

Court File No. 661/89
773/89
811/89

SUPREME COURT OF ONTARIO
(Divisional Court)

B E T W E N:

NSP INVESTMENTS LIMITED, THE CORPORATION OF
THE TOWN OF MILTON, THE MILTON AREA CITIZENS
COALITION, THE HALTON FEDERATION OF
AGRICULTURE, WATKIN AND DOREEN MARTIN, WALTER
TOMOSKY, THOMAS AND MARY-JEAN MARTIN, MICHAEL
AND CYNTHIA REED, GRAHAM AND EVELYN GILLIES,
SALLY VETULIA, RAY AND ANNETTE WINTER, KIP AND
ANNE CHAPUT, WILFRED AND FREDA LAWRENCE, BILL
AND BEVERLY KETELAARS, JOHN VITETTA, STEVE AND
SHIRLEY DOLBY, KEN WETTLAUFER, HOWARD GOWLAND,
MR. AND MRS. PIETRO MOSCATO, MR. AND MRS. L.
CIACCO, RICK AND COLLEEN SIMMONS, MR. AND MRS.
ALBERTA SILVA

Applicants

- and -

THE JOINT BOARD (ESTABLISHED UNDER SECTION 4
OF CONSOLIDATED HEARINGS ACT, 1981 S.O. 1981,
C.20, AS AMENDED), THE REGIONAL MUNICIPALITY
OF HALTON, THE CORPORATION OF THE CITY OF
BURLINGTON, THE WEST BURLINGTON CITIZENS'
GROUP, AND THE HONOURABLE JAMES BRADLEY, IN
HIS CAPACITY AS THE MINISTER OF THE
ENVIRONMENT

Respondents

BOOK OF AUTHORITIES

ONTARIO MINISTRY OF THE ENVIRONMENT
LEGAL SERVICES BRANCH
10TH FLOOR
135 ST. CLAIR AVENUE WEST
TORONTO, ONTARIO
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Solicitors for the Respondent, the
Ontario Ministry of the Environment

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RE COUNTY OF NORTHUMBERLAND LANDFILL SITE

*Joint Board, W. H. J. Thompson, Q.C., Chairman and M. I. Jeffrey, Q.C.,
Member. November 28, 1983.*

Official plan (waste disposal site) — Joint board — Amendment to official plan needed to permit use of site by municipalities outside of planning area — Site not contravening intent of Food Land Guidelines — Need established — Planning concerns answered — No adverse effect on financial position of municipalities involved — Vehicular access adequate.

Zoning (waste disposal site) — Appeal — Joint board — Amendment to official plan needed to permit use of site by municipalities outside of planning area — Site not contravening intent of Food Land Guidelines — Need established — Planning concerns answered — No adverse effect on financial position of municipalities involved — Vehicular access adequate.

Joint board — Sanitary landfill site — Official plan amendment, zoning by-law appeal and certificate of approval to establish, maintain and operate landfill site — County application opposed by township and residents' group — Joint board calling ministry representatives to resolve discrepancies in environmental evidence — Discussion on award of costs to ratepayers against proponent.

Evidence — Joint board — Landfill site — Conflict in expert hydrogeological evidence presented by proponent and by objectors — Board calling Ministry of the Environment representatives to resolve conflict.

Environmental protection — Landfill site — Joint board — Certificate of approval to establish, maintain, and operate 56-acre landfill site sought by county — Site opposed by township and residents' group — Joint board calling Ministry of the Environment representatives to resolve conflict in environmental evidence — Annual progress report on monitoring programme to be filed with township and not with ratepayers' group — Condition requiring replacement of water supply to adjacent farmer should it be affected by landfill operation.

Services — Garbage disposal — Landfill site — Joint board — County seeking approval of landfill site — Opposition by township and residents — All planning and environmental concerns answered — Limited costs awarded to ratepayer's in opposition.

Costs — Joint board — Sanitary landfill site — County seeking approval of site serving several municipalities — Opposition by township and by ratepayers' group — Ratepayers awarded limited costs for consultants because their concerns led to further clarification of the issues before the board — Effect of legal aid certificate secured by residents discussed — Township not awarded costs — Township benefitting from approval of site — No award to be made against Ministry of the Environment except in very clear circumstances where unjustifiable burden would otherwise result.

The County of Northumberland sought approval of the joint board to establish a sanitary landfill operation in the Township of Seymour on a 56-acre site previously approved following a public hearing by the Environmental Assessment Board. However, the previous approval restricted the site to deal only with waste received from the Campbellford-Seymour Planning Area as permitted in the

operative official plan. The county subsequently wished to have the flexibility of receiving waste from municipalities outside of the Campbellford-Seymour Planning Area, and hence further applications were necessitated. The county in these fresh applications sought an amendment to the official plan, an order directing an amendment to the township's restricted area by-law and a new certificate of approval under the *Environmental Protection Act*, R.S.O. 1980, c. 141. The applications were opposed by the township and by a residents' group.

In the first part of the hearing, the hydrogeological evidence presented by experts for the county and for the residents' group was in conflict. Hence, the board requested evidence from the Ministry of the Environment, and this evidence suggested that further testing should be completed to enlarge the data base. As a result, the hearing was adjourned and further tests were conducted by the county, and new evidence presented to the board. }

Held, the applications were approved by the board. The further testing substantiated the county's hydrogeological interpretation of the proposed site. Sand or permeable zones postulated by the opposition either did not exist or were discontinuous and would be unlikely to provide a route for leachate to escape off site. Adverse environmental impacts were unlikely and, if occurring, could be detected in ample time and remedied by the proposed monitoring programme and collection system respectively. ↵

In planning terms, the site did not contravene the intent of the Flood Land Guidelines and the existing and proposed road system could adequately handle any vehicular traffic. There was a need for a landfill site serving the area and the development would not adversely affect the financial position of the municipalities involved. Hence, the applications should be approved and, in the circumstances, an award of costs totalling \$15,000 against the county and in favour of the residents' group was in order to relieve the individual residents from the personal financial responsibility of paying consultants' fees. Although the residents' position was ultimately not accepted by the board, their evidence had lead to the interim conclusion by the ministry that there was insufficient data to support the site. Thus, the issues raised by the residents did assist the board in reaching its decision by providing a framework within which the county's evidence could be assessed and evaluated. Although the township requested costs, none were awarded because its residents would receive the benefit of the use of the waste disposal site and would also receive the benefit of having township roads upgraded.

Statutes referred to

Consolidated Hearings Act, 1981 (Ont.), c. 20

Environmental Protection Act, R.S.O. 1980, c. 141, ss. 30, 33

Rules and regulations referred to

O. Reg. 309, s. 8(17)

APPLICATION before the Joint Board under ss. 2 and 3 of the *Consolidated Hearings Act*, 1981 (Ont.), c. 20, involving ss. 39(23) and 51 of the *Planning Act*, R.S.O. 1980, c. 379 and ss. 30 and 33 of the *Environmental Protection Act*, R.S.O. 1980, c. 141 (CH-81-10).

John S. Herron and Gordon C. Kelly, Q.C., for County of Northumberland.

T. E. Vigod and Marcia Valiante, student-at-law, for H.E.L.P. (Help Eliminate Leachate Pollution).

Minoo Khorshed, Q.C., Carol M. Olchowski and J. R. Tidball, for Ministry of the Environment.

W. H. J. THOMPSON, Q.C., CHAIRMAN AND M. I. JEFFREY, Q.C.,
MEMBER:—

Background

The subject-matter of this hearing involved primarily an application by the Corporation of the County of Northumberland for a certificate of approval to establish, maintain and operate a landfill site on a 56-acre (approximately) site located in the Township of Seymour on the north side of the township road lying between Concessions IV and V.

A public hearing with reference to the same site came before the Environmental Assessment Board (EAB) in January of 1979 and that board recommended approval of the site subject to certain conditions.

A chronology of events leading up to the selection of this site is contained in the EAB report dated March 15, 1979, and filed as ex. 10 herein.

The Ministry of the Environment issued a provisional certificate of approval on November 8, 1979, subject to conditions relating to the redesign of the site to provide for a leachate collection system.

In December of 1979 an application was made to the Township of Seymour Council to rezone the subject lands to permit a waste disposal site in conformity with the Official Plan of the Campbellford-Seymour Planning Area which application was refused. The county then appealed this refusal to the Ontario Municipal Board.

The original application for a certificate of approval before the EAB was restricted to deal only with waste received from the Town of Campbellford and the Township of Seymour in order to comply with the Official Plan of the Campbellford-Seymour Planning Area which did not permit waste from other areas to be disposed of in the said planning area. The county wished to have the flexibility of receiving waste from the Village of Hastings and a portion of the Township of Percy and, accordingly, passed a resolution requesting an amendment to the official plan permitting the proposed site to be used by municipalities other than those in the planning area.

this would indicate that either the zone if it did exist was discontinuous, or the sand zone itself had dried up. Mr. Sobanski testified, however, that small sand pockets encountered during the drilling programme were still saturated.

The only other possibility raised by Mr. Anderson was the hypothesis that the flow in the sand or permeable zone flowed below the level of the tile drain and discharged directly into the creek. Mr. Sobanski examined the sediments of the creek bed during the summer months and found no evidence to support this theory.

The Board after carefully reviewing all of the evidence presented by the three expert hydrogeologists has concluded that it is unlikely that the sand or permeable zones envisioned by Mr. Anderson in fact exist and that if they do exist, they are discontinuous and will be unlikely to provide leachate an avenue of escape in the direction of the O'Rourke property.

Mr. Anderson's concerns in this regard were, in the Board's view, satisfactorily addressed by means of additional testing and it is important to note that at least some of additional tests conducted by the county, with the full co-operation of ministry staff, were ones suggested by Mr. Anderson as a means of proving or disproving his theory.

It has been said that this proposed landfill site has been one of the most extensively tested sites for its size in Ontario, and while this may or may not be true, it is impossible to say with 100% certainty that there is no risk whatsoever. We are dealing with a subsurface hydrogeological setting and science has not yet devised a method of predicting ground water movement with absolute precision short of perhaps excavating the entire site which for obvious reasons is both impractical and financially prohibitive.

It is for these reasons that it is important that a proper monitoring programme be set in place to ensure that any assumptions and predictions made with respect to the movement of ground water are in fact correct and, if not, adequate time is available to take remedial measures before any off-site contamination can occur.

During the early part of this hearing the ministry presented a brief to the Board (ex. 51) outlining suggested conditions to be attached to a certificate of approval should the Board decide to grant approval. All of the suggested conditions except the first and the last dealt with the monitoring of the proposed site with particular emphasis directed towards early detection of any easterly flow component. In this regard under suggested condition

No. 1(d), cell Nos. 36 to 41 inclusive were not to be utilized until after the easterly ground water flow direction, its magnitude, and the impact at the easterly boundary on ground water quality had been determined acceptable to the ministry.

After hearing the further hydrogeological evidence adduced at this hearing by both the county and those in opposition, and after analyzing the further reports and test results, the ministry submitted revised suggested conditions for a certificate of approval dated September 28, 1983, and filed as ex. 137. These suggested conditions were presented through the ministry's witness Mr. Nars Borodczak, Manager of the Environmental Approvals Section. Once again most of the suggested conditions were directed towards the monitoring aspects of the proposed site and ex. 137 contained a statement of *rationale* for the suggested imposition of the said conditions.

Counsel for the ministry advised the Board that condition No. 1 requiring the landfill to be constructed and operated in accordance with the documents listed in sch. "A", except for such minor modifications as may be approved by the director of the central region of the ministry, made reference to the *application* for a certificate of approval dated August 12, 1982, and that it was not ministry practice to include the application as part of any certificate of approval.

Suggested condition Nos. 2, 3 and 4 deal with a comprehensive monitoring programme and leachate collection system to be submitted to and approved by the Director of the Central Region of the Ministry of the Environment prior to the deposition of any wastes at the proposed site.

Mr. Borodczak advised the Board that the ministry was, as a result of the further testing conducted over the summer, no longer concerned over the possibility of boundary contamination from any easterly flow component and consequently is of the opinion that cell Nos. 36 to 41 may be utilized when required. If the monitoring programme indicates any potential adverse effects, the ministry would be in a position to have the county undertake whatever corrective measures might be required as determined and approved by the ministry.

With respect to the ministry's proposed condition No. 4, specifying that a copy of the annual progress report referred to therein be provided by the county to the Township of Seymour and H.E.L.P. for as long as that organization continues in existence, the Board received strenuous objection from counsel for the county who pointed out the difficulties that would or could arise at

some time in the future in determining firstly, who constitutes the membership of H.E.L.P. and, secondly, who represents that organization. The same objection was raised with respect to the requirement of a meeting to review the report suggested in condition No 5.

The Board is of the view that Mr. Heron's objections are well founded and that the township, H.E.L.P., or any member of the public would have adequate opportunity to review the annual report either at the ministry or the township offices.

Counsel for H.E.L.P., in argument, also presented suggested conditions to be attached to any certificate should approval be granted. Specifically, Mrs. Vigod requested the inclusion of additional tests to be conducted on certain wells in both the 550 and 575 zones and other specific requirements with respect to the monitoring programme referred to in ex. 137 being the conditions of approval suggested by the ministry.

Counsel for the county argued that additional testing was implicitly included in condition Nos. 2 and 3 submitted by the ministry and that the ministry's freedom of action in this regard should be unrestricted by reference to any specific tests or any other aspects of the monitoring programme.

The Board agrees with the submissions made by counsel for the county and is of the opinion that the ministry should have the flexibility to require any testing it deems appropriate in the circumstances and this flexibility of action should extend to all aspects of the monitoring programme. It may be that entirely new tests or methods of monitoring are developed in the future and accordingly the ministry should not be confined to specific tests in the course of carrying out or evaluating any monitoring programme.

Mrs. Vigod also requested the Board to include, if approval is to be granted, a condition of approval that the leachate collection system detailed in Hydrology Consultant's Report dated November 4, 1982 (ex. 39), be put in place and operated immediately and not as a contingency.

The Board does not feel on the basis of the evidence before the Board that a leachate collection system need be installed, if at all, until such time as the monitoring programme indicates a need for it. The conditions suggested by the ministry provide that the design for a leachate collection system must be submitted to and approved by the ministry prior to the deposition of wastes at the site and this, in the Board's view, is adequate protection should the occasion arise. A great deal of time and thought has already

been directed at the design of the collection system particularly with respect to the "hydraulic trap" aspects thereof.

If, as a result of the ongoing monitoring programme, the ministry feels that remedial or contingency measures must be implemented, the Board has little doubt that the ministry would order implementation of the leachate collection system, however, it may be that only certain specific measures would be required and the Board is satisfied that there would be ample time to both design and put in place any necessary corrective measures. The same comments equally apply with respect to chloride levels exceeding the ministry guidelines or regulations at the property boundaries or for that matter with respect to any of the surrounding watercourses.

For reasons expressed earlier, the Board rejects the suggestion that a liaison committee consisting of representatives of the county, Township of Seymour, H.E.L.P. and the ministry be struck to receive and review all reports, data, etc. In the Board's opinion there will be difficulties in determining just who represents H.E.L.P. from time to time and is satisfied that any interested person will have the opportunity to review the reports relevant to the proposed site at the ministry or township offices and take whatever measures are deemed necessary.

The Board heard evidence from Mr. Phil O'Rourke whose property lies immediately east of the site and consists of an operating dairy farm as well as having certain acreage under crops. His primary concern was a fear that his water supply from wells, ponds and surface springs would become contaminated as a result of the landfill. In response to Mr. O'Rourke's concerns, H.E.L.P. has suggested that conditions of approval relating to these concerns be attached to any certificate of approval which may be granted.

In matters such as the one before the Board it is incumbent upon the Board to consider the public interests involved and any such consideration entails not only the interests of the public at large, but also the interests of adjacent residents who may be affected and who are also members of the public.

In this regard, the Board feels it imperative that the present quality of the O'Rourke water supply not be impaired in any way as a result of the proposed landfilling. It is apparent from the evidence that the O'Rourkes are virtually the only adjacent residents that will be directly and adversely affected should the county's hydrogeological interpretation of the site prove to be wrong and should the monitoring programme and contingency

measures fail to prevent the impairment or contamination of their water supply. It is beyond question that a safe water supply is both necessary and of the utmost importance to the use and enjoyment of the O'Rourke property.

For reasons stated earlier, the Board is of the opinion that, although the chances of such contamination occurring are extremely remote, the county should nevertheless be obliged to ensure that the O'Rourke water supply is maintained at a level of quality that existed prior to the commencement of landfilling, at the county's expense, and the Board is prepared to attach such a condition of approval, should this undertaking be approved.

During the course of this hearing, counsel for both the township of Seymour and H.E.L.P. sought to introduce evidence concerning the existing Campbellford waste disposal site with a view towards demonstrating that expansion of the existing site would be a preferred alternative to approval of the proposed site being the subject application before the Board. This application is under the provisions of the *Environmental Protection Act* which unlike the *Environmental Assessment Act* does not require the proponent to evaluate alternatives to the proposed undertaking. Accordingly it is the view of this Board that the evaluation of the subject application must be confined to evidence relevant to the proposed site. Evidence on alternatives may in some instances be admissible, not for the purpose of demonstrating that an alternative site is "better" than the proposed site, but rather for the purpose of providing a reference in order that the Board might properly assess certain criteria, such as the need for a new site, for matters like that of "need" are often constituent elements of the concept of public interest. If the Board were in fact to entertain evidence concerning alternative sites in the context of evaluating whether or not an alternative site was "better" or more suitable than the proposed site under consideration, then it could be argued with some merit, that such a determination could not properly be made unless the alternative site was also evaluated on its merits. This would necessarily include a comprehensive analysis based on essentially the same degree of investigation as would be required with respect to the proponent's application.

Surely in the absence of a statutory requirement to investigate and assess alternatives, as is the case under the *Environmental Assessment Act*, and notwithstanding that the proponent may have considered alternatives during the site selection process, the proponent should not be placed in the position of having to respond to evidence concerning alternatives to the site chosen by

him and which is the subject-matter of the application before the Board.

The Board has heard evidence that the existing Campbellford site has reached its capacity and is in the process of being closed and accordingly has concluded that there is a need for a new waste disposal site.

For the reasons expressed above, the Board has also concluded that any further evidence concerning alternatives to the proposed site is irrelevant to this application and would not assist the Board in reaching a decision under the *Environmental Protection Act*.

Summary of findings

After carefully considering all of the evidence presented at this hearing, the Board makes the following findings and conclusions:

1. There is a need for a landfill site in the north end of the County of Northumberland to serve not only the Township of Seymour and the Town of Campbellford, but also the Township of Percy and the Village of Hastings.
2. The existing sewage treatment plant in Campbellford can adequately accommodate (with modification if necessary) any leachate generated at this site for off-site treatment.
3. The existing and proposed road system will adequately handle any vehicular traffic to and from the proposed site and will not pose any major problems with respect to pedestrian safety and surrounding residences.
4. The agricultural potential of this site is not such that should prevent the development of a waste disposal site.
5. The proposed development of this site will not adversely affect the financial position of the municipalities involved.
6. The schedule to Official Plan Amendment 31 is satisfactory for the purpose of that amendment.
7. The proposed zoning by-law amendment (ex. 22) conforms to the official plan as amended by proposed Official Plan Amendment 31.
8. The proposed use of the site does not contravene the intent of the Food Land Guidelines.
9. It is unlikely that the sand or permeable zones postulated by Mr. Anderson (primarily in the 575± and 550± elevations) in fact exist and that if they do exist they are discontinuous and will be unlikely to provide a route for leachate to escape off site.

