à ce moment-là, selon le président de

to the then president of the Society, the restriction of abortion was not negotiable.

Kennedy Prov. Ct. J. held evidence of statements and speeches made in the legislature during debates to be relevant and admissible. He found that the Health Minister had openly stated the government's policy to stop free-standing abortion clinics, in particular Dr. Morgentaler's, that this sentiment permeated the debates on both sides of the Assembly, and that Dr. Morgentaler was an acknowledged "mischief" against which the legislation was directed. He also considered relevant, though not determinative, the substantial penalties imposed by the Act (s. 6(1)).

He concluded that the Act and regulation were in pith and substance criminal law, "made primarily to control and restrict abortions within the province" and "to keep free-standing abortion clinics, and in the specific, Dr. Morgentaler out of Nova Scotia" (at p. 302). The province's privatization concerns, while real, were incidental to the paramount purpose of the legislation. Given this conclusion, Kennedy Prov. Ct. J. acquitted the respondent. He refrained from dealing with the *Charter* issues unless directed by an appeal court to do so.

B. *Nova Scotia Supreme Court, Appeal Division* (1991), 104 N.S.R. (2d) 361

(1) Freeman J.A., Clarke C.J.N.S. and Hart and Chipman JJ.A. concurring

Freeman J.A. held, at p. 363, that while the province had the legislative power to pass a law in the present form, the question was whether it was colourable criminal law, i.e.:

> . . . whether the province properly used [its] powers and created a law within the provincial competence, or whether it improperly attempted to use federal powers to

l'ordre à l'époque, la limitation de l'avortement n'était pas négociable.

Le juge Kennedy a décidé que la preuve des déclarations et des discours faits devant l'assemblée législative était pertinente et admissible. Il a conclu que le ministre de la Santé avait dit ouvertement que la position de son gouvernement était d'empêcher l'implantation de cliniques d'avortement autonomes, en particulier celle du Dr Morgentaler, que la même opinion était répandue parmi les députés des deux côtés qui ont participé au débat à l'assemblée législative et que le Dr Morgentaler représentait un «mal» reconnu que les textes législatifs cherchaient à corriger. Il a de plus tenu pour admissibles, encore qu'elles ne fussent pas décisives, les amendes importantes dont la Loi frappait les contrevenants (par. 6(1)).

Il a conclu que la Loi et le règlement ressortissaient, de par leur caractère véritable, au droit criminel [TRADUCTION] «visant avant tout à contrôler et à limiter les avortements dans la province» et «à empêcher l'implantation de cliniques d'avortement autonomes et, particulièrement, celle du Dr Morgentaler, en Nouvelle-Écosse» (à la p. 302). Les préoccupations de la province quant à la privatisation étaient certes réelles, mais elles étaient accessoires à l'objet primordial des textes législatifs. Étant donné cette conclusion, le juge Kennedy a acquitté l'intimé. Il s'est abstenu d'examiner les questions relatives à la *Charte*; il ne le fera que si une cour d'appel le lui demande.

B. *La Cour suprême de la Nouvelle-Écosse, Section d'appel* (1991), 104 N.S.R. (2d) 361

(1) Le juge Freeman (avec l'appui du juge en chef Clarke et des juges Hart et Chipman)

Le juge Freeman a décidé que, à la p. 363, la province avait l'autorité législative pour adopter une loi sous cette forme, mais que la question était de savoir s'il s'agissait de droit criminel déguisé, c'est-à-dire:

> [TRADUCTION] . . . si la province avait utilisé à bon droit [ses] pouvoirs et créé une loi relevant de sa compétence ou si elle avait à tort essayé d'utiliser le pouvoir fédéral

pass a law that, regardless of its form, is actually a criminal law.

He held that both purpose and effect are relevant to characterizing the "matter" in relation to which a law is enacted. He found that the legislation effectively duplicated s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34 (now s. 287), the section struck down by this Court in *Morgentaler (1988)*, *supra*. On the other hand, he also held that the effect of the Act was to prevent privatization, and since legislative effects alone were inconclusive, he examined purpose in more depth. He held that the legislative debates were admissible and relevant to the background and purpose of the legislation. They demonstrated that the government's intent in making the March regulations and introducing the Act was to prevent the establishment of Morgentaler clinics in Nova Scotia, and that the members of both sides of the House understood this as the paramount purpose of the legislation.

Freeman J.A. conceded that a credible case could be made out for the provincial objective of stamping out privatization of health care services, but disagreed that this was the primary target of the legislation. Six factors pointed in the other direction (at pp. 376-77), and they are worth repeating in full:

1. Privatization of medical services had not been enunciated as a government objective prior to the introduction of the *Medical Services Act*. It was not mentioned in the Throne Speech on February 23, 1989. The Throne Speech did say that a Royal Commission Report was being awaited. The order-in-council establishing the Royal Commission made no reference to privatization.

2. The "March regulations" were obviously aimed at Morgentaler clinics. Hon. David Nantes, Health Minister, made that clear when he announced them to the legislature .... The *Medical Services Act* was presented to the legislature following a court challenge to the March regulations. It was introduced on June 6, 1989, and passed, with the appearance of last-minute haste, the day the House closed on June 15, 1989. The March regulations were encompassed by the *Medical Services Act*

de voter une loi qui, peu importe sa forme, relève en fait du droit criminel.

Il a conclu que l'objet et l'effet sont aussi pertinents l'un que l'autre par rapport à la qualification du sujet sur lequel porte une loi. Il a conclu que les textes législatifs faisaient effectivement double emploi avec l'art. 251 du *Code criminel*, S.R.C. 1970, ch. C-34 (maintenant l'art. 287), article qui a été annulé par notre Cour dans l'arrêt *Morgentaler (1988)*, précité. En revanche, il a aussi conclu que la Loi avait pour effet d'empêcher la privatisation et, comme ses effets pris isolément étaient peu concluants, il a examiné son objet de façon plus approfondie. Il a décidé que les débats législatifs étaient admissibles et pertinents quant au contexte et à l'objet des textes législatifs. Ils montraient que le gouvernement, en prenant les règlements de mars et en déposant la Loi, avait l'intention d'empêcher l'implantation de cliniques Morgentaler en Nouvelle-Écosse et que les députés des deux côtés de l'assemblée comprenaient que c'était là l'objet primordial des textes.

Le juge Freeman a concédé que la thèse selon laquelle l'objectif de la province était d'enrayer la privatisation des services de santé reposait sur des arguments valables, mais il n'était pas d'accord pour dire que c'était là l'objet principal des textes. Six facteurs l'ont amené à la conclusion opposée (aux pp. 376 et 377); il vaut la peine de les citer intégralement:

[TRADUCTION] 1. Avant le dépôt du projet de la *Medical Services Act*, le gouvernement n'avait pas précisé que son objectif était la privatisation des services médicaux. Il n'a pas été question de cet objectif dans le discours du Trône du 23 février 1989. On y mentionnait qu'on attendait la publication du rapport d'une commission royale d'enquête. Le décret constituant cette commission ne fait aucunement allusion à la privatisation.

2. Les «règlements de mars» visaient manifestement les cliniques Morgentaler. Monsieur David Nantes, ministre de la Santé, l'a bien souligné quand il en a fait part à l'assemblée législative [. . .] La *Medical Services Act* a été présentée à l'assemblée après que les règlements de mars eurent été attaqués en justice. Elle a été présentée le 6 juin 1989 et votée, à la hâte, semble-t-il, le jour de la clôture de la session le 15 juin 1989. Les règlements de mars étaient englobés dans la *Medical Services Act* et

and its regulation. They were revoked, no longer necessary, on July 20, 1989, the day the regulation was passed under the *Medical Services Act*.

3. In explaining the desirability of avoiding the pitfalls of privatization, the Crown relied heavily on economic considerations. The report of the Royal Commission on Health Costs was being awaited, as the Throne Speech noted. In passing the *Medical Services Act* on June 15, 1989, the legislature elected to do so without the benefit of observations or recommendations by the Royal Commission . . . .

4. The Crown's evidence as to the official policy of the government of Nova Scotia on the privatization issue was given by Mr. Malcom [a senior bureaucrat] . . . . The Minister of Health or other cabinet Ministers could have given the best evidence as to the real purpose of the *Medical Services Act*. While Mr. Nantes emphasized privatization in moving second reading of the *Medical Services Act*, his remarks to the house about the abortion clinics left little doubt about the government's objectives for the *Act*.

5. The Department of Health had been engaged in discussions with the Medical Society of Nova Scotia to have more health care services delivered outside of hospitals. The Medical Society was not consulted about the *Act* prior to its introduction. The evidence suggests the *Act* runs counter to the direction of the talks.

6. Under s. 35 of the *Health Services and Insurance Act* the penalty for a violation of either the *Act* or regulations made under it is a maximum fine of $100 for a first offence and $200 for a subsequent offence. Under the *Hospitals Act* the maximum fine is $500. The *Medical Services Act* provides for a minimum fine of $10,000 and a maximum fine of $50,000. The Crown's explanation for the substantial penalties under the *Medical Services Act* is noteworthy:

> "Penalties are a means of enforcing compliance with provincial laws . . . . Where a person is determined to carry on a lucrative business, as is Dr. Morgentaler, who charged an average of $350 per procedure (Admission of Facts), and who anticipates being open for business in Halifax two days per week, (Transcript, p. 1165) at 15 procedures per day, or approxi-

dans son règlement d'application. N'étant plus nécessaires, ils ont été abrogés le 20 juillet 1989, jour où a été pris le règlement en application de la *Medical Services Act*.

3. Pour expliquer pourquoi il était souhaitable d'éviter les embûches de la privatisation, le ministère public a insisté sur des considérations économiques. Le rapport de la commission royale d'enquête sur les coûts des soins de santé était attendu, comme le signalait le discours du Trône. En adoptant la *Medical Services Act* le 15 juin 1989, l'assemblée a choisi d'aller de l'avant sans avoir eu l'avantage de prendre connaissance des observations ou des recommandations de la commission royale d'enquête. . .

4. La preuve du ministère public quant à la position officielle du gouvernement de la Nouvelle-Écosse au chapitre de la privatisation a été fournie par le témoignage de M. Malcom [un haut fonctionnaire] . . . Le ministre de la Santé ou d'autres ministres auraient pu apporter la meilleure preuve relativement à l'objectif véritable de la *Medical Services Act*. Certes, M. Nantes a mis l'accent sur la privatisation en proposant la deuxième lecture du projet de loi, mais ses propos devant l'assemblée au sujet des cliniques d'avortement ne laissaient aucun doute quant aux objectifs du gouvernement relativement à cette loi.

5. Le ministère de la Santé avait discuté avec l'ordre des médecins de la Nouvelle-Écosse de la possibilité de fournir davantage de soins de santé ailleurs que dans les hôpitaux. L'ordre des médecins n'a pas été consulté au sujet de la *Loi* avant qu'elle n'ait été déposée. Les témoignages semblent indiquer que la *Loi* ne va pas dans le même sens que les pourparlers.

6. Aux termes de l'art. 35 de la *Health Services and Insurance Act*, la peine pour la violation de la *Loi* ou du règlement est une amende maximale de 100 $ en cas de première infraction, et de 200 $, en cas de récidive. Sous le régime de la *Hospitals Act*, l'amende maximale est de 500 $. La *Medical Services Act* prévoit une amende minimale de 10 000 $ et une amende maximale de 50 000 $. Il convient de noter que le ministère public a donné, à propos des amendes importantes prévues par cette loi, l'explication qui suit:

> «Les peines sont un moyen d'assurer le respect des lois provinciales. [. . .] Lorsqu'une personne est déterminée, comme l'est le Dr Morgentaler, à exercer une activité commerciale lucrative — il demandait en moyenne 350 $ par intervention (admission de faits) et prévoyait ouvrir sa clinique à Halifax deux jours par semaine (Transcription, à la p. 1165), ce qui

mately $10,000 for two days work, if the penalty was not substantial, it would not ensure compliance with the law. In this case a penalty of $10,000 represents approximately two days work for Dr. Morgentaler." [Freeman J.A.'s emphasis.]

Freeman J.A. concluded as follows, at p. 378:

In summary, there is little in the evidence of the purpose of the *Medical Services Act* to suggest that its primary thrust was privatization, and a great deal that shows it was primarily intended to prohibit Morgentaler abortion clinics. It will be recalled that the effect was somewhat equivocal: it impacted upon private abortion clinics in the same manner as s. 251 of the *Criminal Code*, but it also had the effect of preventing privatization. When the purpose and effect of the *Act* are considered together, against the background of all the relevant circumstances, the conclusion is inescapable.

The *Medical Services Act* is in its pith and substance criminal law, as Judge Kennedy found it to be. As such, it is beyond the jurisdiction of the government of Nova Scotia; it must be struck down.

(2) Jones J.A., dissenting

In Jones J.A.'s view, the issue was "simply whether the province has the power to regulate how and where medical services may be performed in the province" (at p. 378). He referred to the provinces' general jurisdiction over health matters including the non-criminal aspects of abortion, and after considering the terms of the *Medical Services Act*, he concluded, at p. 383:

In the absence of federal legislation the province has a legitimate interest in the performance of abortions in doctors' offices where that practice is objectionable to the public. Obviously that was the view of the Legislature. In my view the pith and substance of the *Act* is simply the regulation of where these medical services can be performed. I see no difference in principle between such legislation and legislation requiring the treatment of aids patients or battered children in hospitals. Those are matters within the power of the provinces to legislate in relation to public health. That being

donne 15 interventions par jour ou environ 10 000 $ pour deux jours de travail — si l'amende n'est pas élevée, elle n'assurera pas le respect de la loi. En l'espèce, une amende de 10 000 $ représente environ deux jours de travail pour le Dr Morgentaler.» [Souligné par le juge Freeman.]

Le juge Freeman a tiré la conclusion suivante, à la p. 378:

[TRADUCTION] Bref, peu d'éléments de preuve relatifs à l'objet de la *Medical Services Act* donnent à penser que son objet principal était la privatisation, alors que de nombreux éléments montrent qu'elle a été conçue avant tout pour interdire les cliniques d'avortement du Dr Morgentaler. On se souviendra que son effet a été quelque peu équivoque: elle a eu un impact sur les cliniques d'avortement privées de la même manière que l'art. 251 du *Code criminel*, mais elle a eu aussi pour effet d'interdire la privatisation. Si l'on rapproche l'objet et l'effet de la *Loi*, en tenant compte du contexte que forme l'ensemble des circonstances pertinentes, on doit forcément en arriver à une seule conclusion.

De par son caractère véritable, la *Medical Services Act* ressortit au droit criminel, comme l'a estimé le juge Kennedy. À ce titre, elle excède la compétence du gouvernement de la Nouvelle-Écosse; elle doit être annulée.

(2) Le juge Jones (dissident)

De l'avis du juge Jones, la question était [TRADUCTION] «simplement de savoir si la province a le pouvoir de réglementer les modalités des services médicaux et le lieu où ils peuvent être fournis dans la province» (à la p. 378). Il a mentionné la compétence générale de la province sur les questions de santé, y compris sur les aspects non criminels de l'avortement, et après avoir examiné les termes de la *Medical Services Act*, il a conclu, à la p. 383:

[TRADUCTION] En l'absence de loi fédérale, la province a un intérêt légitime dans l'avortement pratiqué dans le bureau d'un médecin, s'il s'agit d'un acte jugé répréhensible par le public. De toute évidence, l'assemblée législative était de cet avis. Selon moi, de par son caractère véritable, la *Loi* a simplement pour objet de fixer en quel lieu ces services médicaux peuvent être fournis. Je ne vois aucune différence en principe entre une telle loi et une loi exigeant que les patients sidéens ou les enfants maltraités soient traités dans les hôpitaux. Ce sont des questions qui relèvent de l'autorité des provinces en

so it is not open to this Court to review the reasons for the legislation.

He considered the "colourability" doctrine inapplicable since here the province was empowered to deal with the subject, and "[l]egislation is not open to review on the issue of colourability where a legislature is clearly acting within its powers" (at pp. 384-85). He would have allowed the appeal and ordered the trial to continue.

Issues

On February 18, 1992, the Chief Justice stated the following constitutional questions:

1. Is the *Medical Services Act*, R.S.N.S. 1989, c. 281, *ultra vires* the Legislature of the Province of Nova Scotia on the ground that the Act is legislation in relation to criminal law falling within the exclusive legislative jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?

2. Is the *Medical Services Designation Regulation*, N.S. Reg. 152/89, made on the 20th day of July, 1989, pursuant to s. 8 of the *Medical Services Act*, R.S.N.S. 1989, c. 281, *ultra vires* the Lieutenant Governor in Council on the ground the Regulation was made pursuant to legislation in relation to criminal law falling within the exclusive legislative jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?

It is important to keep in mind that the question before us is limited to the distribution of powers. The impact of the *Canadian Charter of Rights and Freedoms* on legislation of this kind, while an important subject, is not in issue here. A holding that this legislation relates to a matter within the legislative competence of one or the other level of government does not mean that such legislation would either survive or fail the scrutiny of the *Charter*.

Moreover, even for purposes of the distribution of powers the issues are limited in this case: the criminal law power is the only federal head of

matière de santé publique. En conséquence, il n'appartient pas à notre Cour d'examiner les raisons qui sous-tendent la loi.

Il a estimé que la théorie du détournement de pouvoir était inapplicable car en l'occurrence la province avait le pouvoir de légiférer sur le sujet: [TRADUCTION] «Une loi n'est pas susceptible de révision pour détournement de pouvoir si l'assemblée législative exerce de toute évidence l'autorité dont elle est investie» (aux pp. 384 et 385). Il aurait fait droit à l'appel et ordonné la reprise du procès.

Les questions en litige

Le 18 février 1992, le Juge en chef a formulé les questions constitutionnelles suivantes:

1. La *Medical Services Act*, R.S.N.S. 1989, ch. 281, excède-t-elle la compétence de la législature de la province de la Nouvelle-Écosse pour le motif que cette loi touche le droit criminel, une matière qui relève de la compétence législative exclusive du Parlement du Canada, en vertu du par. 91(27) de la *Loi constitutionnelle de 1867*?

2. Le *Medical Services Designation Regulation*, N.S. Reg. 152/89, pris le 20 juillet 1989, conformément à l'art. 8 de la *Medical Services Act*, R.S.N.S. 1989, ch. 281, excède-t-il la compétence du lieutenant-gouverneur en conseil pour le motif que ce règlement a été pris conformément à une loi touchant le droit criminel, une matière qui relève de la compétence législative exclusive du Parlement du Canada, en vertu du par. 91(27) de la *Loi constitutionnelle de 1867*?

Il importe de ne pas oublier que la question dont nous sommes saisis est limitée au partage des compétences. L'impact de la *Charte canadienne des droits et libertés* sur des textes législatifs de ce genre, quoiqu'il constitue un point important, n'est pas en litige en l'espèce. Conclure que ces textes concernent un sujet relevant de la compétence législative de l'un ou de l'autre palier de gouvernement ne signifie pas soit qu'ils résisteraient à un examen fondé sur la *Charte*, soit qu'ils seraient invalidés.

Au surplus, même aux fins du partage des compétences, les questions en litige sont restreintes: le pouvoir relatif au droit criminel est le seul chef de

power in issue. This is the basis on which the case has proceeded since the trial, and is reflected in the terms of the constitutional questions. Although the argument has been made elsewhere that abortion falls properly under the federal government's residual power to legislate for peace, order and good government (see, e.g., M. McConnell and L. Clark, "Abortion Law in Canada: A Matter of National Concern" (1991), 14 *Dalhousie L.J.* 81), that argument cannot be entertained here because of the way in which the issues were framed. Hence the intervener CARAL was not allowed to present argument on this issue in this case: *R. v. Morgentaler*, [1993] 1 S.C.R. 462 (motion in chambers). The only issues are whether the legislation is within the competence of the province under s. 92 of the *Constitution Act, 1867*, or whether it is in relation to the criminal law and thus within the exclusive competence of Parliament under s. 91(27).

compétence fédéral en cause. C'est la prémisse sur laquelle repose la présente espèce depuis le procès et elle se reflète dans les questions constitutionnelles. Certes, d'aucuns ont fait valoir que l'avortement relevait à juste titre du pouvoir résiduel du gouvernement fédéral de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada (voir, p. ex., M. McConnell et L. Clark, «Abortion Law in Canada: A Matter of National Concern» (1991), 14 *Dalhousie. L.J.* 81), mais cet argument ne saurait être retenu dans le cas présent à cause de la formulation des questions en litige. C'est pourquoi l'intervenante ACDA n'a pas été autorisée à présenter d'argumentation sur ce point en l'espèce: *R. c. Morgentaler*, [1993] 1 R.C.S. 462 (requête en chambre). Les seules questions en litige sont de savoir si les textes législatifs ressortissent à la compétence de la province en application de l'art. 92 de la *Loi constitutionnelle de 1867* ou s'ils se rapportent du droit criminel et relèvent, par conséquent, de la compétence exclusive du Parlement conformément au par. 91(27).

Analysis

A. *General*

The appellant argued that the *Medical Services Act* and the regulation are valid provincial legislation enacted pursuant to the province's legislative authority over hospitals, health, the medical profession and the practice of medicine. It relies particularly on heads (7), (13), and (16) of s. 92 of the *Constitution Act, 1867*, which give the province exclusive legislative authority over:

> **92.** . . .
>
> 7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
>
> . . .
>
> 13. Property and Civil Rights in the Province.
>
> . . .

Analyse

A. *Aperçu*

L'appelante a soutenu que la *Medical Services Act* et son règlement d'application formaient des textes législatifs provinciaux valides, édictés conformément à l'autorité législative de la province en ce qui a trait aux hôpitaux, à la santé, et à la profession et la pratique médicales. Elle s'appuie en particulier sur les rubriques (7), (13) et (16) de l'art. 92 de la *Loi constitutionnelle de 1867*, qui accordent à la province l'autorité législative exclusive relativement aux matières suivantes:

> **92.** . . .
>
> 7. L'établissement, l'entretien et l'administration des hôpitaux, asiles, institutions et hospices de charité dans la province, autres que les hôpitaux de marine;
>
> . . .
>
> 13. La propriété et les droits civils dans la province;
>
> . . .

16. Generally all Matters of a merely local or private Nature in the Province.

The ground on which the legislation is challenged is head (27) of s. 91, which reserves "The Criminal Law . . . " to Parliament. On the basis of the analysis that follows I conclude that the *Medical Services Act* and *Medical Services Designation Regulation* are criminal law in pith and substance and consequently *ultra vires* the province of Nova Scotia. The appeal must therefore be dismissed.

In my opinion, the Act and *Medical Services Designation Regulation* must be considered together for the purposes of constitutional characterization. The Act is in general terms, and only by N.S. Reg. 152/89 were its terms given specific meaning by attachment to particular medical services. The history of the Act, including its consideration in the House of Assembly and its connection to the earlier March regulations, shows that it was always considered in light of the medical services to which it would apply, and it was almost always discussed with particular reference to one of them, namely abortion. The Act and the list of services eventually embodied in the regulation were intertwined from the start.

The situation is similar to that in *Texada Mines Ltd. v. Attorney-General of British Columbia*, [1960] S.C.R. 713, in which British Columbia enacted legislation providing for a tax to be imposed in respect of a mineral or minerals found in a "producing area". The rate of tax, the minerals subject to it and the producing area in which it would apply were all left to be designated. Regulations were made designating a certain area as a "producing area", designating iron as the only mineral subject to the tax and setting the rate of tax. This Court considered the statute together with the regulations for the purposes of constitutional characterization, and found (after referring also to related statutes, the legislative history and background including the province's historical efforts to encourage iron smelting in the province by means of what were effectively export taxes, the nature of the iron ore market, and the deterrent effect of the tax) that the statute was an *ultra vires*

16. Généralement toutes les matières d'une nature purement locale ou privée dans la province.

La contestation des textes est fondée sur la rubrique (27) de l'art. 91, qui réserve «Le droit criminel [. . .]» au Parlement. Étant donné l'analyse qui suit, je conclus que la *Medical Services Act* et le *Medical Services Designation Regulation* participent du droit criminel de par leur caractère véritable et, par conséquent, excèdent les pouvoirs de la province de la Nouvelle-Écosse. Le pourvoi doit donc être rejeté.

À mon avis, la Loi et le *Medical Services Designation Regulation* doivent être examinés ensemble aux fins de leur qualification constitutionnelle. La Loi est rédigée en termes généraux dont le sens n'a été précisé que dans le règlement N.S. Reg. 152/89, par lequel ils ont été rattachés à des services médicaux particuliers. L'historique de la Loi, y compris son étude à l'assemblée législative et son rapport avec les règlements de mars, montre qu'elle a toujours été examinée en fonction des services médicaux auxquels elle s'appliquerait, et le débat sur cette loi a presque toujours porté sur l'un de ces services, soit l'avortement. La Loi et la liste de services insérée ultérieurement dans les règlements sont entrelacées depuis le début.