10. The proposed use of the site for waste disposal will be unlikely to have any adverse environmental impacts upon surrounding aquifers and watercourses that cannot be detected in ample time and remedied by the proposed monitoring programme and collection system respectively.
11. Notwithstanding the conclusion reached in para. 10, the county shall be obliged at its expense to ensure that the O'Rourke water supply is maintained at a level of quality that existed prior to the commencement of landfilling.

Decision of the Board

The Board hereby approves the subject application for the establishment of a landfill site for the purpose of receiving, dumping and disposing of waste in lands described as the Southeast Quarter of Lot 3, Concession V, Township of Seymour, County of Northumberland, more particularly described in instrument No. 94244 registered in the Registry Office for the Land Registry Division of Northumberland East (No. 38) having an area of approximately 56 acres on the north side of the Township Road lying between Concessions IV and V in the said Township of Seymour, subject to the conditions of approval as hereinafter set out.

The director of environmental approvals shall issue a provisional certificate of approval (which certificate shall replace the original certificate of approval issued by the Ministry of the Environment for this same site) to include the following conditions, together with such additional provisions as the director may deem appropriate relative to the final plans and specifications to be submitted by the applicant.

1. The landfill site shall be constructed and operated in accordance with the documents listed in sch. "A" to this decision subject to such minor modification as may be approved by the Director of Central Region of the Ministry of the Environment from time to time.
- 2.(i) No wastes shall be deposited until a detailed programme for monitoring methane gas, surface water, ground water, and leachate, together with the design for a leachate collection system are submitted to and approved by the Director of Central Region of the Ministry of the Environment.
- (ii) The said monitoring programme may be modified from time to time as required by the Director of Central Region of the Ministry of the Environment.

3. If, in the opinion of the Director of Central Region of the Ministry of the Environment, the monitoring programme indicates the potential for adverse environmental impact from the operation of the landfill site, the county shall forthwith undertake such contingency measures as may be required by the Director of Central Region of the Ministry of the Environment.
4. The county shall retain a consultant to provide the Director of the Central Region of the Ministry of the Environment with an annual progress report which shall include an interpretive analysis of the results of all monitoring programmes for leachate and gas and a report on the progress of site development with descriptions of any deviations from the approved design report. The first report is to be submitted by December 31, 1984. A copy of each annual progress report is to be provided to the Township of Seymour and is to be available to interested members of the public for inspection at the ministry and the county and township offices during regular business hours.
5. The certificate of approval shall be registered on the title to the land comprising the waste disposal site. No operation shall be carried out at the site after 60 days from this condition becoming enforceable unless this certificate, including the reasons for these conditions as set out in sch. "B" [omitted] to this decision, has been registered by the county as an instrument in the appropriate land registry office against title to the site and a duplicate registered copy thereof returned by the county to the director.
6. The county shall take whatever steps may be necessary, at its expense, to ensure that the O'Rourke property's water supply (relating to the farm and residence located immediately east of the subject site) is maintained at a level of quality that existed prior to the commencement of landfilling. For the purpose of fulfilling this condition the county shall engage a consultant to test and evaluate the quality of the water now used by the O'Rourke family before landfilling commences. In the event that the quality of the O'Rourke water falls below that existing before landfilling occurs on the site, which impairment of water quality must be confirmed by the Ministry of the Environment to whom any complaint therein shall be directed, the county shall:
 - (i) supply and install suitable holding tanks or vessels to contain an adequate supply of potable water forthwith,

The Construction of Statutes

Elmer A. Driedger,
Q.C., B.A., LL.B., LL.D.

Professor of Law, University of Ottawa
Former Deputy Minister of Justice
and
Deputy Attorney General of Canada

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AMBIGUITY AND IMPRECISION

A. CHOICE BETWEEN ALTERNATIVES

When two constructions are open the courts must make a choice, and in making that choice such factors as absurdity, injustice, anomaly, hardship, and inconvenience are relevant. Generally speaking, as was indicated in *R. v. Judge of the City of London Court*, the courts will adopt a construction that will avoid such consequences.¹⁴¹ If the language is equivocal and there are two reasonable meanings of that language, the interpretation that will avoid a penalty is to be adopted.¹⁴²

B. REASONABLENESS

The language of the statute must be reasonably capable of two constructions before a choice may be made.¹⁴³ As was stated by Finemore J. in *Holmes v. Bradfield*:¹⁴⁴

It is, however, common practice that if there are two reasonable interpretations, so far as the grammar is concerned, of the words in an Act, the courts adopt that which is just, reasonable and sensible rather than one which is, or appears to them to be, none of those things.

And, as Lord Simon of Glaisdale said in *Stock v. Frank Jones (Tipton) Ltd.*,¹⁴⁵

if the words are capable of more than one meaning it is a perfectly legitimate intermediate step in construction to choose between potential meanings by various tests (statutory, objective, anomaly, etc.) which throw light on what the draftsman meant to say.

¹⁴¹ Some additional examples are: *Gill v. Donald Humberstone & Co. Ltd.*, [1963] 1 W.L.R. 929; *Railton v. Wood* (1890), 15 A.C. 363; *Fry v. Inland Revenue Commissioners*, [1959] 1 Ch. 86; *The Crystal*, [1894] A.C. 508; *R. v. Overseers of Tonbridge* (1884), 13 Q.B.D. 339.

¹⁴² *McLaughlin v. R.* (1979), 12 C.R. (3d) 391, aff'd [1980] 2 S.C.R. 331, citing *Re H.P.C. Productions Ltd.*, [1962] Ch. 466, at p. 485; *Corp. d'Administration et de Placements Ltée v. Castonguay* (1970), 3 N.B.R. (2d) 278.

¹⁴³ *Howley v. Deputy A.-G. of Canada*, [1977] 2 S.C.R. 45, at p. 53.

¹⁴⁴ [1949] 2 K.B. 1, at pp. 7-8; see also *Murray v. District of West Vancouver*, [1937] 3 W.W.R. 269; *R. v. Symington* (1895), 4 B.C.R. 323; *Canadian Performing Right Society v. Famous Players Canadian Corp.*, [1929] A.C. 456.

¹⁴⁵ [1978] 1 W.L.R. 231, at p. 236.

CHAPTER 6

The Method of Construction

THE STEPS

The decisions examined thus far indicate that the provisions of an enactment relevant to a particular case are to be read in the following way:

1. The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).
2. The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament embodied in the Act as a whole, the object of the Act and the scheme of the Act, and if they are clear and unambiguous and in harmony with that intention, object and scheme and with the general body of the law, that is the end.
3. If the words are apparently obscure or ambiguous, then a meaning that best accords with the intention of Parliament, the object of the Act and the scheme of the Act, but one that the words are reasonably capable of bearing, is to be given them.
4. If, notwithstanding that the words are clear and unambiguous when read in their grammatical and ordinary sense, there is disharmony within the statute, statutes in *pari materia*, or the general law, then an ordinary meaning that will produce harmony is to be given the words, if they are reasonably capable of bearing that meaning.
5. If obscurity, ambiguity or disharmony cannot be resolved objectively by reference to the intention of Parliament, the object of the Act or the scheme of the Act, then a meaning that appears to be the most reasonable may be selected.

THE INTENTION OF PARLIAMENT

In the end, therefore, as Chief Justice Tindal said in the *Sussex Peerage Case* "the only rule for the construction of Acts of Parliament is, that they

**REFERENCE RE AGRICULTURAL PRODUCTS MARKETING ACT AND
TWO OTHER ACTS**

*Supreme Court of Canada, Laskin, C.J.C., Martland, Judson, Ritchie, Spence,
Pigeon, Dickson, Beetz and de Grandpré, JJ. January 19, 1978.*

Constitutional law — Distribution of legislative authority — Validity of legislation dealing with co-operative egg marketing scheme — Agricultural Products Marketing Act, R.S.C. 1970, c. A-7 — Farm Products Marketing Agencies Act, 1970-71-72 (Can.), c. 65 — Farm Products Marketing Act, R.S.O. 1970, c. 162 — British North America Act, 1867.

The federal Minister of Agriculture and ten provincial Ministers of Agriculture as well as the federal and provincial marketing boards and the provincial egg producers marketing boards entered into an agreement respecting "the establishment of a comprehensive marketing programme for the purpose of regulating the marketing of eggs in Canada". The agreement involved federal and provincial marketing plans which would establish agreed-upon quotas for intraprovincial, interprovincial and export trade. By SOR/73-1 the Governor in Council established the Canadian Egg Marketing Agency (CEMA) under the authority of the *Farm Products Marketing Agencies Act*, 1970-71-72 (Can.), c. 65, and established quotas for each Province authorized to be marketed in interprovincial and export trade. CEMA also was authorized to impose levies or charges on persons engaged in the production or marketing of eggs and to appoint the local egg board to collect them on its behalf. Under Regulations enacted pursuant to the *Farm Products Marketing Act*, R.S.O. 1970, c. 162, as amended, the egg board was required to collect levies to defray the administrative costs of CEMA and the cost of the removal of the eggs within the provincial quota but surplus to the requirement of the table market. In addition, under the *Agricultural Products Marketing Act*, R.S.C. 1970, c. A-7, the Governor in Council authorized the provincial egg board to collect the levies or charges to finance its own administrative costs, to cover the costs of a removal programme for eggs surplus to the local requirements and to equalize returns to producers. By O. Reg. 595/72, the Ontario Farm Products Marketing Board set a total quota to be marketed intraprovincially that was identical to the federal quota. The marketing quotas set out in SOR/73-1 and the Ontario Regulation were identical to the quotas fixed by the federal-provincial agreement and the legislative action by the federal and provincial authorities were an attempt to carry out that agreement.

On a reference to the Ontario Court of Appeal under the *Constitutional Question Act*, R.S.O. 1970, c. 79, to determine the constitutional validity of provisions of the *Agricultural Products Marketing Act* (Can.), the *Farm Products Marketing Agencies Act* (Can.), and the *Farm Products Marketing Act* (Ont.) as well as the Orders in Council and Regulations passed pursuant to these statutes, the Court of Appeal held, Dubin, J.A., dissenting in part, that the provisions were *intra vires* the Parliament of Canada and the Legislature of Ontario. On appeal to the Supreme Court of Canada, *held*, the appeal should be allowed in part.

Per Pigeon, J., Martland, Ritchie, Beetz and de Grandpré, JJ., concurring: All ten questions referred should be answered in favour of the validity of the provisions except for part of Q.1 which asks whether ss. 2 and 3 of the *Agricultural Products Marketing Act* (Can.) are *ultra vires*. Except with respect to s. 2(2)(a) the question should be answered in the negative: Section 2(2)(a) provides for levies in respect of products in intraprovincial trade and s. 2(2)(b) for levies in respect of extra-provincial trade. Section 2(2)(a) is invalid. It purports to authorize the granting to a provincial board or agency of the authority to impose and to use levies or charges "in relation to the powers granted to such board or agency under the laws of any province with respect to the marketing of any agricultural product locally within the

The authorities on s. 121 were brought into the submissions to support the contentions that s. 121 applies to federal legislation no less than to provincial legislation and that the marketing plan here exhibits a protectionist policy as among Provinces, impeding the flow of trade in eggs between and among Provinces. Reference was made to the observation of Viscount Simon, L.C., in *Atlantic Smoke Shops Ltd. v. Conlon et al.*, [1943] 4 D.L.R. 81 at p. 92, [1943] A.C. 550 at p. 569, [1943] 3 W.W.R. 113, that "the meaning of s. 121 cannot vary according as it is applied to Dominion or to Provincial legislation". It seems to me, however, that the application of s. 121 may be different according to whether it is provincial or federal legislation that is involved because what may amount to a tariff or customs duty under a provincial regulatory statute may not have that character at all under a federal regulatory statute. It must be remembered too that the federal trade and commerce power also operates as a brake on provincial legislation which may seek to protect its producers or manufacturers against entry of goods from other Provinces.

A federal regulatory statute which does not directly impose a customs charge but through a price fixing scheme, designed to stabilize the marketing of products in interprovincial trade, seeks through quotas, paying due regard to provincial production experience, to establish orderly marketing in such trade cannot, in my opinion, be in violation of s. 121. In *Gold Seal Ltd. v. Dominion Express Co. et al.* (1921), 62 D.L.R. 62, 62 S.C.R. 424, [1921] 3 W.W.R. 710, both Anglin and Mignault, J.J., viewed s. 121 as prohibiting the levying of customs duties or like charges when goods are carried from one Province into another. Rand, J., took a broader view of s. 121 in *Murphy v. C.P.R. Co. et al.* (1958), 15 D.L.R. (2d) 145 at p. 153, [1958] S.C.R. 626 at p. 642, 19 W.W.R. 57, where he said this:

I take s. 121, apart from Customs duties, to be aimed against trade regulation which is designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist. That it does not create a level of trade activity divested of all regulation I have no doubt; what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as incidents of trade. What is forbidden is a trade regulation, that in its essence and purpose is related to a provincial boundary.

Accepting this view of s. 121, I find nothing in the marketing scheme here that, as a trade regulation, is *in its essence and purpose* related to a provincial boundary. To hold otherwise would mean that a federal marketing statute, referable to interprovincial trade, could not validly take into account patterns of production in the various Provinces in attempting to establish an equitable basis for the flow of trade. I find here no design of punitive regulation directed against or in favour of any Province.

I would accordingly answer Q. 3 in the negative in respect of the

statute as a whole and in respect of the provisions that were particularly impugned.

VII

Question 4 relates to the validity of the Canadian Egg Marketing Agency Proclamation, SOR/73-1, as a whole and to s. 10 of the Proclamation in particular. The Proclamation has its source in s. 17(1) of the *Farm Products Marketing Agencies Act* which I reproduce again for convenience of reference, as follows:

17(1) The Governor in Council may by proclamation establish an agency with powers relating to any farm product or farm products the marketing of which in interprovincial and export trade is not regulated pursuant to the *Canadian Wheat Board Act* or the *Canadian Dairy Commission Act* where he is satisfied that a majority of the producers of the farm product or of each of the farm products in Canada is in favour of the establishment of an agency.

In establishing an agency for the marketing of a certain farm product or products, the Governor in Council's proclamation must, under s. 18(1)(c), "set out the terms of any marketing plan which the agency is empowered to implement". The provisions of the schedule to SOR/73-1 purport to set out those terms, and they involve the Canadian Egg Marketing Agency, established by the Proclamation, and egg marketing boards of each of the ten Provinces in the implementation of the marketing plan. (The Quebec agency named in the order is Eggs for Consumption Producers' Federation, Quebec, which is thus given board status). Section 10 of the Plan empowers the federal agency, by order or regulation, to impose levies or charges "on persons engaged in the production of eggs or the marketing thereof" and it may, with the concurrence of a provincial board, use the latter to collect the levies or charges that it imposes.

The definition of "marketing plan" in s. 2(e) of the Act is in part, as follows:

- (e) "marketing plan" means a plan relating to the promotion, regulation and control of marketing of any regulated product in interprovincial or export trade that *includes provision for all or any of the following*:

(The italics are mine.) Then follows a list of matters (i) to (vi) which are summarized in the factum of the appellants in these words:

- i) the determination of who are interprovincial and export traders;
- ii) the determination of acts constituting interprovincial and export trade;
- iii) regulation of the marketing of the regulated product on a basis that enables the agency implementing the plan to fix and determine quantity of the product which enters the stream of interprovincial and export trade and the price, time and place at which the regulated product may be so marketed;
- iv) pooling of receipts from such trade;
- v) licensing the traders in such trade;
- vi) financing the system of such controls by levies of these activities.

The argument on SOR/73-1 as a whole is that there is a violation of the principle of the *Brant Dairy* case in that the Proclamation did not set out all the terms of the Plan to be implemented by CEMA but rather redelegated to CEMA authority to fill out various terms by its own regulations and orders. Thus, it is pointed out (to take some examples in support of this contention set out in the appellants' factum) that

There is no term in the plan for the determination of those engaged in the growing or production of the regulated product as contemplated by 2(e)(i). That is left to the agency to set out in its Quota Regulation S.O.R./73-289, Section 2.

There is no term in the plan for the exemption of any class of persons so engaged in the growing or production of the regulated product as contemplated by 2(e)(i). That is again left to be set out by the agency in its Regulation S.O.R./73-289.

The plan does contain in Section 1 a term which specifies:

"those acts that constitute the marketing of the regulated product" as contemplated by 2(e)(ii), but fails to set out any term relating to the exemption of any class of marketers. It appears that the agency has set out that term by inference from its quota regulations quoted above in that the product of the exempt producer is exempt from the marketing controls.

This submission draws a distinction between the setting out of terms and the implementation thereof which I do not think can be supported when regard is had to other provisions of the Act. The appellants would read the word "implement" to mean purely administrative application of known terms, all of which are found in the Plan. The reading is, in my opinion, too narrow. The dictionary meaning of "implement" includes "to complete, supplement": see Shorter Oxford Dictionary, 3rd ed. (Reprint, 1947), p. 967. Section 23(1)(b) of the Act empowers an agency (subject to the proclamation which established it or any subsequent proclamation altering its powers) to implement a marketing plan the terms of which are set out in a proclamation, and s. 23(1)(f) expressly enables the agency to do what CEMA has done here. That provision reads, in part:

(f) Where it is empowered to implement a marketing plan, make such orders and regulations as it considers necessary in connection therewith . . .

I hold, therefore, that the legislation itself overcomes any difficulty which, in the absence of such provisions, would bring into play the principle of the *Brant Dairy* case.

Question 4(b) relates specifically to s. 10 of the Plan, which reads as follows:

10(1) The Agency may, by order or regulation, impose levies or charges on persons engaged in the production of eggs or the marketing thereof and any such order or regulation may classify such persons into groups and specify the levies or charges, if any, payable by the members of each such group and provide for the manner of collection thereof.

(2) Levies imposed by any order or regulation referred to in subsection (1) shall be established at such levels as to produce in each year a return to the Agency that is an amount sufficient to defray its administrative and marketing expenses and costs as estimated by it for the year.

(3) The Agency, in estimating its administrative and marketing expenses and costs for a year, shall allow for the creation of reserves, the payment of expenses and losses resulting from the sale or disposal of eggs, equalization or adjustment payments among egg producers based on moneys realized from the sale of eggs during such period or periods of time as the Agency considers appropriate and any other expenses and costs deemed essential by the Agency for the realization of its objects.

(4) The Agency may, with the concurrence of a Commodity Board, appoint that Commodity Board to collect on its behalf the levies or charges imposed by any order or regulation referred to in subsection (1).

In so far as there is here an imposition of a levy in respect of intra-provincial trade the matter is covered by my reasons given in answer to Q. 1. I have, however, already indicated that I would read the power given in s. 2(e)(vi) of the Act as limited to interprovincial and export trade, and I would limit s. 10 of the Plan in the same way.