La situation est semblable à celle qui était en cause dans l'arrêt *Texada Mines Ltd. c. Attorney-General of British Columbia*, [1960] R.C.S. 713, où la Colombie-Britannique avait voté une loi prévoyant l'imposition d'une taxe sur le minéral ou les minéraux qui seraient extraits dans une [TRADUCTION] «région productrice». Le taux de la taxe, les minéraux assujettis à celle-ci et la région productrice visée devaient être désignés plus tard. Un règlement a été pris, désignant une certaine région «région productrice», désignant un seul minéral, soit le fer, et fixant le taux de la taxe. Notre Cour a étudié la loi et le règlement ensemble afin d'en déterminer la constitutionnalité et a conclu (après s'être référée aussi à des lois connexes, à l'historique de la loi et au contexte, y compris les efforts déployés dans le passé par la province pour encourager l'établissement de fonderies sur son territoire au moyen de ce qui représentait en réalité des taxes à l'exportation, la nature du marché du minerai de

attempt to encourage the establishment of an iron ore smelter by imposing a prohibitive export tax. The regulations gave concrete meaning and content to the statute and were indispensable to its classification for constitutional purposes.

fer et l'effet dissuasif de la taxe) que la loi constituait une tentative *ultra vires* d'encourager l'établissement d'une fonderie par l'imposition d'une taxe à l'exportation prohibitive. Le règlement donnait un sens et un contenu concrets à la loi et était indispensable pour sa qualification sur le plan constitutionnel.

In similar fashion, the statute and regulation are considered together in the following analysis. I will refer to them both together as "the legislation". Together, in my opinion, they constitute an indivisible attempt by the province to legislate in the area of criminal law.

De la même façon, la loi et le règlement sont examinés ensemble dans l'analyse qui suit. Je les appellerai «les textes législatifs». Pris ensemble, à mon avis, ils représentent une tentative indivisible de la part de la province de légiférer dans le domaine du droit criminel.

B. *Classification of Laws*

(1) "What's the 'Matter'?"

B. *La qualification des lois*

(1) «Quelle est la matière en cause?»

Classification of a law for purposes of federalism involves first identifying the "matter" of the law and then assigning it to one of the "classes of subjects" in respect to which the federal and provincial governments have legislative authority under ss. 91 and 92 of the *Constitution Act, 1867*. This process of classification is "an interlocking one, in which the British North America Act and the challenged legislation react on one another and fix each other's meaning": B. Laskin, "Tests for the Validity of Legislation: What's the 'Matter'?" (1955), 11 *U.T.L.J.* 114, at p. 127. Courts apply considerations of policy along with legal principle; the task requires "a nice balance of legal skill, respect for established rules, and plain common sense. It is not and never can be an exact science": F. R. Scott, *Civil Liberties and Canadian Federalism* (1959), at p. 26.

La qualification d'une loi dans le cadre du fédéralisme suppose premièrement l'identification de la «matière» visée, puis son rangement dans l'une des «catégories de sujets» relativement auxquels les gouvernements fédéral et provinciaux exercent leur autorité législative sous le régime des art. 91 et 92 de la *Loi constitutionnelle de 1867*. Ce processus de qualification est fait [TRADUCTION] «d'éléments qui s'entremêlent et dans ce processus, l'Acte de l'Amérique du Nord britannique et la loi contestée interagissent et déterminent le sens l'un de l'autre»: B. Laskin, «Tests for the Validity of Legislation: What's the «Matter»?» (1955), 11 *U.T.L.J.* 114, à la p. 127. Les tribunaux tiennent compte de considérations générales ainsi que des principes de droit; la tâche exige [TRADUCTION] «un délicat dosage de compétence de juriste, de respect des règles établies et de gros bon sens. Ce n'est pas et ce ne sera jamais une science exacte»: F. R. Scott, *Civil Liberties and Canadian Federalism* (1959), à la p. 26.

A law's "matter" is its leading feature or true character, often described as its pith and substance: *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580 (P.C.), at p. 587; see also *Whitbread v. Walley*, [1990] 3 S.C.R. 1273, at p. 1286. There is no single test for a law's pith and substance. The approach must be flexible and a technical, formalistic approach is to be avoided. See

La «matière» d'une loi est son idée maîtresse, souvent appelée son caractère véritable: *Union Colliery Co. of British Columbia c. Bryden*, [1899] A.C. 580 (C.P.), à la p. 587; voir aussi *Whitbread c. Walley*, [1990] 3 R.C.S. 1273, à la p. 1286. Il n'y a pas de critère unique du caractère véritable d'une loi. Il faut procéder avec souplesse et éviter tout formalisme. Voir Hogg, *Constitutional Law of*

Hogg, *Constitutional Law of Canada* (3rd ed. 1992), vol. 1, at p. 15-13. While both the purpose and effect of the law are relevant considerations in the process of characterization (see, e.g., *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 (P.C.) (the *Alberta Bank Taxation Reference*), at p. 130; *Starr v. Houlden*, [1990] 1 S.C.R. 1366, at pp. 1389, 1392), it is often the case that the legislation's dominant purpose or aim is the key to constitutional validity. Rand J. put it this way in *Switzman v. Elbling*, [1957] S.C.R. 285, at pp. 302-3:

> The detailed distribution made by ss. 91 and 92 places limits to direct and immediate purposes of provincial action . . . . The settled principle that calls for a determination of the "real character", the "pith and substance", of what purports to be enacted and whether it is "colourable" or is intended to effect its ostensible object, means that the true nature of the legislative act, its substance in purpose, must lie within s. 92 or some other endowment of provincial power.

See also *Carnation Co. v. Quebec Agricultural Marketing Board*, [1968] S.C.R. 238; *Canadian Indemnity Co. v. Attorney-General of British Columbia*, [1977] 2 S.C.R. 504, at p. 512; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at pp. 354-55, 357-58; and *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at pp. 744-45, 747 and 751 (Dickson C.J.), at p. 788 (Beetz J.), and at p. 807 (Wilson J.).

(2) Purpose and Effect

(a) *"Legal Effect" or Strict Legal Operation*

Evidence of the "effect" of legislation can be relevant in two ways: to establish "legal effect" and to establish "practical effect". The analysis of pith and substance necessarily starts with looking at the legislation itself, in order to determine its legal effect. "Legal effect" or "strict legal operation" refers to how the legislation as a whole affects the rights and liabilities of those subject to its terms, and is determined from the terms of the legislation itself. See Hogg, *supra*, at pp. 15-13 and 15-15. Legal effect is often a good indicator of

Canada (3e éd. 1992), vol. 1, à la p. 15-13. Bien que l'objet et l'effet de la loi soient des facteurs pertinents dans le processus de qualification (voir, p. ex., l'arrêt *Attorney-General for Alberta c. Attorney-General for Canada*, [1939] A.C. 117 (C.P.) (*Alberta Bank Taxation Reference*), à la p. 130; l'arrêt *Starr c. Houlden*, [1990] 1 R.C.S. 1366, aux pp. 1389 et 1392), il arrive souvent que l'objet ou le but principal de la loi soit l'élément clef de la constitutionnalité. Comme le dit le juge Rand dans l'arrêt *Switzman c. Elbling*, [1957] R.C.S. 285, aux pp. 302 et 303:

> [TRADUCTION] La répartition détaillée prévue aux art. 91 et 92 impose des limites aux fins directes et immédiates de l'action provinciale. [. . .] Le principe établi qui exige la détermination du «caractère véritable», de «l'essence et la substance», de ce qui est censé avoir été adopté comme loi et la question de savoir si le texte est «spécieux» ou est destiné à atteindre son objet ostensible, signifie que la nature véritable de l'acte législatif, son objet fondamental, doit relever de l'art. 92 ou de quelque autre attribution de pouvoirs provinciaux.

Voir également les arrêts *Carnation Co. c. Quebec Agricultural Marketing Board*, [1968] R.C.S. 238; *Canadian Indemnity Co. c. Procureur général de la Colombie-Britannique*, [1977] 2 R.C.S. 504, à la p. 512; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, aux pp. 354, 355, 357 et 358; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713, aux pp. 744, 745, 747 et 751 (le juge en chef Dickson), à la p. 788 (le juge Beetz) et à la p. 807 (le juge Wilson).

(2) L'objet et l'effet

a) *L'«effet juridique» ou l'application sur le strict plan du droit*

La preuve de l'«effet» d'un texte législatif peut être pertinente sous deux aspects: pour établir son «effet juridique» et pour établir son «effet pratique». L'analyse du caractère véritable commence nécessairement par l'examen du texte même, en vue d'en déterminer l'effet juridique. L'«effet juridique» ou l'«application sur le strict plan du droit» se rapporte à la manière dont le texte législatif dans son ensemble influe sur les droits et les obligations de ceux qui sont assujettis à ses dispositions, et est déterminé en fonction des termes

chief' at which the legislation is directed: *Alberta Bank Taxation Reference, supra*, at pp. 130-33. It also includes legislative history, in the sense of the events that occurred during drafting and enactment; as Ritchie J., concurring in *Reference re Anti-Inflation Act, supra*, wrote at p. 437, it is "not only permissible but essential" to consider the material the legislature had before it when the statute was enacted.

The former exclusionary rule regarding evidence of legislative history h as gradually been relaxed (*Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, at pp. 317-19), but until recently the courts have balked at admitting evidence of legislative debates and speeches. Such evidence was described by Dickson J. in *Reference re Residential Tenancies Act, 1979, supra*, at p. 721 as "inadmissible as having little evidential weight", and was excluded in *Reference re Upper Churchill Water Rights Reversion Act, supra*, at p. 319, and *Attorney General of Canada v. Reader's Digest Association (Canada) Ltd.*, [1961] S.C.R. 775. The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation. Indeed, its admissibility in constitutional cases to aid in determining the background and purpose of legislation now appears well established. See *Reference re Anti-Inflation Act, supra*, at p. 470, *per* Beetz J. (dissenting); *R. v. Edwards Books and Art Ltd., supra*, at p. 749; *Starr v. Houlden, supra*, at pp. 1375-76, 1404 (distribution of powers); *R. v. Whyte*, [1988] 2 S.C.R. 3, at pp. 24-25; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at pp. 983-84 (*Charter*); and *R. v. Mercure*, [1988] 1 S.C.R. 234, at pp. 249-251 (language rights). I would adopt the following passage from

preuve du «mal» que le texte vise à corriger: *Alberta Bank Taxation Reference*, précité, aux pp. 130 à 133. Ils comprennent aussi l'historique du texte, c'est-à-dire les circonstances de sa rédaction et de son adoption; comme le dit le juge Ritchie dans ses motifs concordants dans le *Renvoi relatif à la Loi anti-inflation*, précité, à la p. 437, il nous est «non seulement permis, mais nécessaire» de prendre en considération les renseignements que le législateur avait devant lui lorsqu'il l'a adopté.

L'ancienne règle d'exclusion touchant la preuve de l'historique d'un texte législatif a été graduellement assouplie (*Renvoi relatif à la Upper Churchill Water Rights Reversion Act*, [1984] 1 R.C.S. 297, aux pp. 317 à 319), mais jusqu'à récemment, les tribunaux ont hésité à admettre la preuve des débats et des discours devant le corps législatif. Dans le *Renvoi relatif à la Loi de 1979 sur la location résidentielle*, précité, à la p. 721, le juge Dickson a dit que ces discours étaient «irrecevables vu leur faible valeur probante» et ils ont été exclus dans le *Renvoi relatif à la Upper Churchill Water Rights Reversion Act*, précité, à la p. 319 et dans l'arrêt *Attorney General of Canada c. Reader's Digest Association (Canada) Ltd.*, [1961] R.C.S. 775. La principale critique dont a été l'objet ce type de preuve a été qu'elle ne saurait représenter l'«intention» de la législature, personne morale, mais c'est aussi vrai pour d'autres formes de contexte d'adoption d'une loi. À la condition que le tribunal n'oublie pas que la fiabilité et le poids des débats parlementaires sont limités, il devrait les admettre comme étant pertinents quant au contexte et quant à l'objet du texte législatif. En effet, il semble désormais bien établi qu'ils sont admissibles dans les affaires constitutionnelles car ils aident le tribunal à déterminer le contexte et l'objet du texte. Voir le *Renvoi relatif à la Loi anti-inflation*, précité, à la p. 470, le juge Beetz (dissident); *R. c. Edwards Books and Art Ltd.*, précité, à la p. 749; *Starr c. Houlden*, précité, aux pp. 1375, 1376 et 1404 (partage des pouvoirs); *R. c. Whyte*, [1988] 2 R.C.S. 3, aux pp. 24 et 25; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, aux pp. 983 et 984 (*Charte*), et *R. c. Mercure*, [1988] 1 R.C.S. 234, aux pp. 249 à 251 (droits linguistiques). Je souscris au passage qui suit, tiré de

Hogg, supra, as an accurate summary of the state of the law on this point (at pp. 15-14 and 15-15):

> In determining the "purpose" of a statute in this special sense, there is no doubt as to the propriety of reference to the state of law before the statute and the defect in the law (the "mischief") which the statute purports to correct. These may be referred to under ordinary rules of statutory interpretation. Until recently, there was doubt about the propriety of reference to parliamentary debates (Hansard) and other sources of the "legislative history" of the statute. The relevance of legislative history is obvious: it helps to place the statute in its context, gives some explanation of its provisions, and articulates the policy of the government that proposed it. Legislative history has usually been held inadmissible in Canada under ordinary rules of statutory interpretation. But the interpretation of a particular provision of a statute is an entirely different process from the characterization of the entire statute for purposes of judicial review. There seems to be no good reason why legislative history should not be resorted to for the latter purpose, and, despite some earlier authority to the contrary, it is now established that reports of royal commissions and law reform commissions, government policy papers and even parliamentary debates are indeed admissible. [Footnotes omitted.]

I would therefore hold, as did Freeman J.A. in the Court of Appeal, that the excerpts from Hansard were properly admitted by the trial judge in this case. In a nutshell, this evidence demonstrates that members of all parties in the House understood the central feature of the proposed law to be prohibition of Dr. Morgentaler's proposed clinic on the basis of a common and almost unanimous opposition to abortion clinics *per se*. I will return to the evidence below.

(c) *Practical Effect*

In the present case the Attorney General of Nova Scotia submits that the evidence shows that the future administration of the Act will not result in a restriction on abortion services; the respondent submits the opposite. This raises the question of the relevance of evidence of practical effect. I have noted that the legal effect of the terms of legisla-

Hogg, *op. cit.*, qui constitue un résumé exact de l'état actuel du droit sur ce point (aux pp. 15-14 et 15-15):

> [TRADUCTION] Il n'y a aucun doute que, pour déterminer l'«objet» d'une loi dans ce sens particulier, le tribunal peut à bon droit se référer à l'état du droit avant l'adoption de la loi et au défaut de la loi (au «mal») qu'elle vise à corriger. Les règles ordinaires d'interprétation des lois lui permettent de s'y référer. Jusqu'à récemment, il n'était pas certain qu'il pouvait se reporter aux débats parlementaires (au compte rendu officiel) et à d'autres sources concernant l'«historique de la loi». La pertinence de l'historique de la loi est évidente: elle aide à situer la loi dans son contexte, donne certaines explications sur ses dispositions et précise la position du gouvernement qui l'a proposée. Les tribunaux canadiens ont habituellement jugé inadmissible l'historique de la loi suivant les règles ordinaires d'interprétation. Mais l'interprétation d'une disposition particulière est un processus tout à fait différent de la qualification d'une loi dans son ensemble aux fins du contrôle judiciaire. Il semble qu'il n'y ait aucune bonne raison de ne pas se reporter à l'historique de la loi pour cette dernière fin et, malgré une certaine jurisprudence ancienne qui s'y opposait, il est maintenant bien établi que les rapports de commissions d'enquête et de commissions de réforme du droit, les énoncés de politique gouvernementaux et même les débats parlementaires sont en effet admissibles. [Renvois omis.]

Je suis donc d'avis, comme le juge Freeman de la Cour d'appel, que c'est à bon droit que le juge du procès a admis les extraits du Hansard en l'espèce. En un mot, cette preuve montre que les députés de tous les partis à l'assemblée comprenaient que l'idée maîtresse de la loi proposée était l'interdiction de la clinique du Dr Morgentaler parce que l'opposition à toute clinique d'avortement quelle qu'elle soit était générale, voire quasi unanime. Je reviendrai à cette preuve.

c) *L'effet pratique*

En l'espèce, le procureur général de la Nouvelle-Écosse soutient que la preuve montre que l'application future de la Loi n'entraînera pas de restriction des services d'avortement; l'intimé soutient le contraire. Cela soulève la question de la pertinence de la preuve de l'effet pratique. J'ai fait observer que l'effet juridique des termes du texte

tion is always relevant. Barring material amendments, it does not change over time. The practical effect of legislation, on the other hand, has a less secure status in constitutional analysis. Practical effect consists of the actual or predicted results of the legislation's operation and administration (see, e.g., *Saumur*, *supra*). Courts are often asked to adjudicate the constitutionality of legislation which is not yet in force or which, as here, has only been in force a short time. In such cases any prediction of future practical effect is necessarily short-term, since the court is not equipped to predict accurately the future consequential impact of legislation.

In the *Anti-Inflation Act* reference, *supra*, Laskin C.J. was willing to admit evidence of the circumstances in which the legislation was passed (at p. 391), but did not admit evidence of its predicted operation and effect, finding that "no general principle of admissibility or inadmissibility can or ought to be propounded by this Court" (at p. 389). The difficulty with practical effect is that whereas in one context practical effect may reveal the true purpose of the legislation (see *Saumur*, *supra*), in another context it may be incidental and entirely irrelevant even though it is drastic (*Attorney-General for Saskatchewan v. Attorney-General for Canada*, [1949] A.C. 110 (P.C.), *Canadian Indemnity Co. v. Attorney-General of British Columbia*, *supra*, *Whitbread v. Walley*, *supra*, at p. 1286); and in yet another context provincial and federal enactments with the same practical impact may both stand if the matter to which they relate has two "aspects" of roughly equivalent importance, one within federal and the other within provincial competence (*Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.), at p. 130; *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749).

In the majority of cases the only relevance of practical effect is to demonstrate an *ultra vires* purpose by revealing a serious impact upon a matter

législatif est toujours pertinent. Sauf si des modifications importantes sont apportées, cet effet ne change pas au fil des ans. En revanche, l'importance de l'effet pratique d'un texte législatif dans l'analyse constitutionnelle est moins certaine. L'effet pratique consiste dans le résultat réel ou prévu de l'application du texte (voir, p. ex., l'arrêt *Saumur*, précité). Les tribunaux sont souvent appelés à statuer sur la constitutionnalité de textes législatifs qui ne sont pas encore en vigueur ou qui, comme en l'espèce, ne le sont que depuis peu de temps. En pareil cas, toute prédiction de l'effet pratique futur n'est possible qu'à court terme, car le tribunal n'a pas les compétences pour prédire exactement les conséquences futures du texte.

Dans le *Renvoi relatif à la Loi anti-inflation*, précité, le juge en chef Laskin était disposé à admettre la preuve des circonstances de l'adoption de la loi (à la p. 391), mais il n'a pas admis la preuve de son application et de son effet prévus, estimant que «la Cour doit s'abstenir de formuler un principe général sur l'admissibilité de la preuve extrinsèque» (à la p. 389). Ce qui est difficile dans le cas de l'effet pratique c'est que, tandis que dans un contexte donné, l'effet pratique d'un texte législatif peut indiquer son objet véritable (voir l'arrêt *Saumur*, précité), dans un autre, il peut être accessoire et tout à fait dépourvu de pertinence, même s'il est radical (*Attorney-General for Saskatchewan c. Attorney-General for Canada*, [1949] A.C. 110, (C.P.); *Canadian Indemnity Co. c. Procureur général de la Colombie-Britannique*, précité; *Whitbread c. Walley*, précité, à la p. 1286); et dans un autre encore, une loi provinciale et une loi fédérale ayant le même effet pratique peuvent être toutes deux tenues pour valides si la matière à laquelle elles se rapportent comporte deux «aspects» d'importance à peu près équivalente, l'un relevant de la compétence du fédéral l'autre de la compétence de la province (*Hodge c. The Queen* (1883), 9 App. Cas. 117 (C.P.), à la p. 130; *Bell Canada c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 749).

Dans la majorité des cas, l'effet pratique ne sera pertinent que s'il témoigne d'un objet *ultra vires*, c'est-à-dire s'il révèle une conséquence grave sur

outside the enacting body's legislative authority and thus either contradicting an appearance of *intra vires* or confirming an impression of *ultra vires*. It was in light of the difficult status of practical effect (particularly as exemplified in *Walter v. Attorney General of Alberta*, [1969] S.C.R. 383, wherein provincial legislation banning communal landholding was held *intra vires* even though the legislation drastically infringed the Hutterite community's religious freedom) that Wilson J., concurring in *R. v. Big M Drug Mart Ltd., supra*, held that legislative purpose is the focal point in distribution of powers analysis. One of the issues in that case was whether the *Lord's Day Act*, R.S.C. 1970, c. L-13, was enacted pursuant to Parliament's criminal law power. Dickson J. (as he then was), writing for the majority, held that the Act was valid criminal law because its purpose was to compel religious observance of a Sunday sabbath (at p. 352), and emphasized that his conclusion depended on the identification of the purpose of the Act (at p. 355). Wilson J. held, in a passage not in conflict with Dickson J.'s approach to division of powers, that the pith and substance of legislation is determined through "an examination of the primary legislative purpose with a view to distinguishing the central thrust of the enactment from its merely incidental effects" (at p. 357). She concluded, at p. 358, that:

> Only when the effects of the legislation so directly impinge on some other subject matter as to reflect some alternative or ulterior purpose do the effects themselves take on analytic significance.

If, however, pith and substance can be determined without reference to evidence of practical effect, the absence of evidence that the legislation has a practical effect in line with this characterization will not displace the conclusion as to the legislation's invalidity. In such a case, "evidence as to the likely effect of legislation would not add anything useful to the task of characterization, but would merely bear on the wisdom or efficacy of

une matière qui ne relève pas de la compétence du corps législatif qui a adopté le texte et s'il contredit ainsi un objet apparemment *intra vires* ou s'il confirme l'impression que le texte est *ultra vires*. C'est à cause de la difficulté de la détermination du rôle de l'effet pratique (comme l'illustre en particulier l'arrêt *Walter c. Attorney General of Alberta*, [1969] R.C.S. 383, dans lequel une loi provinciale interdisant la propriété collective de terres a été déclarée *intra vires* même si elle portait gravement atteinte à la liberté de religion d'une communauté huttérite) que, dans l'arrêt *R. c. Big M Drug Mart Ltd.*, précité, le juge Wilson, qui a souscrit à l'avis de ses collègues, a décidé que l'objet d'un texte législatif est au centre de l'analyse fondée sur le partage des compétences. Dans cette affaire, il s'agissait entre autres de décider si la *Loi sur le dimanche*, S.R.C. 1970, ch. L-13, avait été adoptée conformément au pouvoir du Parlement en matière de droit criminel. Le juge Dickson (plus tard Juge en chef), au nom de la majorité, a décidé que la loi relevait bien du droit criminel parce qu'elle avait pour objet l'observance obligatoire du sabbat (dimanche) (à la p. 352) et il a souligné que sa conclusion reposait sur le fait que l'objet de la loi avait été identifié (à la p. 355). Dans un passage qui ne s'opposait pas au point de vue du juge Dickson sur le partage des compétences, le juge Wilson a conclu que le caractère véritable de la loi est déterminé «par un examen de l'objet premier de la loi afin de distinguer la portée principale de cette loi de ses effets purement secondaires» (à la p. 357). Elle conclut, à la p. 358:

> Ce n'est que lorsqu'une loi a des effets qui empiètent si directement sur un autre domaine qu'elle doit avoir un objet dissimulé que lesdits effets prennent eux-mêmes de l'importance aux fins de l'analyse . . .

Si, toutefois, le caractère véritable peut être déterminé sans qu'il soit tenu compte de la preuve de l'effet pratique, l'absence de preuve que le texte législatif a un effet pratique correspondant à sa qualification n'écarte pas la conclusion quant à son invalidité. Dans un tel cas, [TRADUCTION] «la preuve de l'effet probable de la loi ne serait d'aucune utilité par rapport à la tâche de qualifier la loi, mais concernerait simplement la sagesse ou l'effi-

the statute. In those cases the evidence is not relevant" (Hogg, *supra*, at p. 15-16). See also *Reference re Anti-Inflation Act, supra*, at pp. 424-25. Such evidence will not change the legislation's "matter", and only goes to the effectiveness of the statute to fulfil its object. The court is not concerned with the wisdom of a statute, and the government surely cannot justify legislation already determined to be *ultra vires* by arguing that it will not realize its aim or objective. Moreover, as I have said, legislation is often considered before experience has shown its actual impact, and prediction of future impact is necessarily short-term. I would adapt what La Forest J. said in another context (*R. v. Edwards Books and Art Ltd., supra*, at p. 803) to this situation: "[i]t is undesirable that an Act be found constitutional today and unconstitutional tomorrow" simply because of the absence of conclusive evidence as to future impact or the possibility of a change in practical effect.

cacité de la loi. En pareil cas, la preuve n'est pas pertinente» (Hogg, *op. cit.*, à la p. 15-16). Voir aussi le *Renvoi relatif à la Loi anti-inflation*, précité, aux pp. 424 et 425. Cette preuve ne change pas la «matière» que vise le texte législatif et ne se rapporte qu'à l'efficacité de la loi pour ce qui est d'atteindre son objectif. Le tribunal ne s'intéresse pas à la sagesse de la loi et le gouvernement ne saurait certainement pas justifier un texte législatif déjà déclaré *ultra vires* en affirmant qu'il n'atteindra pas son but ou son objectif. Au surplus, je le répète, le texte est souvent étudié avant qu'on en connaisse les conséquences réelles et on ne peut nécessairement prédire son effet futur qu'à court terme. J'adapterais à la situation en cause ce qu'a dit le juge La Forest dans un autre contexte (arrêt *R. c. Edwards Books and Art Ltd.*, précité, à la p. 803): «[i]l n'est pas souhaitable qu'une loi soit jugée constitutionnelle aujourd'hui et inconstitutionnelle demain» simplement en raison de l'absence de preuve concluante quant à son effet futur ou quant à la possibilité d'un changement dans son effet pratique.

(3) Scope of the Applicable Heads of Power

The issue we face in the present case is whether Nova Scotia has, by the present legislation, regulated the place for delivery of a medical service with a view to controlling the quality and nature of its health care delivery system, or has attempted to prohibit the performance of abortions outside hospitals with a view to suppressing or punishing what it perceives to be the socially undesirable conduct of abortion. The former would place the legislation within provincial competence; the latter would make it criminal law.

(a) *The Criminal Law*

Section 91(27) of the *Constitution Act, 1867* gives the federal Parliament exclusive legislative jurisdiction over criminal law in the widest sense of the term: *Attorney General for Ontario v. Hamilton Street Railway Co.*, [1903] A.C. 524 (P.C.), at p. 529. In *Proprietary Articles Trade Association v. Attorney General for Canada*, [1931] A.C. 310 (P.C.), at p. 324, the Judicial Committee took this

(3) La portée des chefs de compétence applicables

La question à trancher en l'espèce est de savoir si la Nouvelle-Écosse a, par les textes législatifs en cause, fixé le lieu où des services médicaux doivent être fournis afin de contrôler la qualité et la nature de son système de santé ou si elle a tenté d'interdire de pratiquer un avortement ailleurs que dans un hôpital afin de supprimer ou de punir l'avortement, qu'elle perçoit comme une conduite socialement indésirable. Dans la première hypothèse, le texte relève de la compétence de la province; dans la seconde, il touche le droit criminel.

a) *Le droit criminel*

Le paragraphe 91(27) de la *Loi constitutionnelle de 1867* attribue au Parlement la compétence législative exclusive sur le droit criminel au sens le plus large du terme: *Attorney General for Ontario c. Hamilton Street Railway Co.*, [1903] A.C. 524 (C.P.), à la p. 529. Dans l'arrêt *Proprietary Articles Trade Association c. Attorney General for Canada*, [1931] A.C. 310 (C.P.), à la p. 324, le

to include any act prohibited with penal consequences, but this interpretation was too generous and the missing ingredient was supplied by Rand J. in his classic formulation of the scope of the tests for criminal law in *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 (the *Margarine Reference*), at pp. 49-50:

> . . . we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.
>
> . . .
>
> Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law. . . .

The presence or absence of a criminal public purpose or object is thus pivotal: see *Lord's Day Alliance of Canada v. Attorney General of British Columbia*, [1959] S.C.R. 497, at pp. 508-9; *Goodyear Tire and Rubber Co. of Canada v. The Queen*, [1956] S.C.R. 303, at p. 313; and *Boggs v. The Queen*, [1981] 1 S.C.R. 49. This is not contradicted by the decision in *Starr v. Houlden, supra*. In that case the province of Ontario established a commission of inquiry to investigate and find whether Patricia Starr and Tridel Corporation had, in their dealings with public officials, conferred benefits, advantages or rewards of any kind on any public official. The terms of reference specified individuals by name and used language virtually indistinguishable from that of s. 121(*b*) of the *Criminal Code*. Lamer J. (as he then was), speaking for the majority, held the inquiry *ultra vires*, at p. 1402:

> . . . it is the combined and cumulative effect of the names together with the incorporation of the *Criminal Code* offence that renders this inquiry *ultra vires* the province. The terms of reference name private individuals and do so in reference to language that is virtually

Comité judiciaire du Conseil privé a émis l'avis que ce terme incluait tout acte interdit, assorti de conséquences pénales, mais cette interprétation était trop libérale et l'élément manquant a été fourni par le juge Rand dans sa formulation classique de la portée des critères du droit criminel dans *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] R.C.S. 1 (*Renvoi sur la margarine*), aux pp. 49 et 50:

> [TRADUCTION] . . . nous pouvons à bon droit rechercher quel mal ou effet public préjudiciable ou indésirable est visé par la loi. Cet effet peut viser des intérêts sociaux, économiques ou politiques; et la législature a eu en vue la suppression du mal ou la sauvegarde des intérêts menacés.
>
> . . .
>
> L'interdiction est-elle alors édictée en vue d'un intérêt public qui peut lui donner un fondement la rattachant au droit criminel? Paix, sécurité, santé, moralité, ordre public: telles sont les fins visées ordinairement mais non exclusivement par ce droit-là . . .

La présence ou l'absence d'un objet ou objectif public touchant le droit criminel est donc centrale: voir *Lord's Day Alliance of Canada c. Attorney General of British Columbia*, [1959] R.C.S. 497, aux pp. 508 et 509; *Goodyear Tire and Rubber Co. of Canada c. The Queen*, [1956] R.C.S. 303, à la p. 313; *Boggs c. La Reine*, [1981] 1 R.C.S. 49. L'arrêt *Starr c. Houlden*, précité, ne contredit pas ce principe. Dans cette affaire, la province d'Ontario avait établi une commission d'enquête chargée de vérifier si Patricia Starr et Tridel Corporation avaient, dans le cadre de leurs relations d'affaire avec des fonctionnaires, accordé des bénéfices, avantages ou récompenses quelconques à un fonctionnaire. Le mandat désignait des personnes nommément et contenait des termes presque identiques à ceux de l'al. 121*b*) du *Code criminel*. Le juge Lamer (maintenant Juge en chef), au nom de la majorité, a conclu, à la p. 1402, que l'enquête excédait la compétence de la province:

> C'est [. . .] l'effet combiné et cumulatif des noms et de l'incorporation de l'infraction visée au *Code criminel* qui rend l'enquête *ultra vires* de la province. Le mandat désigne des personnes nommément et le fait en utilisant des termes qui sont presque identiques à ceux de la dis-

indistinguishable from the parallel *Criminal Code* provision. Those same terms of reference require the Commissioner to investigate and make findings of fact that would in effect establish a *prima facie* case against the named individuals sufficient to commit those individuals to trial for the offence in s. 121 of the *Code*. The net effect of the inquiry, although perhaps not intended by the province, is that it acts as a substitute for a proper police investigation, and for a preliminary inquiry . . . .

Lamer J. found the circumstances surrounding the establishment of the inquiry and the legal effect of its terms of reference to be overpowering and determinative of the inquiry's criminal character. That the province may not have intended to usurp the criminal process of an investigation and preliminary inquiry into specific offences by named individuals was irrelevant. That does not mean, however, that the purpose or object of the inquiry was irrelevant. It was simply a case in which the legal effect of the terms of reference was paramount in establishing a criminal public purpose within Rand J.'s tests. In sum, Lamer J. found that the inquiry offended the principle that the province cannot use an inquiry "for the purpose of gathering sufficient evidence to lay charges or to gather sufficient evidence to establish a *prima facie* case" (at pp. 1411-12).

(b) *Provincial Health Jurisdiction*

The provinces have general legislative jurisdiction over hospitals by virtue of s. 92(7) of the *Constitution Act, 1867*, and over the medical profession and the practice of medicine by virtue of ss. 92(13) and (16). Section 92(16) also gives them general jurisdiction over health matters within the province: *Schneider v. The Queen*, [1982] 2 S.C.R. 112, at p. 137. The *Schneider* case gives an indication of the watershed between valid health legislation and criminal law. In that case, British Columbia's *Heroin Treatment Act* was held to be *intra vires* because its object was not to punish narcotics addicts, but to treat their addiction and ensure their safety and security. Narcotic addiction

position correspondante du *Code criminel*. Le même mandat enjoint au commissaire de faire enquête et de constater des faits qui constitueraient en réalité, contre les personnes désignées, une preuve *prima facie* suffisante pour obtenir le renvoi de ces personnes à leur procès pour infraction à l'art. 121 du *Code*. Même si la province n'a peut-être pas visé ce résultat, l'enquête a pour conséquence ultime d'équivaloir à une enquête de police et à une enquête préliminaire . . .

Le juge Lamer a conclu que les circonstances qui ont donné lieu à la création de la commission et l'effet juridique de son mandat étaient concluants et déterminants pour ce qui était du caractère criminel de l'enquête. Le fait que la province n'a peut-être pas voulu usurper les fonctions inhérentes à une enquête policière et à une enquête préliminaire sur des individus nommément désignés relativement à des infractions criminelles précises n'était pas pertinent. Cela ne signifie pas, cependant, que l'objet ou le but de l'enquête n'étaient pas pertinents. Il s'agissait simplement d'une affaire où l'effet juridique du mandat présentait une importance primordiale pour l'établissement d'un objectif public touchant le droit criminel selon les critères énoncés par le juge Rand. En résumé, le juge Lamer a conclu que l'enquête portait atteinte au principe selon lequel une province ne peut utiliser une enquête «dans le but de rassembler suffisamment d'éléments de preuve pour porter des accusations ou pour établir une preuve *prima facie*» (à la p. 1412).

b) *La compétence de la province en matière de santé*

Le paragraphe 92(7) de la *Loi constitutionnelle de 1867* accorde aux provinces la compétence législative générale sur les hôpitaux et les par. 92(13) et (16) leur attribuent la compétence sur la profession médicale et sur la pratique de la médecine. Le paragraphe 92(16) leur accorde aussi la compétence générale en matière de santé sur leur territoire: *Schneider c. La Reine*, [1982] 2 R.C.S. 112, à la p. 137. L'affaire *Schneider* donne une indication de la ligne de démarcation entre un texte législatif valide sur la santé et une loi en matière criminelle. Dans cette affaire, l'*Heroin Treatment Act* de la Colombie-Britannique a été jugée *intra vires* parce que son objet n'était pas de punir les

was targeted not as a public evil but as a "physiological condition necessitating both medical and social intervention" (at p. 138). Accordingly, if the central concern of the present legislation were medical treatment of unwanted pregnancies and the safety and security of the pregnant woman, not the restriction of abortion services with a view to safeguarding the public interest or interdicting a public harm, the legislation would arguably be valid health law enacted pursuant to the province's general health jurisdiction.

toxicomanes, mais de les traiter et de veiller à leur sécurité. La toxicomanie n'y était pas visée en tant que fléau social mais en tant qu'«état physiologique qui appelle une intervention à la fois médicale et sociale» (à la p. 138). Par conséquent, si la préoccupation centrale des textes législatifs en l'espèce était le traitement médical des grossesses non désirées et la sécurité des femmes enceintes, et non la limitation des services d'avortement destinée à protéger l'intérêt public ou à interdire un mal public, ou pourrait soutenir que les textes constituent une loi valide sur la santé, édictée conformément à la compétence générale de la province en matière de santé.

In addition, there is no dispute that the heads of s. 92 invoked by the appellant confer on the provinces jurisdiction over health care in the province generally, including matters of cost and efficiency, the nature of the health care delivery system, and privatization of the provision of medical services.

En outre, tous sont d'accord pour dire que les chefs de compétence de l'art. 92 invoqués par l'appelante attribuent aux provinces la compétence sur les soins de santé dans la province en général, y compris les questions de coûts et d'efficacité, la nature du système de santé et la privatisation des services médicaux.

(c) *The Regulation of Abortion*

c) *La réglementation de l'avortement*

In the U.K. and Canada, the prohibition of abortion with penal consequences has long been considered a subject for the criminal law. As early as the mid-nineteenth century, with the adoption of legislation imitating *Lord Ellenborough's Act* (U.K.), 43 Geo. 3, c. 58, through the time of Confederation and up to the 1969 amendments to the *Criminal Code* which introduced the relieving portion of s. 251 (*Criminal Law Amendment Act, 1968-69*, S.C. 1968-69, c. 38, s. 18), the criminal law in Canada prohibited abortions with penal consequences; before the introduction of the relieving portion of s. 251 there was no such thing as a non-criminal abortion. As Dickson J. (as he then was) said in *Morgentaler (1975), supra*, at p. 672, "since Confederation, and indeed before, the law of Canada has regarded as criminal, interference with pregnancy, however early it may take place . . . ."

Au Royaume-Uni et au Canada, l'interdiction de l'avortement assortie de conséquences pénales a longtemps été tenue pour une question de droit criminel. Dès le milieu du XIX^e^ siècle, avec l'adoption de la loi imitant la *Lord Ellenborough's Act* (R.-U.), 43 Geo. 3, ch. 58, jusqu'à l'époque de la Confédération et aux modifications apportées en 1969 au *Code criminel*, introduisant la disposition d'exemption de l'art. 251 (*Loi de 1968-69 modifiant le droit pénal*, S.C. 1968-69, ch. 38, art. 18), le droit criminel canadien a comporté une interdiction de l'avortement assortie de conséquences pénales; avant l'introduction de la disposition d'exemption de l'art. 251, l'avortement non criminel n'existait pas. Comme le dit le juge Dickson (plus tard Juge en chef) dans l'arrêt *Morgentaler (1975)*, précité, à la p. 672: «depuis la Confédération, et même avant, la loi canadienne a toujours considéré comme un crime le fait d'interrompre la grossesse, même à ses débuts . . .»

Section 251 of the *Criminal Code* was a valid exercise of the criminal law power. Why? In *Morgentaler (1975), supra*, Dr. Morgentaler

L'article 251 du *Code criminel* représentait un exercice valide du pouvoir de légiférer en matière criminelle. Pourquoi? Dans l'arrêt *Morgentaler*

argued that s. 251 was an encroachment on provincial legislative power in relation to hospitals and the regulation of the profession of medicine and the practice of medicine, but this argument was dismissed unanimously from the bench without hearing from the Crown. Laskin C.J., who dissented as to the result, was the only judge who gave reasons for the Court's rejection of the argument that s. 251 was legislation for the protection of a pregnant woman's health (at p. 626):

> This, however, is to attribute to Parliament a particular, indeed exclusive concern under s. 251 with health, to the exclusion of any other purpose that would make it a valid exercise of the criminal law power.

He held, on the contrary, at p. 627, that s. 251 was well within Rand J.'s tests for criminal law in the *Margarine Reference, supra*, because:

> What is patent on the face of the prohibitory portion of s. 251 is that Parliament has in its judgment decreed that interference by another, or even by the pregnant woman herself, with the ordinary course of conception is socially undesirable conduct subject to punishment.

The presence of the dispensing provisions in s. 251 was explained on the basis that "Parliament may determine what is not criminal as well as what is, and may hence introduce dispensations or exemptions in its criminal legislation" (at p. 627). Finally, in so far as s. 251 had "any relationship to the establishment of hospitals or the regulation of the medical profession or the practice thereof," Laskin C.J. held this relationship to be "so incidental as to be little short of ephemeral" (at p. 628).

In *Morgentaler (1988), supra*, this Court unanimously reaffirmed the holding that s. 251 was valid criminal law for purposes of the distribution of powers. Beetz J. (with whom Estey J. concurred), at pp. 82 and 122-23, and Wilson J., at p. 181, held that while s. 251 had as an ancillary objective the protection of the life or health of pregnant women, its principal objective was the

(1975), précité, le Dr Morgentaler a soutenu que cet article portait atteinte au pouvoir législatif des provinces relativement aux hôpitaux et à la réglementation de la profession et de la pratique médicales, mais notre Cour a rejeté cet argument à l'unanimité à l'audience sans entendre les plaidoiries du ministère public. Le juge en chef Laskin, dissident quant au résultat, a été le seul juge à donner des motifs pour le rejet par la Cour de l'argument voulant que l'art. 251 visait la protection de la santé de la femme enceinte (à la p. 626):

> Mais cela revient à prêter au Parlement une préoccupation particulière, à vrai dire exclusive, pour la santé, à l'exclusion de tout autre motif qui ferait de l'article un exercice valide du pouvoir de légiférer en matière criminelle.

Il a conclu, au contraire, à la p. 627, que l'art. 251 répondait très bien aux critères énoncés par le juge Rand au regard du droit criminel dans le *Renvoi sur la margarine*, précité, pour la raison suivante:

> Ce qui est évident à la lecture de la partie de l'art. 251 qui porte interdiction, c'est que le Parlement, exerçant son jugement, a décrété que l'intervention d'une autre personne, voire de la mère elle-même, dans le cours ordinaire de la conception constitue une conduite socialement indésirable et passible de sanctions.

Il explique la présence des dispositions d'exemption à l'art. 251 par le principe que «le Parlement peut déterminer ce qui n'est pas criminel aussi bien que ce qui l'est, et qu'il peut par conséquent introduire dans ses lois pénales des dispenses ou des immunités» (à la p. 627). Pour terminer, le juge en chef Laskin conclut que, dans la mesure où l'art. 251 a «quelque relation avec l'établissement d'hôpitaux ou la réglementation de la profession ou de la pratique médicale, cette relation est tellement incidente qu'elle en est presque illusoire» (à la p. 628).

Dans l'arrêt *Morgentaler (1988)*, précité, notre Cour a réitéré à l'unanimité sa conclusion que l'art. 251 était une loi valide en matière criminelle aux fins du partage des pouvoirs. Le juge Beetz (avec l'appui du juge Estey), aux pp. 82, 122 et 123, et le juge Wilson, à la p. 181, ont conclu que, si l'art. 251 avait pour objectif secondaire la protection de la vie et de la santé de la femme

protection of the state interest in the foetus. (I would note that although in this case the objective of the legislation was also discussed in the context of the *Charter*, a statute's "objective" for *Charter* purposes necessarily reflects its "purpose" for distribution of powers purposes: *R. v. Big M Drug Mart Ltd., supra*, at pp. 353, 361-62.) Beetz J. held, at pp. 128-29, that this made it a valid exercise of the criminal law power. On the other hand, Dickson C.J. (Lamer J., as he then was, concurring), at p. 75, and McIntyre J. (dissenting, La Forest J. concurring), at pp. 135 and 156, held that the objective of the section was to balance the interests of the foetus and the pregnant woman. McIntyre J. held, at p. 156, that this objective made the section a valid exercise of the criminal law power. Dickson C.J. and Wilson J. did not give reasons for finding the section *intra vires*.

enceinte, son objectif premier était la protection de l'intérêt de l'État dans le fœtus. (Je ferai remarquer que, bien que dans la présente espèce, l'objectif des textes législatifs ait été examiné dans le contexte de la *Charte*, l'objectif d'une loi pour l'application de la *Charte* reflète nécessairement son «objet» aux fins du partage des pouvoirs: arrêt *R. c. Big M Drug Mart Ltd.*, précité, aux pp. 353, 361 et 362.) Aux pages 128 et 129, le juge Beetz a conclu qu'il constituait pour cela un exercice valide du pouvoir relatif au droit criminel. En revanche, le juge en chef Dickson (avec l'appui du juge Lamer (maintenant Juge en chef)), à la p. 75, et le juge McIntyre (dissident et à l'avis duquel le juge La Forest a souscrit), aux pp. 135 et 156, ont conclu que l'objectif de l'article était d'équilibrer les intérêts du fœtus et ceux de la femme enceinte. À la p. 156, le juge McIntyre a conclu qu'en raison de cet objectif, l'article constituait un exercice valide du pouvoir de légiférer en matière criminelle. Le juge en chef Dickson et le juge Wilson n'ont pas donné de motifs au soutien de leur conclusion que l'article était *intra vires*.

The two *Morgentaler* decisions focus attention on the purpose or concern of abortion legislation to determine if it is truly criminal law: Is the performance or procurement of abortion prohibited as socially undesirable conduct? Is protecting the state interest in the foetus or balancing the interests of the foetus against those of women seeking abortions a primary objective of the legislation? Is the protection of the woman's health only an ancillary concern? And are other provincial concerns such as the establishment of hospitals or the regulation of the medical profession or the practice thereof merely incidental?

Les deux arrêts *Morgentaler* mettent l'accent sur l'objet des dispositions relatives à l'avortement ou sur la préoccupation du législateur, lorsqu'il s'agit de déterminer si la loi touche vraiment le droit criminel: Le fait de pratiquer ou de procurer un avortement est-il interdit en tant qu'acte socialement indésirable? Protéger l'intérêt de l'État dans le fœtus ou équilibrer les intérêts du fœtus et ceux des femmes qui veulent avorter sont-ils un objectif premier des dispositions? La protection de la santé de la femme est-elle seulement une préoccupation secondaire? Les autres préoccupations de la province, comme l'établissement d'hôpitaux ou la réglementation de la profession ou de la pratique médicales, sont-elles seulement accessoires?

It is not necessary for the purposes of this appeal to attempt to delineate the scope of provincial jurisdiction to regulate the performance of abortions. Suffice it to say that any provincial jurisdiction to regulate the delivery of abortion services must be solidly anchored in one of the provincial heads of power which give the provinces jurisdiction to legislate in relation to such matters as

Il n'est pas nécessaire pour les besoins du présent pourvoi de tenter de circonscrire la portée de la compétence provinciale quant à la réglementation de l'avortement. Qu'il suffise de dire que toute compétence provinciale au chapitre de la réglementation des services d'avortement doit être ancrée dans l'un des chefs de compétence attribuant aux provinces l'autorité législative relative-

health, hospitals, the practice of medicine and health care policy.

C. *Application of the Principles to the Case at Bar*

An examination of the terms and legal effect of the *Medical Services Act* and the *Medical Services Designation Regulation*, their history and purpose and the circumstances surrounding their enactment leads to the conclusion that the legislation's central purpose and dominant characteristic is the restriction of abortion as a socially undesirable practice which should be suppressed or punished. Although the evidence of the legislation's practical effect is equivocal, it is not necessary to establish that its immediate or future practical impact will actually be to restrict access to abortions in order to sustain this conclusion.

(1) Legal Effect: the Four Corners of the Legislation

Starting with the terms of the legislation, the *Medical Services Act* makes it an offence subject to significant fines (s. 6) to perform abortions or other services designated by the *Medical Services Designation Regulation* outside a hospital approved as such under the *Hospitals Act* (s. 4). It is impossible to tell from the legislation itself whether this amounts to a total prohibition of abortion (which all parties concede would be *ultra vires* the province), since extrinsic evidence is necessary to establish that abortions are available in Nova Scotia hospitals. The Act also denies public health insurance coverage for the performer and recipient of such services (s. 5), and provides for injunctive relief against violations of its terms (s. 7). It is entitled "An Act to Restrict the Privatization of Medical Services", and its purpose is expressed to be the prohibition of the privatization of certain medical services in order to maintain a single high-quality health care delivery system in the province (s. 2). The allegation of *ultra vires* and the decisions in the courts below focused on the offence provisions of the legislation. No argument was directed toward the "de-insurance" section in this Court (s. 5). Although the "de-insurance" and

ment aux matières telles que la santé, les hôpitaux, la pratique de la médecine et la politique de la santé.

C. *L'application des principes à l'espèce*

L'examen des termes et de l'effet juridique de la *Medical Services Act* et du *Medical Services Designation Regulation*, de leur historique, de leur objet et des circonstances de l'adoption de la Loi et de la prise du règlement m'amène à conclure que l'objet central et la caractéristique dominante des textes législatifs sont la limitation de l'avortement en tant qu'acte socialement indésirable qu'il convient de supprimer ou de punir. Certes, la preuve de l'effet pratique des textes législatifs est équivoque, mais il n'est pas nécessaire, pour étayer cette conclusion, d'établir que son impact pratique, immédiat ou futur, sera réellement de limiter les avortements.