In the result, I would answer "no" to both parts of Q. 4.

VIII

Question 5 does not require any extensive consideration. The argument thereon related not directly to the levy orders which are specified in Q. 5 but rather to the constitutionality of the empowering statute and of the Proclamation which authorized the imposition of the levies.

The *Farm Products Marketing Agencies Act* is, in respect of its provisions for levies, not explicit as is the *Agricultural Products Marketing Act* that levies in respect of intraprovincial trade may be imposed under federal authority. However, treating the *Farm Products Marketing Agencies Act* (as I said it must be) as directed to interprovincial and export trade, I see only an accounting problem in the orders for levies. The orders themselves are clearly within the enabling authority.

On the footing of the limitation of the Act and of the Proclamation and Plan to interprovincial and export marketing, I would answer "no" to both parts of Q. 5.

IX

Question 6, relating to the *Canadian Egg Licensing Regulations*, SOR/73/286, involves a point made in respect of Q. 4, namely, that there is an infringement of the *Brant Dairy* principle because the terms of the licensing system were not fixed by the Governor in Council in the Proclamation establishing CEMA and prescribing the Marketing Plan but, rather, power to do so was unlawfully delegated to CEMA.

decisive of the wife's entitlement to the declaration which she received. In our opinion the judgment of the trial Judge was right on the facts as he found them to be. The appeal is accordingly dismissed with costs.

MATAS, J.A., concurs with HALL, J.A.

Appeal dismissed.

RE AHMAD AND APPEAL BOARD ESTABLISHED BY THE
PUBLIC SERVICE COMMISSION

*Federal Court of Appeal, Jaccett, C.J., Cattnach and Pratte, JJ.
November 27, 1974.*

Public service — Dismissal — Incompetence — Employee released on ground of incompetence — How incompetence determined — Review of determination — Public Service Employment Act (Can.), s. 31(1).

Incompetence on the part of an employee is in the first instance based on the observation of the employee by his superiors in the performance of his duties, and is thus a matter of opinion. In the absence of a specific statutory or other legal direction or of proof of bad faith, the superiors' conclusion that an employee is incompetent cannot be reversed by an appeal board established under s. 31(1) of the *Public Service Employment Act*, R.S.C. 1970, c. P-32; for that purpose, unless it has evidence before it to prove that the superiors formed their conclusion erroneously.

Administrative law — Ministerial powers — Delegation — Statute empowering deputy head of department to recommend release of employee on ground of incompetence — Deputy head delegating powers to subordinate in exercise of statutory power to delegate any of his "powers, functions or duties" — Delegation proper — Decision not requiring personal attention of deputy department head — Public Service Employment Act (Can.), ss. 6(5), 31(1).

[*Carltona, Ltd. v. Com'rs of Works*, [1943] 2 All E.R. 560, apld; *Mun-goni v. A.-G. Northern Rhodesia*, [1960] A.C. 337, refd to]

Public service — Release of employee — Procedure — Statute providing for recommendation that employee be released for incompetence, followed by notice in writing to employee of recommendation — Statute affording employee an appeal — Employee notified first — Employee given relief contemplated by statute — Substantial compliance with statute — Public Service Employment Act (Can.), s. 31(1).

APPLICATION to set aside a decision of an appeal board established by the Public Service Commission.

Y. A. G. Hynna, for applicant.

R. W. Côté, for respondent.

The judgment of the Court was delivered by

JACKETT, C.J.:—This is a s. 28 [of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.)] application to set aside a decision of a board established by the Public Service Commission to conduct an inquiry as a result of an appeal by the applicant against a recommendation that he be "released", under s. 31 of the *Public Service Employment Act*, R.S.C. 1970, c. P-32, because "in the opinion of the deputy head" he was "incompetent."

Section 31 reads as follows:

31(1) Where an employee, in the opinion of the deputy head, is incompetent in performing the duties of the position he occupies or is incapable of performing those duties and should

(a) be appointed to a position at a lower maximum rate of pay, or

(b) be released,

the deputy head may recommend to the Commission that the employee be so appointed or released, as the case may be.

(2) The deputy head shall give notice in writing to an employee of a recommendation that the employee be appointed to a position at a lower maximum rate of pay or be released.

(3) Within such period after receiving the notice in writing mentioned in subsection (2) as the Commission prescribes, the employee may appeal against the recommendation of the deputy head to a board established by the Commission to conduct an inquiry at which the employee and the deputy head concerned, or their representatives, are given an opportunity of being heard, and upon being notified of the board's decision on the inquiry the Commission shall,

(a) notify the deputy head concerned that his recommendation will not be acted upon, or

(b) appoint the employee to a position at a lower maximum rate of pay, or release the employee,

accordingly as the decision of the board requires.

(4) If no appeal is made against a recommendation of the deputy head, the Commission may take such action with regard to the recommendation as the Commission sees fit.

(5) The Commission may release an employee pursuant to a recommendation under this section and the employee thereupon ceases to be an employee.

The s. 28 application is based on attacks that, in effect, in my view, amount to three contentions, viz.:

(a) there was no recommendation by the Department to the Commission, under s. 31(1), that the applicant be "released" before notice was given to the applicant of such a recommendation and the applicant had appealed therefrom, and there was therefore no "appeal" in respect of which a "board" established under s. 31 had juris-

- diction to conduct an inquiry or in respect of which such a board had jurisdiction to give the decision that is the subject of this s. 28 application;
- (b) alternatively, there was no valid recommendation by the Department to the Commission under s. 31(1) because the deputy head had not personally formed the "opinion" that the applicant was "incompetent in performing the duties of the position" that he occupied; and
 - (c) in the further alternative, the board erred in law in not deciding on the merits of the case that the recommendation that the applicant be released should not be carried out.

Dealing with the last of these attacks first, it is, in my view, based on a misconception. In the absence of arbitrary standards laid down by law, competence or incompetence is not something that can, or must, be determined, as a matter of law, by application of a rule. Whether or not a person is competent or incompetent for a post is a matter of opinion, and, in the absence of any special legal direction, all that the law can imply with regard thereto is that it must be honestly formed, and that it must, in the first instance at least, be based upon the observation, by those under whom he works, of the manner in which the person whose competence is in question carries out his duties. In particular circumstances, rough and ready rules of thumb may be adopted by such persons as an aid to the formation of the required opinion; but, in my view, in the absence of

- (a) some failure to apply properly some specific statutory or other legal direction, or
- (b) proof of bad faith on the part of those whose observations and judgment are in question,

a board of review established under s. 31 would not be justified in deciding that a deputy head's recommendation should not be acted upon unless it had before it material that satisfied it, as a matter of fact, that the deputy head was wrong in forming the opinion that the person in question was "incompetent in performing the duties of the position he occupies".

The portion of the Board's decision that deals with this third attack reads as follows:

The Appeal Board is satisfied with the Department's replies to the appellant's allegations. There is no evidence to give the Appeal Board any reason to conclude that the appellant's work performance was ever assessed on the basis of any factors other than merit. With

respect to the quality of the appellant's work output, the evidence shows that Father Pagano based his opinion on the quality of the appellant's work on a review of only four translations submitted to him by the appellant. On the other hand, the Department has presented evidence, in the form of reports from several of the appellant's superiors and reports from the Advisory Committee on Quality to show that the quality of the appellant's overall work performance throughout his seven years' service in the Department did not meet the minimum acceptable standards. On the basis of this material, the Appeal Board cannot conclude that Father Pagano's assessment of the appellant's work can be held to refute the Department's thoroughly documented contention that the appellant fails to meet the quality standards required of a TR 1 level employee.

Moreover, the appellant has presented no evidence to give the Appeal Board any reason to conclude that the members of the Advisory Committee on Quality for the September to December, 1973, rating period were incapable of evaluating the quality of the type of translations that the appellant was primarily working on at that time. In any case, the evidence shows that the reports of this committee is quite consistent with the reports of earlier committees whose competence has not been challenged in this case.

With respect to the quantity of work produced by the appellant, there is no evidence to give the Appeal Board any reason to conclude that the appellant was required to produce at a rate that was anything more than the minimum which the Department had a right to expect from an employee in the appellant's position.

The evidence presented in this case leaves the Appeal Board with no doubt that the appellant is incompetent within the meaning of Section 31 of the Public Service Employment Act to perform the duties of the position at the TR 1 level . . .

Since the appellant has not shown that his unsatisfactory performance is due to matters within his control or that his performance is likely to improve, the Appeal Board considers that the Department is justified in taking action to have the appellant released pursuant to Section 31 of the said Act.

The submissions made on behalf of the applicant in connection with this attack are fairly represented by his "Memorandum of Points of Argument" in this Court. In Part II of his "Memorandum of Points of Argument", the applicant states the "Points in Issue" in this connection as follows:

- (c) The Appeal Board misdirected itself as to what standards it had to determine in making a finding as to the competence of the Applicant, and specifically, erred in accepting as a minimum standard the requirement to produce an average of 2,500 words (weighted) per day.
- (d) The Appeal Board erred in law in holding that standard of 2,500 words per day (weighted) imposed specifically on the Applicant was the standard applicable generally to employees at the TR-1 level.
- (e) The Appeal Board made erroneous findings of fact without regard to the materials before it in finding that the Applicant

had not met the minimum standards applicable to his level. In doing so, the Appeal Board disregarded the only evidence before it as to standards of general application to the TR-1 level, namely, the performance pay rating system.

In Part III of his "Memorandum of Points of Argument", the applicant developed several points in this connection as follows:

4. Under Sections 10 and 12 of the Public Service Employment Act, selection standards are established by the Public Service Commission. Implicit in this, and in the system of collective bargaining established under the Public Service Staff Relations Act, is that the standards so established may not be arbitrarily and unilaterally changed for any position by the employer. Much less can the employer, or the immediate superiors of an employee impose special standards in respect of a particular employee.

5. In this case, neither the selection standards for the position of a TR-1 level employee (Casebook, p. 21) nor other evidence before the Board established any specific minimum standards of general application. It was the duty of the Appeal Board in its enquiry to determine what such minimum standards were in order to make a finding on whether the Applicant should be released for incompetence in the performance of duties at his TR-1 level. The Appeal Board erred in law in not making a finding as to standards of general application even though there was evidence before him relevant to the issue.

6. The Appeal Board erred in law in finding that the Applicant was incompetent because he did not meet the standards imposed on him specifically as to quantity and quality production. As a matter of law, the Appeal Board's findings are untenable on the evidence before him, even if the additional evidence before this Court is not considered. The Appeal Board erred in that it in effect made a finding as to departmental standards of general application to TR-1 employees based on what the employee's immediate superiors had set as special standards for the Applicant. The Appeal Board erroneously applied the standard of quantity of 2,500 words per day (weighted) set by the superiors, in the face of evidence that the minimum standards for a TR-1 could not reasonably be taken to be in excess of the quantity and quality standards for performance pay increases established between the employer and employee as part of the collective bargaining process.¹

As the applicant himself says, there are no such things as "minimum standards of general application" with regard to competency applicable to the position involved in this case. (I

¹I make no reference to the paragraphs relating to material that was not before the Board and of which there is no reason to think that the Board knew or should have known when it gave its decision. Failure to find such evidence in the course of its inquiry, if, as a reasonable matter, it should have found it, might be a valid ground of attack but not taking into account material that did not come to its attention cannot be a ground for setting its decision aside under s. 28(1)(b) or (c).

find it inconceivable that there could be such standards in the case of a professional person.) As it seems to me, the board approached the matter in the proper way, having regard to the views that I have already expressed with reference to its duty in such a case, and I can see no ground for saying that its decision can be set aside under s. 28(1)(b) or (c).

There remain the two other points, each of which raises the question whether there ever was a recommendation under s. 31, the existence of which was a condition precedent to a board having jurisdiction to give a "decision" under that section.

The first of these two points sufficiently appears from the following portion of Part III of the applicant's memorandum in this Court:

2. Specifically, the recommendation was made by the Director of Personnel Administration purporting to act by virtue of an Instrument of Delegation of powers by the Deputy Head (Casebook, pgs. 211-214 and p. 283).

Section 31(1) places the duty and function of formulating an opinion as to the competence of the employee in the deputy head. While section 6(5) of the Public Service Employment Act authorizes the delegation by the deputy head of his powers, functions and duties to persons under his jurisdiction, the deputy head by his Instrument of Delegation authorized the Director of Personnel Administration to exercise and perform his *powers* only.

In the absence of specific delegation of the functions and duties to the Director of Personnel Administration, the duty and function to formulate an opinion remained with the deputy head.

There was no evidence before the Board that the deputy head had ever considered the matter; rather the letter from the Director (Casebook, p. 211 and 283) and evidence of departmental officials clearly show that the matter was considered only at the level of the Applicant's immediate superiors and the Director of Personnel Administration.

Section 6(5) of the *Public Service Employment Act* provides that a deputy head may authorize one or more persons under his jurisdiction "to exercise and perform any of the powers, functions or duties of the deputy head" under that Act. By an instrument dated March 22, 1971, the deputy head in question authorized, *inter alia*, the "Director, Personnel Administration Branch" to "exercise and perform the powers and to delegate functions or duties" conferred upon him by, *inter alia*, s. 31 of the *Public Service Employment Act*. In my view, while not as aptly worded as it might have been, this instrument was adequate authority for the Director to form the opinion of the applicant's incompetency that was a condition precedent to a recommendation under s. 31. (Compare *Mun-*

goni v. A.-G. Northern Rhodesia, [1960] A.C. 337.) In any event, quite apart from special statutory authorization, in my view, this opinion was not one that required personal attention from the deputy head and was validly formed by appropriate departmental officials on the basis of the principles applied in such cases as *Carltona, Ltd. v. Com'rs of Works*, [1943] 2 All E.R. 560. See *per* Lord Greene, M.R., in that case at p. 563:

In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them.

See also S. A. de Smith's *Judicial Review of Administrative Action* (1968), at pp. 290-1 of the second edition.

It would be quite impossible for the deputy head of a large modern Government department to give personal attention to all such matters, important as they may be to individuals concerned. That is why departmental administration is organized as it is and, in my view, there is a necessary implication, in the absence of something expressly or implicitly to the contrary, that ministers' powers, and deputy ministers' powers, are exercised on their behalf by their departmental organizations as long as they are of an administrative character. To what extent officials are allowed or required to do so in particular cases is a matter of internal arrangement and outsiders have no status to question the authority of an official in a particular case.

I come now to the first attack made by the applicant on the appeal board's decision, as those attacks are enumerated

above, which attack I find the most difficult to resolve. Section 31 contemplates, *inter alia*:

- (a) a recommendation by the deputy head to the Public Service Commission that an employee be released for incompetency;
- (b) a notice in writing to the employee "of a recommendation that the employee . . . be released";
- (c) within a prescribed period after such notice, an "appeal" by the employee "against the recommendation" to a board established by the Commission "to conduct an inquiry" at which the employee and the deputy head concerned are given an opportunity of being heard;
- (d) a decision by the board at the end of its inquiry;
- (e) action by the Commission,
 - (i) notifying the deputy head that his recommendation will not be acted upon, or
 - (ii) releasing the employee, "according as the decision of the board requires".

In the ordinary course, one would have expected that the first step would be the recommendation by the deputy head to the Commission but what happened here was that the Department first notified the employee that it had been decided that a recommendation would be made to the Commission, the applicant then appealed and the deputy head then communicated his recommendation to the Commission. Looked at as a legal proceeding, there was no "appeal" under s. 31 because there was no "recommendation" to appeal from when the appeal document was sent to the Commission. I must say that I have great difficulty in resisting that conclusion. However, on mature consideration, I have come to the conclusion that it is not the correct conclusion. The actions in question were part of the administration of the Department concerned and not a legal proceeding at all. A decision had been taken to recommend release for incompetency and it was communicated to the employee who appealed from it and was afforded exactly the relief contemplated by s. 31 in respect of the recommendation of which he had been given notice. I can see no disadvantage and great advantage from the point of view of administration of the Public Service, in accepting this substantial compliance with s. 31 as falling within the terms thereof and I have accordingly concluded that this attack also must be rejected.

I am, therefore, of the opinion that the s. 28 application should be dismissed.

Application dismissed.

CASES
DETERMINED BY THE
SUPREME COURT OF CANADA ON APPEAL
FROM
DOMINION AND PROVINCIAL COURTS

IN THE MATTER OF A REFERENCE AS TO THE
VALIDITY OF THE REGULATIONS IN RELATION TO CHEMICALS ENACTED BY THE GOVERNOR GENERAL OF CANADA ON THE 10TH DAY OF JULY, 1941, P.C. 4996, AND OF AN ORDER OF THE CONTROLLER OF CHEMICALS, DATED THE 16TH DAY OF JANUARY, 1942, MADE PURSUANT THERETO.

1942
*Dec. 14, 15.
1943
*Jan. 5.

Constitutional law—Power of the Governor General in Council, under the War Measures Act, 1914, to delegate his powers to subordinate agencies—Order in Council same as Act of Parliament—Final responsibility for acts of Governor General in Council resting upon Parliament—Enactment contained in Order in Council not open to review by courts of law—Regulations as to chemicals and Order by Controller of Chemicals declared intra vires—Applicability of the maxim: Delegatus non potest delegare.

Held: Regulations respecting chemicals established by an Order in Council, which is expressed to be made pursuant to the powers conferred by the *Department of Munitions and Supply Act* and by the *War Measures Act*, are not *ultra vires* of the Governor General in Council either in whole or in part, except paragraph four which is *ultra vires*.

Paragraph four of the Order in Council provides that the compensation, to which a person may be entitled whenever the Controller of Chemicals takes possession of any chemicals, or equipment, or real or personal property, shall be as prescribed and determined by the Controller, with the approval of the Minister of Munitions and Supply. Such paragraph is in conflict with section 7 of the *War Measures Act*, which enacts that, whenever any property has been expropriated by the Crown, the claim for compensation must be referred by the Minister of Justice to the Exchequer Court of Canada or to other mentioned courts.

Held, also: An Order of the Controller of Chemicals, appointed by these Regulations, relating to the control of the production and consumption of, as well as the dealing in, glycerine, is not *ultra vires* of the Controller either in whole or in part.

No opinion was expressed by the Court, such questions not having been referred to it, as to the meaning or the application of any of the Regulations or of the Order of the Controller.

*PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

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The authority vested in the Governor General in Council by the *War Measures Act*, (its constitutional validity having been finally determined in *Re Gray*, 57 S.C.R. 150 and *Fort Frances* case, [1923] A.C. 695), is legislative in its character; and an order in council passed in conformity with the conditions prescribed by, and the provisions of, that Act, i.e. a legislative enactment such as should be deemed necessary and advisable by reason of war, have the effect of an Act of Parliament: *In re Gray*, *supra*.

Held, further, that the Governor General in Council has the power, under section 3 of the *War Measures Act*, to delegate his powers, whether legislative or administrative, to subordinate agencies (Boards, Controllers and other officers) to make orders, rules and by-laws generally of the nature of those the Controller of Chemicals is empowered to make by the Regulations above mentioned.

But, under the *War Measures Act*, the final responsibility for the acts of the Executive Government rests upon Parliament.