(1) L'effet juridique: la teneur des textes législatifs

Voyons d'abord la teneur des textes législatifs. Aux termes de la *Medical Services Act*, constitue une infraction qui rend passible d'une forte amende (art. 6) le fait de pratiquer un avortement ou de fournir d'autres services désignés dans le *Medical Services Designation Regulation* ailleurs que dans un hôpital approuvé en conformité avec la *Hospitals Act* (art. 4). À la lecture des textes, il est impossible de dire si cela représente l'interdiction totale de l'avortement (ce qui excéderait la compétence de la province, de l'aveu de toutes les parties), car il faut recourir à la preuve extrinsèque pour établir si l'on pratique des avortements dans les hôpitaux de la Nouvelle-Écosse. La Loi prive du droit à l'assurance-maladie les personnes qui fournissent des services de cette nature et celles à qui ils sont fournis (art. 5), et elle dispose qu'en cas de contravention à ses dispositions, une injonction peut être décernée (art. 7). Elle s'intitule [TRADUCTION] «Loi tendant à limiter la privatisation des services médicaux» et son objet expressément énoncé est d'interdire la privatisation de certains services médicaux dans le but de maintenir un seul système de santé de qualité supérieure dans la province (art. 2). L'allégation selon laquelle elle est

injunction provisions clearly enhance the practical clout of the prohibition, they do not require independent consideration in the context of this case. It is sufficient for the purposes of characterizing this legislation to concentrate on the prohibition of the performance of a designated service outside a hospital. It is apparent from the combined effect of the offence and the regulation that one purpose of the legislation is to prohibit the establishment of free-standing abortion clinics.

The majority in the Court of Appeal conceded that the province had the legislative authority to pass a law in the present form. I acknowledge that the legislation has the legal effect of preventing privatization by prohibiting the private (i.e., outside a hospital) provision of the designated services. But the legislation expressly prohibits the performance of abortions in certain circumstances with penal consequences, a subject, as I have said, traditionally regarded as part of the criminal law. In *Scowby v. Glendinning*, [1986] 2 S.C.R. 226, a majority of this Court held provincial legislation creating an offence of arbitrary arrest or detention and a right to relief in the form of *habeas corpus* to be suspect on its face since arbitrary arrest or detention and the availability of *habeas corpus* in such circumstances have been dealt with by Parliament in the criminal law "almost since the advent of Confederation" (at p. 240). Likewise, one of the reasons behind this Court's invalidation of a municipal by-law prohibiting street prostitution in *Westendorp v. The Queen*, [1983] 1 S.C.R. 43, was that conduct relating to prostitution has long been regarded as criminal. The present legislation, prohibiting traditionally criminal conduct, is therefore of questionable validity on its face: cf. *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing*

ultra vires, ainsi que les décisions des tribunaux d'instance inférieure, ont mis l'accent sur les dispositions prévoyant les infractions. Devant notre Cour, on n'a fait valoir aucun argument relatif à l'article prévoyant que les services ne seraient plus assurés (art. 5). Bien que les dispositions concernant l'exclusion de l'assurance et l'injonction augmentent nettement la rigueur de l'interdiction dans la pratique, elles n'exigent pas d'examen séparé en l'espèce. Il suffit, pour la qualification de ces textes législatifs, de s'en tenir à l'interdiction de la fourniture d'un service désigné ailleurs que dans un hôpital. Il ressort à l'évidence de l'effet cumulatif de l'infraction et du règlement que les textes législatifs avaient pour seul objet d'interdire l'implantation de cliniques d'avortement autonomes.

La Cour d'appel, à la majorité, a concédé que la province avait l'autorité législative pour adopter une loi sous cette forme. Je reconnais que les textes législatifs ont pour effet, sur le plan juridique, d'empêcher la privatisation en interdisant la fourniture privée (c'est-à-dire ailleurs que dans un hôpital) des services désignés. Mais les textes législatifs interdisent expressément l'avortement dans certaines circonstances et assortissent cette interdiction de conséquences pénales; or cette matière relève traditionnellement, je le répète, du domaine du droit criminel. Dans l'arrêt *Scowby c. Glendinning*, [1986] 2 R.C.S. 226, notre Cour a décidé, à la majorité, qu'une loi provinciale créant une infraction d'arrestation ou de détention arbitraires et un recours en *habeas corpus* est suspecte à première vue car l'arrestation ou la détention arbitraires et la possibilité de recourir à l'*habeas corpus* en pareille situation ont été l'objet de lois fédérales en matière criminelle «presque depuis la Confédération» (à la p. 240). De la même façon, dans l'arrêt *Westendorp c. La Reine*, [1983] 1 R.C.S. 43, notre Cour a invalidé un règlement municipal interdisant la prostitution dans les rues, entre autres, parce que les actes participant de la prostitution ont depuis longtemps été considérés comme criminels. La validité des textes législatifs en l'espèce, qui interdisent un acte traditionnellement tenu pour criminel, est donc douteuse à première vue: voir *Rio Hotel Ltd. c. Nouveau-Brunswick (Commission des licences et permis d'alcool)*,

Board), [1987] 2 S.C.R. 59, at p. 80, *per* Estey J. (concurring in the result).

This conclusion makes it unnecessary to invoke the "colourability doctrine", but since it figured prominently in the courts below and in argument before us, I will address it briefly. The respondent attacks the legislation on the basis that it is colourable criminal law. The "colourability doctrine" in the distribution of powers is invoked when a law looks as though it deals with a matter within jurisdiction, but in essence is addressed to a matter outside jurisdiction: *Starr v. Houlden, supra*, at p. 1403; *Reference re Upper Churchill Water Rights Reversion Act, supra*, at p. 332; *Ladore v. Bennett*, [1939] A.C. 468 (P.C.), at p. 482. There is no need to invoke the doctrine in this case because while the Act states in its title and s. 2 that its aim is to prohibit the privatization of medical services, there are doubts about the legislation's *vires* on its face due to the fact that it appears to occupy ground historically occupied by the criminal law. Moreover the ordinary approach to pith and substance entitles the Court to look beyond the terms of the legislation. As Rand J. declared in the *Margarine Reference, supra*, at p. 48, a statement of purpose is at most "a fact to be taken into account, the weight to be given to it depending on all the circumstances".

In any event, the colourability doctrine really just restates the basic rule, applicable in this case as much as any other, that form alone is not controlling in the determination of constitutional character, and that the court will examine the substance of the legislation to determine what the legislature is really doing:

> [t]he legislative bodies cannot, by statutory recitals, settle the classification of their own statutes for purposes of the distribution of powers .... Selection of the aspect that matters is the exclusive prerogative of the court, and the so-called doctrine of colourability is simply an instance of this rule ....

[1987] 2 R.C.S. 59, à la p. 80, le juge Estey (souscrivant au résultat).

Étant donné cette conclusion, il n'est pas nécessaire d'invoquer la «théorie du détournement de pouvoir», mais comme on en a beaucoup fait état devant les tribunaux d'instance inférieure et devant nous, je vais en dire quelques mots. L'intimé attaque les textes législatifs parce qu'il s'agirait de droit criminel déguisé. La «théorie du détournement de pouvoir», en ce qui a trait au partage des compétences, est invoquée lorsqu'une loi semblant porter sur un sujet relevant de la compétence d'un gouvernement porte en réalité sur un sujet qui ne relève pas de cette compétence: *Starr c. Houlden*, précité, à la p. 1403; *Renvoi relatif à la Upper Churchill Water Rights Reversion Act*, précité, à la p. 332; *Ladore c. Bennett*, [1939] A.C. 468 (C.P.), à la p. 482. Point n'est besoin d'invoquer la théorie en l'espèce parce que, bien que la Loi dise dans son intitulé et à l'art. 2 que son but est d'interdire la privatisation des services médicaux, la validité des textes législatifs est douteuse à première vue à cause du fait qu'ils semblent occuper un champ traditionnellement réservé au droit criminel. Par surcroît, le tribunal peut d'ordinaire aller au-delà des termes de la loi pour évaluer son caractère véritable. Comme le dit le juge Rand dans le *Renvoi sur la margarine*, précité, à la p. 48, l'énoncé de l'objet est tout au plus [TRADUCTION] «un fait qu'il faut prendre en considération, le poids qu'il convient de lui accorder dépendant de l'ensemble des circonstances».

Quoi qu'il en soit, la théorie du détournement de pouvoir ne fait que réaffirmer la règle fondamentale, applicable dans la présente espèce comme dans toute autre, que la forme seule n'est pas déterminante de la qualification constitutionnelle et que le tribunal examinera le fond de la loi pour déterminer sa portée véritable:

> [TRADUCTION] ... les corps législatifs ne peuvent pas, par un préambule, fixer la qualification de leurs propres lois pour l'application du partage des pouvoirs [...] Le choix de l'aspect qui est important est l'apanage des tribunaux et la théorie dite du détournement de pouvoir n'est qu'un cas d'application de cette règle ...

See W. R. Lederman, "The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada" (1965), reprinted in Lederman, *Continuing Canadian Constitutional Dilemmas* (1981), 266, at p. 282; see also A. S. Abel, "The Neglected Logic of 91 and 92" (1969), 19 *U.T.L.J.* 487, at p. 494; *Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328 (P.C.), at p. 337; and *Central Canada Potash Co. v. Saskatchewan*, [1979] 1 S.C.R. 42, at p. 76. Under either the basic approach to pith and substance or the "colourability doctrine", therefore, we need to look beyond the four corners of the legislation to see what it is really about. As stated by Laskin C.J. in *Potash*, *supra*, at p. 76, "[i]t is nothing new for this Court, or indeed, for any Court in this country seized of a constitutional issue, to go behind the words used by a Legislature and to see what it is that it is doing".

(2) Beyond the Four Corners

(a) *Duplication of Criminal Code Provisions*

Once the legal effect of legislation is ascertained, it can be compared with that of any relevant legislation passed by the other level of government. The majority of the Court of Appeal found that the present legislation effectively duplicated s. 251 (now s. 287) of the *Criminal Code*. Freeman J.A. held, at pp. 367 and 371-72, that:

> Using s. 251 as a starting point, even a cursory examination discloses that the *Medical Services Act* has an impact and effect on abortions in private clinics virtually indistinguishable from that of s. 251.
>
> . . .
>
> If a distinction exists, it is a philosophical one too subtle to alter the outcome. Under either piece of legislation, a doctor who performed an abortion in a private clinic might find a policeman in the waiting room. He or she could be convicted on precisely the same evidence under either enactment.

Voir W. R. Lederman, «The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada» (1965), réédité dans Lederman, *Continuing Canadian Constitutional Dilemmas* (1981), 266, à la p. 282; voir aussi A. S. Abel, «The Neglected Logic of 91 and 92» (1969), 19 *U.T.L.J.* 487, à la p. 494; *Attorney-General for Ontario c. Reciprocal Insurers*, [1924] A.C. 328 (C.P.), à la p. 337, et *Central Canada Potash Co. c. Saskatchewan*, [1979] 1 R.C.S. 42, à la p. 76. En conséquence, que nous abordions le caractère véritable du point de vue classique ou suivant la «théorie du détournement de pouvoir», nous devons aller au-delà de la teneur même des textes législatifs pour découvrir leur objet véritable. Comme le dit le juge en chef Laskin dans l'arrêt *Potash*, précité, à la p. 76, «[c]e n'est pas la première fois que cette Cour, comme tout tribunal canadien saisi d'une question constitutionnelle, doit chercher ce qui se cache derrière les termes utilisés par une législature et déterminer leur portée véritable».

(2) Au-delà de la teneur

a) *Chevauchement avec des dispositions du Code criminel*

Une fois déterminé l'effet juridique des textes législatifs, on peut le comparer à celui de tout texte pertinent adopté par l'autre palier de gouvernement. La Cour d'appel à la majorité a jugé que les textes législatifs en l'espèce reprenaient effectivement les termes de l'art. 251 (maintenant l'art. 287) du *Code criminel*. Le juge Freeman a conclu aux pp. 367, 371 et 372:

> [TRADUCTION] Si l'on prend l'art. 251 comme point de départ, même un examen superficiel nous révèle que la *Medical Services Act* a un impact sur les avortements dans les cliniques privées qui est presque identique à celui de l'art. 251.
>
> . . .
>
> S'il y a une différence, c'est une distinction philosophique trop subtile pour modifier le résultat. Sous le régime de l'une et l'autre lois, le médecin qui pratiquerait un avortement dans une clinique privée pourrait se trouver face à un policier dans la salle d'attente. Il pourrait être déclaré coupable en fonction de la même preuve sous les deux régimes.

Provincial legislation has been held invalid when it employs language "virtually indistinguishable" from that found in the *Criminal Code*: *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, at p. 699; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, *supra*, at pp. 70-71 and 80; and *Starr v. Houlden*, *supra*, at pp. 1402 and 1405-6. However, even when the legal effect of federal and provincial legislation is virtually identical this does not necessarily determine validity, since the provinces can enact provisions with the same legal effect as federal legislation provided this is done in pursuit of a provincial head of power: *O'Grady v. Sparling*, [1960] S.C.R. 804; *Smith v. The Queen*, [1960] S.C.R. 776; *Stephens v. The Queen*, [1960] S.C.R. 823; *R. v. Chiasson* (1982), 39 N.B.R. (2d) 631 (C.A.), at p. 636, aff'd [1984] 1 S.C.R. 266. The duplication of *Criminal Code* language may raise an inference that the province has stepped into the realm of the criminal law; the more exact the reproduction, the stronger the inference that this is the dominant purpose of the enactment.

Des lois provinciales ont été déclarées invalides parce qu'elles contenaient des termes «presque identiques» à ceux employés dans le *Code criminel*: *Nova Scotia Board of Censors c. McNeil*, [1978] 2 R.C.S. 662, à la p. 699; *Rio Hotel Ltd. c. Nouveau-Brunswick (Commission des licences et permis d'alcool)*, précité, aux pp. 70, 71 et 80; *Starr c. Houlden*, précité, aux pp. 1402, 1405 et 1406. Toutefois, même si l'effet juridique des textes provinciaux et fédéraux sont presque identiques, cela ne détermine pas nécessairement la validité, car les provinces peuvent édicter des dispositions ayant le même effet juridique que celui d'un texte fédéral à la condition que ce soit dans l'exercice d'un chef de compétence provincial: *O'Grady c. Sparling*, [1960] R.C.S. 804; *Smith c. The Queen*, [1960] R.C.S. 776; *Stephens c. The Queen*, [1960] R.C.S. 823; *R. c. Chiasson* (1982), 39 N.B.R. (2d) 631 (C.A.), à la p. 636; conf. par [1984] 1 R.C.S. 266. On peut inférer de la similitude avec les termes du *Code criminel* que la province a empiété sur le domaine du droit criminel; plus la reproduction est exacte, plus on doit en conclure que c'est là l'objet principal de la loi.

The guiding principle is that the provinces may not invade the criminal field by attempting to stiffen, supplement or replace the criminal law (*Reference re Freedom of Informed Choice (Abortions) Act* (1985), 44 Sask. R. 104 (C.A.)) or to fill perceived defects or gaps therein (*Scowby v. Glendinning*, *supra*, at p. 238). The legal effect of s. 251 and the present legislation, each taken as a whole, is quite different: among other things, s. 251 made it an offence for a woman to obtain an abortion, and prescribed the burdensome "therapeutic abortion committee" system and the "life or health" criterion for a legal abortion, none of which are present in the Act and regulation; and the present legislation prohibits other services besides abortion and directly concerns public health insurance coverage. Freeman J.A. was clearly right, however, that in so far as it prohibits abortion clinics the legal effect of the medical services legislation is completely embraced by s. 251 and, had the latter provision not been struck down, the present legislation would have been redundant in that respect. Section 251 is now, of course,

Le principe directeur veut que les provinces ne puissent s'ingérer dans les sphères criminelles en essayant de renforcer, de compléter ou de remplacer le droit criminel (*Reference re Freedom of Informed Choice (Abortions) Act* (1985), 44 Sask. R. 104 (C.A.)) ou de remédier à ce qu'elles considèrent comme des défauts ou des failles (*Scowby c. Glendinning*, précité, à la p. 238). L'effet juridique de l'art. 251 et celui des textes législatifs en l'espèce, pris dans chaque cas dans leur ensemble, est tout à fait distinct: entre autres, l'art. 251 criminalisait le fait pour une femme d'obtenir un avortement et instaurait le système lourd du «comité de l'avortement thérapeutique», ainsi que le critère de «la vie ou de la santé» selon lequel l'avortement pouvait être tenu pour légal, tous des éléments absents dans la Loi et le règlement; de plus, les textes législatifs en l'espèce interdisent d'autres services outre l'avortement et ils concernent directement le régime public d'assurance-maladie. Toutefois, le juge Freeman avait manifestement raison de dire que, dans la mesure où les textes sur les services médicaux interdisent les cliniques d'avor-

inoperative. The absence of operative federal legislation does not enlarge provincial jurisdiction, though. It simply means that if the provincial legislation is found to be *intra vires*, no problem of paramountcy arises.

In my opinion the overlap of legal effects between the now defunct criminal provision and the Nova Scotia legislation is capable of supporting an inference that the legislation was designed to serve a criminal law purpose. It is a piece in the puzzle which along with the other evidence may demonstrate the true purpose of the legislation.

(b) *Background and Surrounding Circumstances*

The events leading up to and including the enactment of the Act and regulation do not support the appellant's assertions that the pith and substance of the legislation relate to provincial jurisdiction over health. On the contrary, they strengthen the inference that the impugned Act and regulation were designed to serve a criminal law purpose.

(i) The Course of Events

It is clear that the catalyst for government action was the rumour and later announcement of Dr. Morgentaler's intention to open his clinic. The Crown concedes this. The respondent was clearly, as the trial judge concluded, a "mischief" against which the legislation was directed. The government knew of Dr. Morgentaler's intention to open a clinic by some time in January 1989. It responded with the March regulations, which prohibited abortions outside hospitals and "de-insured" such services. The direct and exclusive aim of this action was to stop the Morgentaler clinic and no one disputes that. The Minister of

tement, leur effet juridique est entièrement englobé par l'art. 251 et, si celui-ci n'avait pas été invalidé, les textes législatifs en l'espèce auraient été redondants à cet égard. L'article 251 est maintenant inopérant, bien sûr. L'absence de loi fédérale opérante n'élargit cependant pas la compétence provinciale. Elle signifie simplement que, si les textes provinciaux sont jugés *intra vires*, aucun problème de prépondérance ne se pose.

À mon avis, le chevauchement de l'effet juridique de la disposition criminelle maintenant annulée et de celui des textes législatifs de la Nouvelle-Écosse permet d'inférer que les textes étaient conçus pour atteindre un objectif touchant le droit criminel. C'est une pièce du puzzle qui, jointe aux autres éléments de preuve, peut indiquer l'objet véritable des textes.

b) *Le contexte et les circonstances*

L'adoption de la Loi et la prise du règlement, ainsi que les faits qui les ont précédés, ne justifient pas les assertions de l'appelante selon lesquelles le caractère véritable des textes législatifs se rapporte à la compétence de la province en matière de santé. Au contraire, ils corroborent la conclusion qu'ils visaient un objectif touchant le droit criminel.

(i) Le déroulement des faits

De toute évidence, ce qui a joué le rôle de catalyseur de l'action gouvernementale, ce sont la rumeur, puis l'annonce par le Dr Morgentaler de son intention d'ouvrir sa clinique. Le ministère public le concède. L'intimé représentait nettement, comme l'a conclu le juge du procès, un «mal» que les textes législatifs visaient à corriger. Le gouvernement a appris en janvier 1989 que le Dr Morgentaler avait l'intention d'ouvrir une clinique. Il a réagi en prenant, en mars, les règlements qui interdisaient de pratiquer un avortement ailleurs que dans un hôpital et qui excluaient l'assurance-maladie à leur égard. Le but direct et exclusif de cette action était d'empêcher l'ouverture de la clinique du Dr Morgentaler et cela, personne ne le conteste.

Health made this clear upon announcing the regulations:

> . . . Cabinet has today approved two new regulations relating to the provision of abortion services.
>
> As all members know, it is not the policy of this government to endorse or support in any way the provision of these services through free-standing clinics or other facilities which do not fall within the category of an approved hospital.

(Nova Scotia, House of Assembly, *Debates and Proceedings* (March 16, 1989), at p. 1008.)

The March regulations singled out abortion, and the Morgentaler clinic in particular.

In May 1989, the March regulations were challenged in court by CARAL on the ground that they were unconstitutional: see *Canadian Abortion Rights Action League Inc. v. Nova Scotia (Attorney General), supra.* Shortly before the date when that action was first to come on for hearing (June 22, 1989), and days before the close of the legislative session, the government introduced and rushed the Act through the House of Assembly. It was introduced on June 6 and received third and final reading and royal assent on June 15. The legislation was enacted in what can only be considered great haste. The Act, considered along with the services that were proposed to be designated, accomplished all the purposes of the March regulations. Yet instead of singling out abortion, it took the form of a general "floating" prohibition of the performance of medical services other than in a hospital, which would crystallize upon the designation of several services among which abortion was to be found. On July 20, 1989, the Executive Council made the *Medical Services Designation Regulation* and simultaneously revoked the March Regulations. I am in complete agreement with Freeman J.A.'s characterization of the course of events, at pp. 376-77, which I reproduce again here for convenience:

> 2. The "March regulations" were obviously aimed at Morgentaler clinics. Hon. David Nantes, Health Minister, made that clear when he announced them to the leg-

Le ministre de la Santé l'a bien précisé en annonçant les règlements:

> [TRADUCTION] . . . le conseil des ministres a approuvé aujourd'hui deux nouveaux règlements concernant la fourniture de services d'avortement.
>
> Comme tous les députés le savent, notre gouvernement n'a pas comme politique de sanctionner ni de soutenir de quelque façon que ce soit la fourniture de tels services dans des cliniques autonomes ou d'autres établissements qui n'entrent pas dans la catégorie des hôpitaux approuvés.

(Nova Scotia, House of Assembly, *Debates and Proceedings* (16 mars 1989), à la p. 1008.)

Les règlements de mars étaient dirigés contre l'avortement et surtout contre la clinique du Dr Morgentaler.

En mai 1989, l'ACDA a contesté devant les tribunaux la constitutionnalité des règlements de mars: voir *Canadian Abortion Rights Action League Inc. c. Nova Scotia (Attorney General)*, précité. Peu de temps avant la date où l'affaire devait être entendue (le 22 juin 1989) et quelques jours avant la clôture de la session parlementaire, le gouvernement a déposé le projet de loi et l'a fait adopter à toute vapeur. Il a été présenté le 6 juin et a reçu la troisième et dernière lecture et la sanction royale le 15 juin. La Loi a été édictée en grande hâte, chacun le reconnaîtra. Si l'on tient compte aussi des services devant être désignés, elle a permis d'atteindre tous les objectifs des règlements de mars. Et pourtant, au lieu de viser expressément l'avortement, elle a pris la forme d'une interdiction générale, «flottante», de la fourniture de services médicaux ailleurs que dans un hôpital, interdiction qui serait concrétisée au moment où seraient désignés certains services, dont l'avortement. Le 20 juillet 1989, le conseil exécutif a pris le *Medical Services Designation Regulation* et a révoqué en même temps les règlements de mars. Je suis tout à fait d'accord avec la description du déroulement des faits que donne le juge Freeman aux pp. 376 et 377 et je la reprends ici par souci de commodité:

> 2. Les «règlements de mars» visaient manifestement les cliniques Morgentaler. Monsieur David Nantes, ministre de la Santé, l'a bien souligné quand il en a fait part à

islature .... The *Medical Services Act* was presented to the legislature following a court challenge to the March regulations. It was introduced on June 6, 1989, and passed, with the appearance of last-minute haste, the day the House closed on June 15, 1989. The March regulations were encompassed by the *Medical Services Act* and its regulation. They were revoked, no longer necessary, on July 20, 1989, the day the regulation was passed under the *Medical Services Act*.

Neither the timing nor the overlap of subject matter can be viewed as coincidental. It is reasonable to infer, as did the trial judge, that the government believed that the new legislation would accomplish the purpose of the March regulations, and intended it to do so. The March regulations were the first response to Dr. Morgentaler's announcement, and the subsequent legislation was the continuation and consolidation of that response. Together they constituted a hastily devised plan aimed directly at ridding the province of Dr. Morgentaler and his proposed clinic. The course of events suggests that this purpose was the principal purpose of the legislation and contributes to the impression that privatization and quality assurance were only incidental concerns at best.

(ii) Hansard

I have reviewed the evidence of the legislative debates on the *Medical Services Act*, and have concluded that they give a clear picture of what the members of the House, both government and opposition, saw as being in issue. Both the trial judge and Freeman J.A. referred extensively to excerpts from Hansard. The following passage from the trial judge's reasons, at pp. 300-301, fairly captures the flavour of the proceedings:

During the debate at the time of second reading on June 12, 1989, the Opposition Health Critic, Sandra Jolly, says at page 4678:

"... It is a dilemma that is both complex and emotional and the Liberal caucus of Nova Scotia agrees with the Minister of Health and Fitness that the

l'assemblée législative [. . .] La *Medical Services Act* a été présentée à l'assemblée après que les règlements de mars eurent été attaqués en justice. Elle a été présentée le 6 juin 1989 et votée, à la hâte, semble-t-il, le jour de la clôture de la session le 15 juin 1989. Les règlements de mars étaient englobés dans la *Medical Services Act* et dans son règlement d'application. N'étant plus nécessaires, ils ont été abrogés le 20 juillet 1989, jour où a été pris le règlement en application de la *Medical Services Act*.

Ni le moment choisi ni le chevauchement des sujets ne sauraient être tenus pour fortuits. Il est raisonnable d'inférer, comme l'a fait le juge du procès, que le gouvernement croyait que les nouveaux textes législatifs permettraient d'atteindre l'objectif visé par les règlements de mars et que là était son intention. Les règlements de mars constituaient la première réponse à l'annonce faite par le Dr Morgentaler, et les textes législatifs ultérieurs ont été la suite et le renforcement de cette réponse. Ils formaient ensemble un plan dressé à la hâte et conçu expressément pour débarrasser la province du Dr Morgentaler et de son projet de clinique. La suite des faits semble indiquer que cet objectif était l'objet principal des textes législatifs et confirme l'impression que la privatisation et l'assurance de la qualité n'étaient tout au plus que des objets secondaires.

(ii) Le compte rendu officiel des débats

J'ai étudié la preuve des débats parlementaires relatifs à la *Medical Services Act* et j'en ai conclu que ceux-ci décrivent bien ce en quoi consistait la question pour les députés, tant du parti ministériel que de l'opposition. Le juge du procès et le juge Freeman ont tous les deux cité de larges extraits du Hansard. Le passage qui suit, tiré des motifs du juge du procès, aux pp. 300 et 301, rend bien l'atmosphère des débats:

[TRADUCTION] Durant le débat en deuxième lecture le 12 juin 1989, la porte-parole de l'opposition pour les questions de santé, Sandra Jolly, a dit, à la page 4678:

«. . . C'est un dilemme qui est à la fois complexe et chargé d'émotion, et le groupe parlementaire libéral de la Nouvelle-Écosse convient avec le ministre de la

Morgentaler clinic should not be set up in this province. I want to make that point very clear. (Applause)

"The Liberal caucus is of the opinion that it is unnecessary for the clinic to come to Nova Scotia, so in that part of the bill, we do agree with the current government. We are in agreement and we have stated that right from the very beginning, that we do not feel that the clinic is required here. What concerns me is that the government has very hurriedly put together this legislation, and what they are doing is not only trying to work at keeping the Morgentaler clinic out, but we really do see it as a regression or a step backwards in regard to medical services for the people of Nova Scotia."

The Opposition critic went on at length expressing concerns about the broad implications of the Bill.

When the Minister of Health had a chance to respond, he states: (at page 4716):

"I heard the most weak-kneed, weak-hearted support for the question of the control of free-standing abortion clinics that I heard yet in this entire session of the Legislature. It was always the Liberal caucus that has this position, we have this position. Well, I am going to make mine personal and say I, as the Minister of Health and I, as an MLA, am not supportive of free-standing abortion clinics." (Applause)

On June 5, 1989, the day before the proposed *Act* was introduced in First Reading, the Minister of Health and Fitness, in discussions concerning the budget estimates for the Department of Health said at p. 785:

"... we have adopted a policy as government that we are not going to be supportive [of free-standing abortion clinics] and we will do everything in our effort to stop them. That is what we have said and that is what we are doing, if we need more steps, if we have to take more steps, we are going to take them. I am going to be carrying out that policy at the direction of my government and I am going to be supportive of that policy."

Freeman J.A. made reference, among others, to the following excerpts, at pp. 375-76:

Paul MacEwan, member for Cape Breton Nova, said:

Santé et de la Condition physique que la clinique du Dr Morgentaler ne doit pas être implantée dans cette province. Je tiens à le préciser.» (Applaudissements)

«Le groupe parlementaire libéral est d'avis qu'il n'est pas nécessaire que cette clinique soit ouverte en Nouvelle-Écosse; nous sommes donc d'accord avec le gouvernement actuel quant à cette partie du projet de loi. Nous sommes d'accord et cela nous l'avons dit dès le tout début, nous croyons que nous n'avons pas besoin de cette clinique. Ce qui m'inquiète, c'est que le gouvernement ait préparé à la hâte ce texte de loi, et ce qu'il fait, c'est non seulement tenter d'empêcher l'établissement de la clinique de Morgentaler, mais encore, en réalité, à notre sens, rétrograder ou faire un pas en arrière en ce qui concerne les services médicaux offerts aux habitants de la Nouvelle-Écosse.»

La porte-parole de l'opposition a exposé en long et en large les inquiétudes que suscitaient les vastes conséquences du projet de loi.

Lorsqu'il a eu l'occasion d'y répondre, le ministre de la Santé a dit ceci (à la page 4716):

«J'ai entendu l'appui le plus lâche, le moins senti, sur la question de la lutte contre les cliniques d'avortement autonomes, que j'aie entendu jusqu'ici durant toute la session. Cela a toujours été la position du groupe parlementaire libéral, c'est notre position. Eh bien! Je vais prendre position personnellement. Je dis, à titre de ministre de la Santé et à titre de député, que je ne suis pas en faveur des cliniques d'avortement autonomes.» (Applaudissements)

Le 5 juin 1989, le jour précédant la présentation du projet de loi en première lecture, le ministre de la Santé et de la Condition physique a dit, lors de discussions sur les prévisions de dépenses du ministère de la Santé, à la p. 785:

«. . . suivant la position qu'a prise notre gouvernement, nous sommes contre [les cliniques d'avortement autonomes] et nous ferons tout notre possible pour en empêcher l'établissement. C'est ce que nous avons dit et c'est ce que nous faisons; s'il faut, si nous devons prendre d'autres mesures, nous les prendrons. Je vais donner suite à cette position selon les directives de mon gouvernement et je vais appuyer cette position.»

Le juge Freeman s'est référé notamment aux extraits suivants, aux pp. 375 et 376:

[TRADUCTION] Paul MacEwan, député de Cape Breton Nova, a dit:

"So certainly, you know, if this government wants to pose as being the great champion of those that want to keep Mr. Morgentaler out of Nova Scotia, let it be noted that it was the very last thing that they thought of before they adjourned the House for the year . . . .

«Alors, bien sûr, vous savez, si ce gouvernement veut se faire passer pour le grand champion de ceux qui veulent empêcher le Dr Morgentaler de s'établir en Nouvelle-Écosse, remarquez que c'est la dernière chose à laquelle ils pensaient quand ils ont ajourné pour l'année . . .»

"Now we are led to believe that this is a bill that is not really just to restrict the privatization of medical services, whatever that is, but it is a bill to make it impossible or to make it unlikely I suppose that the abortion clinic that Morgentaler wants to establish can be set up . . . "

«Maintenant, on veut nous faire croire que c'est un projet de loi qui, en réalité, ne vise pas seulement à limiter la privatisation des services médicaux, quel que soit ce qu'on veut dire par là, mais qui rend impossible ou improbable, je suppose, l'établissement de la clinique que veut ouvrir Morgentaler . . .»

Following the remarks by members of opposition parties Mr. Nantes spoke again:

Après que les députés des partis d'opposition eurent fait des observations, M. Nantes a repris la parole:

"I do not think you can play both sides of this issue. You cannot criticize the health care system and say, we do it all wrong and talk about clinics and all that sort of thing without coming out on this particular element. Do you support or do you not support a free-standing abortion clinic? I want you to know that not only can I speak personally, but also, I think we represent the consensus and overwhelming view of this side of the legislature. (Applause)

«Je ne pense pas que l'on puisse jouer sur les deux tableaux. Vous ne pouvez pas critiquer le système de santé et dire que tout va de travers, puis parler de cliniques et tout ça, sans vous prononcer sur cette question particulière. Êtes-vous pour ou contre une clinique d'avortement autonome? Je veux que vous sachiez que, non seulement je peux parler pour ma part, mais encore je pense que nous représentons le consensus et le point de vue d'une majorité écrasante des députés de ce côté-ci de la Chambre.» (Applaudissements)

"I think I am even prepared to go a little further and say that I do think it represents the majority view of quite a number of members on the other side of the house, also." (Applause)

«Je pense que je suis même prêt à aller plus loin et à dire que je crois représenter aussi l'opinion d'une forte majorité des députés de l'autre côté de la Chambre.» (Applaudissements)

The Hansard evidence demonstrates both that the prohibition of Dr. Morgentaler's clinic was the central concern of the members of the legislature who spoke, and that there was a common and emphatically expressed opposition to free-standing abortion clinics *per se*. The Morgentaler clinic was viewed, it appears, as a public evil which should be eliminated. The concerns to which the appellant submits the legislation is primarily directed — privatization, cost and quality of health care, and a policy of preventing a two-tier system of access to medical services — were conspicuously absent throughout most of the legislative proceedings. They were emphasized by the Minister, Mr. Nantes, on moving second reading of the bill on June 12, 1989. This does not, however, in my view, detract significantly from the overall impression left by the debates.

La preuve du Hansard montre, d'une part, que l'interdiction de la clinique du Dr Morgentaler était la préoccupation centrale des députés qui ont pris la parole et, d'autre part, que les cliniques d'avortement autonomes en tant que telles ont fait l'objet d'une opposition commune et catégorique. La clinique Morgentaler était considérée, apparemment, comme un fléau public qu'il fallait éliminer. Les préoccupations auxquelles ces textes législatifs se rapportaient principalement, d'après l'appelante, — privatisation, coût et qualité des soins, opposition à l'instauration d'un système de santé à deux niveaux — ont visiblement été absentes durant la presque totalité des débats. Le ministre, M. Nantes, les a fait valoir quand il a proposé la deuxième lecture du projet de loi le 12 juin 1989. Cela, à mon sens, n'atténue cependant pas beaucoup l'impression générale produite par les débats.

Of course, one must be mindful of the limited use to which such evidence can be put, as I discussed earlier. To quote Kennedy Prov. Ct. J., at first instance, at p. 301:

> I recognize that it would be folly for a court to conclude that everything that is said in a political forum has meaning in relation to the characterization of the legislation produced by that body.

Nonetheless, I see no reason to interfere with Freeman J.A.'s assessment of the tone of the proceedings, at p. 367:

> One need not look beyond the pages of Hansard . . . to realize the sense of moral outrage of representatives in the House of Assembly engendered by the prospect of Morgentaler clinics in Nova Scotia. Moral considerations attach not only to the performance of abortions, but to where they are performed and under what circumstances.

The appellant argues that even if the object of the legislation was to suppress free-standing abortion clinics on grounds of public morals, this is not fatal to provincial jurisdiction. Although there has been some recognition of a provincial "morality" power, it is clear that the exercise of such a power must be firmly anchored in an independent provincial head of power: *Rio Hotel Ltd. v. New Brunswick, supra*, at pp. 71-80; *Attorney General for Canada and Dupond v. City of Montreal*, [1978] 2 S.C.R. 770; R. Pepin, "Le pouvoir des provinces canadiennes de légiférer sur la moralité publique" (1988), 19 *R.G.D.* 865; *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 364.

While legislation which authorizes the establishment and enforcement of a local standard of morality does not *ipso facto* "invade the field of criminal law" (see *Nova Scotia Board of Censors v. McNeil, supra*, at pp. 691-92), it cannot be denied that interdiction of conduct in the interest of public morals was and remains one of the classic ends of the criminal law, as established in the

Bien entendu, on ne doit pas oublier que l'utilisation qu'on peut faire d'une telle preuve est restreinte, comme nous l'avons déjà vu. Pour reprendre les paroles du juge Kennedy de la Cour provinciale, en première instance, à la p. 301:

> [TRADUCTION] Je reconnais que ce serait de la folie, de la part d'un tribunal, de conclure que tout ce qui se dit à une tribune politique a une signification relativement à la qualification d'une loi conçue par le corps politique en cause.

Néanmoins, je ne vois aucune raison de modifier l'évaluation que fait le juge Freeman de l'ambiance de la Chambre, à la p. 367:

> [TRADUCTION] On n'a pas besoin d'aller au-delà des pages du Hansard [. . .] pour se rendre compte de l'indignation provoquée parmi les députés à la Chambre par la possibilité de l'ouverture de cliniques Morgentaler en Nouvelle-Écosse. Des considérations morales se rattachent non seulement au fait de pratiquer un avortement, mais encore au lieu où il est pratiqué et à ses circonstances.

L'appelante soutient que, même si le but des textes législatifs était de supprimer les cliniques d'avortement autonomes pour des raisons de morale sociale, cela ne porte pas un coup fatal à la question de la compétence de la province. Certes, on a reconnu une certaine autorité aux provinces en matière de «bonnes mœurs», mais, de toute évidence, l'exercice d'un tel pouvoir doit être solidement ancré dans un chef de compétence provincial distinct: *Rio Hotel Ltd. c. Nouveau-Brunswick*, précité, aux pp. 71 à 80; *Procureur général du Canada et Dupond c. Ville de Montréal*, [1978] 2 R.C.S. 770; R. Pepin, «Le pouvoir des provinces canadiennes de légiférer sur la moralité publique» (1988), 19 *R.G.D.* 865; *Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307, à la p. 364.

Bien qu'une loi permettant d'établir et d'appliquer des normes locales de moralité ne soit pas nécessairement «un empiétement dans le domaine du droit criminel» (voir l'arrêt *Nova Scotia Board of Censors c. McNeil*, précité, aux pp. 691 et 692), on ne peut pas nier que l'interdiction d'un acte dans l'intérêt de la morale publique était et reste l'une des fins classiques du droit criminel, comme

Margarine Reference, supra, at p. 50: see *Westendorp v. The Queen, supra*, and *Johnson v. Attorney General of Alberta*, [1954] S.C.R. 127, at pp. 148-49.

As Wilson J. recognized in *Morgentaler (1988), supra*, at p. 171, a woman's decision to have an abortion is "profound[ly] social and ethical;" indeed it is "essentially a moral decision" (cf. M. L. McConnell, "'Even by Commonsense Morality': *Morgentaler, Borowski* and the Constitution of Canada" (1989), 68 *Can. Bar Rev.* 765, at p. 766) and it seems clear to me that the present legislation, whose primary purpose is to prohibit abortions except in certain circumstances, treats of a moral issue.

In view of the foregoing, there is a strong inference that the purpose of the legislation and its true nature relate to a matter within the federal head of power in respect of criminal law. In order to determine whether this is its dominant purpose or characteristic, it is necessary to compare the above indicia of federal subject matter with indications of provincial objectives.

(iii) Searching for Provincial Objectives

At trial the appellant presented evidence that the Act's objectives were to prevent privatization and the consequent development of a two-tier system of medical service delivery, to ensure the delivery of high-quality health care, and to rationalize the delivery of medical services so as to avoid duplication and reduce public costs. The principal Crown witness on these points, John Malcom, the Health Department Administrator, testified that Nova Scotia's health care system evolved around the public hospital and that there have never been private, "for-profit" medical clinics in the province. He said that Nova Scotia has a policy of equal access to health care services, and that duplication of health care services creates a two-tier system. Moreover, his evidence was that rationalization of

l'a établi le *Renvoi sur la margarine*, précité, à la p. 50: voir *Westendorp c. La Reine*, précité, et *Johnson c. Attorney General of Alberta*, [1954] R.C.S. 127, aux pp. 148 et 149.

Comme le juge Wilson l'a reconnu dans l'arrêt *Morgentaler (1988)*, précité, à la p. 171, la décision que prend une femme de se faire avorter est «profondément d'ordre social et éthique»; en fait, elle constitue [TRADUCTION] «essentiellement une décision d'ordre moral» (voir M. L. McConnell, ««Even by Commonsense Morality»: *Morgentaler, Borowski* and the Constitution of Canada» (1989), 68 *R. du B. can.* 765, à la p. 766), et il me semble clair que les textes législatifs en l'espèce, dont l'objet premier est d'interdire l'avortement sauf dans certaines circonstances, portent sur une question morale.

Vu ce qui précède, il y a de fortes raisons d'inférer que l'objet des textes et leur nature véritable concernent une matière relevant de la compétence fédérale en matière de droit criminel. Pour déterminer si c'est là son objet ou sa caractéristique prédominants, il est nécessaire de comparer les indices mentionnés ci-dessus qui permettent de conclure à une matière ressortissant au pouvoir fédéral et les signes révélateurs d'objectifs relevant de la compétence des provinces.

(iii) L'identification des objectifs de la province

Au procès, l'appelante a produit des éléments de preuve tendant à établir que les objectifs de la Loi étaient d'empêcher la privatisation et l'instauration d'un système de santé à deux niveaux qui en résulterait, d'assurer le maintien d'un système de santé de qualité supérieure, et de rationaliser la prestation des services médicaux de façon à éviter qu'ils ne fassent double emploi et à réduire les dépenses publiques. John Malcom, administrateur du ministère de la Santé et principal témoin cité par le ministère public sur ces points, a témoigné que le développement du système de santé de la Nouvelle-Écosse avait été axé exclusivement sur les hôpitaux publics et qu'il n'y avait jamais eu de cliniques privées, «à but lucratif», dans la province. Il a dit que la Nouvelle-Écosse avait une politique

health care services was the most cost-effective approach.

It may be that this evidence represented the policy of the government of Nova Scotia at one time. The respondent correctly pointed out, however, that this evidence was not established at trial to have been the basis for the impugned legislation. Indeed, Kennedy Prov. Ct. J. considered the evidence and found that any privatization concerns were "incidental to the paramount purpose of the legislation" (at p. 302). I see no good reason to question this finding.

First, as to the health and safety of women and the argument that the in-hospital requirement was enacted because of a concern over quality assurance, there is no evidence in the record to indicate that abortions performed in clinics like Dr. Morgentaler's pose any danger to the health of women. Counsel conceded that the quality of medical service in free-standing abortion clinics is comparable to that available in hospitals. I also note that in *Morgentaler (1988)*, *supra*, Beetz J. held that studies, experience and expert evidence established that abortions can safely be performed in clinics and that the in-hospital requirement was no longer justified from a medical point of view. Since the appellant agrees that the quality of medical service in clinics is comparable to that in hospitals, the argument that the legislation was directed at quality assurance and women's health and safety is deprived of any force.

Second, the government did not express concerns about privatization in relation to this legislation or the March regulations until the Act was moved for second reading. Again, I would adopt

d'égalité d'accès aux soins de santé et que des services qui font double emploi aboutissent à un système de santé à deux niveaux. De plus, il a témoigné que la rationalisation des services de santé était le procédé le plus économique.

Il se peut que cette preuve témoigne de la position du gouvernement de la Nouvelle-Écosse à une époque donnée. L'intimé a cependant souligné avec raison que l'on n'avait pas établi au procès que cette position ait été le fondement des textes législatifs attaqués. En fait, le juge Kennedy de la Cour provinciale a étudié la preuve et conclu que les préoccupations relatives à la privatisation étaient [TRADUCTION] «accessoires à l'objectif primordial des textes législatifs» (à la p. 302). Je ne vois aucune bonne raison de mettre en doute cette conclusion.

Premièrement, en ce qui a trait à la santé et à la sécurité des femmes et à l'argument que l'obligation de pratiquer les avortements dans un hôpital a été insérée pour des raisons tenant à l'assurance de la qualité, aucun élément de preuve versé au dossier n'indique que les avortements pratiqués dans des cliniques comme celle du Dr Morgentaler mettent en danger la santé des femmes. L'avocat a concédé que la qualité des services médicaux dans les cliniques d'avortement autonomes était comparable à celle observée dans les hôpitaux. Je note en outre que dans l'arrêt *Morgentaler (1988)*, précité, le juge Beetz a conclu que des études, l'expérience et les dépositions d'experts avaient établi que les avortements peuvent être pratiqués sans danger dans des cliniques et que l'obligation de les pratiquer dans un hôpital n'était plus justifiée du point de vue médical. Comme l'appelante convient que la qualité des services médicaux dans les cliniques est comparable à celle qui existe dans les hôpitaux, l'argument que les textes législatifs visaient l'assurance de la qualité et la santé et la sécurité des femmes perd toute sa force.

Deuxièmement, ce n'est qu'à l'étape de la deuxième lecture du projet de loi que le gouvernement a fait part de son inquiétude au sujet de la privatisation, que ce soit par rapport à ces textes ou

Freeman J.A.'s statement of the relevant facts, at pp. 376-77:

1. Privatization of medical services had not been enunciated as a government objective prior to the introduction of the *Medical Services Act*. It was not mentioned in the Throne Speech on February 23, 1989. The Throne Speech did say that a Royal Commission Report was being awaited. The order-in-council establishing the Royal Commission made no reference to privatization.

. . .

3. In explaining the desirability of avoiding the pitfalls of privatization, the Crown relied heavily on economic considerations. The report of the Royal Commission on Health Costs was being awaited, as the Throne Speech noted. In passing the *Medical Services Act* on June 15, 1989, the legislature elected to do so without the benefit of observations or recommendations by the Royal Commission . . . .

On February 23, 1989, just three weeks before the adoption of the March regulations, the Throne Speech was delivered. Although it discussed health care policy, it made no mention of a policy with respect to privatization. As Freeman J.A. observes, it did refer to the Royal Commission on Health Care, which had been established in 1987 to undertake a thorough examination of the province's health care system. The Throne Speech indicated that the government was awaiting the Commission's report.

That report was delivered in December 1989. Its recommendations were inconsistent with a policy of opposing privatization. It recommended, *inter alia*, moving as many services as possible out of hospitals and minimizing the length of hospital stays, in order to reduce public health care costs. It stated, in part, that while institutions should continue to be the focal points of health care delivery in Nova Scotia:

aux règlements de mars. Encore une fois, j'adopte l'exposé que fait le juge Freeman des faits pertinents, aux pp. 376 et 377:

1. Avant le dépôt du projet de la *Medical Services Act*, le gouvernement n'avait pas précisé que son objectif était la privatisation des services médicaux. Il n'a pas été question de cet objectif dans le discours du Trône du 23 février 1989. On y mentionnait qu'on attendait la publication du rapport d'une commission royale d'enquête. Le décret constituant cette commission ne fait aucunement allusion à la privatisation.

. . .

3. Pour expliquer pourquoi il était souhaitable d'éviter les embûches de la privatisation, le ministère public a insisté sur des considérations économiques. Le rapport de la commission royale d'enquête sur les coûts des soins de santé était attendu, comme le signalait le discours du Trône. En adoptant la *Medical Services Act* le 15 juin 1989, l'assemblée a choisi d'aller de l'avant sans avoir eu l'avantage de prendre connaissance des observations ou des recommandations de la commission royale d'enquête . . . .

Le 23 février 1989, seulement trois semaines avant l'adoption des règlements de mars, un discours du Trône a été présenté. Bien qu'il ait traité de politique de la santé, on n'y trouve aucune mention de politique en matière de privatisation. Comme l'a fait observer le juge Freeman, le discours parle effectivement de la commission royale d'enquête sur les soins de santé, qui avait été désignée en 1987 et chargée d'effectuer une étude approfondie du système de santé de la province. On signalait dans le discours du Trône que le gouvernement attendait la publication du rapport de la commission.

Ce rapport a paru en décembre 1989. Les recommandations qu'il contient sont inconciliables avec une politique d'opposition à la privatisation. On y recommande, entre autres, de fournir le plus possible de services ailleurs que dans les hôpitaux et de réduire au minimum la durée de l'hospitalisation, afin de diminuer les dépenses publiques au chapitre de la santé. On y lit notamment que, bien que les établissements doivent continuer de représenter l'axe privilégié de la fourniture des soins de santé en Nouvelle-Écosse:

. . . there is increasing understanding that many health care services can be provided safely and appropriately outside of institutional settings.

John Malcom, the Crown health care policy expert, testified, on cross-examination, that the directions enunciated in the report were consistent with the approach the Department of Health had been taking. The Throne Speech of 1990, delivered two months after the report, discussed the report, and again — understandably, in light of the Commission's recommendations — made no mention of a policy of opposing the private delivery of health care services.

Third, it is significant that there is no evidence of any prior study or consultation regarding the cost-effectiveness or quality of medical services delivered in private clinics. Again, Freeman J.A.'s words, at p. 377, are apropos and I repeat them for convenience:

5. The Department of Health had been engaged in discussions with the Medical Society of Nova Scotia to have more health care services delivered outside of hospitals. The Medical Society was not consulted about the *Act* prior to its introduction. The evidence suggests the *Act* runs counter to the direction of the talks.

The Medical Society was not consulted until after the legislation was introduced, and then only to discuss the services to be designated. This would not be particularly significant on its own, but, according to the evidence of Dr. Vincent Audain, who was the president of the Medical Society at the relevant time, the Medical Society had been engaged in discussions with government toward moving more health care services outside hospitals. Dr. Audain learned of the Act through a telephone message the day the bill was introduced. He testified that the Society was perturbed by this unexpected action and suspected that the motive behind it was the "abortion issue". The Society passed a resolution, which it communicated to the government, condemning the legislation on the basis that it would have a negative impact on the

[TRADUCTION] . . . on se rend compte de plus en plus que beaucoup de services de santé peuvent être fournis sans danger et adéquatement à l'extérieur des établissements hospitaliers.