Per Rinfret and Taschereau JJ.—Parliament has not abdicated its general legislative powers nor abandoned its control. The subordinate instrumentality, which it has created for exercising the powers, remains responsible directly to Parliament and depends upon the will of Parliament for the continuance of its official existence.

Per Davis J.—Parliament has not effaced itself, and has full power to amend or repeal the *War Measures Act* or to make ineffective any of the orders in council passed in pursuance of its provisions.

Per Kerwin J.—If at any time Parliament considers that too great a power has been conferred upon the Governor General in Council, the remedy lies in its own hand.

Per Rinfret and Taschereau JJ.—The advisability of the delegation of his powers to other agencies is in the discretion of the Governor General in Council; and once the discretion is exercised, the resulting enactment is a law by which every court is bound in the same manner and to the same extent as if Parliament had enacted it.

Comments as to the applicability of the maxim *Delegatus non potest delegare*.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada in the exercise of the powers conferred by section 55 of the *Supreme Court Act* (R.S.C. 1927, c. 35) of the following questions: 1. Are the regulations in relation to chemicals dated the 10th day of July, 1941, P.C. 4996 aforesaid, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent? 2. Is the order dated the 16th day of January, 1942, respecting glycerine (referred to as Order No. C.C. 2-B) *ultra vires* of the Controller of Chemicals either in whole or in part and, if so, in what particular or particulars and to what extent?

The Order in Council referring these questions to the Court is as follows:—

“Whereas section three of the *War Measures Act*, chapter 206 of the Revised Statutes of Canada, 1927, provides as follows:

3. The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:—

- (a) Censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;
- (b) Arrest, detention, exclusion and deportation;
- (c) Control of the harbours, ports and territorial waters of Canada and the movements of vessels;
- (d) Transportation by land, air, or water and the control of the transport of persons and things;
- (e) Trading, exportation, importation, production and manufacture;
- (f) Appropriation, control, forfeiture and disposition of property and of the use thereof.

2. All orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation; but if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder, shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation, extension or revocation.

“And whereas by reason of the state of war now existing, the Governor General in Council has deemed it necessary or advisable for the security, defence, peace, order and welfare of Canada to authorize acts and things to be done and, from time to time, to make orders and regulations pursuant to the *War Measures Act* aforesaid and in particular to control, restrict and regulate by means of Controllers the production, sale, distribution, consumption and use of essential supplies and thereby powers have been conferred upon the said Controllers in the exercise of which numerous orders and regulations have been made by the aforesaid Controllers affecting the community at large and a question of general application has arisen as to the authority of the Governor General in Council to establish this method and system of control;

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HUDSON J.—The questions submitted by His Excellency the Governor General in Council to this Court for hearing and consideration are the following:

1. Are the regulations in relation to chemicals dated the 10th day of July, 1941, P.C. 4996 aforesaid, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent?

2. Is the order dated the 16th day of January, 1942, respecting glycerine (referred to as Order No. C.C. 20B) *ultra vires* of the Controller of Chemicals either in whole or in part and, if so, in what particular or particulars and to what extent?

The terms of the Order in Council referred to in the first question and the order of the Controller of Chemicals referred to in the second have already been quoted by other members of the Court, and it is not necessary for me now to repeat them.

It is quite clear that in time of war Parliament has power to legislate in respect of the subject matter of the orders under consideration.

It is equally clear that Parliament could delegate such powers to the Governor General in Council or to others.

So much is conclusively established by a decision of this Court in *Re Gray*, (1) and by the Judicial Committee of the Privy Council in *Fort Frances Pulp and Power Company Ltd. v. Manitoba Free Press Company Ltd.* (2).

The subject matter of the orders in question falls within the provisions of section 3 of the *War Measures Act*, and in particular paragraphs (e) and (f) of such section.

That the Governor General in Council himself could deal with this matter is not open to serious question.

But it is contended that under the terms of the statute the Governor General in Council had no power to delegate to others the authority to make orders and regulations such as is done here.

The statute does not in express terms provide for delegation and the maxim *delegatus non potest delegare* is invoked to support a construction as would deny any implication of such an authority.

The general principle is stated in Broom's Legal Maxims at page 570, as follows:

This principle is that a delegated authority cannot be re-delegated: *delegata potestas non potest delegari*, that is, one agent cannot lawfully

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(1) [1918] 57 Can. S.C.R. 150

(2) [1923] A.C. 695.

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appoint another to perform the duties of his agency. This rule applies wherever the authority involves a trust or discretion in the agent for the exercise of which he is selected, but does not apply where it involves no matter of discretion, and it is immaterial whether the act be done by one person or another, and the original agent remains responsible to the principal.

The principle thus stated is somewhat qualified by Broom, at page 572, as follows:

Although, however, a deputy cannot, according to the above rule, transfer his entire powers to another, yet a deputy possessing general powers may, in many cases, constitute another person his servant or bailiff, for the purpose of doing some particular act; provided, of course, that such act be within the scope of his own legitimate authority.

Hudson J. And again:

The rule as to delegated functions must, moreover, be understood with this necessary qualification, that, in the particular case, no power to re-delegate such functions has been given. Such an authority to employ a deputy may be either express or implied by the recognised usage of trade.

The maxim is most frequently applied in matters pertaining to principal and agent but it is also applied in respect of legislative grants of authority; for example in *Re Behari Lal et al*, (1), it was held that the power conferred on the Governor General in Council by section 30 of the *Immigration Act* to prohibit the landing of immigrants of a specified class could not be delegated to the Minister of the Interior. Mr. Justice Clement said:

***In my opinion, nothing short of express words would avail to enable His Excellency in Council to delegate to another or others a power of this nature, the exercise of which is conditioned upon his consideration of its necessity or expediency.

Again in *Geraghty v. Porter*, (2), it was held that a delegated power of legislation must be exercised strictly in accordance with the powers creating it; and in the absence of express power so to do the authority cannot be delegated to any other person or body.

The maxim, however, is at most a rule of construction, subject to qualifications, some of which are referred to by Broom.

In the case of a statute, there, of course, must be a consideration of the language of the whole enactment and of its purposes and objects.

(1) (1908) 13 B.C.R. 415.

(2) (1917) New Zealand Law
Rep. 554.

The *War Measures Act* was passed soon after the commencement of the war in 1914. Section 3 provided that:

The Governor in Council may do and authorise such acts and things, and make from time to time such orders and regulations as he may, by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada;

In the course of that war, under the authority of this Act, the Governor General in Council appointed many controllers who actively exercised powers in general not dissimilar from those here under consideration. In no case was it ever held that such delegation was *ultra vires*. On the contrary, in the case of *Fort Frances Pulp and Paper Company Ltd. v. Manitoba Free Press Company Ltd.* (3), it was expressly held by Mr. Justice Riddell at the trial (4) that such delegation by the Governor in Council to a controller of pulp and paper was valid. Mr. Justice Riddell said at page 119:

Moreover, if the Dominion have regulative power over any class of subjects, it may exercise such power through any agency selected by itself—the power of the Dominion is not delegated, and the maxim *Delegatus non potest delegare* has no application.

And again:

The Governor in Council in effect regulated the trading, etc., so far as it consisted in paper, etc., by directing those concerned to obey the orders and regulations of the Minister: I think that this was perfectly valid.

The case went to the Ontario Court of Appeal, but this question was not there dealt with, the appeal being dismissed on another ground. In the Judicial Committee of the Privy Council the appeal was again dismissed. Their Lordships held that the *War Measures Act* and the Orders in Council thereunder were *intra vires*. At the conclusion of his judgment Lord Haldane accepted in general the views of Mr. Justice Riddell, although guarding himself against accepting his statement on one point which is not here relevant.

At the commencement of the present war the *War Measures Act* again came into operation. Since then the practice of 1914-1918 has been followed and extended, commensurate with the vastly increased national obligations.

(3) (1923) A.C. 695.

(4) (1922) 52 O.L.R. 118.

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It is manifest that the business of government in war time cannot be effectively carried on without delegation by the Executive of a very great part of its duties.

This was found to be the case in Great Britain during the last war. There was first a general delegation of powers to His Majesty in Council, and then a sub-delegation by His Majesty in Council to controllers or directors of different governmental activities arising out of the prosecution of the war. Notwithstanding that His Majesty in Council had no express power of sub-delegation, none of the acts of the controllers or directors were ever declared to be *ultra vires* because of such sub-delegation. The attitude of the courts in England is sufficiently shown by the following extracts from Halsbury's Laws of England, vol. 6, p. 527:

Presumptions in favour of the liberty or property of the subject, which are usually of great effect in interpreting statutes in time of peace, become relatively weak in time of war when the safety of the realm is in danger.

Again at page 533:

Note (d). The main Act was the *Defence of the Realm Consolidation Act*, 1914 (5 Geo. 5, c. 8), which was in form declaratory, though it undoubtedly introduced some new law*** It was held, on more than one occasion, that no regulation which was made with the honest intention of securing the public safety and defence of the realm could be treated by the Courts as invalid, unless it was clear, upon the face of it, that it could not possibly aid in securing the public safety or the defence of the realm.

After the conclusion of the war several emergency Acts were passed, and the latest which came into effect at the commencement of the present war contained express authority to His Majesty in Council to delegate. It was pressed upon us as an argument that it was then recognized in England that the prior legislation was insufficient. This, however, would not be conclusive even in England and much less so when construing the Canadian Act.

Bearing in mind that we are not now called upon to construe a constitutional Act but an Act which the Canadian Parliament passed in war time for the security, defence and welfare of Canada, I do not think that the maxim *delegatus non potest delegare* is applicable.

By the statute the Governor in Council is given power to do and authorise such acts and things and make from time to time such orders and regulations as he may deem necessary or advisable for the security, defence, peace, order and welfare of Canada, and by subsection 2 such orders and regulations shall have the force of law.

In the light of the necessity for delegation and what took place during the last war, and the decision of the courts in the case of *Fort Frances Pulp and Paper Co. v. Manitoba Free Press* (1), I think it must be held that the Governor in Council has the power to delegate to others the performance of such duties as has been done in the present case. Any such delegation would, of course, not confer on the delegate power to do anything in conflict with other provisions of the *War Measures Act*. One of such provisions has been called to our attention, namely clause 4 of Order in Council No. 4996, in regard to compensation. This conflicts with section 7 of the *War Measures Act* and, for that reason, is invalid.

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For these reasons, I concur in the following answers to the questions referred to us:

The answer to interrogatory number one is: The Regulations are not *ultra vires* of the Governor General in Council either in whole or in part, except paragraph four which is *ultra vires*. No question is before us concerning the meaning, or the application, of any of the Regulations.

The answer to interrogatory number two is: The order is not *ultra vires* of the Controller of Chemicals either in whole or in part. Here again no question is before us concerning the meaning, or the application, of the order or any part thereof.

MERCURY OILS LIMITED (DEFEND- }
ANT) } APPELLANT;

AND

VULCAN - BROWN PETROLEUMS }
LIMITED (PLAINTIFF) } RESPONDENT.

1942
*May 13,
14, 15.
*Dec. 24.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME
COURT OF ALBERTA

Gas and oil leases—Effect upon lease of subsequent legislation preventing performance of a condition—Whether lease frustrated—Constitutional law—Validity of Oil and Gas Wells Act, Alberta, 1931, c. 48.

The appellant held under a lease from the owner "the right and interest of the lessor in all the petroleum" in a certain parcel of land. The respondent held under a prior sublease the petroleum and natural gas

*PRESENT:—Rinfret, Kerwin, Hudson and Taschereau JJ. and Gilmarders J. *ad hoc*.

DELEGATUS NON POTEST DELEGARE

The administrative law which has grown up around the Latin maxim *delegatus non potest delegare*, a delegate may not re-delegate, deals with the extent to which an authority may permit another to exercise a discretion entrusted by a statute to itself. The maxim is derived from and is most frequently applied in matters relating to principal and agent but it is not confined thereto;¹ it is basic in administrative law, the law relating to discretions conferred by statute. The maxim does not state a rule of law; it is "at most a rule of construction" and in applying it to a statute "there, of course, must be a consideration of the language of the whole enactment and of its purposes and objects".² As a rule of construction for a section in the statute which confers a discretion on an authority named therein, the maxim applies: to an authority empowered to lay down general rules (legislative power);³ to an authority empowered to decide a particular issue affecting the rights of an individual, be it a magistrate, a municipal authority, a wartime controller or a minister of the Crown (judicial and quasi judicial power);⁴ to an authority empowered to determine whether legal proceedings shall or shall not be initiated against an individual;⁵ and even to an authority empowered to do an act involving the exercise of practically no discretion, such as a utility company operating under a charter,⁶ and a person serving a distress warrant.⁷ It applies, in short, to all persons who are empowered by statute to do anything. Its most important application, however, is to authorities which are by statute empowered to exercise discretions affecting the rights and interests of the public, and it is this aspect of it that will be dealt with here.

The maxim deals with "delegation" by an authority of its statutory discretion. What is "delegation"? "Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to

¹ The contrary statement of Rinfret and Taschereau JJ. in *Reference re Regulations re Chemicals*, [1943] 1 D.L.R. 248, 261, is incorrect; Hudson J. at pp. 275-276 of the same case correctly states the law.

² Per Hudson J. at p. 276 of the case cited above.

³ See such cases as *Hodge v. The Queen* (1883), 9 App. Cas. 117; *Re Behari Lal*, 13 B.C.R. 415; *Geraghty v. Porter* [1917] New Zealand Law Reports 554.

⁴ See such cases as *Caudle v. Seymour*, 113 E.R. 1372; *R. v. Stepney*, [1902] 1 K.B. 317; *Mills v. London County Council*, [1925] 1 K.B. 213; *Fowler (John) & Co. (Leeds) v. Duncan*, [1941] Ch. 450; *R. v. Chiswick Police Superintendent*, [1918] 1 K.B. 578.

⁵ See such cases as *Kyle v. Barbor* (1888), 58 L.T. 229; *Firth v. Staines*, [1897] 2 Q.B. 70; *R. v. Halkett*, [1910] 1 K.B. 50.

⁶ See such cases as *Eccles Corporation v. South Lancashire Tramways Company*, [1910] 2 Ch. 263 and *Spurling v. Dantoft*, [1891] 2 Q.B. 384, 392.

⁷ *Symonds v. Kurz* (1889), 61 L.T. 559, 560, per Field J.

the conferring of an authority to do things which otherwise that person would have to do himself. . . . it is never used by legal writers, so far as I am aware, as implying that the delegating person parts with this power in such a way as to denude himself of his rights."⁸ The fact that the authority named in the statute has and retains a general control over the activities of the person to whom it has entrusted the exercise of its statutory discretion does not, therefore, save its act of so entrusting to him the discretion from being "delegation" and so falling within the ambit of the maxim. If, however, the authority exercises such a substantial degree of control over the actual exercises of the discretion so entrusted that it can be said to direct its own mind to it, there is in law no "delegation" and the maxim does not apply. A provincial legislature which, being empowered by the B.N.A. Act to legislate on "property and civil rights within the Province" permits a commission to make regulations affecting taverns;⁹ the Governor in Council who, being empowered by the War Measures Act to "make. . . such. . . regulations as he may by reason of the existence of . . . war. . . deem necessary or advisable for the . . . defence . . . of Canada" permits the Controller of Chemicals to make regulations affecting chemicals;¹⁰ a committee which hands over its statutory powers to one of their number to be exercised according to his own unaided judgment;¹¹ a municipal council which, being empowered by statute to award compensation, adopts from the Treasury a standard of compensation and does not apply its own judgment to the amount it will give;¹² all these are delegating their powers and the question then is "Does the Act expressly or impliedly permit such delegation"?

A wartime controller who appoints someone to assist him in carrying out his duties but does not authorize him to exercise any of his powers,¹³ and a Minister of Justice who signs an order suppressing a newspaper but acts, in accordance with ordinary departmental practice, not of his own knowledge but on the

⁸ *Huth v. Clarke* (1890), 25 Q.B.D. 391, 395, per Wills J. This case held, therefore, that the executive committee of a local authority which, acting under a section permitting it to "delegate" its powers to a sub-committee, had so delegated them, did not thereby preclude itself from continuing to exercise itself the powers delegated by it.

⁹ *Hodge v. The Queen* (1883), 9 App. Cas. 117; *Shannon v. Lower Mainland Dairy Products Board*, [1938] A.C. 708.

¹⁰ *Reference re Regulations re Chemicals*, [1943] 1 D.L.R. 248.

¹¹ *Cook v. Ward* (1877), 2 C.P.D. 255.

¹² *R. v. Stenney*, [1902] 1 K.B. 317.

¹³ *Fowler (John) & Co. (Leeds) v. Duncan*, [1941] Ch. 450.

recommendation of his subordinates¹⁴ are not delegating their powers and no further question arises. A county council which is empowered to grant movie licences "on such terms and conditions . . . as the Council may by the respective licences determine" delegates its powers if it inserts a condition "that no film be shown which has not been certified for public exhibition by the British Board of Film Censors",¹⁵ but does not delegate them if it adds thereto a rider reserving to itself the right to dispense with that condition.¹⁶ A local authority which is required by statute to "approve" the acts of one of its committees or officers delegates its powers and so does not "approve" if it passes a resolution allowing them to decide any matter independently of the authority and requiring them only to report quarterly the number of cases decided;¹⁷ it does not delegate its powers and so does "approve" if in a particular case the committee or officer has decided a matter independently of the authority and the authority later ratifies the decision but without inquiring into it.¹⁸

When is delegation permissible? The answer to this question depends entirely on the interpretation of the statute which confers the discretion. A discretion conferred by statute is *prima facie* intended to be exercised by the authority on which the statute has conferred it and by no other authority, but this intention may be negatived by any contrary indications found in the language, scope or object of the statute; to put the matter in another way, the word "personally" is to be read into the statute after the name of the authority on which the discretion is conferred unless the language, scope or object of the statute shows that the words "or any person authorized by it" are to be read thereinto in its place. This *prima facie* rule of construction dealing with delegation is derived in part from the "literal" rule of construction, in part from the political theory known as "the rule of law," and in part from the presumption that the naming of a person to exercise some discretion indicates that he was deliberately selected because of some aptitude peculiar to himself. The literal rule of construction prescribes that nothing is to be added to a statute unless there are adequate grounds to justify the inference that the legislature intended something which it

¹⁴ *Yasny v. Lapointe*, [1940] 3 D.L.R. 204; *R. v. Chiswick Police Superintendent*, [1918] 1 K.B. 758 (Secretary of State signing deportation order in fact issued by a civil servant) is to the same effect.

¹⁵ *Ellis v. Dubowski*, [1921] 3 K.B. 621.

¹⁶ *Mills v. L.C.C.*, [1925] 1 K.B. 213.

¹⁷ *High v. Billings* (1903), 67 L.T. 550.