John Malcom, l'expert cité par le ministère public quant à la politique de la santé, a témoigné, au cours de son contre-interrogatoire, que les orientations énoncées dans le rapport allaient dans le sens des vues du ministère de la Santé. Le discours du Trône de 1990, lu deux mois après la publication du rapport, traite du rapport et, une fois de plus — cela se comprend étant donné les recommandations de la commission — ne fait aucunement mention d'une politique d'opposition aux services de santé privés.

Troisièmement, il est révélateur qu'aucun élément de preuve n'établisse que des études ou une consultation aient été faites auparavant au sujet du rapport coût/efficacité ou de la qualité des services médicaux fournis dans les cliniques privées. Encore une fois, les remarques du juge Freeman, à la p. 377, sont à propos et je les reprends par souci de commodité:

5. Le ministère de la Santé avait discuté avec l'ordre des médecins de la Nouvelle-Écosse de la possibilité de fournir davantage de soins de santé ailleurs que dans les hôpitaux. L'ordre des médecins n'a pas été consulté au sujet de la *Loi* avant qu'elle n'ait été déposée. Les témoignages semblent indiquer que la *Loi* ne va pas dans le même sens que les pourparlers.

L'ordre des médecins n'a pas été consulté avant la présentation du projet de loi et la consultation n'a porté ensuite que sur les services à désigner. Cet élément ne serait pas particulièrement révélateur en soi, mais, d'après le témoignage du Dr Vincent Audain, qui était président à l'époque en cause, l'ordre des médecins était en train de discuter avec le gouvernement de la possibilité d'autoriser la fourniture d'une proportion plus grande des services de santé à l'extérieur des hôpitaux. Le Dr Audain a appris l'existence du projet de loi par un message téléphonique le jour de sa présentation. Il a témoigné que l'ordre avait appris avec inquiétude cette action inattendue et qu'il avait soupçonné qu'elle s'expliquait par la «question de l'avortement». L'ordre a adopté une résolution, qu'il a transmise au gouvernement, désavouant la loi

delivery of medical care, would add to the cost of hospital care and conflict with emerging technological advances in medicine. The legislation was seen to contradict the government's stated policy goals of moving more services outside hospitals. Furthermore, according to Dr. Audain, when the Medical Society was consulted in June 1989 as to the medical services to be designated, the restriction of abortion was non-negotiable.

Although the Crown's expert witness, Mr. Malcom, testified as to the adequacy of access to abortion in Nova Scotia, no studies or consultation on the delivery of, access to, or cost-effectiveness of abortion services in hospitals or clinics were conducted, and the Crown relied at trial on dated statistical evidence as to the adequacy of existing facilities. The appellant argued, on the basis of Mr. Malcom's opinion evidence, that quality assurance is best ensured through the Canadian Council on Hospital Accreditation. There is no evidence, however, that the government had inquired into either the quality of services provided in hospitals *vis-à-vis* clinics or the existence of standards for the delivery of abortion services.

The appellant refers to a meeting of the House of Assembly's Committee on Community Services at the abortion unit of the Victoria General Hospital ("VGH"), in Halifax, on May 30, 1989, as evidence of prior consultation. Eighty-three per cent of all abortions performed in Nova Scotia are performed at this hospital. The topic of the meeting was the VGH's termination of pregnancy unit. The Committee met with the head of the gynaecology department, the head of the abortion unit and the charge nurse of the ambulatory care unit. The head of the abortion unit said that in his view Nova Scotia adequately met its own abortion needs and a Morgentaler clinic was unnecessary; however, he

parce qu'elle aurait des répercussions négatives sur la fourniture des services médicaux, qu'elle ferait augmenter les frais d'hospitalisation et qu'elle serait inconciliable avec les progrès techniques en médecine. Les textes législatifs étaient perçus comme contraires à la politique que le gouvernement avait énoncée, c'est-à-dire favoriser la fourniture d'une proportion plus grande des services à l'extérieur des hôpitaux. Par surcroît, selon le Dr Audain, quand l'ordre des médecins a été consulté en juin 1989 au sujet de la liste des services médicaux à désigner, la limitation des avortements n'était pas négociable.

Quoique le témoin expert cité par le ministère public, M. Malcom, ait attesté que l'accès à l'avortement était adéquat en Nouvelle-Écosse, aucune étude ni consultation n'a été menée quant à la fourniture, à l'accès ou au rapport coût/efficacité des services d'avortement fournis dans les hôpitaux et dans les cliniques, et le ministère public s'est fondé au procès sur des statistiques qui dataient pour prouver que les installations existantes étaient suffisantes. Invoquant le témoignage d'expert de M. Malcom, l'appelante a soutenu qu'il valait mieux laisser au Conseil canadien d'agrément des hôpitaux le soin de veiller à l'assurance de la qualité. Toutefois, rien ne prouve que le gouvernement ait effectué une étude sur la qualité des services fournis dans les hôpitaux en comparaison de ceux fournis dans les cliniques ou sur l'existence de normes applicables à la fourniture des services d'avortement.

Pour prouver qu'une consultation a bien eu lieu, l'appelante fait mention d'une réunion du comité des services communautaires de la Chambre qui s'est tenue au service des avortements de l'hôpital Victoria General («l'hôpital») à Halifax, le 30 mai 1989. Quatre-vingt-trois pour cent des avortements pratiqués en Nouvelle-Écosse le sont dans cet hôpital. Le sujet de la réunion était le service d'interruption des grossesses de l'hôpital. Le comité a rencontré le chef du service de gynécologie, le chef du service des avortements, l'infirmière responsable de l'unité des soins ambulatoires. Le chef du service des avortements a dit qu'à son avis, la Nouvelle-Écosse répondait de manière adéquate à

also said that such a clinic would serve all the Atlantic provinces. The three guests generally praised the efficiency and safety of existing abortion services, although it was revealed that average delays at the VGH were from a week to ten days, the medical staff willing to perform abortions at the hospital had fallen from ten to five, the quarters were cramped, and the greatest concern was a lack of information and counselling for both patients and doctors. Little hard data was provided. The meeting, indeed, seems to have provided more of a political platform for the expression of the views of the politicians on the committee than a forum for consultation and fact-finding regarding the issues the legislation was purported to address.

ses propres besoins au chapitre de l'avortement et qu'une clinique Morgentaler était inutile; toutefois, il a également dit qu'une telle clinique recevrait des patientes de toutes les provinces Atlantiques. Les trois invités ont loué en général l'efficacité et la sécurité des services d'avortement existants, encore qu'on ait révélé que les délais moyens à l'hôpital allaient d'une semaine à dix jours, que le nombre de médecins disposés à pratiquer des avortements à l'hôpital était passé de dix à cinq, qu'on y était à l'étroit et que le principal sujet d'inquiétude était l'insuffisance des ressources d'information et de counselling à la disposition des patientes et des médecins. Peu de données précises ont été communiquées. En effet, la réunion semble avoir été davantage une tribune politique permettant aux politiciens membres du comité d'exprimer leur opinion qu'un moyen de tenir une consultation et d'enquêter sur les questions que la législation était censée viser.

The lack of prior study or consultation is not raised to show that the province acted indiscreetly or ineffectually in pursuing provincial objectives, but rather to indicate that the evidence simply does not support the submission that these provincial objectives were the basis for the legislative action in question.

Si je mets en relief l'insuffisance des études ou de la consultation antérieures, ce n'est pas pour montrer que les moyens pris par la province pour atteindre ses objectifs ont été imprudents ou inefficaces, mais plutôt pour indiquer que la preuve n'étaye simplement pas l'argument que ces objectifs de la province formaient la raison d'être de l'action législative en cause.

Another factor I consider relevant is that the "cost-effectiveness" rationale appears to be divorced from reality. Dr. Morgentaler's clinic will not represent a direct increase in the cost to the province of the provision of health care services. The parties dispute the actual cost of abortion services in and out of hospitals, but I do not propose to enter into that argument. In response to questions from the bench, appellant's counsel agreed that the fee paid to the respondent in respect of abortion services would be the same as that provided to a doctor who performed an abortion in a hospital. Consequently the establishment of an abortion clinic would not result in an increased direct cost to the province in the form of doctors' fees. The appellant's argument, as developed through Mr. Malcom's evidence, was that the duplication of services would lower the number of

Un autre facteur que j'estime pertinent c'est que l'argument fondé sur le rapport coût/efficacité semble être contredit par la réalité. La clinique du Dr Morgentaler n'entraînera pas de hausse directe du coût des services de santé supporté par la province. Les parties ne s'entendent pas sur le coût réel des services d'avortement selon qu'ils sont fournis dans les hôpitaux ou ailleurs, mais je n'ai pas l'intention de me lancer dans ce débat. En réponse à des questions posées par le juge, l'avocat de l'appelante a convenu que les honoraires versés à l'intimé pour les services d'avortement étaient égaux à ceux touchés par un médecin qui pratique un avortement à l'hôpital. Par conséquent, l'établissement d'une clinique d'avortement ne provoquerait pas d'augmentation directe des coûts supportés par la province au titre des honoraires des médecins. S'appuyant sur le témoignage de M.

abortions performed in hospitals and eventually lead to an increase in the cost per procedure. The evidence did not establish, however, that the erosion in the number of abortions performed in hospitals would be great enough to have this effect.

A fifth consideration is the list of designated medical services itself. There is no apparent link between the different services. The only common denominator suggested by the appellant is that the government anticipated that these services might be attractive to private facilities. The appellant argued at trial and maintained before us, however, that the government's policy was to oppose the performance of any and all surgical procedures outside hospital. If that were the case, one might wonder why the Act did not prohibit the performance of surgical procedures generally outside a hospital. Designating nine apparently unrelated procedures does not accomplish this purpose.

If the means employed by a legislature to achieve its purported objectives do not logically advance those objectives, this may indicate that the purported purpose masks the legislation's true purpose. In *Westendorp v. The Queen, supra*, Laskin C.J. held that it was specious to regard a by-law which prohibited street prostitution as relating to control of the streets, since if that were its true purpose, "it would have dealt with congregation of persons on the streets or with obstruction, unrelated to what the congregating or obstructing persons say or otherwise do" (at p. 51). Here, one would expect that if the province's policy were to prohibit the performance of any surgical procedures outside hospitals, the legislation would have simply done so.

Finally, although I put little weight on this factor, I agree with both courts below that the relatively severe penalties provided for by the Act are

Malcom, l'appelante a fait valoir que, puisque les services feraient double emploi, moins d'avortements seraient pratiqués à l'hôpital et, à la longue, le coût unitaire s'accroîtrait. La preuve n'a toutefois pas montré que la diminution du nombre d'avortements pratiqués dans les hôpitaux serait suffisante pour produire cet effet.

Un cinquième élément qui entre en ligne de compte est la liste des services médicaux elle-même. Il n'y a pas de lien apparent entre les différents services. Le seul dénominateur commun suggéré par l'appelante est que le gouvernement prévoyait que ces services pourraient être jugés intéressants par des exploitants d'établissements privés. L'appelante a cependant soutenu au procès et devant nous que la position du gouvernement était de s'opposer à ce que toute opération chirurgicale soit pratiquée ailleurs que dans un hôpital. Si tel était le cas, on peut se demander pourquoi la Loi n'a pas interdit, de façon générale, l'exécution des interventions chirurgicales ailleurs que dans un hôpital. Désigner neuf interventions apparemment sans rapport entre elles ne permet pas d'atteindre cet objectif.

Si les moyens employés par une assemblée législative pour atteindre ses prétendus objectifs ne vont pas logiquement dans le sens de ces objectifs, cela peut indiquer que le prétendu objet de la loi masque son objet véritable. Dans l'arrêt *Westendorp c. La Reine*, précité, le juge en chef Laskin conclut que c'est par un raisonnement spécieux qu'on peut dire qu'un règlement interdisant la prostitution dans les rues se rapporte au bon ordre dans la rue, parce que si c'était là le but visé par le règlement, «il traiterait des rassemblements de personnes dans la rue ou de l'encombrement des rues, indépendamment de ce que disent ou font les personnes ainsi rassemblées» (à la p. 51). En l'espèce, on s'attendrait à ce que, si la politique de la province consistait à interdire l'exécution de toute intervention chirurgicale ailleurs que dans un hôpital, les textes législatifs l'auraient simplement interdite.

Pour terminer, bien que j'accorde peu de poids à ce facteur, je suis d'accord avec les deux tribunaux d'instance inférieure pour dire que la sévérité rela-

relevant to its constitutional characterization. Section 6(1) of the Act prescribes fines of $10,000 to $50,000 for each infraction of the Act. Kennedy Prov. Ct. J. and Freeman J.A. considered the relative severity of the fines as one indication that the fines were not simply measures to enforce a regulatory scheme, but penalties to punish abortion clinics as inherently wrong. Of course, s. 92(15) of the *Constitution Act, 1867* allows the provinces to impose punishment to enforce valid provincial law, and the mere addition of penal sanctions to an otherwise valid provincial legislative scheme does not make the legislation criminal law: *Smith v. The Queen*, *supra*, at p. 800; *Nova Scotia Board of Censors v. McNeil*, *supra*, at p. 697; *Irwin Toy Ltd. v. Quebec (Attorney General)*, *supra*, at p. 965. However, the unusual severity of penalties may be taken into account in characterizing legislation: *Westendorp v. The Queen*, *supra*, at p. 51.

D. *Conclusion*

(1) Pith and Substance

This legislation deals, by its terms, with a subject historically considered to be part of the criminal law — the prohibition of the performance of abortions with penal consequences. It is thus suspect on its face. Its legal effect partially reproduces that of the now defunct s. 251 of the *Criminal Code*, in so far as both precluded the establishment and operation of free-standing abortion clinics. Its legislative history, the course of events leading up to the Act's passage and the making of N.S. Reg. 152/89, the Hansard excerpts and the absence of evidence that privatization and the cost and quality of health care services were anything more than incidental concerns, lead to the conclusion that the *Medical Services Act* and the *Medical Services Designation Regulation* were aimed primarily at suppressing the perceived public harm or evil of abortion clinics. The legislation meets the tests set out in the *Margarine Reference*, *supra*, and of

tive des peines prévues par la Loi est pertinente par rapport à sa qualification constitutionnelle. Le paragraphe 6(1) de la Loi impose des amendes de 10 000 $ à 50 000 $ à l'auteur d'une infraction. Le juge Kennedy de la Cour provinciale et le juge Freeman de la Cour d'appel ont estimé que la sévérité relative des amendes constituait une indication que celles-ci n'étaient pas simplement des mesures destinées à mettre en application un régime réglementaire, mais qu'elles visaient à punir l'ouverture de cliniques d'avortement, tenue pour intrinsèquement répréhensible. Bien entendu, le par. 92(15) de la *Loi constitutionnelle de 1867* autorise les provinces à infliger des peines pour appliquer des lois provinciales valides, et le simple fait d'assortir de sanctions pénales un régime provincial par ailleurs valide n'en fait pas une loi touchant le droit criminel: *Smith c. The Queen*, précité, à la p. 800; *Nova Scotia Board of Censors c. McNeil*, précité, à la p. 697; *Irwin Toy Ltd. c. Québec (Procureur général)*, précité, à la p. 965. Toutefois, la sévérité exceptionnelle des peines peut être prise en considération au regard de la qualification de la législation: *Westendorp c. La Reine*, précité, à la p. 51.

D. *Conclusion*

(1) Le caractère véritable

Les textes législatifs en l'espèce portent, de par leurs termes, sur un sujet qui a, par le passé, été tenu pour une question touchant le droit criminel — l'interdiction de l'avortement assortie de conséquences pénales. Ils sont donc suspects à première vue. Leur effet juridique reprend en partie celui de l'art. 251 du *Code criminel* maintenant inopérant, dans la mesure où les deux dispositions interdisent l'établissement et les activités de cliniques d'avortement autonomes. L'historique des textes, le déroulement des faits jusqu'à l'adoption de la Loi et jusqu'à la prise du règlement N.S. Reg. 152/89, les extraits du Hansard et l'absence de preuve que la privatisation et le coût et la qualité des services de santé étaient davantage que des préoccupations accessoires, tout cela m'amène à conclure que la *Medical Services Act* et le *Medical Services Designation Regulation* visaient principalement à supprimer le mal ou fléau public appréhendé que

Morgentaler (1975) and *Morgentaler (1988), supra.* The primary objective of the legislation was to prohibit abortions outside hospitals as socially undesirable conduct, and any concern with the safety and security of pregnant women or with health care policy, hospitals or the regulation of the medical profession was merely ancillary. This legislation involves the regulation of the place where an abortion may be obtained, not from the viewpoint of health care policy, but from the viewpoint of public wrongs or crimes, to echo Cannon J.'s words in *Reference re Alberta Statutes*, [1938] S.C.R. 100, at p. 144 (appeal dismissed as moot in *Alberta Bank Taxation Reference, supra*, at pp. 127-28):

> I agree with the submission of the Attorney-General for Canada that this bill deals with the regulation of the press of Alberta, not from the viewpoint of private wrongs or civil injuries resulting from any alleged infringement or privation of civil rights which belong to individuals, considered as individuals but from the viewpoint of public wrongs or crimes, i.e., involving a violation of the public rights and duties to the whole community, considered as a community, in its social aggregate capacity. [Emphasis added.]

Paraphrasing what Lamer J. said in *Starr v. Houlden, supra*, at p. 1405: I find unpersuasive the argument that this legislation is solidly anchored in s. 92(7), (13) or (16) of the *Constitution Act, 1867*. There is nothing on the surface of the legislation or in the background facts leading up to its enactment to convince me that it is designed to protect the integrity of Nova Scotia's health care system by preventing the emergence of a two-tiered system of delivery, to ensure the delivery of high-quality health care, or to rationalize the delivery of medical services so as to avoid duplication and reduce public health care costs. Any such objectives are clearly incidental to the central feature of the legislation, which is the prohibition of abortions outside

représentaient les cliniques d'avortement. Les textes législatifs répondent aux critères énoncés dans le *Renvoi sur la margarine* et dans les arrêts *Morgentaler (1975)* et *Morgentaler (1988)*, précités. L'objet premier des textes était d'interdire de pratiquer un avortement ailleurs que dans un hôpital parce que cela constituait un acte socialement indésirable, et toute préoccupation à l'égard de la santé et de la sécurité des femmes enceintes ou à l'égard de la politique de la santé, des hôpitaux ou de la réglementation de la profession médicale n'était qu'accessoire. Les textes législatifs en l'espèce concernent la réglementation du lieu où l'avortement peut être pratiqué, non pas sur le plan de la politique de la santé, mais dans l'optique de méfaits public ou de crimes, pour reprendre les propos du juge Cannon dans *Reference re Alberta Statutes*, [1938] R.C.S. 100, à la p. 144 (pourvoi rejeté en raison de son caractère théorique par *Alberta Bank Taxation Reference*, précité, aux pp. 127 et 128):

> [TRADUCTION] Je souscris à l'avis du procureur général du Canada selon lequel le présent projet de loi traite de la réglementation de la presse de l'Alberta, non du point de vue des délits privés ou des préjudices civils résultant d'une prétendue violation ou privation des droits civils des individus en tant que tels, mais du point de vue des délits publics ou crimes, c'est-à-dire ceux qui impliquent une violation des droits et des devoirs publics envers la collectivité tout entière, considérée comme telle, dans sa capacité d'agir en tant que collectivité. [Je souligne.]

Pour reprendre la formule du juge Lamer dans l'arrêt *Starr c. Houlden*, précité, à la p. 1405, je trouve peu convaincant l'argument selon lequel les textes législatifs en l'espèce sont solidement ancrés aux par. 92(7), (13) ou (16) de la *Loi constitutionnelle de 1867*. Ni la teneur des textes ni la suite des faits qui a conduit à leur adoption ne me persuadent qu'ils visent à protéger l'intégrité du système de santé de la Nouvelle-Écosse en empêchant l'instauration d'un système à deux niveaux, à assurer la prestation de soins de qualité supérieure ou à rationaliser la fourniture des services médicaux afin d'éviter qu'ils fassent double emploi et de réduire les dépenses publiques au chapitre des soins de santé. De tels objectifs sont nettement

hospitals as socially undesirable conduct subject to punishment.

(2) Practical Effect

This legislation will certainly restrict abortion in the sense that it makes abortions unavailable in any place other than hospitals. But will it lead to a practical restriction of access to abortion in Nova Scotia? Will the present hospital system be able and willing to accommodate all the women who desire to terminate a pregnancy, given among other things that the hospital in which 83 percent of all abortions are performed has lost half of its medical staff willing to perform the procedure? These are questions that the trial judge did not answer, and on which the parties are resolutely divided. Women may not wish to have an abortion in a hospital for any number of legitimate reasons. Clearly restrictions as to place can have the effect of restricting abortions in practice, and indeed it was the operation of s. 251 of the *Criminal Code* in restricting abortions to certain hospitals that contributed largely to its demise. One of the reasons that the former s. 251 of the *Criminal Code* was struck down in *Morgentaler (1988)*, *supra*, was that the in-hospital requirement in that section led to unacceptable delays, undue stress and trauma, and a severe practical restriction of access to abortion services. Several years of experience under s. 251 showed that the combined decisions and actions of individual anti-abortion hospital boards could render access to legal abortion non-existent in large areas of the country. Something similar may occur in Nova Scotia but that is something we have no way of predicting. One of the effects of the legislation is consolidation of abortions in the hands of the provincial government, largely in one provincially controlled institution. This renders free access to abortion vulnerable to administrative erosion.

accessoires à la caractéristique centrale des textes, savoir l'interdiction de pratiquer un avortement ailleurs que dans un hôpital, acte tenu pour socialement indésirable et passible de sanctions.

(2) L'effet pratique

Les textes législatifs en l'espèce limiteront certainement l'avortement en ce sens qu'ils le rendront impossible à obtenir ailleurs que dans un hôpital. Mais entraînera-t-il dans la pratique une restriction de l'accès à l'avortement en Nouvelle-Écosse? Le système hospitalier actuel sera-t-il en mesure d'accueillir toutes les femmes qui désirent interrompre leur grossesse, et sera-t-il prêt à les recevoir, étant donné, entre autres, que l'hôpital dans lequel 83 p. 100 de tous les avortements sont pratiqués a perdu la moitié de ses médecins disposés à pratiquer cette intervention? Ce sont des questions auxquelles le juge du procès n'a pas répondu et sur lesquelles les parties divergent résolument. Les femmes peuvent ne pas vouloir se faire avorter à l'hôpital pour une quantité de raisons légitimes. De toute évidence, les restrictions concernant le lieu peuvent avoir pour effet de limiter l'avortement en pratique et, de fait, l'invalidation de l'art. 251 du *Code criminel* a été due en grande partie au résultat de son application, c'est-à-dire qu'il avait limité l'avortement à certains hôpitaux. Dans l'arrêt *Morgentaler (1988)*, précité, l'ancien art. 251 du *Code criminel* a été annulé notamment parce que l'obligation de se faire avorter à l'hôpital contenue dans cet article engendrait des délais inacceptables et une tension et une angoisse excessives, et elle restreignait grandement en pratique l'accès aux services d'avortement. Après plusieurs années d'application de l'art. 251, on a constaté que les décisions et les actions conjuguées des conseils d'hôpitaux anti-avortement avaient rendu l'accès à l'avortement légal inexistant dans de nombreuses régions du pays. Une chose semblable pourrait se produire en Nouvelle-Écosse, mais nous n'avons aucun moyen de le prédire. L'un des effets des textes législatifs est l'attribution au gouvernement provincial du droit exclusif de pratiquer des avortements, et ce dans une large mesure dans un seul établissement contrôlé par l'État. Le libre accès à l'avortement est ainsi susceptible de subir l'érosion administrative.

Having applied the ordinary tests as to the matter of the present legislation, I am able to conclude that the legislation was an *ultra vires* invasion of the field of criminal law. I am able to reach this conclusion without predicting the ultimate practical effect of this legislation, and it is consequently unnecessary to adjudicate the intractable dispute between the parties as to whether this legislation will, in fact, restrict access to abortion in Nova Scotia. The appellant's evidence that the legislation will not have the practical effect of restricting abortions is simply evidence that the legislation will not actually accomplish what it set out to do. In view of my conclusion as to the pith and substance of the legislation, I am not concerned with whether the legislation is effective and such evidence can no more be used to validate *ultra vires* legislation than to invalidate *intra vires* legislation, as was held in *Reference re Anti-Inflation Act*, *supra*.