¹⁸ *Firth v. Staines*, [1897] 2 Q.B. 70.

omitted to express;¹⁹ to read in the word "personally" adds nothing to the statute, to read in the words "or any person authorized by it" does. The "rule of law" says that, since the common law recognizes no distinction between government officials and private citizens, all being equal before the law, no official can justify interference with the common law rights of the citizen unless he can point to some statutory provision which expressly or impliedly permits him to do so; to point to a provision justifying interference by A does not, of course, justify interference by B. The presumption that the person named was selected because of some aptitude peculiar to himself requires the authority named in the statute to use its own peculiar aptitude and forbids it to entrust its statutory discretion to another who may be less apt than it, unless it is clear from the circumstances that some reason other than its aptitude dictated the naming of it to exercise the discretion. Because, however, the courts will readily mould the literal words of a statute to such a construction as will best achieve its object; because they will, recognizing the facts of modern government, readily imply in an authority such powers as it would normally be expected to possess; because the presumption of deliberate selection, strong when applied to the case of a principal who appoints an agent or a testator who selects a trustee, wears thin when applied to a statute which authorizes some governmental authority, sometimes with a fictitious name such as "Governor-in-Council" or "Minister of Justice", to exercise a discretion which everyone, even the legislature, knows will in fact be exercised by an unknown underling in the employ of the authority, the *prima facie* rule of *delegatus non potest delegare* will readily give way, like the principles on which it rests, to slight indications of a contrary intent.

What are these indications? The *prima facie* rule is displaced, of course, by a section in the statute which expressly permits the authority entrusted with a discretion to delegate it to another.²⁰ In the absence of such a provision, how does the court decide whether the rule is or is not intended to apply; how does it decide whether to read in the word "personally" or the words "or any person authorized by it"? The language of the statute does not, *ex hypothesi*, help it; it is driven therefore

¹⁹ See Maxwell, *Interpretation of Statutes*, 7th ed., 12 and such cases as *Ex p. Sharps* (1864), 5 R. & S. 322 (successor in office incapable of acting); *Peebles v. Oswaldtwistle Urban District Council*, [1897] 1 Q.B. 384 (statutory forum exclusive); *Liverpool Corporation v. Hope*, [1938] 1 K.B. 751 (statutory method of enforcement exclusive).

²⁰ As in two well known English Acts, Education Act, 1921, sec. 4 (2) and Emergency Powers (Defence) Act, 1939, sec. 1 (3).

to the scope and object of the statute. Is there anything in the nature of the authority to which the discretion is entrusted, in the situation in which the discretion is to be exercised, in the object which its exercise is expected to achieve to suggest that the legislature did not intend to confine the authority to the personal exercise of its discretion? This question is answered in practice by comparing the *prima facie* rule with the known practices or the apprehended needs of the authority in doing its work; the court inquires whether the policy-scheme of the statute is such as could not easily be realized unless the policy which requires that a discretion be exercised by the authority named thereto be displaced; it weighs the presumed desire of the legislature for the judgment of the authority it has named against the presumed desire of the legislature that the process of government shall go on in its accustomed and most effective manner and where there is a conflict between the two policies it determines which, under all the circumstances, is the more important.

These propositions are abundantly illustrated by the Canadian cases on the delegation of legislative power. In *Hodge v. The Queen*, the Privy Council held that the Ontario legislature could delegate to a commission the power to regulate taverns which by the terms of the B. N. A. Act was given to the legislature; the Ontario legislature, it said, was "in no sense a delegate"; it was Westminster seen through the wrong end of the telescope; it was intended to govern Ontario in the same way as the British Parliament governed England; it pointed out that to hold otherwise would paralyze the process of government in a province.²¹ In *Shannon v. Lower Mainland Dairy Products Board*, where it was argued that a provincial legislature could not delegate its power to legislate except as to details, the Privy Council countered with a reference to the everyday practice of twentieth century legislatures and said that "it is unnecessary to try to enumerate the innumerable occasions on which Legislatures, Provincial, Dominion and Imperial have entrusted various persons and bodies with similar powers to those contained in this Act".²² In the fall of 1943 the question arose whether the Governor-in-Council could delegate to wartime boards and controllers the power conferred upon him by section 3 of the War Measures Act "to make . . . such . . . regulations as he may by reason of . . . war . . . deem necessary or advisable for the . . . defence . . . of Canada." An Ontario County Court Judge decided that he could not; "for one must realize that the Government of

²¹ (1883), 9 App. Cas. 117.

²² [1938] A. C. 703, 713.

Canada cannot go on without the delegation of wide legislative authority to the executive, but one must also realize that delegation cannot develop to the extent that our democratic government blossoms into a bureaucracy or a dictatorship".²³ The Supreme Court of Canada resolved this conflict of policies in the opposite direction and held otherwise. Chief Justice Duff succeeded in satisfying himself that the words of section 3 authorized delegation, but the other Judges held the *prima facie* rule against delegation to be displaced not by the words but by the circumstances of the Act. Rinfret J., for instance, equated the wartime relationship of the Government and the Parliament to the peacetime relationship of a provincial legislature to the Imperial Parliament and so concluded that for the duration of the war the Government was intended to be a Parliament in miniature to which, in accordance with *Hodge v. The Queen*, the maxim would not even apply.²⁴ Kerwin J. referred to "the purpose and intent of the Act which was to place in the hands of the Governor-General in Council all possible power in order that the war should be carried to a successful conclusion".²⁵ Hudson J. said that "in the light of the necessity for delegation and what took place during the last war. . . . I think it must be held that the Governor in Council has the power to delegate to others the performance of such duties as has been done in the present case."²⁶ In each of these cases the courts set about interpreting the statute the same way; they admitted the *prima facie* rule, balanced against it their knowledge of the practice of government through subordinate agencies and their appreciation of the impossibility of achieving the purpose of the Act without it, weighed the conflicting policies in the balance and came to a conclusion.

The same technique is to be observed in the English cases dealing with local authorities. May a local sanitary authority, whose approval to the initiation of nuisance proceedings is required by the statute, permit its inspector to decide for himself whether they shall be initiated or not and then, after he has initiated them, ratify his act by subsequent formal approval? In such a case the court balances the consideration that "it is important that (the authority) should exercise a discretion in each case and it is not enough that (the inspector) does what he pleases and then relies on his acts being afterwards approved by the authority"²⁷

²³ *Rex v. Holmes*, [1943] 1 D.L.R. 241 247.

²⁴ *Reference re Regulations re Chemicals*, [1943] 1 D.L.R. 248 at pp. 260-261.

²⁵ *Ibid.*, at p. 272.

²⁶ *Ibid.*, at p. 278.

²⁷ *Bowyer, Philpott & Payne, Limited v. Mather*, [1919] 1 K.B. 419 429, per Avory J.

against the consideration that "in practice (the authority) are probably satisfied by the report of their medical officer, and I do not suppose that they ever go to the premises for the purpose of satisfying themselves (of the existence of a nuisance)".²⁸ The policy of maintaining the exercise by the sanitary authority named of the discretion entrusted to it is here balanced against the policy of maintaining the established practice whereby the real business of sanitary government is carried on by the inspector. Must an inspector of nuisances, who is by statute empowered to "procure any sample of food. . . and if he suspect the same to have been sold to him contrary to any provision of this Act" to send it to the district analyst and thereafter to take proceedings to recover a penalty, go in person to the store and "personally procure" a sample? In *Horder v. Scott*,²⁹ the court rejected the argument that only a competent person, viz., the inspector of nuisances, was intended by the statute to procure the sample and based its decision on the ground that "inspectors of nuisances. . . have numerous duties to perform, and if we held that to procure a sample under s. 13, the inspector must personally visit the shop, we should limit the operation of a very beneficial Act." Here again may be observed the same balancing of the same policies. Further illustration from the field of local government would be tedious³⁰ and this discussion will be concluded by referring to a case where it was held that the General Medical Council could not delegate to an executive committee its power to discipline dentists. Farwell J. there thought that a power of such importance to the dentist disciplined and to the dental profession as a whole should remain with the whole council and that the convenience of swift action through a committee, and the fact that the statute itself provided that "The General Council shall. . . have power to act by an executive committee of the Council", were not enough to tip the balance against the application of the *prima facie* rule.³¹

The time has now come to sum up. The maxim *delegatus non potest delegare* enunciates a rule of construction for interpreting statutes which confer upon governmental authorities the power to decide questions affecting the rights of the public; it applies to all types of authority, central, local or professional, and all types

²⁸ *R. v. Chapman, ex parte Artidge*, [1918] 2 K.B. 298, 307, per Avory, J.

²⁹ (1880), 5 Q.B.D. 552, 556, per Field J. See also *Tyler v. Dairy Supply* (1908), 98 L.T. 867, where the argument rejected in *Horder v. Scott* is forcibly put by the Court but again rejected.

³⁰ References may be made to similar balancing of the two conflicting policies in *High v. Billings* (1903), 67 L.T. 550, and *Firth v. Staines*, [1897] 2 Q.B. 70.

³¹ *General Medical Council v. United Kingdom Dental Board*, [1936] Ch. 41.

of discretion, legislative, judicial, quasi-judicial and administrative. The rule of construction prescribes that to any statute which confers a discretion upon a named authority, the word "personally" should be added after the name of the authority. Where an authority, although entrusting to its employees the task of exercising the discretion in the first instance, retains nonetheless such a substantial degree of control over the actual exercise by them of the discretion so entrusted that it can be said to direct its own mind to it, the authority is exercising the discretion personally and there is no delegation. Where, however the control exercised by the authority over the actual exercise of the discretion by its employees is absent or falls short of being substantial the authority does not exercise the discretion personally and is delegating its powers; it then becomes necessary to turn back to the statute and inquire whether its language, scope or object is such as to displace the prima facie rule of construction. To determine whether in place of the word "personally" the words "or any person authorized by it" should be read into the statute and thus permit the delegation, the court weighs the importance of maintaining in the particular situation the policy of requiring the named authority to exercise the discretion itself against the importance of maintaining in the particular situation the established procedure followed by the authority, and of furthering the most convenient method of achieving the object of the Act. As in all cases where the decision turns on a court's estimate of the comparative value of two conflicting policies it is not easy to predict what a court will do with the instant case, but it is worth remarking that in their application of the maxim *delegatus non potest delegare* to modern governmental agencies the Courts have in most cases preferred to depart from the literal construction of the words of the statute which would require them to read in the word "personally" and to adopt such a construction as will best accord with the facts of modern government which, being carried on in theory by elected representatives but in practice by civil servants or local government officers, undoubtedly requires them to read in the words "or any person authorized by it."

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[HIGH COURT OF JUSTICE]

Re Board of Education for City of London and Fenn et al.

OSLER, J.

10TH NOVEMBER 1970.

Schools — Board of Reference — Disagreement between school board and teacher — Board of Reference to deal with disagreement — Requirement that Minister direct Judge to act as chairman within 30 days — Whether Deputy may make decision for Minister — Whether letter may be signed by assistant Deputy — What constitutes valid direction — Schools Administration Act, s. 27(1)(b) — Interpretation Act, s. 27(m) — Judges Act (Can.), s. 38(1)(b).

The letter addressed on behalf of the Minister of Education to a Judge asking him to act as chairman of a Board of Reference to deal with a disagreement between a teacher and a school board satisfies the requirement of s. 27(1)(b) of the *Schools Administration Act*, R.S.O. 1960, c. 361, that the Minister must "within thirty days . . . grant the Board of Reference and direct a judge to act as chairman", notwithstanding that it may also be necessary for an Order in Council to be passed to authorize the Judge to act pursuant to s. 38(1)(b) (rep. & sub. 1966-67, c. 76, s. 5) of the *Judges Act*, R.S.C. 1952, c. 159, and that the Order in Council is not made within the 30 day period. The appointment of the Judge is valid if made by the Deputy Minister on the authority of the Minister, since s. 27(m) of the *Interpretation Act*, R.S.O. 1960, c. 191, provides that "words directing or empowering a public officer . . . to do an act . . . include . . . his lawful deputy", and the Minister of Education is a public officer within the meaning of the section. Apart from the *Interpretation Act*, the matter is in any event not one to which the maxim *delegatus non potest delegare* applies. Where the decision to appoint has been properly made by the Deputy in accordance with his authority, it is permissible for the letter to be signed by an assistant Deputy in accordance with established procedure.

[*Reference Re Regulations Re Chemicals*, [1943] S.C.R. 1, [1943] 1 D.L.R. 248, 79 C.C.C. 1; *The King v. Superintendent of Chiswick Police Station, Ex p. Sacksteder*, [1918] 1 B. 578, apud; *Re McBride and Stewart*, [1931] O.R. 461, [1931] 4 D.L.R. 910; affd [1932] O.R. 176, [1932] 1 D.L.R. 624, refd to]

APPLICATION for an order prohibiting further proceedings by a Board of Reference under the *Schools Administration Act*.

C. M. Pensa, for applicant.

B. T. Granger, for respondent.

OSLER, J.:—This was an application on behalf of the Board of Education for the City of London for an order prohibiting the members of a purported Board of Reference under the *Schools Administration Act*, R.S.O. 1960, c. 361, from taking any further proceedings. The respondent Terrence Fenn, a teacher whose teaching contract was terminated by the Board of Education for the City of London, applied for a Board

of Reference, as contemplated by s. 25(3) of the Act, and the other three respondents constituted the Board purportedly granted by the Minister of Education in compliance with the provisions of s. 27(1)(b).

To put the matter shortly, it is alleged that the Board was not properly constituted in accordance with the section last referred to, but this allegation involves questions of law of some difficulty.

Section 25(1) of the *Schools Administration Act* provides that the dismissal of a teacher by a Board shall be by notice in writing which shall state the reasons for the dismissal. Subsections (3) and (4) of that section are in the following terms:

25(3) Notwithstanding anything in this or any other Act, where a teacher is dismissed or the engagement of a teacher is terminated by the board or teacher, the teacher or board if not in agreement with the dismissal or termination may at any time within fifteen days after receiving the notice referred to in subsection 1 or 2, as the case may be, apply in writing by registered letter to the Minister for a Board of Reference, stating the disagreement.

(4) The applicant shall send a copy of the application by registered mail to the other party to the disagreement on the same day as the application is sent to the Minister.

The action that may then follow is provided for by s. 27, s.ss. (1) and (3) [later rep. & sub. 1968-69, c. 114, s. 3] of which are as follows:

27(1) Upon receipt of an application for a Board of Reference, the Minister shall send notice of the application by registered mail to the other party to the disagreement and shall within thirty days thereof inquire into the disagreement and shall, within the same time,

(a) refuse to grant the Board of Reference; or

(b) grant the Board of Reference and direct a judge to act as chairman thereof.

(3) Upon directing a judge to act as chairman of a Board of Reference, the Minister shall cause notice thereof to be sent by registered mail to the board and teacher involved in the disagreement and the notice shall require each of them to name a representative to the Board of Reference and to notify the Minister of such nomination by registered mail within ten days of the sending of the notice by the Minister.

It is urged that throughout this part of the Act time limits are of vital importance because Boards and teachers affected are prohibited from doing certain things until the time provided in the Act for the grant of a Board and for its meeting has expired.

It is provided that the chairman of a Board of Reference shall convene the Board within 30 days of his appointment

and upon reasonable notice to the parties, that the meetings of the Board shall be held *in camera* and that it shall report to the Minister within seven days of the completion of its hearing.

One contention can be shortly disposed of. It was submitted by counsel for the respondents that prohibition would not lie because the Board had itself determined that it did have jurisdiction and that that determination was not reviewable in this Court. What happened, as appears from the record and the "addendum to the transcript of evidence and rulings of the Board of Reference", was that the Board did meet and that arguments were then directed to it with reference to the manner of its appointment and its consequent jurisdiction. To quote a sentence from the Board's reasons, it decided that "... we are unanimously of the view that this matter is properly before this Board and that this Board had jurisdiction to proceed". They then go into detail and describe what was done by the original complainant, Mr. Fenn, what was done or purportedly done by the Minister and by the Deputy Minister and, in a word, all the preliminary matters leading up to the appointment.

However true it may be that, once appointed, an *ad hoc* Board under a statute of this kind has power to decide questions of law and fact arising in the course of its inquiry, it cannot conclusively decide a matter relating to the validity of its own creation.

The Board contemplated by the *Schools Administration Act* can only come into existence by the means contemplated by s. 27 thereof. The only way in which that section can be complied with is for the Minister, within a certain period of time, to grant a Board and direct a Judge to act as chairman thereof. If, therefore, the powers given to the Minister were not properly exercised, the Board did not in law acquire power to do anything and, in fact, the gentlemen who purportedly make up the Board do not even form a Board.

In other words, before the jurisdiction purportedly given to a Board under the Act can be exercised by anyone, the Board must come into existence, and the question of whether this has happened is, in fact, the very question I must decide.

As was said in the frequently-quoted decision of *The Queen v. Bolton* (1841), 1 Q.B. 36 [headnote], 113 E.R. 1054:

The test of jurisdiction under this rule is, whether or not the justices had power to enter upon the inquiry, not whether their conclusions, in the course of it, were true or false.

In the instant case, if the Board was never constituted in law, it had no jurisdiction even to inquire into the validity of its own constitution.

The facts are not seriously in dispute and establish that Terrence Fenn was advised by his employer, the London Board of Education, on May 14, 1970, that his teaching contract was terminated. By letter dated June 2, 1970, Mr. Fenn applied to the Minister of Education for a Board of Reference as he is entitled to do by s. 25(3) of the Act. The notice of termination was served upon Mr. Fenn on May 19th, and his application was made on June 2nd and received by the Minister on June 4th. It is admitted that the application was brought within the time provided and, while it is not established that the application was sent by registered mail, nothing was made of this point, and it is agreed that the Minister did cause notice of the application to be sent by registered mail to the London Board of Education within the prescribed time.

The matter was placed in the hands of the Deputy Minister of Education, Dr. John Russell McCarthy, to whom it was directed "from the Minister's office". He caused a preliminary investigation to be made by one W. C. Van der Burgh, an assistant superintendent with the Department of Education. On June 18th, Van der Burgh made a written report to McCarthy which concludes in these words:

Even though this appears to be a clear case involving the efficiency of the teacher which it is considered is within the competency of the officials of the London Board of Education to determine, I recommend that a Board of Reference be granted.

On the basis of this report, Dr. McCarthy states that he made the decision to appoint a Board and, in fact, the memorandum bears upon it, with reference to the paragraph just quoted, the words "approved for the Minister" followed by the initials "JRM" and preceded by the date "20/6/70".

Cross-examined on his affidavit, Dr. McCarthy states that he has standing oral authority to act in this manner. As he states:

If a Board of Reference is to be granted, the Minister has delegated to me authority to do it. If it is our recommendation not to grant a Board, the Minister has to do it personally. I do not have authority to turn down a Board of Reference.

The memorandum so annotated was then forwarded to one J. F. Kinlin, an assistant Deputy Minister, who on June 26, 1970, signed a letter prepared by Mr. Van der Burgh and

addressed to Mr. Sutton, director of education of the London Board of Education, advising that:

A Board of Reference is being granted and the Minister has asked His Honour Judge R. J. Cudney . . . to act as Chairman of the Board

and a letter to Judge Cudney stating that:

The Minister of Education has instructed me to notify you that in accordance with the provisions of Section 27(1) (b) of The Schools Administration Act he asks you to act as Chairman of a Board of Reference . . .

These letters were forwarded by registered mail to the respective addressees.

It was explained by Dr. McCarthy, who was examined pursuant to Rule 230, that the departmental practice in these matters is to seek the advice of the Chief Judge of the County Courts as to a suitable County Court Judge to nominate.

Finally, on July 7, 1970, an Order in Council was passed containing, *inter alia*, the following recitals and directions:

WHEREAS . . . one Terrence Richard Fenn, . . . has applied to the Minister of Education for a Board of Reference . . .

WHEREAS . . . the Minister of Education has granted the said Board of Reference and is now by the provisions of Part III of the said Act required to direct a judge of a county or district court to act as chairman of the said Board of Reference, and

WHEREAS, pursuant to clause b of subsection 1 of section 38 of the Judges Act (Canada), the appointment to a board of arbitration of a judge of a county or district court is required to be made by your Honour in the absence of any specific statutory authorization of a judge so to act, The Honourable A. F. Lawrence, Acting Minister of Education therefore recommends that His Honour R. J. Cudney . . . be appointed a member of the Board of Reference . . . The Honourable A. F. Lawrence, Acting Minister of Education further recommends that he be authorized to direct his Honour Judge Cudney to act as chairman of the said Board of Reference. The Committee of Council concur in the recommendations of the Honourable A. F. Lawrence, Acting Minister of Education and advise that the same be acted on.

The effect of the Order in Council would thus appear to be that Cudney, Co.Ct.J., is appointed a member of a Board and that the Acting Minister is authorized to direct the Judge to act as chairman of the Board of Reference.

The case mounted against the Board is dependent upon three propositions. First, it is said that when the Act provides [s. 27(1) (b)] that "the Minister shall . . . grant the Board of Reference and direct a judge to act as chairman thereof", this is a legislative direction to the Minister and it cannot be complied with by the Deputy Minister. In other

words, there is no power of delegation to the Deputy Minister. It is then said that, even if a power to delegate to the Deputy Minister exists, what was done was effectively done by Kinlin, an assistant Deputy Minister. Finally, it is urged that, as the Order in Council referred to above was not passed until more than 30 days after the application for a Board had been received by the Minister, the direction to the Minister to grant the Board, if at all, within 30 days was not complied with. This last allegation, of course, assumes that the effective "direction" to the Judge was the Order in Council rather than the letter from Mr. Kinlin.

To deal first with the last-mentioned subject, in my view, the Order in Council was not the direction contemplated by s. 27(1)(b) of the *Schools Administration Act* and, in fact, was quite unnecessary under that Act. The decision to grant the Board was made by the Deputy Minister, Dr. McCarthy, and signified by him when he approved in writing on June 20th the recommendation contained in the memorandum from Van der Burgh. The implementation of this decision was effected by Kinlin's letters of June 26th advising the London Board of Education that, "A Board of Reference is being granted and the Minister has asked His Honour Judge R. J. Cudney . . . to act as Chairman of the Board", and to Cudney, Co.Ct.J., advising him that, "The Minister of Education has instructed me to notify you that . . . he asks you to act as Chairman of a Board of Reference . . .". These actions were taken well within a period of 30 days following receipt by the Minister of an application for the Board and, hence, they comply with s. 27.

The Order in Council was necessary solely because of the provisions of the *Judges Act*, R.S.C. 1952, c. 159, which, by s. 38(1) [rep. & sub. 1966-67, c. 76, s. 5] prohibits a federally-appointed Judge from acting as a commissioner or arbitrator or on any inquiry or other proceeding unless:

- (b) In the case of any matter within the legislative authority of the legislature of a province, the judge is by an Act of the legislature of the province expressly authorized so to act or he is thereunto appointed or so authorized by the Lieutenant-Governor in Council of the province.

While it may be argued that the Legislature of Ontario, by providing that a Judge is to be the chairman of a Board of Reference under the *Schools Administration Act*, has expressly authorized a Judge so to act, I do not take this to be the case, and, at any rate, the Lieutenant-Governor in Council

apparently considered the authorization of Cudney, Co.Ct.J., to be required.

The effect of the Order in Council, therefore, is to confirm the appointment of Cudney, Co.Ct.J., already made, as I shall discuss below, and to save the learned County Court Judge from a possible breach of the *Judges Act* should he have undertaken to act before receiving such authorization as the Order in Council provided.

Turning then to the mechanics of the appointment, I am of the opinion that Kinlin's activities amounted to no more than that. It appears in evidence that the department has established a standard procedure for such cases and that Kinlin had standing orders to obtain from the Chief Judge of the County Courts recommendations as to the Judges available to act and to communicate the Minister's request to a Judge so recommended, without further direct instructions. That is what was done on this occasion and I find it to be sufficient compliance with the Act. While s. 27(1)(b) says that the Minister shall "direct a judge to act as chairman", surely it cannot be required that the direction be couched in brisk or mandatory terms. In the first place, it is not within the competence of a provincial Minister to "direct" a federally-appointed Judge whose actions are governed by the *Judges Act* and, in any event, normal courtesy would suggest language of the type employed by Mr. Kinlin.

The decision that is required by s. 27 to be made is essentially whether or not a Board of Reference is to be established. This, surely, is the question to which the mind of the responsible person, Minister or Deputy, must be directed and the question of the identity of the particular Judge is not one to which he need address his mind. He is to direct a Judge, but there is no requirement that he is personally to select a Judge. The direction, couched in the form of a request as indicated above, was given to the Judge by an assistant Deputy Minister in the name of the Minister and in accordance with a procedure long known to and approved by the Minister, and this is all that was required.

We go then to the fundamental question, finding as I do, that the decision to grant a Board was made by the Deputy Minister rather than by the Minister of Education. By statute or by operation of law, did the Deputy have the authority to make such a decision? The *Interpretation Act*, R.S.O. 1960, c. 191, provides in s. 27(m) that:

(m) words directing or empowering a public officer or functionary to do an act or thing, or otherwise applying to him by his

name of office, include his successors in office and his lawful deputy;

An example of the application of that clause is found in *Re McBride and Stewart*, [1931] O.R. 461, [1931] 4 D.L.R. 910; affirmed [1932] O.R. 176, [1932] 1 D.L.R. 624, where it was held by Jeffrey, J., that a deputy County Court Clerk had power to tax a bill in a proceeding under the *Municipal Act*, R.S.O. 1927, c. 233, which provided for the taxation of costs by the Clerk of the County Court. An appeal from that decision was dismissed. However, it was argued before me that a Minister of the Crown is not a public officer or functionary within the meaning of that clause. I have been unable to find any reference to a Minister in the *Interpretation Act*, but it may be that some assistance can be found from a comparison of that Act with the corresponding federal statute, the *Interpretation Act*, R.S.C. 1952, c. 158 [later rep. & replaced by 1967 (Can.), c. 7]. Section 31(1)(l) deals specifically with a Minister of the Crown and provides that words directing or empowering a Minister of the Crown to do any act or thing include "his or their lawful deputy". Then follows para. (m), which is almost identical with s. 27(m) of the Ontario Act save that, where in the Ontario Act the reference is to "a public officer or functionary", the federal Act states that:

(m) words directing or empowering *any other* public officer or functionary to do any act or thing, or otherwise applying to him by his name of office, include his successors in such office, and his or their lawful deputy;

(Emphasis mine.)

That paragraph following immediately after para. (l), which does deal with a Minister of the Crown, implies by its reference to "any other" public officer that a Minister of the Crown is a public officer.

Therein lies the probable explanation for the failure of the Ontario *Interpretation Act* to deal specifically with a Minister of the Crown, and I have concluded that I am justified in considering that a Minister does come within the provisions of Ontario s. 27(m) and, hence, power given to him is given to his Deputy.

Should I be wrong in this conclusion, I am nevertheless of the opinion, reading the statute as a whole and considering its purpose, that this is a case in which the maxim *delegatus non potest delegare* has no application. A helpful article in this connection is to be found in "Delegatus Non Potest Delegare", 21 *Can. Bar Rev.* 257 (1943), in the course of

which Professor John Willis suggests that the guiding principle should be that set out by Hudson, J., in *Reference Re Regulations Re Chemicals*, [1943] S.C.R. 1 at p. 34, [1943] 1 D.L.R. 248 at p. 276, 79 C.C.C. 1. In that case the learned Judge, after referring to the maxim and to its statement in Broom's *Legal Maxims*, 10th ed., pp. 570 and 572, goes on to say that:

The maxim, however, is at most a rule of construction, subject to qualifications, some of which are referred to by Broom.

In the case of a statute, there, of course, must be a consideration of the language of the whole enactment and of its purposes and objects.

Further assistance is, in my view, to be obtained from what is set out by the learned author at p. 261 of the article referred to:

Is there anything in the nature of the authority to which the discretion is entrusted, in the situation in which the discretion is to be exercised, in the object which its exercise is expected to achieve to suggest that the legislature did not intend to confine the authority to the personal exercise of its discretion? This question is answered in practice by comparing the prima facie rule with the known practices or the apprehended needs of the authority in doing its work; the court inquires whether the policy-scheme of the statute is such as could not easily be realized unless the policy which requires that a discretion be exercised by the authority named thereto be displaced; it weighs the presumed desire of the legislature for the judgment of the authority it has named against the presumed desire of the legislature that the process of government shall go on in its accustomed and most effective manner and where there is a conflict between the two policies it determines which, under all the circumstances, is the more important.

Approaching the *Schools Administration Act* in that way, it seems to me virtually impossible that "the process of government shall go on in its accustomed and most effective manner" if the Minister of Education is personally required to perform all the acts and make all the judgments which fall within his authority under that Act and the many other particular statutes charging him with responsibility.

It is frequently stated that the person to whom the responsibility for decision is entrusted by statute carries out his trust if it can be shown that his mind was directed to the question he is called upon to decide. Even if this standard is to be applied in the present case, I think it can be said to have been met. The evidence of Dr. McCarthy is that the Minister, upon assuming office, applied his mind to the question of Boards of Reference under this Act and decided that in every case where a Board was requested he would permit

his Deputy Minister to deal with such a request affirmatively and without actual reference to the Minister, but that he would personally pass upon any case in which it was recommended by his staff that a negative answer be given to the request. Among other reasons why I am satisfied that the proper construction of the Act is that delegation to the Deputy Minister may be permitted is the fact that s. 27 itself imposes very restrictive time limits upon the person who is to make the decision and the actions that are to be taken. In the present instance, for example, it is disclosed in evidence that during the entire period within which this application for a Board was in departmental hands, the Minister was personally either fully engaged in dealing with the legislative programme before the provincial Legislature or absent from his office on vacation. It cannot have been the intention of the Legislature to require that all the things thrust upon the Minister under this and other statutes he is charged with administering should be personally seen to in every detail by a man given such heavy responsibilities.

In addition to the specific authority which I find is given by the *Interpretation Act*, therefore, I find indications in the *Schools Administration Act* itself sufficient to justify the conclusion that the Minister was empowered to delegate to his deputy powers of the character here under review.

In the light of these findings, therefore, it is apparent that everything required by the statute to be done was in fact done within the specific periods of time and the grant of a Board was correctly made and the Board is, therefore, empowered to deal with the issue referred to it.

Before leaving the matter entirely, I wish to add that, assuming that the Deputy Minister did have the powers I have attributed to him, the manner in which those powers were exercised through the agency of Kinlin, the assistant Deputy, brings the case within the principle upheld in *The King v. Superintendent of Chiswick Police Station, Ex p. Sacksteder*, [1918] 1 K.B. 578. In that case the Home Secretary of Great Britain had been given certain powers under the *Aliens Restriction Act, 1914 (U.K.)*, c. 12, and this included an order for the immediate deportation of persons. Under those powers the Home Secretary made such an order with respect to a particular person. He had previously made a general order that anybody against whom an order of deportation should be made was to be kept in custody and detained until the deportation order could be executed and then placed upon a ship selected by a departmental officer.

The Court of Appeal found that there could be no objection to a general order being made which would govern the detailed steps to be taken against any person ordered by the Minister to be deported and that the mere carrying out of such detailed order in any particular case by a subordinate did not constitute improper delegation by the Minister.

Here, assuming that McCarthy had the authority to decide that there should be a Board, all that was done by Kiulin, the assistant Deputy Minister, was to carry out the procedure previously laid down for dealing with all cases of such a character.

For these reasons, therefore, the application to prohibit further action by the present Board will be dismissed. The individual respondent, Fenn, will have his costs. I do not understand that costs were incurred by the Board and, in any case, they were not separately represented before me. If necessary, I may be spoken to further regarding the costs of the Board, but at present I make no order in this connection.

Application dismissed.

[HIGH COURT OF JUSTICE]

Johnston v. Wellesley Hospital et al.

ADDY, J.

13TH SEPTEMBER 1970.

Physicians and surgeons — Negligence — Standard of care of specialist — Effect of error of judgment — Applicability of doctrine of *res ipsa loquitur*.

In treating a patient, a physician, even if he is a specialist, does not warrant that his treatment will be successful. While a specialist will be held to a higher degree of skill than a physician who does not profess to be so qualified by special skill and ability, he is bound to exercise only that degree of care and skill which could reasonably be expected of a normal, prudent practitioner of the same experience and standing. Nor will a mere error of judgment on the part of the specialist, proved only by subsequent developments to be an error of judgment, result in the physician's liability for untoward consequences of his treatment. Finally, in an action against a physician for negligence, where the cause of the damage to the plaintiff is known, the doctrine of *res ipsa loquitur* has no application, and the onus of establishing negligence rests with the plaintiff.

[*Crits and Crits v. Sylvester et al.*, [1956] O.R. 132, 1 D.L.R. (2d) 502; *affd* [1956] S.C.R. 991, 5 D.L.R. (2d) 601; *Wilson v. Swanson*, [1956] S.C.R. 804, 5 D.L.R. (2d) 113; *Gent and Gent v. Wilson*, [1956] O.R. 257, 2 D.L.R. (2d) 160; *Leighton v. Sargent* (1853), 27 N.H.R. 460, *anld*]

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Dec. 26.

1918

March 9.

[CLUTE, J.]

MURPHY V. CITY OF TORONTO.

Workmen's Compensation Act—Ontario Act 4 Geo. V. ch. 25 and Amending Acts—Contractor—Assessment of, as Employer of Wage-earners—Failure of Contractor to Pay Sum Assessed—Notification by Workmen's Compensation Board to City Corporation, Principal of Contractor—Payment of Assessment by Corporation—Right to Withhold Amount from Sum Due under Contract—Action to Recover Amount Withheld—Defence—Justification under Order of Board—Necessity for Proof of Order or Decision of Board—Failure to Prove—Judgment for Contractor—Opening up—Fresh Evidence Taken—Pay-roll—Estimate—Authority of Officer of Board—Delegation of Powers—Sec. 78 (3) of Act—Adoption of Assessment by Board—Jurisdiction of Court to Inquire into Proceedings of Board—Proposed Addition of Board as Third Party after Trial and Judgment—Right to Bring Board before Court.

The plaintiff, a contractor, sued the defendants, a city corporation, for a sum said to be due under a contract for work done for the defendants. The defendants admitted that they had withheld the amount sued for from the amount justly due to the plaintiff, and had paid it to the Workmen's Compensation Board, upon notification from the Board that the plaintiff was indebted to the Board, under the provisions of the Workmen's Compensation Act, 4 Geo. V. ch. 25, and amending Acts (5 Geo. V. ch. 24, 6 Geo. V. ch. 31, and 7 Geo. V. ch. 34), in the sum so withheld, which had been assessed by the Board upon the plaintiff as an employer of wage-earners. The defendants pleaded the order of the Board and its decision that they were entitled to indemnity from the plaintiff:—

Held, that the Court had jurisdiction to inquire into the proceedings of the Board so as to ascertain whether or not the defendants had brought themselves within the protection of the Act; that the Act requires that there shall be a decision of the Board; and that in this case, so far as evidence taken at the trial shewed, there was no such decision.

There was no evidence that the Board made an assessment or gave notice of an assessment being made, or became entitled to register an assessment, or had registered an assessment; and the defendants were not, so far as the evidence shewed, called upon by any official act of the Board to pay the amount alleged to have been assessed against the plaintiff.

Consideration of the provisions of the Act (as amended), especially secs. 10, 60, 62, 63.

Judgment was pronounced in favour of the plaintiff for the amount claimed without costs; but the entry of the judgment was stayed for a month to enable the parties to ascertain and adjust the differences between them and the Board.

Upon the application of the defendants to the trial Judge, the case was reopened, and the defendants adduced further evidence, upon which it was *held*, by the trial Judge, upon the question whether a valid assessment had been made, that, although there was no official record of an assessment having been made, what was done by the Board amounted to a valid assessment under the provisions of the Act.

The Board in fact never acted or assumed to act under sec. 78, sub-sec. (3), which is its only authority for making an assessment based on such sum as, in the opinion of the Board, is the probable amount of the pay-roll of the employer. The Board could not be said to have made the assessment; it was made by an officer of the Board.

Sections 84 to 98 of the Act (as amended) considered.

The Board could not delegate its authority to fix the amount upon which the assessment should be based.

But, although the assessment made by the officer on the amount of the pay-roll as fixed by him was not binding on the plaintiff, yet, the question having

been opened by the Board at the plaintiff's request, and the Board having confirmed what the officer had done, there was an act of the Board which cured the defect and rendered the assessment valid.

The action was, therefore, dismissed.

An application by the defendants, made after the original trial and judgment, to extend the time for service of a third party notice upon the Board was refused, both because it could not be entertained at that stage, and because the Board could not be brought before the Court to answer a claim for anything done under the statute.

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ACTION to recover \$2,230.20, the balance alleged to be due to the plaintiff, a contractor, for work done for the Corporation of the City of Toronto, the defendants, under a contract.

The defence was, that the defendants had paid the Workmen's Compensation Board the sum of \$2,230.20, pursuant to the Board's order, that being a sum primarily due by the plaintiff to the Board, and that they were justified in charging that sum against the plaintiff, and so nothing was due to him.

November 7. The action was tried by CLUTE, J., without a jury, at Toronto.

F. J. Hughes, for the plaintiff.

Irving S. Fairly, for the defendants.

November 24. CLUTE, J.:—The plaintiff's claim is for \$2,230.20, the balance due him upon a contract with the city.

This balance upon the contract is not denied, but the defendants plead that on the 26th September, 1916, the Workmen's Compensation Board notified the defendants that the plaintiff was indebted to it under the provisions of the Workmen's Compensation Act, 4 Geo. V. ch. 25, as amended,* in the sum of \$2,230.20, and had so notified the plaintiff; that the plaintiff did not pay the Board the amount so due; and that on the 26th September, 1916, the Board ordered the defendants to pay the said amount to the Board, at the same time deciding that the defendants were entitled to indemnity from the plaintiff in respect of the full amount of such payment; that the defendants paid the said sum of \$2,230.20 to the Board, and were not liable to the plaintiff in respect thereof.

The defendants further plead that, by virtue of the Work-

* The amending Acts are: 5 Geo. V. ch. 24; 6 Geo. V. ch. 31; 7 Geo. V. ch. 34.

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men's Compensation Act as amended, especially secs. 10, 60, and 98, this action is not maintainable and should be stayed. To this the plaintiff replies that he is not indebted to the Workmen's Compensation Board as alleged, and he denies that the said Board had decided, or had power or jurisdiction to decide, that the defendants were entitled to indemnity from the plaintiff as alleged in paragraph 5 of the statement of defence.

At the trial, the defendants' counsel admitted the amount due on the contract, and relied upon their defence.