(3) Severance

Severance is infrequently applied in distribution of powers cases. The general rule is that severance is available where the remaining good part can survive independently and would have been enacted by itself (see the *Alberta Bill of Rights case, supra*, at p. 518). Here there is no "remaining good part", since the foregoing analysis has shown that the pith and substance of the entire legislation taken together, Act and regulation alike, is criminal law. As Hogg says, "[f]or constitutional purposes the statute is one law, and it will stand or fall as a whole" (*supra*, at p. 15-21); the same reasoning applies where, as here, two pieces of legislation are intertwined parts of a single legislative plan or scheme (see *Attorney General for Ontario v. Reciprocal Insurers*, *supra*, and *Alberta Bank Taxation Reference*, *supra*), two separate provisions or enactments "are so interconnected that they must be read together as expressing a single legislative purpose" (*Switzman v. Elbling*, *supra*, at p. 315, *per* Nolan J.), or the regulations "are so intertwined with the authorizing statute as to stamp it

Après avoir appliqué les critères ordinaires relativement à la matière des textes législatifs en l'espèce, je puis conclure qu'ils constituaient une ingérence *ultra vires* dans le domaine du droit criminel. Je peux tirer cette conclusion sans prédire l'effet pratique à long terme de ces textes et il n'est donc pas nécessaire de trancher le litige insoluble entre les parties pour ce qui est de savoir si ces textes limiteront, en pratique, l'accès à l'avortement en Nouvelle-Écosse. La preuve de l'appelante selon laquelle les textes n'auront pas, dans la pratique, pour effet de limiter l'avortement établit simplement qu'ils ne permettront pas de fait d'atteindre les objectifs poursuivis. Vu ma conclusion quant au caractère véritable des textes, je n'ai pas à me prononcer sur la question de savoir s'ils sont efficaces et cette preuve ne peut pas davantage être utilisée pour valider une loi *ultra vires* que pour invalider une loi *intra vires*, comme notre Cour l'a décidé dans le *Renvoi relatif à la Loi anti-inflation*, précité.

(3) La dissociation

La dissociation n'est pas souvent appliquée dans les affaires relatives au partage des compétences. La règle générale veut que la dissociation soit possible si la partie valide restante peut survivre indépendamment et aurait pu être édictée séparément (voir l'affaire *Alberta Bill of Rights*, précitée, à la p. 518). En l'espèce, il n'y a pas de «partie valide restante», car l'analyse qui précède a montré que les textes législatifs dans leur ensemble — tant la Loi que le règlement — de par leur caractère véritable, ressortissent au droit criminel. Comme le dit Hogg, [TRADUCTION] «[s]ur le plan de la constitutionnalité, la loi est une et indivisible» (*op. cit.*, à la p. 15-21); le même raisonnement est valable quand, comme en l'espèce, deux textes sont des parties entrelacées d'un seul et même régime ou programme législatif (voir *Attorney General for Ontario c. Reciprocal Insurers*, et *Alberta Bank Taxation Reference*, précités), quand deux dispositions ou textes [TRADUCTION] «sont à ce point liés qu'il y a lieu de les interpréter ensemble comme l'expression d'un seul objet législatif» (*Switzman c. Elbling*, précité, à la p. 315 (le juge Nolan), ou quand les règlements «sont si intimement liés à la loi habilitante qu'ils l'imprègnent de leur carac-

with their character" (*Central Canada Potash Co. v. Saskatchewan, supra*, at p. 64).

As a result, the Act and regulation are *ultra vires* in their entirety.

(4) Disposition

For the foregoing reasons, I would answer the constitutional questions as follows:

1. Is the *Medical Services Act*, R.S.N.S. 1989, c. 281, *ultra vires* the Legislature of the Province of Nova Scotia on the ground that the Act is legislation in relation to criminal law falling within the exclusive legislative jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?

Answer: Yes.

2. Is the *Medical Services Designation Regulation*, N.S. Reg. 152/89, made on the 20th day of July, 1989, pursuant to s. 8 of the *Medical Services Act*, R.S.N.S. 1989, c. 281, *ultra vires* the Lieutenant Governor in Council on the ground the Regulation was made pursuant to legislation in relation to criminal law falling within the exclusive legislative jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?

Answer: Yes.

The appeal is therefore dismissed. I would award the respondent his costs of the appeal on a party and party scale.

Appeal dismissed with costs.

Solicitors for the appellant: Marian F. H. Tyson and Louise Walsh Poirier, Halifax.

Solicitors for the respondent: Buchan, Derrick & Ring, Halifax.

Solicitor for the intervener the Attorney General of Canada: The Deputy Attorney General of Canada, Ottawa.

tère» (*Central Canada Potash Co. c. Saskatchewan*, précité, à la p. 64).

En conséquence, la Loi et le règlement au complet sont *ultra vires*.

(4) Dispositif

Pour les motifs qui précèdent, je répondrais aux questions constitutionnelles de la manière suivante:

1. La *Medical Services Act*, R.S.N.S. 1989, ch. 281, excède-t-elle la compétence de la législature de la province de la Nouvelle-Écosse pour le motif que cette loi touche le droit criminel, une matière qui relève de la compétence législative exclusive du Parlement du Canada, en vertu du par. 91(27) de la *Loi constitutionnelle de 1867*?

Réponse: Oui.

2. Le *Medical Services Designation Regulation*, N.S. Reg. 152/89, pris le 20 juillet 1989, conformément à l'art. 8 de la *Medical Services Act*, R.S.N.S. 1989, ch. 281, excède-t-il la compétence du lieutenant-gouverneur en conseil pour le motif que ce règlement a été pris conformément à une loi touchant le droit criminel, une matière qui relève de la compétence législative exclusive du Parlement du Canada, en vertu du par. 91(27) de la *Loi constitutionnelle de 1867*?

Réponse: Oui.

Le pourvoi est donc rejeté. L'intimé a droit à ses dépens dans le pourvoi comme entre parties.

Pourvoi rejeté avec dépens.

Procureurs de l'appelante: Marian F. H. Tyson et Louise Walsh Poirier, Halifax.

Procureurs de l'intimé: Buchan, Derrick & Ring, Halifax.

Procureur de l'intervenant le procureur général du Canada: Le sous-procureur général du Canada, Ottawa.

Solicitor for the intervener the Attorney General for New Brunswick: Paul M. Breton, Fredericton.

Procureur de l'intervenant le procureur général du Nouveau-Brunswick: Paul M. Breton, Fredericton.

Solicitor for the intervener REAL Women of Canada: Angela M. Costigan, Toronto.

Procureur de l'intervenante REAL Women of Canada: Angela M. Costigan, Toronto.

Solicitors for the intervener the Canadian Abortion Rights Action League: Tory Tory DesLauriers & Binnington, Toronto.

Procureurs de l'intervenante l'Association canadienne pour le droit à l'avortement: Tory Tory DesLauriers & Binnington, Toronto.

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("*ESA*") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appelants*

c.

Zittrer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

N° du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «*LNE*») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le

ance, termination or vacation pay under the *ESA*. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40*a* of the *ESA* suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's *Interpretation Act* provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the *ESA* and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40*a* to be inapplicable in bankruptcy situations is incompatible with both the object of the *ESA* and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbi-

motif que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*. En appel, le ministère a eu gain de cause devant la Cour de l'Ontario (Division générale) mais la Cour d'appel de l'Ontario a infirmé ce jugement et a rétabli la décision du syndic. Le ministère a demandé l'autorisation d'interjeter appel de l'arrêt de la Cour d'appel mais il s'est désisté. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé et obtenu l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. En l'espèce, il s'agit de savoir si la cessation d'emploi résultant de la faillite de l'employeur donne naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*.

Arrêt: Le pourvoi est accueilli.

Une question d'interprétation législative est au centre du présent litige. Bien que le libellé clair des art. 40 et 40*a* de la *LNE* donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé, l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. Il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur. Au surplus, l'art. 10 de la *Loi d'interprétation* ontarienne dispose que les lois «sont réputées apporter une solution de droit» et qu'elles doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

L'objet de la *LNE* et des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. Conclure que les art. 40 et 40*a* sont inapplicables en cas de faillite est incompatible tant avec l'objet de la *LNE* qu'avec les dispositions relatives aux indemnités de licenciement et de cessation d'emploi. Le législateur ne peut avoir voulu des conséquences absurdes mais c'est le résultat auquel on arriverait si les employés congédiés avant la faillite avaient droit à ces avantages mais pas les employés congédiés après la faillite. Une distinction serait établie entre les employés sur la seule base de la date de leur

trarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the *Employment Standards Amendment Act, 1981* exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the *ESA* is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40*a* are examined in their entire context, the words "terminated by an employer" must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *Bankruptcy Act* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. It was not necessary to address the applicability of s. 7(5) of the *ESA*.

Cases Cited

Distinguished: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343; **referred to:** *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213;

congédiement et un tel résultat les priverait arbitrairement de certains des moyens dont ils disposent pour faire face à un bouleversement économique.

Le recours à l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié. En vertu du par. 2(3) de l'*Employment Standards Amendment Act, 1981*, étaient exemptés de l'obligation de verser des indemnités de cessation d'emploi, les employeurs qui avaient fait faillite et avaient perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale. Le paragraphe 2(3) implique nécessairement que les employeurs en faillite sont assujettis à l'obligation de verser une indemnité de cessation d'emploi. Si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin. En outre, comme la *LNE* est une loi conférant des avantages, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur.

Lorsque les mots exprès employés aux art. 40 et 40*a* sont examinés dans leur contexte global, les termes «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui sont licenciés pour quelque autre raison serait arbitraire et inéquitable. Une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. La cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. Il était inutile d'examiner la question de l'applicabilité du par. 7(5) de la *LNE*.

Jurisprudence

Distinction d'avec les arrêts: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343; **arrêts mentionnés:** *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. c. Hydro-Québec*,

Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. v. Vasil*, [1981] 1 S.C.R. 469; *Paul v. The Queen*, [1982] 1 S.C.R. 621; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025.

Statutes and Regulations Cited

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Employment Standards Act, R.S.O. 1970, c. 147, s. 13(2).
Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5) [rep. & sub. 1986, c. 51, s. 2], 40(1) [rep. & sub. 1987, c. 30, s. 4(1)], (7), 40*a*(1) [rep. & sub. *ibid.*, s. 5(1)].
Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40(7).
Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2.
Interpretation Act, R.S.O. 1980, c. 219 [now R.S.O. 1990, c. I.11], ss. 10, 17.
Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, ss. 74(1), 75(1).

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Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 2nd ed. Cowansville, Que.: Yvon Blais, 1991.
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Sullivan, Ruth. *Driedger on the Construction of Statutes*, 3rd ed. Toronto: Butterworths, 1994.

[1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103; *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986; *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701; *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. c. Vasil*, [1981] 1 R.C.S. 469; *Paul c. La Reine*, [1982] 1 R.C.S. 621; *R. c. Morgentaler*, [1993] 3 R.C.S. 463; *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513; *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025.

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Employment Standards Act, 1974, S.O. 1974, ch. 112, art. 40(7).
Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2.
Loi d'interprétation, L.R.O. 1980, ch. 219 [maintenant L.R.O. 1990, ch. I-11], art. 10, 17.
Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi, L.O. 1995, ch. 1, art. 74(1), 75(1).
Loi sur la faillite, L.R.C. (1985), ch. B-3 [maintenant la *Loi sur la faillite et l'insolvabilité*], art. 121(1).
Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5) [abr. & rempl. 1986, ch. 51, art. 2], 40(1) [abr. & rempl. 1987, ch. 30, art. 4(1)], (7), 40*a*(1) [abr. & rempl. *ibid.*, art. 5(1)].

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Christie, Innis, Geoffrey England and Brent Cotter. *Employment Law in Canada*, 2nd ed. Toronto: Butterworths, 1993.
Côté, Pierre-André. *Interprétation des lois*, 2e éd. Cowansville, Qué.: Yvon Blais, 1990.
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Sullivan, Ruth. *Driedger on the Construction of Statutes*, 3rd ed. Toronto: Butterworths, 1994.

Sullivan, Ruth. *Statutory Interpretation.* Concord, Ont.: Irwin Law, 1997.

APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and *Kathleen Martin*, for the appellants.

Raymond M. Slattery, for the respondent.

David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

The judgment of the Court was delivered by

IACOBUCCI J. — This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving

Sullivan, Ruth. *Statutory Interpretation.* Concord, Ont.: Irwin Law, 1997.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. nº 586 (QL), qui a infirmé un jugement de la Cour de l'Ontario (Division générale) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, statuant que le ministère du Travail pouvait prouver des réclamations au nom des employés de l'entreprise en faillite. Pourvoi accueilli.

Steven M. Barrett et *Kathleen Martin*, pour les appelants.

Raymond M. Slattery, pour l'intimée.

David Vickers, pour le ministère du Travail de la province d'Ontario, Direction des normes d'emploi.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Il s'agit d'un pourvoi interjeté par les anciens employés d'un employeur maintenant en faillite contre une ordonnance qui a rejeté les réclamations qu'ils ont présentées en vue d'obtenir une indemnité de licenciement (y compris la paie de vacances) et une indemnité de cessation d'emploi. Le litige porte sur une question d'interprétation législative. Tout particulièrement, le pourvoi tranche la question de savoir si, en vertu des dispositions législatives pertinentes en vigueur à l'époque de la faillite, les employés ont le droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi lorsque la cessation d'emploi résulte de la faillite de leur employeur. 1

1. Les faits

Avant sa faillite, la société Rizzo & Rizzo Shoes Limited («Rizzo») possédait et exploitait au Canada une chaîne de magasins de vente au détail de chaussures. Environ 65 pour 100 de ces magasins étaient situés en Ontario. Le 13 avril 1989, une pétition en faillite a été présentée contre la 2

order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

4 In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "*ESA*"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave

chaîne de magasins. Le lendemain, une ordonnance de séquestre a été rendue sur consentement à l'égard des biens de Rizzo. Au prononcé de l'ordonnance, les employés de Rizzo ont perdu leur emploi.

Conformément à l'ordonnance de séquestre, l'intimée, Zittrer, Siblin & Associates, Inc. (le «syndic») a été nommée syndic de faillite de l'actif de Rizzo. La Banque de Nouvelle-Écosse a nommé Peat Marwick Limitée («PML») comme administrateur séquestre. Dès la fin de juillet 1989, PML avait liquidé les biens de Rizzo et fermé les magasins. PML a versé tous les salaires, les traitements, toutes les commissions et les paies de vacances qui avaient été gagnés par les employés de Rizzo jusqu'à la date à laquelle l'ordonnance de séquestre a été rendue.

En novembre 1989, le ministère du Travail de la province d'Ontario, Direction des normes d'emploi (le «ministère») a vérifié les dossiers de Rizzo afin de déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi*, L.R.O. 1980, ch. 137 et ses modifications (la «*LNE*»). Le 23 août 1990, au nom des anciens employés de Rizzo, le ministère a remis au syndic intimé une preuve de réclamation pour des indemnités de licenciement et des paies de vacances (environ 2,6 millions de dollars) et pour des indemnités de cessation d'emploi (14 215 $). Le syndic a rejeté les réclamations et a donné avis du rejet le 28 janvier 1991. Aux fins du présent pourvoi, les réclamations ont été rejetées parce que le syndic était d'avis que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*.

Le ministère a interjeté appel de la décision du syndic devant la Cour de l'Ontario (Division générale) laquelle a infirmé la décision du syndic et a admis les réclamations en tant que réclamations non garanties prouvables en matière de faillite. En appel, la Cour d'appel de l'Ontario a cassé le jugement de la cour de première instance et rétabli la

to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "*BA*"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "*ESA*") respectively.

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7. —

(5) Every contract of employment shall be deemed to include the following provision:

> All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act*.

40. — (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;

(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

décision du syndic. Le ministère a demandé l'autorisation d'en appeler de l'arrêt de la Cour d'appel, mais il s'est désisté le 30 août 1993. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. L'ordonnance de notre Cour faisant droit à ces demandes a été rendue le 5 décembre 1996.

2. Les dispositions législatives pertinentes

Aux fins du présent pourvoi, les versions pertinentes de la *Loi sur la faillite* (maintenant la *Loi sur la faillite et l'insolvabilité*) et de la *Loi sur les normes d'emploi* sont respectivement les suivantes: L.R.C. (1985), ch. B-3 (la «*LF*») et L.R.O. 1980, ch. 137 et ses modifications au 14 avril 1989 (la «*LNE*»). 6

Loi sur les normes d'emploi, L.R.O. 1980, ch. 137 et ses modifications:

7 . . .

(5) Tout contrat de travail est réputé comprendre la disposition suivante:

> L'indemnité de cessation d'emploi et l'indemnité de licenciement deviennent exigibles et sont payées par l'employeur à l'employé en deux versements hebdomadaires à compter de la première semaine complète suivant la cessation d'emploi, et sont réparties sur ces semaines en conséquence. La présente disposition ne s'applique pas à l'indemnité de cessation d'emploi si l'employé a choisi de maintenir son droit d'être rappelé, comme le prévoit le paragraphe 40a (7) de la *Loi sur les normes d'emploi*.

40 (1) Aucun employeur ne doit licencier un employé qui travaille pour lui depuis trois mois ou plus à moins de lui donner:

a) un préavis écrit d'une semaine si sa période d'emploi est inférieure à un an;

b) un préavis écrit de deux semaines si sa période d'emploi est d'un an ou plus mais de moins de trois ans;

(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;

(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;

(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;

(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . .

40*a* . . .

(1a) Where,

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

c) un préavis écrit de trois semaines si sa période d'emploi est de trois ans ou plus mais de moins de quatre ans;

d) un préavis écrit de quatre semaines si sa période d'emploi est de quatre ans ou plus mais de moins de cinq ans;

e) un préavis écrit de cinq semaines si sa période d'emploi est de cinq ans ou plus mais de moins de six ans;

f) un préavis écrit de six semaines si sa période d'emploi est de six ans ou plus mais de moins de sept ans;

g) un préavis écrit de sept semaines si sa période d'emploi est de sept ans ou plus mais de moins de huit ans;

h) un préavis écrit de huit semaines si sa période d'emploi est de huit ans ou plus,

et avant le terme de la période de ce préavis.

. . .

(7) Si un employé est licencié contrairement au présent article:

a) l'employeur lui verse une indemnité de licenciement égale au salaire que l'employé aurait eu le droit de recevoir à son taux normal pour une semaine normale de travail sans heures supplémentaires pendant la période de préavis fixée par le paragraphe (1) ou (2), de même que tout salaire auquel il a droit;

. . .

40*a* . . .

[TRADUCTION] (1a) L'employeur verse une indemnité de cessation d'emploi à chaque employé licencié qui a travaillé pour lui pendant cinq ans ou plus si, selon le cas:

a) l'employeur licencie cinquante employés ou plus au cours d'une période de six mois ou moins et que les licenciements résultent de l'interruption permanente de l'ensemble ou d'une partie des activités de l'employeur à un établissement;

b) l'employeur dont la masse salariale est de 2,5 millions de dollars ou plus licencie un ou plusieurs employés.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2. — (1) Part XII of the said Act is amended by adding thereto the following section:

. . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

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

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. *Ontario Court (General Division)* (1991), 6 O.R. (3d) 441

Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22

[TRADUCTION]

2. (1) La partie XII de la loi est modifiée par adjonction de l'article suivant:

. . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

Loi sur la faillite, L.R.C. (1985), ch. B-3

121. (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date de la faillite, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à la date de la faillite, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

Loi d'interprétation, L.R.O. 1990, ch. I.11

10 Les lois sont réputées apporter une solution de droit, qu'elles aient pour objet immédiat d'ordonner l'accomplissement d'un acte que la Législature estime être dans l'intérêt public ou d'empêcher ou de punir l'accomplissement d'un acte qui lui paraît contraire à l'intérêt public. Elles doivent par conséquent s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables.

. . .

17 L'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit.

3. L'historique judiciaire

A. *La Cour de l'Ontario (Division générale)* (1991), 6 O.R. (3d) 441

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

Après avoir tranché plusieurs points non soulevés dans le présent pourvoi, le juge Farley est passé à la question de savoir si l'indemnité de licenciement et l'indemnité de cessation d'emploi sont des réclamations prouvables en application de la *LF*. S'appuyant sur la décision *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (C.S. Ont. en matière de faillite), il a conclu que manifestement, l'indemnité de licenciement et l'indemnité de cessation d'emploi sont prouvables en matière de faillite lorsque l'obligation légale d'effectuer ces versements a pris naissance avant la faillite. Par conséquent, il a estimé que le point essentiel à résoudre en l'espèce était de savoir si la faillite était assimilable au licenciement et entraînait l'application des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* de manière que l'obligation de verser ces indemnités prenne naissance également au moment de la faillite.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

Le juge Farley a abordé cette question en faisant remarquer que l'objet et l'intention de la *LNE* étaient d'établir des normes minimales d'emploi et de favoriser et protéger les intérêts des employés. Il a donc conclu que la *LNE* visait à apporter une solution de droit et devait dès lors être interprétée de manière équitable et large afin de garantir la réalisation de son objet selon ses sens, intention et esprit véritables.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

Le juge Farley a ensuite décidé que priver les employés en l'espèce du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi aurait pour conséquence injuste et arbitraire que l'employé licencié juste avant la faillite aurait droit à une indemnité de licenciement et à une indemnité de cessation d'emploi, alors que celui qui a perdu son emploi en raison de la faillite elle-même n'y aurait pas droit. Ce résultat, a-t-il dit, irait à l'encontre du but visé par la loi.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in

Le juge Farley ne voyait pas pourquoi les réclamations des employés en l'espèce ne seraient pas généralement considérées comme des réclamations concernant les salaires ou comme d'autres réclamations présentées en application de la *LF*. Il a souligné que les anciens employés en l'espèce

the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

n'avaient pas soutenu que les indemnités de licenciement et de cessation d'emploi devaient être prioritaires dans la distribution de l'actif, mais tout simplement qu'elles étaient des réclamations prouvables en matière de faillite (non garanties et non privilégiées). Pour ce motif, il a conclu qu'il ne convenait pas d'invoquer la jurisprudence et la doctrine portant sur l'interprétation des dispositions relatives à la priorité de la *LF*.

Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

11 Même si la faillite ne met pas fin à la relation entre l'employeur et l'employé de façon à faire jouer les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNF*, le juge Farley était d'avis que les employés en l'espèce avaient néanmoins droit à ces indemnités, car il s'agissait d'engagements contractés avant la date de la faillite conformément au par. 7(5) de la *LNE*. Il a conclu d'une part qu'aux termes du par. 7(5), tout contrat de travail est réputé comprendre une disposition prévoyant le versement d'une indemnité de licenciement et d'une indemnité de cessation d'emploi au moment de la cessation d'emploi et d'autre part que l'employeur en faillite est assujetti à l'obligation conditionnelle de verser ces indemnités depuis le début de la relation entre l'employeur et l'employé, soit bien avant la faillite.

Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the "*ESAA*"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

12 Le juge Farley a également examiné le par. 2(3) de l'*Employment Standards Amendment Act, 1981*, L.O. 1981, ch. 22 («l'*ESAA*»), qui est une disposition transitoire exemptant certains employeurs en faillite des nouvelles obligations relatives au paiement de l'indemnité de cessation d'emploi jusqu'à ce que les modifications aient reçu la sanction royale. Il était d'avis que cette disposition n'aurait pas été nécessaire si le législateur n'avait pas voulu que les obligations auxquelles sont tenus les employeurs au moment d'un licenciement s'appliquent aux employeurs en faillite en vertu de la *LNE*. Le juge Farley a conclu que la réclamation présentée par les anciens employés de Rizzo en vue d'obtenir des indemnités de licenciement et de cessation d'emploi pouvait être traitée comme une créance non garantie et non privilégiée dans une faillite. Par conséquent, il a accueilli l'appel formé contre la décision du syndic.

B. *Ontario Court of Appeal* (1995), 22 O.R. (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or who proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40*a*(1)(*a*) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40*a* does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a peti-

B. *La Cour d'appel de l'Ontario* (1995), 22 O.R. (3d) 385

Au nom d'une cour unanime, le juge Austin a commencé son analyse de la question principale du présent pourvoi en s'arrêtant sur le libellé des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE*. Il a noté, à la p. 390, que les dispositions relatives à l'indemnité de licenciement utilisent des expressions comme «[a]ucun employeur ne doit licencier un employé» (par. 40(1)), «le préavis qu'un employeur donne pour licencier» (par. 40(2)) et les «employés qu'un employeur a licenciés ou se propose de licencier» (par. 40(5)). Passant à l'indemnité de cessation d'emploi, il a cité l'al. 40*a*(1)*a*), à la p. 391, lequel contient l'expression «l'employeur licencie cinquante employés». Le juge Austin a conclu que ce libellé limite l'obligation d'accorder une indemnité de licenciement et une indemnité de cessation d'emploi aux cas où l'employeur licencie des employés. Selon lui, la cessation d'emploi résultant de l'effet de la loi, notamment de la faillite, n'entraîne pas l'application de la *LNE*.

À l'appui de sa conclusion, le juge Austin a examiné les arrêts de principe dans ce domaine du droit. Il a cité *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (C.S. en matière de faillite), dans lequel le juge Houlden (maintenant juge de la Cour d'appel) a statué que les dispositions relatives à l'indemnité de licenciement de la *LNE* n'étaient pas conçues pour s'appliquer à l'employeur en faillite. Il a également invoqué *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (C.S. Ont. en matière de faillite), à l'appui de la proposition selon laquelle la faillite d'une compagnie à la demande d'un créancier ne constitue pas un congédiement. Il a conclu ainsi, à la p. 395:

> [TRADUCTION] Le libellé clair des art. 40 et 40*a* ne crée une obligation de verser une indemnité de licenciement ou une indemnité de cessation d'emploi que si l'employeur licencie l'employé. En l'espèce, la cessation d'emploi n'est pas le fait de l'employeur, elle résulte d'une ordonnance de séquestre rendue à l'encontre de Rizzo le 14 avril 1989, à la suite d'une pétition présentée par l'un de ses créanciers. Le droit à une indemnité

tion by one of its creditors. No entitlement to either termination or severance pay ever arose.

Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40*a*.

Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

5. Analysis

The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40*a*(1a) begins with

de licenciement ou à une indemnité de cessation d'emploi n'a jamais pris naissance.

15 En ce qui concerne le par. 7(5) de la *LNE*, le juge Austin a rejeté l'interprétation du juge de première instance et a estimé que cette disposition ne créait pas d'engagement. Selon lui, elle ne faisait que préciser quand l'engagement contracté par ailleurs devait être acquitté et ne se rapportait donc pas à la question dont la cour était saisie. Le juge Austin n'a pas accepté non plus l'opinion exprimée par le tribunal inférieur au sujet du par. 2(3), la disposition transitoire de l'*ESAA*. Il a jugé que cette disposition n'avait aucun effet quant à l'intention du législateur, comme l'attestait la terminologie employée aux art. 40 et 40*a*.

16 Le juge Austin a conclu que, comme la cessation d'emploi subie par les anciens employés de Rizzo résultait d'une ordonnance de faillite et n'était pas le fait de l'employeur, il n'existait aucun engagement en ce qui concerne l'indemnité de licenciement, l'indemnité de cessation d'emploi ni la paie de vacances. L'ordonnance du juge de première instance a été annulée et la décision du syndic de rejeter les réclamations a été rétablie.

4. Les questions en litige

17 Le présent pourvoi soulève une question: la cessation d'emploi résultant de la faillite de l'employeur donne-t-elle naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*?

5. Analyse

18 L'obligation légale faite aux employeurs de verser une indemnité de licenciement ainsi qu'une indemnité de cessation d'emploi est régie respectivement par les art. 40 et 40*a* de la *LNE*. La Cour d'appel a fait observer que le libellé clair de ces dispositions donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé. Par exemple, le par. 40(1) commence par les mots suivants: «Aucun employeur ne doit

the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legisla-*

licencier un employé . . .» Le paragraphe 40*a*(1a) contient également les mots: «si [. . .] l'employeur licencie cinquante employés ou plus . . .» Par conséquent, la question dans le présent pourvoi est de savoir si l'on peut dire que l'employeur qui fait faillite a licencié ses employés.

La Cour d'appel a répondu à cette question par la négative, statuant que, lorsqu'un créancier présente une pétition en faillite contre un employeur, les employés ne sont pas licenciés par l'employeur mais par l'effet de la loi. La Cour d'appel a donc estimé que, dans les circonstances de l'espèce, les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNE* n'étaient pas applicables et qu'aucune obligation n'avait pris naissance. Les appelants répliquent que les mots «l'employeur licencie» doivent être interprétés comme établissant une distinction entre la cessation d'emploi volontaire et la cessation d'emploi forcée. Ils soutiennent que ce libellé visait à dégager l'employeur de son obligation de verser des indemnités de licenciement et de cessation d'emploi lorsque l'employé quittait son emploi volontairement. Cependant, les appelants prétendent que la cessation d'emploi forcée résultant de la faillite de l'employeur est assimilable au licenciement effectué par l'employeur pour l'exercice du droit à une indemnité de licenciement et à une indemnité de cessation d'emploi prévu par la *LNE*.

Une question d'interprétation législative est au centre du présent litige. Selon les conclusions de la Cour d'appel, le sens ordinaire des mots utilisés dans les dispositions en cause paraît limiter l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi aux employeurs qui ont effectivement licencié leurs employés. À première vue, la faillite ne semble pas cadrer très bien avec cette interprétation. Toutefois, en toute déférence, je crois que cette analyse est incomplète.

Bien que l'interprétation législative ait fait couler beaucoup d'encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994) (ci-après «*Construction of Statutes*»); Pierre-André Côté, *Interprétation des lois* (2e éd.

tion in Canada (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2e éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Parmi les arrêts récents qui ont cité le passage ci-dessus en l'approuvant, mentionnons: *R. c. Hydro-Québec*, [1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

22 Je m'appuie également sur l'art. 10 de la *Loi d'interprétation*, L.R.O. 1980, ch. 219, qui prévoit que les lois «sont réputées apporter une solution de droit» et doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

23 Bien que la Cour d'appel ait examiné le sens ordinaire des dispositions en question dans le présent pourvoi, en toute déférence, je crois que la cour n'a pas accordé suffisamment d'attention à l'économie de la *LNE*, à son objet ni à l'intention du législateur; le contexte des mots en cause n'a pas non plus été pris en compte adéquatement. Je passe maintenant à l'analyse de ces questions.

In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of "... the interests of employees by requiring employers to comply with

24 Dans l'arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, à la p. 1002, notre Cour, à la majorité, a reconnu l'importance que notre société accorde à l'emploi et le rôle fondamental qu'il joue dans la vie de chaque individu. La manière de mettre fin à un emploi a été considérée comme étant tout aussi importante (voir également *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701). C'est dans ce contexte que les juges majoritaires dans l'arrêt *Machtinger* ont défini, à la p. 1003, l'objet de la *LNE* comme étant la protection «. . . [d]es intérêts des employés en exigeant que

certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, ". . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

les employeurs respectent certaines normes minimales, notamment en ce qui concerne les périodes minimales de préavis de licenciement». Par conséquent, les juges majoritaires ont conclu, à la p. 1003, qu'«. . . une interprétation de la Loi qui encouragerait les employeurs à se conformer aux exigences minimales de celle-ci et qui ferait ainsi bénéficier de sa protection le plus grand nombre d'employés possible est à préférer à une interprétation qui n'a pas un tel effet».

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.)

L'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. L'article 40 de la *LNE* oblige les employeurs à donner à leurs employés un préavis de licenciement raisonnable en fonction des années de service. L'une des fins principales de ce préavis est de donner aux employés la possibilité de se préparer en cherchant un autre emploi. Il s'ensuit que l'al. 40(7)a), qui prévoit une indemnité de licenciement tenant lieu de préavis lorsqu'un employeur n'a pas donné le préavis requis par la loi, vise à protéger les employés des effets néfastes du bouleversement économique que l'absence d'une possibilité de chercher un autre emploi peut entraîner. (Innis Christie, Geoffrey England et Brent Cotter, *Employment Law in Canada* (2e éd. 1993), aux pp. 572 à 581.)

26 Similarly, s. 40*a*, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

De même, l'art. 40*a*, qui prévoit l'indemnité de cessation d'emploi, vient indemniser les employés ayant beaucoup d'années de service pour ces années investies dans l'entreprise de l'employeur et pour les pertes spéciales qu'ils subissent lorsqu'ils sont licenciés. Dans l'arrêt *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, le juge Robins a cité en les approuvant, aux pp. 556 et 557, les propos tenus par D. D. Carter dans le cadre d'une décision rendue en matière de normes d'emploi dans *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), à la p. 19, où il a décrit ainsi le rôle de l'indemnité de cessation d'emploi:

Severance pay recognizes that an employee does make an investment in his employer's business — the extent of this investment being directly related to the length of

[TRADUCTION] L'indemnité de cessation d'emploi reconnaît qu'un employé fait un investissement dans l'entreprise de son employeur — l'importance de cet investis-

the employee's service. This investment is the seniority that the employee builds up during his years of service.... Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

sement étant liée directement à la durée du service de l'employé. Cet investissement est l'ancienneté que l'employé acquiert durant ses années de service [...] À la fin de la relation entre l'employeur et l'employé, cet investissement est perdu et l'employé doit recommencer à acquérir de l'ancienneté dans un autre lieu de travail. L'indemnité de cessation d'emploi, fondée sur les années de service, compense en quelque sorte cet investissement perdu.

In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

27 À mon avis, les conséquences ou effets qui résultent de l'interprétation que la Cour d'appel a donnée des art. 40 et 40*a* de la *LNE* ne sont compatibles ni avec l'objet de la Loi ni avec l'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes. Selon un principe bien établi en matière d'interprétation législative, le législateur ne peut avoir voulu des conséquences absurdes. D'après Côté, *op. cit.*, on qualifiera d'absurde une interprétation qui mène à des conséquences ridicules ou futiles, si elle est extrêmement déraisonnable ou inéquitable, si elle est illogique ou incohérente, ou si elle est incompatible avec d'autres dispositions ou avec l'objet du texte législatif (aux pp. 430 à 432). Sullivan partage cet avis en faisant remarquer qu'on peut qualifier d'absurdes les interprétations qui vont à l'encontre de la fin d'une loi ou en rendent un aspect inutile ou futile (Sullivan, *Construction of Statutes*, *op. cit.*, à la p. 88).

The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up

28 Le juge de première instance a noté à juste titre que, si les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* ne s'appliquent pas en cas de faillite, les employés qui auraient eu la «chance» d'être congédiés la veille de la faillite auraient droit à ces indemnités, alors que ceux qui perdraient leur emploi le jour où la faillite devient définitive n'y auraient pas droit. À mon avis, l'absurdité de cette conséquence est particulièrement évidente dans les milieux syndiqués où les mises à pied se font selon l'ancienneté. Plus un employé a de l'ancienneté, plus il a investi dans l'entreprise de l'employeur et plus son droit à une indemnité de licenciement et à une indemnité de cessation d'emploi est fondé. Pourtant, c'est le personnel ayant le plus d'ancienneté qui risque de travailler

until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *ESAA* introduced s. 40*a*, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

2. . . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional

jusqu'au moment de la faillite et de perdre ainsi le droit d'obtenir ces indemnités.

Si l'interprétation que la Cour d'appel a donnée des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi est correcte, il serait acceptable d'établir une distinction entre les employés en se fondant simplement sur la date de leur congédiement. Il me semble qu'un tel résultat priverait arbitrairement certains employés d'un moyen de faire face au bouleversement économique causé par le chômage. De cette façon, les protections de la *LNE* seraient limitées plutôt que d'être étendues, ce qui irait à l'encontre de l'objectif que voulait atteindre le législateur. À mon avis, c'est un résultat déraisonnable.

En plus des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi, tant les appelants que l'intimée ont invoqué divers autres articles de la *LNE* pour appuyer les arguments avancés au sujet de l'intention du législateur. Selon moi, bien que la plupart de ces dispositions ne soient d'aucune utilité en ce qui concerne l'interprétation, il est une disposition transitoire particulièrement révélatrice. En 1981, le par. 2(1) de l'*ESAA* a introduit l'art. 40*a*, la disposition relative à l'indemnité de cessation d'emploi. En application du par. 2(2), cette disposition entrait en vigueur le 1er janvier 1981. Le paragraphe 2(3), la disposition transitoire en question, était ainsi conçue:

[TRADUCTION]

2. . . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

La Cour d'appel a conclu qu'il n'était ni nécessaire ni approprié de déterminer l'intention qu'avait le législateur en adoptant ce paragraphe

subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40*a* was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469, at p. 487; *Paul v. The Queen*, [1982] 1 S.C.R. 621, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

provisoire. Néanmoins, la cour a estimé que l'intention du législateur, telle qu'elle ressort des premiers mots des art. 40 et 40*a*, était claire, à savoir que la cessation d'emploi résultant de la faillite ne fera pas naître l'obligation de verser l'indemnité de cessation d'emploi et l'indemnité de licenciement qui est prévue par la *LNE*. La cour a jugé que cette intention restait inchangée à la suite de l'adoption de la disposition transitoire. Je ne puis souscrire ni à l'une ni à l'autre de ces conclusions. En premier lieu, à mon avis, l'examen de l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié et notre Cour y a eu souvent recours (voir, par ex., *R. c. Vasil*, [1981] 1 R.C.S. 469, à la p. 487; *Paul c. La Reine*, [1982] 1 R.C.S. 621, aux pp. 635, 653 et 660). En second lieu, je crois que la disposition transitoire indique que le législateur voulait que l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi prenne naissance lorsque l'employeur fait faillite.

In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

32 À mon avis, en raison de l'exemption accordée au par. 2(3) aux employeurs qui ont fait faillite et ont perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale, il faut nécessairement que les employeurs faisant faillite soient de fait assujettis à l'obligation de verser une indemnité de cessation d'emploi. Selon moi, si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin.

I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows (at p. 89):

33 Je m'appuie sur la décision rendue par le juge Saunders dans l'affaire *Royal Dressed Meats Inc.*, précitée. Après avoir examiné le par. 2(3) de l'*ESAA*, il fait l'observation suivante (à la p. 89):

> . . . any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the E.S.A. . . . it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

> [TRADUCTION] . . . tout doute au sujet de l'intention du législateur ontarien est dissipé, à mon avis, par la disposition transitoire qui introduit les indemnités de cessation d'emploi dans la L.N.E. [. . .] Il me semble qu'il faut conclure que le législateur voulait que l'obligation de verser des indemnités de cessation d'emploi prenne naissance au moment de la faillite. Selon moi, cette intention s'étend aux indemnités de licenciement qui sont de nature analogue.

This interpretation is also consistent with statements made by the Minister of Labour at the time

34 Cette interprétation est également compatible avec les déclarations faites par le ministre du

he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.
>
> . . .
>
> . . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

> . . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legisla-

Travail au moment de l'introduction des modifications apportées à la *LNE* en 1981. Au sujet de la nouvelle disposition relative à l'indemnité de cessation d'emploi, il a dit ce qui suit:

> [TRADUCTION] Les circonstances entourant une fermeture régissent l'applicabilité de la législation en matière d'indemnité de cessation d'emploi dans certains cas précis. Par exemple, une société insolvable ou en faillite sera encore tenue de verser l'indemnité de cessation d'emploi aux employés dans la mesure où il y a des biens pour acquitter leurs réclamations.
>
> . . .
>
> . . . les mesures proposées en matière d'indemnité de cessation d'emploi seront, comme je l'ai mentionné précédemment, rétroactives au 1er janvier de cette année. Cette disposition rétroactive, toutefois, ne s'appliquera pas en matière de faillite et d'insolvabilité dans les cas où les biens ont déjà été distribués ou lorsqu'une entente est déjà intervenue au sujet de la proposition des créanciers.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 4 juin 1981, aux pp. 1236 et 1237.)

De plus, au cours des débats parlementaires sur les modifications proposées, le ministre a déclaré:

> [TRADUCTION] En ce qui a trait à la rétroactivité, l'indemnité de cessation d'emploi ne s'appliquera pas aux faillites régies par la Loi sur la faillite lorsque les biens ont été distribués. Cependant, lorsque la présente loi aura reçu la sanction royale, les employés visés par des fermetures entraînées par des faillites seront visés par les dispositions relatives à l'indemnité de cessation d'emploi.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 16 juin 1981, à la p. 1699.)

Malgré les nombreuses lacunes de la preuve des débats parlementaires, notre Cour a reconnu qu'elle peut jouer un rôle limité en matière d'interprétation législative. S'exprimant au nom de la Cour dans l'arrêt *R. c. Morgentaler*, [1993] 3 R.C.S. 463, à la p. 484, le juge Sopinka a dit:

> . . . jusqu'à récemment, les tribunaux ont hésité à admettre la preuve des débats et des discours devant le corps législatif. [. . .] La principale critique dont a été l'objet ce type de preuve a été qu'elle ne saurait représenter «l'intention» de la législature, personne morale, mais

tive history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2, at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40*a* of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were

c'est aussi vrai pour d'autres formes de contexte d'adoption d'une loi. À la condition que le tribunal n'oublie pas que la fiabilité et le poids des débats parlementaires sont limités, il devrait les admettre comme étant pertinents quant au contexte et quant à l'objet du texte législatif.

Enfin, en ce qui concerne l'économie de la loi, puisque la *LNE* constitue un mécanisme prévoyant des normes et des avantages minimaux pour protéger les intérêts des employés, on peut la qualifier de loi conférant des avantages. À ce titre, conformément à plusieurs arrêts de notre Cour, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur (voir, par ex., *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2, à la p. 10; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513, à la p. 537). Il me semble que, en limitant cette analyse au sens ordinaire des art. 40 et 40*a* de la *LNE*, la Cour d'appel a adopté une méthode trop restrictive qui n'est pas compatible avec l'économie de la Loi. 36

La Cour d'appel s'est fortement appuyée sur la décision rendue dans *Malone Lynch*, précité. Dans cette affaire, le juge Houlden a conclu que l'art. 13, la disposition relative aux mesures de licenciement collectif de l'ancienne *ESA*, R.S.O. 1970, ch. 147, qui a été remplacée par l'art. 40 en cause dans le présent pourvoi, n'était pas applicable lorsque la cessation d'emploi résultait de la faillite de l'employeur. Le paragraphe 13(2) de l'*ESA* alors en vigueur prévoyait que, si un employeur voulait licencier 50 employés ou plus, il devait donner un préavis de licenciement dont la durée était prévue par règlement [TRADUCTION] «et les licenciements ne prenaient effet qu'à l'expiration de ce délai». Le juge Houlden a conclu que la cessation d'emploi résultant de la faillite ne pouvait entraîner l'application de la disposition relative à l'indemnité de licenciement car les employés placés dans cette situation n'avaient pas reçu le préavis écrit requis par la loi et ne pouvaient donc pas être considérés comme ayant été licenciés conformément à la Loi. 37

Deux ans après que la décision *Malone Lynch* eut été prononcée, les dispositions relatives à l'in- 38

amended by *The Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats*, *supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C.S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

demnité de licenciement de l'*ESA* de 1970 ont été modifiées par *The Employment Standards Act, 1974*, S.O. 1974, ch. 112. Dans la version modifiée du par. 40(7) de l'*ESA* de 1974, il n'était plus nécessaire qu'un préavis soit donné avant que le licenciement puisse produire ses effets. Cette disposition vient préciser que l'indemnité de licenciement doit être versée lorsqu'un employeur omet de donner un préavis de licenciement et qu'il y a cessation d'emploi, indépendamment du fait qu'un préavis régulier ait été donné ou non. Il ne fait aucun doute selon moi que la décision *Malone Lynch* portait sur des dispositions législatives très différentes de celles qui sont applicables en l'espèce. Il me semble que la décision du juge Houlden a une portée limitée, soit que les dispositions de l'*ESA* de 1970 ne s'appliquent pas à un employeur en faillite. Pour cette raison, je ne reconnais à la décision *Malone Lynch* aucune valeur persuasive qui puisse étayer les conclusions de la Cour d'appel. Je souligne que les tribunaux dans *Royal Dressed Meats*, précité, et *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (C.S.C.-B.), ont refusé de se fonder sur *Malone Lynch* en invoquant des raisons similaires.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), which cited the decision in *Malone Lynch*, *supra*, with approval.

La Cour d'appel a également invoqué *Re Kemp Products Ltd.*, précité, à l'appui de la proposition selon laquelle, bien que la relation entre l'employeur et l'employé se termine à la faillite de l'employeur, cela ne constitue pas un «congédiement». Je note que ce litige n'est pas fondé sur les dispositions de la *LNE*. Il portait plutôt sur l'interprétation du terme «congédiement» dans le cadre de ce que le plaignant alléguait être un contrat de travail. J'estime donc que cette décision ne fait pas autorité dans les circonstances de l'espèce. Pour les raisons exposées ci-dessus, je ne puis accepter non plus que la Cour d'appel se fonde sur l'arrêt *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), qui citait la décision *Malone Lynch*, précitée, et l'approuvait.

40 As I see the matter, when the express words of ss. 40 and 40*a* of the *ESA* are examined in their entire context, there is ample support for the con-

Selon moi, l'examen des termes exprès des art. 40 et 40*a* de la *LNE*, replacés dans leur contexte global, permet largement de conclure que les

clusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESAA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

mots «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Adoptant l'interprétation libérale et généreuse qui convient aux lois conférant des avantages, j'estime que ces mots peuvent raisonnablement recevoir cette interprétation (voir *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025). Je note également que l'intention du législateur, qui ressort du par. 2(3) de l'*ESAA*, favorise clairement cette interprétation. Au surplus, à mon avis, priver des employés du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi en application de la *LNE* lorsque la cessation d'emploi résulte de la faillite de leur employeur serait aller à l'encontre des fins visées par les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi et minerait l'objet de la *LNE*, à savoir protéger les intérêts du plus grand nombre d'employés possible.

In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

41 À mon avis, les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui ont été licenciés pour quelque autre raison serait arbitraire et inéquitable. De plus, je pense qu'une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. Je conclus donc que la cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. En raison de cette conclusion, j'estime inutile d'examiner l'autre conclusion tirée par le juge de première instance quant à l'applicabilité du par. 7(5) de la *LNE*.

I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections

42 Je fais remarquer qu'après la faillite de Rizzo, les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la

74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, "[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law". As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

LNE ont été modifiées à nouveau. Les paragraphes 74(1) et 75(1) de la *Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi*, L.O. 1995, ch. 1, ont apporté des modifications à ces dispositions qui prévoient maintenant expressément que, lorsque la cessation d'emploi résulte de l'effet de la loi à la suite de la faillite de l'employeur, ce dernier est réputé avoir licencié ses employés. Cependant, comme l'art. 17 de la *Loi d'interprétation* dispose que «[l]'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit», je précise que la modification apportée subséquemment à la loi n'a eu aucune incidence sur la solution apportée au présent pourvoi.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

6. Dispositif et dépens

Je suis d'avis d'accueillir le pourvoi et d'annuler le premier paragraphe de l'ordonnance de la Cour d'appel. Je suis d'avis d'y substituer une ordonnance déclarant que les anciens employés de Rizzo ont le droit de présenter des demandes d'indemnité de licenciement (y compris la paie de vacances due) et d'indemnité de cessation d'emploi en tant que créanciers ordinaires. Quant aux dépens, le ministère du Travail n'ayant produit aucun élément de preuve concernant les efforts qu'il a faits pour informer les employés de Rizzo ou obtenir leur consentement avant de se désister de sa demande d'autorisation de pourvoi auprès de notre Cour en leur nom, je suis d'avis d'ordonner que les dépens devant notre Cour soient payés aux appelants par le ministère sur la base des frais entre parties. Je suis d'avis de ne pas modifier les ordonnances des juridictions inférieures à l'égard des dépens.

Appeal allowed with costs.

Pourvoi accueilli avec dépens.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto.

Procureurs des appelants: Sack, Goldblatt, Mitchell, Toronto.

Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto.

Procureurs de l'intimée: Minden, Gross, Grafstein & Greenstein, Toronto.

Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

Procureur du ministère du Travail de la province d'Ontario, Direction des normes d'emploi: Le procureur général de l'Ontario, Toronto.

SEARS CANADA INC. Applicant	and	PARFUMS CHRISTIAN DIOR CANADA INC. & PARFUMS GIVENCHY CANADA LTD. Respondents	File No.: CT-2007-001 Registry Document No.:

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF the *Competition Act*, R.S.C 1985, c. C-34, as amended;

IN THE MATTER OF an application by Sear **CANADA** Inc. for an order pursuant to section 103.1 granting leave to make application under section 75 o the *Competition Act*;

SUPPLEMENTARY REPRESENTATIONS OF THE RESPONDENTS

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March 15, 2007

File: 2373-001

BY COURIER

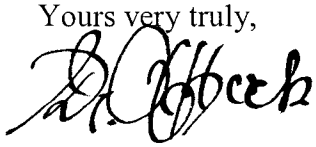
The Honourable Madam Justice Simpson
Chairperson
Competition Tribunal
Thomas D'Arcy McGee Building
600 – 90 Sparks St.
Ottawa, ON K1P 5B4

Dear Madam Justice Simpson:

Re: Parfums Christian Dior Canada Inc. et al. ats Sears Canada Inc.
Competition Tribunal File No. CT-2007-001

Enclosed please find our response to questions posed to counsel at the conclusion of the oral hearing of the above noted matter on Wednesday, March 14, 2007.

Yours very truly,



D.S. Affleck
DSA/lm

cc. Bennett Jones LLP
Attention: John F. Rook, Q.C., Derek J. Bell and Linda J. Visser