Mr. Howard Spencer Rupert, the Secretary of the Commissioner of Works of the City of Toronto, was called and produced a letter dated the 20th December, 1916, as follows:—

"To the Works Department,
"City Hall,
"Toronto.

"Re M. H. Murphy, Contractor.

"Confirming conversation with you this morning, we beg to remind you that the assessment of this contractor, which, with added percentage to date for non-payment, is \$2,230.20, remains unpaid. Under section 10, the city of course is responsible for payment of this amount with the usual right of indemnity by way of withholding balances to meet it.

"Yours truly,

"Workmen's Compensation Board,

"N. B. Wormwith, solicitor."

And a further letter to the Works Department as follows:—

"This contractor's assessment, which is, in accordance with our notice to you, \$2,230.20, is still unpaid, and under section 10 of the Act 4 Geo. V. ch. 25, as amended by 5 Geo. V. ch. 24, we would ask you to kindly forward us your cheque for that amount, so that the amount which has remained in abeyance for an unreasonable length of time may be cleaned up.

"Workmen's Compensation Board,

"N. B. Wormwith, solicitor."

Mr. Laver, the paying teller of the Treasury Department of the City of Toronto, produced a cheque dated the 3rd January, payable to the Workmen's Compensation Board, for \$2,230.20,

which was duly paid. To the cheque was attached an account, dated the 22nd December, 1916, in which the Corporation of the City of Toronto were charged as indebted to the Workmen's Compensation Board, "Assessments to December 29th, 1916, *re* M. H. Murphy as per H.O. letter No. 5826, \$2,230.20." The cheque was remitted on the 5th January, 1917.

The plaintiff admitted in his examination for discovery (questions 19 and 20) that he had paid no part of this sum, but he said that he had paid the Board the initial estimate for 1915.

This completed the defence.

In reply the plaintiff was called. He denied that he was liable to the Workmen's Compensation Board, or that he ever received any order or judgment for this amount, or for any amount, or any notice.

Section 63 of the Workmen's Compensation Act provides:—

"An order of the Board for the payment of compensation by an employer who is individually liable to pay the compensation or any other order of the Board for the payment of money made under the authority of this Part, or a copy of any such order certified by the Secretary to be a true copy, may be filed with the clerk of any County or District Court and when so filed shall become an order of that Court and may be enforced as a judgment of the Court."

The plaintiff further stated that he had never received any notice of such filing with the Court, or any notice of any kind of that having been done, or any notice that a certificate had been issued by the Board under sec. 95, and stated that he had never been served with any attaching process either by the city corporation or the Board, or any notice whatever that the city corporation intended to pay over this amount to the Board; that he had never seen or authorised any such payment, and did not know of it until after it had been made; that he was arranging a settlement of the amount at the time; and correspondence on this subject was put in.

This correspondence begins with a letter of the 16th October, 1916, from the Board to the plaintiff, requiring the plaintiff to attend at the Board's offices on the 19th October, with all books, papers, memoranda, or letters shewing the amount of work done

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and moneys expended for wages during the years 1915 and 1916; followed by a further letter from the Board to the plaintiff, dated the 23rd October, 1916, that, "failing to receive payment of your assessment, which with added percentage to date is \$2,230.20, we give you notice that we are filing with the Clerk of the County Court of Toronto, the Board's certificate to the effect that this amount is still due and owing by you. This means that the certificate, when filed, becomes an order of the Court, and may be enforced as a judgment. Unless your cheque for the amount as indicated is received by Saturday, November 4th, we shall instruct the sheriff to make the regular levy upon your lands and chattels. Workmen's Compensation Board, *per* N. B. Wormwith, solicitor."

On the 2nd November, 1916, the plaintiff's solicitor replied to this letter, stating that he was busy getting this matter into shape, but found it was heavier than at first appeared, and asked for a few days in order that he might present the matter as fully as he could. This request was complied with on the 6th November; and on the 13th November the plaintiff's solicitor enclosed to the Board a declaration, petition, and schedule, and stated that he would be pleased to appear before the Board personally, for Mr. Murphy, at any time, and bring his books in order to substantiate the statements set forth in the petition.

The Board replied on the 16th November that the matter should have their consideration, and on the 25th November the Board further replied: "We have placed your declaration with the schedules before the Board; and, if Mr. Murphy will attend with all books, papers, memoranda, etc., to substantiate the statement set forth, it will then be determined whether it is necessary to have a formal hearing before the Board. Thursday of next week would be the most convenient for this purpose. Workmen's Compensation Board, *per* N. B. Wormwith, solicitor."

To this Mr. Hughes, the plaintiff's solicitor, replied, on the 27th November, that he would attend on the following Thursday, with books etc.

The plaintiff states that he attended with the accounts shewing the amount paid out by him for wages, and saw Mr. Bastedo, the auditor to the Board, and the solicitor of the Board, and he made an affidavit; that he also attended on the

Thursday following the 27th November, with his brother and solicitor for 2½ hours, and he left the accounts with the Board. He swears that the wages for 1915 were \$3,700 odd, and not more than \$3,800; that for 1916 they were between \$16,000 and \$17,000; that the compensation should have been \$1,100 or \$1,200; and that he paid \$456.75, which left the amount due by him at \$800. He denied that any assessment had been made by the Board until the 30th March. Upon cross-examination, exhibit 6 (for identification) was submitted to him. This was put in subject to proper proof. It purports to contain a statement of the plaintiff's pay-roll for 1915 and 1916.

There was also a copy of a letter, dated the 30th September, 1916, purporting to have been written to the plaintiff. This was also marked for identification only—exhibit 7. He denied that he ever received either of these documents. He states that blank forms were sent to his place of residence while he was away in California.

No proof was given of the receipt by the defendants of exhibits 6 and 7 or of any assessment made by the Board for 1916 and 1917.

The solicitor for the Board, Norman B. Wormwith, was called, but he was not able to give any evidence in regard to the sending of these letters. This closed the evidence.

Mr. Fairty, for the defence, relied upon sec. 60, sub-sec. 4, and sec. 10, sub-sec. 5, of the Act, and contended that the Court had no jurisdiction to try the case.

I expressed the view that the question was, whether or not the defendants had brought themselves within the protection of the Act, and that this Court had jurisdiction to make inquiry to ascertain that fact; that the present action was not one against the Board, but against the city corporation. They admitted liability unless protected by what had been done under the Act by the Board so as to justify the payment of the amount claimed by the Board out of any moneys due by the city to the plaintiff under his contract.

Section 60 provides:—

"(1) The Board shall have exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and as to any matter or thing in respect to which any

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power, authority or discretion is conferred upon the Board, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any Court and no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceeding in any Court or be removable by *certiorari* or otherwise into any Court."

The section further provides:—

"(2) Without thereby limiting the generality of the provisions of sub-section (1), it is declared that such exclusive jurisdiction shall extend to determining:

"(a) Whether any industry . . . falls within . . . schedule 1 . . .

"(b) Whether any industry . . . falls within . . . schedule 2 . . .

"(c) Whether any part of any such industry constitutes a part, branch or department of an industry within the meaning of Part 1."

Sub-section (3) gives the Board power to reconsider any matter dealt with by it; and sub-sec. (4) (added by 7 Geo. V. ch. 34, sec. 10) declares that the decisions of the Board shall be upon the real merits and justice of the case, and it shall not be bound to follow strict legal precedent.

Section 60a. (added by 7 Geo. V. ch. 34, sec. 11) provides as follows:—

"Every copy of or extract from an entry in any book or record of the Board, and of any document filed with the Board, certified by the Secretary of the Board to be a true copy or extract, shall be received in any Court as *prima facie* evidence of the matter so certified without proof of the Secretary's appointment, authority, or signature."

Under this clause, I suggested to counsel that, if there was any sufficient assessment or any action and decision of the Board upon the case, I would admit proof of the same. No such proof was tendered or offered, either under sec. 60 or otherwise, and it was again insisted that the Court had no jurisdiction.

Section 62 provides:—

"(1) The Board may act upon the report of any of its officers and any inquiry which it shall be deemed necessary to make may be made by any one of the Commissioners or by an officer

of the Board or some other person appointed to make the inquiry, and the Board may act upon his report as to the result of the inquiry.

"(2) The person appointed to make the inquiry shall for the purposes of the inquiry have all the powers conferred upon the Board by section 55."

Section 55 gives to the Board "the like powers as the Supreme Court for compelling the attendance of witnesses and of examining them under oath, and compelling the production of books, papers, documents and things."

The Act, as I read it, gives to the Board plenary power within its jurisdiction, and to that extent its decision is not open to review, injunction, or prohibition. While the Board is not bound to follow strict legal precedents, but to decide according to the merits and justice of the case, the Act nevertheless requires that there shall be a decision of the Board. The informal procedure, as far as was disclosed by the evidence here, did not constitute the action and decision of the Board within the meaning of the Act.

There are certain things which I regard as requisite and necessary to be done by the Board, and certain action and decision to be taken by the Board, to constitute that binding act and decision which enables the Board to enforce its remedy by registration in the Court, constituting there the judgment and decision of the Board, or by levying of the amount as taxes against the contractor.

The Board has jurisdiction to administer Part 1 of the Act, which applies to the very large number of industries referred to in schedules 1 and 2.

In schedule 1 the Board levies an assessment and collects a fund out of which compensation to the workmen is paid, the employers in this schedule not being individually liable to pay compensation, while as to employers in schedule 2 no accident fund is collected from them, and they are individually liable to pay compensation as each accident occurs.

The scale of compensation is fixed by the Act.

The Act provides that all employers in the industries in schedule 1 are required, without notice and subject to penalty in case of default, to prepare and transmit to the Board, not later

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than the 20th January in each year, a statement of the amount of wages paid during the prior year and an estimate of the amount expected to be expended during the current year.*

Sections 45 to 67 refer to the Workmen's Compensation Board, which is a body corporate, consisting of three members, of whom two constitute a quorum. The Board has like powers as the Supreme Court for the compelling the attendance of witnesses and examining under oath and compelling the production of books, papers, and documents (sec. 55, *supra*).

Section 57 provides that the sittings of the Board are to be held in Toronto, except where it is expedient to hold sittings elsewhere.

Section 58 provides that the Commissioners shall sit at such times and conduct their proceedings in such manner as they may deem most convenient for the proper discharge and speedy despatch of business.

By sec. 59 (1), the Board has power to appoint a Secretary and other officers and clerks as the Board may deem necessary, and may prescribe their duties.

Sections 60 and 63 are quoted above.

Section 63 requires, as I understand it, that the order for the payment of compensation by the employer, who is individually liable to pay compensation, or any other order of the Board for the payment of money made under the authority of the Act, shall be a formal order of the Board of which a certified copy may be obtained.

Sections 78 to 83 provide for statements to be furnished by employers, who are to keep account of wages paid, and are subject to penalty in case of default; and the Board, or any member of it, or any officer or person authorised by it for that purpose, has the right to examine the books and accounts of the employers and make such inquiries as the Board may deem necessary for the purpose of ascertaining, if necessary, whether any statement furnished to the Board under the provisions of the Act is an accurate statement of the matters required to be stated there or of ascertaining the amount of the pay-roll of any employer (sec. 79).

*See sec. 78 of the principal Act, and amendments by 5 Geo. V. ch. 24, sec. 20; 6 Geo. V. ch. 31, sec. 7; and 7 Geo. V. ch. 34, sec. 13.

(2) Subject to a penalty not exceeding \$500.

(3) Officers of the Board are authorised to require and take declarations as to any matter of such examination or inquiry. (Sub-section (3) of sec. 79 is added by 5 Geo. V. ch. 24, sec. 21.)

Section 80 provides that, if a statement is found to be inaccurate, the assessment shall be made on the true amount of the pay-roll as ascertained by such examination and inquiry; and, if the pay-roll is shewn to be inaccurate, the employer shall pay to the Board the difference, and by way of penalty a sum equal to such difference, from which (sub-sec. (2)) he may be relieved if the inaccuracy in the statement was not intentional.

Sections 84 to 98 inclusive refer to assessments to be made by the Board. The sums to be assessed may be either a percentage of the pay-rolls or a specific sum, as the Board may determine (sec. 84, sub-sec. (2)).

Such assessments may be levied provisionally upon the estimate of the pay-roll given by the employer or upon an estimate fixed by the Board, and, after the actual pay-roll has been ascertained, adjusted to the correct amount (sec. 85 (1) as enacted by 5 Geo. V. ch. 24, sec. 23).

Section 86 (as amended by 5 Geo. V. ch. 24, sec. 24, and 7 Geo. V. ch. 34, sec. 15) provides:—

“(1) The Board shall determine and fix the percentage, rate or sum for which the employer is assessed . . . and such employer shall pay to the Board the amount or provisional amount of his assessment within one month, or such other time as the Board may fix, *after notice of the assessment and of such amount has been given to him.* . . .

“(2) The notice may be sent by post to the employer and shall be deemed to have been given to him on the day on which the notice was posted.”

Sub-section 3 provides for the revision of the assessment where the assessment based upon the pay-roll is too low.

Sections 93 and 93a. (added by 5 Geo. V. ch. 24, sec. 27) provide a penalty for non-payment of the assessment; and sec. 95 provides that the Board may collect the assessment through the municipal collectors as a tax.

Section 10 deals with the case of principals and contractors.

Sub-section (3) (enacted by 5 Geo. V. ch. 24 sec. 5) provides

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that it shall be the duty of the principal to see that any sum which the contractor is liable to contribute to the accident fund is paid, and, if the principal fails to do so, he shall be personally liable to pay it to the Board as being entitled in respect of an assessment.

It is under this section and sub-section that the defendant was called upon to pay over the amount here in question.

Sub-section (5) (enacted by 5 Geo. V. ch. 24, sec. 5) provides that the principal is entitled to be indemnified by the person who should have paid the sum, and all questions as to the right to and the amount of any such indemnity shall be determined by the Board.

The difficulty in the defendants' way, in answer to the plaintiff's claim, is, that no evidence was brought before me that the Board as such made an assessment or gave notice of such assessment being made, or became entitled to register the assessment so made in the Court, nor was there any evidence that such registration had been made, nor were the defendants called upon by any official act of the Board to pay the amount alleged to be assessed against the employer.

It was urged before me that all this was unnecessary, inasmuch as anything the Board did was conclusive and binding, and there was no jurisdiction in this Court to make inquiry in respect thereof.

I think this is a misapprehension of the position of the case. I heard the evidence, not in any way to review the action of the Board, but to be satisfied that the Board had acted and had made a decision, and of this no sufficient evidence was offered.

I do not suppose that it can be pretended that any action or decision of the Board is of greater force and virtue than that of a High Court having jurisdiction in the subject-matter, rendering a judgment from which no appeal had been taken; yet, in that case, if the judgment is relied upon, it must be proven; and a casual letter of a clerk would scarcely be evidence of such judgment having been given or entered. In short, I think proper proof should have been given of the decisive action taken by the Board.

Under the Act, evidence should have been given of the facts which rendered the employer liable to pay the amount in question to the Board; and, in default of payment by him, such evidence

should have been offered to the defendants as would entitle them to pay the amount out of their indebtedness to the plaintiff. In both particulars there has been a failure in this regard.

I do not think the plaintiff is free from blame. Apparently, during his absence, the notices which were sent to him for information in respect to his liability, were disregarded, and there was no evidence given before me that satisfied me he had taken due pains to inform the Board as early and as fully as he might have done. The Act is intended for the benefit of a large class, and cannot be satisfactorily and expeditiously applied without prompt co-operation of employers.

I think it therefore reasonable and proper that the plaintiff should not have costs of this action. He is entitled to judgment for \$2,230.20, but I direct that the entry of judgment be stayed for one month, to enable the parties, with the sanction of the Board, if that can be obtained, to ascertain and adjust the difference between them and the Board.

After the above judgment had been delivered, the defendants made a motion for leave to adduce further evidence.

The motion was heard by CLUTE, J., in the Weekly Court, Toronto.

Irving S. Fairty, for the defendants.

F. J. Hughes, for the plaintiff.

December 26. CLUTE, J.:—Motion by the defendants for leave to adduce further evidence "that the Workmen's Compensation Board duly made an assessment on the plaintiff, and gave notice of the same to the plaintiff, and demanded payment from him of the amount of the said assessment, and, in default of payment by the plaintiff, duly required the amount of the said assessment from the defendants, and for an order extending the time for service of the third party notice upon the said Workmen's Compensation Board, as third parties in this action, and for stay of judgment and execution in this action until the issues between the defendants and the said Workmen's Compensation Board as third parties shall have been determined."

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Judgment was given in this case, on the 24th November last, for the plaintiff for \$2,230.20, with a stay for one month, to enable the parties, with the sanction of the Board, if that could be obtained, to ascertain and adjust the differences between them and the Board.

No adjustment was made, and this motion is now launched on the part of the defendants to open the case and to extend the time for giving notice to the Workmen's Compensation Board as third parties.

As pointed out in the judgment, I invited the defendants to produce the evidence now sought to be given, but without effect. In support of the present application, certain copies from the books of the Board are now produced, but the evidence as therein indicated is still incomplete to shew that the requirements of the Act by the Board have been complied with, so as to entitle them to recover from the plaintiff the amount said to be due to the Board, or to justify the defendants in paying over that amount to the Board as indebtedness of the defendants to the plaintiff.

Nevertheless, it is desirable that the facts of the case should be obtained, if they can be obtained, to shew that a valid assessment was made by the Board upon the plaintiff, and that, in default, the defendants properly paid over the amount due the plaintiff, to the Board. I allow the motion to that extent; the defendants to pay to the plaintiff costs of this motion and the costs incident to the taking of such further evidence and further trial of the action, in any event of the cause. Both parties to expedite a further hearing of the case.

With respect to that portion of the motion to extend the time for service of the third party notice upon the Workmen's Compensation Board as third parties in this action, I think there is insuperable difficulty in the defendants' way.

The application is too late; the trial has taken place. I have carefully examined the authorities, and I find no cases where the defendant has been permitted at this stage of the case to give notice.

The plaintiff does not consent; but there still is a greater difficulty in this, viz., that the Workmen's Compensation Board is in a sense a branch of the Government. Their action within the purview of the statute is not open to review in this Court,

nor can they, I think, be brought before this Court to answer any claim for anything done under the statute.

Upon both grounds, I refuse that part of the defendants' motion with costs.

The case was reopened, pursuant to the leave given by CLUTE, J.; and

February 4, 1918, further evidence was taken before the learned Judge.

The same counsel appeared.

March 9. CLUTE, J.:—The plaintiff claims \$2,230.20 under a contract for the construction of certain public works in the city of Toronto.

The defendants admitted the amount, but alleged that it had been paid over, under the Workmen's Compensation Act, to the Board, under a demand from the Board for that amount, as due by the plaintiff to the Board under the Act.

The plaintiff replied that he was not indebted to the Board as alleged.

The case turns entirely upon whether or not this amount had in fact been assessed by the Board against the plaintiff under the Workmen's Compensation Act. There is no official record of an assessment having been made by the Board. The question is, whether what was done amounts to a valid assessment under the provisions of the Act.

The Board is a body corporate, consisting of a Chairman, Vice-chairman, and another Commissioner (secs. 45, 46), of whom two constitute a quorum (sec. 53). The Board has "the like powers as the Supreme Court" for compelling the attendance of witnesses and examining them under oath, and for the production of documents etc. (sec. 55). The Commissioners shall sit at such times and conduct their proceedings in such manner as may be most convenient for the proper discharge and speedy despatch of business (sec. 58). The Board has power to appoint a Secretary and other officers and clerks (sec. 59 (1)). It has exclusive jurisdiction to hear and determine all matters coming before it under Part 1 of the Act, and its decision is final and conclusive and not open to question or review in any Court (sec. 60 (1));

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it has, however, express authority to rescind, alter, or amend its decisions (sub-sec. (3)); and its decisions shall be upon the real merits and justice of the case, and it is not bound to follow strict legal precedent (sub-sec. (4), added by 7 Geo. V. ch. 34, sec. 10); and it may act upon the report of any of its officers, and any inquiry which it shall be deemed necessary to make shall be made by one of the Commissioners or one of the Board's officers, and the Board may act upon his report as to the result of the inquiry (sec. 62(1)). An order of the Board for payment of compensation by an employer (as in this case) or a copy thereof may be filed with the clerk of any County or District Court, and when so filed shall become an order of that Court, and may be enforced as a judgment of the Court (sec. 63). Section 57 provides that the sittings of the Board are to be held in Toronto except where it is expedient to hold sittings elsewhere. The Act provides for an accident fund out of which compensation may be paid. One way of raising this sum is by assessment upon the amount of wages paid by employers, and that method was applicable to this case. For that purpose it is the duty of the employer to furnish a statement of the amount of wages earned by all his employees during the year or any part specified by the Board and the amount which he estimates he will expend for wages during the then current year (sec. 78(1), as amended by 5 Geo. V. ch. 24, sec. 20). And it is the duty of the employer to keep a careful and accurate account of all wages paid to his employees, which shall be produced to the Board and its officers when so required (sec. 78 (1a), added by 6 Geo. V. ch. 31, sec. 7); and a failure to furnish the same within the prescribed time subjects him to a penalty not exceeding \$500 (4). If the employer fails to furnish such statement "the Board may base any assessment . . . on such sum as in its opinion is the probable amount of the pay-roll of the employer and the employer shall be bound thereby, but if it is afterwards ascertained that such amount is less than the actual amount of the pay-roll the employer shall be liable for the difference (3). This is the sub-section applicable to this case.

No pay-roll having been furnished by the plaintiff, Mr. Giles, an officer of the Board, made some inquiry and estimated the amount of the pay-roll at \$60,000, additional to \$15,000—the first estimate—making \$75,000 as the sum upon which the rate of 3 per cent. should be levied, and on \$10,000 for 1916.

The Board as such did not fix any sum as the probable amount of the pay-roll. The question of amount at this stage did not come before the Board and was not considered by it. The additional estimate of \$60,000 was in fact made by Mr. Giles, and the assessment was made at 3 per cent. based on this amount added to the first estimate of \$15,000, viz., \$75,000, and the Board as such had nothing to do with it. This fully appears in the evidence of the Chairman of the Board. The Board in fact never acted or assumed to act under sec. 78, sub-sec. (3), which is its only authority to make an assessment based on such sum as in the *opinion of the Board* is the probable amount of the pay-roll. The opinion of the Board as to the proper amount was not had, and the amount was fixed solely on the opinion of Mr. Giles. The Board not having in any sense ascertained and fixed the probable amount of the pay-roll, it cannot be said in any sense to have made the assessment.

The amount suggested by Giles was passed through the hands of the various clerks, who then computed the amount of the assessment, and gave notice, as I find, to the plaintiff.

The Chairman of the Board was called, and his evidence is principally relied upon in support of the contention that a valid assessment binding upon the plaintiff was made by the Board.

Before referring to his evidence, it may be convenient to notice how the assessment is directed to be made under the Act: see secs. 84 to 98 inclusive. The Act provides (sec. 84) that the Board shall, before the day named by proclamation as mentioned in sec. 3, make a provisional assessment on the employers in each class of such sum as in the opinion of the Board will be sufficient to meet the claims for compensation which will be payable by that class for the first year, etc. The sums to be so assessed may be either a percentage of the pay-rolls of the employers or a specific sum as the Board may determine. In this case the Board determined on a percentage of the pay-roll to raise the amount required, and 3 per cent., as I have stated, was the rate imposed. Section 85 (amended by 5 Geo. V. ch. 24, sec. 23), provides for subsequent assessments, which may be levied provisionally upon the estimate of the pay-roll given by the employer, or upon an estimate fixed by the Board, and, after the actual pay-roll has been ascertained, adjusted to the correct amount. Section 86 (amended

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by 5 Geo. V. ch. 24, sec. 24, and 7 Geo. V. ch. 34, sec. 15) provides that the Board shall determine and fix the percentage, rate or sum for which each employer is assessed, who shall pay to the Board the amount or provisional amount of his assessment within one month, or such other time as the Board may fix after notice of assessment. The notice is to be deemed to have been given to him on the day on which the notice is posted (sub-sec. (2)).

It thus appears that the Board is to fix the rate and make the assessment, the assessment to be made upon the pay-roll furnished by the employer, and, if this is not given, the probable sum is to be estimated and fixed by the Board, and, after the actual pay-roll has been ascertained, adjusted to the correct amount. In the view I take of the Act, it means that there must be a sitting of the Board, and an official act as such to fix the rate, and, when no pay-roll is furnished, to fix the probable amount thereof as a basis on which to make the assessment, and that this cannot be delegated to other officers of the Board (sec. 79 (3), added by 5 Geo. V. ch. 24, sec. 21). The Board may utilise the information obtained by such officers, may adopt the report, but there must be the official act of the Board in fixing the rate and the amount forming the basis of the assessment, and the assessment must be approved by an order of the Board.

It is contended that the evidence now offered is sufficient for that purpose. The Chairman of the Board, Mr. Samuel Price, was called and examined by the plaintiff's counsel.

[The learned Judge set out portions of the testimony of Mr. Price.]

Accepting the evidence of the Chairman of the Board as to what was done in respect of this assessment, I take the facts to be as follows:—

The rate of 3 per cent. was duly fixed by the Board under its seal. No pay-roll having been received from the plaintiff, the officer of the Board for that purpose, Mr. Giles, took action. After some inquiries, he recommended an additional sum of \$60,000 as the basis of assessment to be levied on Mr. Murphy. This was not considered by the Board, but the amount fixed by Mr. Giles as the pay-roll then passed through the hands of the various subordinate officers, who computed the amount, and it was formally entered in the ledger as the assessment of the plaintiff, and a notice of the same sent to him.

This assessment was admittedly not made by the Board as an official act of theirs, but was ascertained by applying the rate of 3 per cent. duly fixed by the Board to what Mr. Giles considered should be the amount of the pay-roll in addition, namely, \$60,000, added to what had already been assessed, \$15,000.

The plaintiff then made application to have the matter opened, and on the 16th October he was notified to attend on the 19th October at the offices of the Board, with his books and papers, etc., shewing the amount of work done and money expended for wages during the years 1915 and 1916. There is a memorandum produced, exhibit 12, as follows:—

"Re Firm 16769—M. H. Murphy.

"His brother called to-day to repudiate the assessment levied on the estimated pay-roll of \$75,000.

"He stated that there were only the time-books of their foreman available, whereby an audit could be made.

"His brother kept no wage-account, but he had some figures with him, which he stated represented an extract from the foreman's time-books, and that the total of the figures would be between \$30,000 and \$35,000.

"Personally, I do not believe the statement, as it is not at all likely that a contractor taking work to such a large extent would not keep a proper account of the wages paid.

"I recommend collecting the assessment as it stands, subject to refund upon the production of proper books of account.

"WTG, CGH

"W. T. G."

"Oct. 19, 1916.

"Board confirms assessment.

"S.P."

The initials "W. T. G." are those of Mr. Giles, and "S. P." of the Chairman of the Board.

In speaking of this confirmation, the witness was asked:—

"Q. Was that when that was confirmed, on that date, 19th October? A. I cannot be positive whether it was confirmed on that day or not, but it was about that time. I presume it was on that date from the fact that the report is dated then. I cannot be positive as to the exact date."

On the 13th November, the plaintiff formally petitioned the

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Board, setting forth certain facts as to his work, and stating that he has now ready for submission to the Board, at their pleasure, his time-books and cheque-books, from which there is compiled the ledger account of the weekly wages paid for the year 1915, including all wages paid out by the plaintiff, the summary whereof is attached to the petition, which shews a total of \$37,821.57.

It would appear that upon this petition the case was opened and the matter was referred to Mr. A. W. Bastedo, an auditor of the Board. The plaintiff with his solicitor attended before Mr. Bastedo, and what is called a pay-roll audit report, exhibit 20, was made out on the usual form. In the body of the document is written:—

"Different items shewn in statement dated November 13th, 1916, covers total wages paid on all my operations for year nineteen hundred and sixteen	\$37,821.57
with the additional amount of	197.25

"Totals \$38,018.82," with a
declaration:—

"I hereby declare the above to represent the whole earnings of all persons in our employ. M. H. Murphy."
(Date Nov. 29, '16).

"Having made a careful audit and investigation, I certify that this statement is a true presentment of the whole earnings of all employees and other facts relating thereto. M. W. Bastedo, Auditor."

This was accompanied by a statutory declaration made by the plaintiff, exhibit 9, which, it was conceded on both sides, was made on the same occasion, though it was dated the 30th November. This statutory declaration verifies the correctness of the amount.

Mr. Bastedo was called, and he denied that this document was an audit. What it meant, or what it is, except as appears upon its face, was not made clear.

Thus the matter stood until the 5th January, when the Board demanded payment from the defendants of \$2,230.20, under sec. 10 of the Act, and the defendants, under such demand, paid the same to the Board, and plead such payment in answer to the plaintiff's action.

The petition was disposed of adversely to the plaintiff. Upon the back thereof it is stated that: "Board decides cannot alter assessment upon evidence now submitted. Apl. 26-17. S.P." (the initials of the Chairman of the Board). The plaintiff denies that he ever heard of this disposition of the petition until the trial.

The result of all the evidence is: (1) That the Board did not make and has not made an estimate, as an official act, of the pay-roll upon which the rate of 3 per cent. was to be levied. (2) Upon certain representations made to the Board for the plaintiff by his brother, that the total figures were between \$30,000 and \$35,000, the Board's officer, Mr. Giles, who is authorised to deal with matters of this kind, declared that he did not believe the statement, "as it is not likely that a contractor taking work to such a large extent would not keep a proper account of the wages," and recommended the collecting of the assessment as it stood, subject to refund upon the production of proper books of account; on the 19th October, 1916, or about that time, the Chairman made a memorandum, "Board confirms the assessment," and signed his initials, "S. P." This is the only record of what was done. (3) The case was subsequently opened in November and referred to the auditor, Mr. Bastedo, who, having taken a declaration of the plaintiff that \$38,018.82 was the total amount of the pay-roll, made what purports to be a formal audit in the following words: "Having made a careful audit and investigation, I certify that this statement is a true presentment of the whole earnings of all employees and other facts relating thereto. M. W. Bastedo, Auditor." (4) No action appears to have been taken upon this audit until April, when there is endorsed upon the petition the following: "Board decided cannot alter assessment upon evidence now submitted. Apl. 26, '17. S. P."

"A corporate officer cannot appoint a deputy to act for him generally, unless he have clear authority to do so by the constitution, and it is immaterial that a by-law made subsequent to the charter may require him 'or his sufficient deputy' to execute the duties of his office: *The King v. Gravesend Corporation* (1824), 4 Dowl. & Ry. (K.B.) 117, where the Court seemed to think that an officer might appoint a deputy to do a purely ministerial act for him, subject to the approval of the corporation:" Halsburys' Laws of England, vol. 8, para. 740.

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"A corporation can only do corporate acts at a corporate meeting, unless a special method is authorised by the constitution : *River Tone Conservators v. Ash* (1829), 10 B. & C. 349, 378; *Rex v. Varlo* (1775), 1 Cowp. 248:" *ib.*, para. 769.

One person cannot constitute a meeting: *Sharp v. Dawes* (1876), 2 Q.B.D. 26.

Having regard to the law applicable to a corporation such as this, whose function is largely judicial, I am of opinion that the Board could not delegate its authority to fix the amount of the roll upon which the Board might act. What is the effect, then, of what was done on the 19th October? There is no record of the meeting of the Board on that date. The Chairman was uncertain whether the entry purporting to confirm the assessment was made then or not. He says it was about that time. There is no record beyond the memorandum as to who was present, or that a regular meeting was called for that date; or that what was done was done as an act of the Board as distinct from that of the individual Chairman.

I have reached the conclusion, with some doubt, that, although the assessment as made by Mr. Giles on the pay-roll, as fixed by him, was not binding on the plaintiff, yet, the question having been opened at the plaintiff's request, and the Board having confirmed what Giles had done, that was an act of the Board which cured the defect and rendered the assessment valid. Nor do I think the re-opening of the question on petition affects this result. The assessment was again confirmed on the 26th April, 1917. It is true the money was paid over by the defendants in January, 1917, while the second investigation was pending. The Board was not bound to accept the findings of its auditor, and was entitled to claim from the defendants what at the time was the amount due by the plaintiff as the amount of the assessment as estimated by the Board.

The action is dismissed. The costs remain as fixed by the order allowing further evidence; that is, no costs of the first hearing. The plaintiff to have the costs of the rehearing to judgment.

In *Reference re Regulation and Control of Radio Communication; Atty.-Gen. for Que. v. Atty.-Gen. for Can.* [1932] 1 WWR 563, [1932] AC 304, 101 LJPC 94, Viscount Dunedin quotes these words of Lord Macnaghten and says that *mutatis mutandis* they might well be applied to the argument of the province in that case.

So, also, it seems to me that *mutatis mutandis* they are applicable here.

The appeal is dismissed.

In the court below the plaintiffs did not ask for costs and so no costs were given. Costs were not mentioned in this court. The respondents are entitled to the costs of the appeal, if they choose to exact the same.

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Appeal

MacDonald,
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SASKATCHEWAN

COURT OF APPEAL

Before Martin, C.J.S., Gordon, MacDonald and Anderson,
J.J.A.

Labour Relations Board of Saskatchewan (Appellant)
v. Speers et al (Respondents)

Trade Union Act, 1944 (Sask.) — Collective Bargaining Order — Jurisdiction of Labour Relations Board to Make Order Based on Findings of its Agent — Functions of Board as Judicial.

The Trade Union Act, 1944, 2nd sess., ch. 69 (Sask.), does not empower the Labour Relations Board to delegate to any of its officers or agents the determination of facts on which its judgment must rest, e.g., a judgment declaring that a certain trade union represents a majority of the employees of a certain employer and that he must bargain collectively with the union's representatives. In making an order founded, not on its own judgment on such a question, but on its agent's determination thereof the board acts without jurisdiction.

In making a collective bargaining order the board exercises judicial functions. See *Bruton v. Regina City Policemen's Assn.* [1945] 2 WWR 273, 1945 Can Abr 136, 860, and other cases.

While exercising its judicial functions the board should be strictly impartial as between labour and the employer.

[Note up with 1 CED (CS) *Courts*, sec. 2; 3 CED (CS) *Trades and Trade Unions*, sec. 9.]

M. C. Shumiatcher, for appellant.

P. G. Hooges, K.C., for respondent.

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Appeal

Gordon, J.A.

October, 29, 1947.

The judgment of the court was delivered by

GORDON, J.A. — This is an appeal from the order of Bigelow, J. quashing an order of the Labour Relations Board declaring that the Regina Undertakers Employees Federal Union No. 233 (hereinafter called "the local") represented a majority of the employees of the respondent George Speers, and ordering him to bargain collectively with the duly appointed or elected representatives of the local.

The facts are simple and are not in dispute. The respondent Speers owns and operates in Regina an undertaking establishment. He has 12 employees including one Sprowl his manager. One Wyatt, formerly an employee of the respondent, made an application to the appellant board under sec. 5 of *The Trade Union Act, 1944*, 2nd sess., ch. 69, as amended, for an order of the board:

"(a) determining that the unit of employees described in the application is an appropriate unit of employees for the purpose of bargaining collectively;

"(b) determining that the said trade union represents a majority of the employees in the said unit; and

"(c) requiring the employer to bargain collectively with the said trade union."

With the application filed were six cards signed by six of the employees of the respondent authorizing the local to act for him in respect to labour relations with the respondent. As there were only nine employees eligible for inclusion, the six formed a two-thirds majority of the employees.

When called upon for a reply the respondent's manager declared that the local did not represent a majority of the employees and that it had no right to seek an order requiring the respondent to bargain collectively with it. The manager Sprowl had taken ballots from eight of the employees and only one had signified his wish to have the local act as his bargaining agent.

Accordingly when the matter came before the board there was really only one fact in dispute, namely: Does the local represent a majority of the eligible employees of the respondent? We are of the opinion that the board could well have granted the request of the respondent that the board itself

conduct a secret ballot as it is directed to do on the application of a trade union under sec. 6 (2) [as enacted by 1946, ch. 98, sec. 2] of *The Trade Union Act, 1944*, and which it may, in its discretion, direct under sec. 6 (1).

Instead of following this course the board sent one of its "executive officers," H. S. Elkin, to interview the eligible employees of the respondent and ascertain this fact for the board.

On July 2 Elkin wrote a letter to each of the employees of the respondent as follows:

"Dear Sir:

Re: Regina Undertakers Employees
Federal Union, No. 233.

"On June 27 in Room 5, Normal School Building, Regina, the Labour Relations Board heard an application by the Regina Undertakers Employees Federal Union, No. 233, concerning certain employees of Speers Funeral Home. Some conflicting evidence as to the wishes of the employees concerned was brought before the board. In view of this, the board has postponed decisions in respect to the application and has instructed the undersigned to contact the employees who signed applications for membership with a view to obtaining some clarification in the matter. Information obtained would of course be strictly confidential.

"It would be appreciated very much if you would at your earliest convenience, contact me by telephone in order that an interview may be arranged, my telephone number is 21621 (switchboard number) and you may get me by asking the operator for the Labour Relations Board. This office is open between the hours of 9:00 a.m. and 12:00 noon and from 1:30 p.m. to 5:00 p.m."

After Elkin had filed two declarations covering his findings, the board reconvened on July 8. At this meeting Elkin was called and cross-examined on these declarations by counsel for the respondent.

On the same day the board made the following order:

"(1) The Employees employed by George Speers in the business carried on by him under the name and style of Speers Funeral Home at 1867 Rose Street in the City

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of Regina in the Province of Saskatchewan, except the manager and office staff, constitute an appropriate unit of employees for the purpose of bargaining collectively;

"(2) Regina Undertakers Employees Federal Union No. 233 represents a majority of the employees in the appropriate unit of employees referred to in paragraph (1) hereof;

"(3) George Speers, carrying on a business under the name and style of Speers Funeral Home at 1867 Rose Street in the City of Regina in the Province of Saskatchewan shall bargain collectively with the duly appointed or elected representatives of the Regina Undertakers Employees Federal Union No. 233 in respect to the employees in the appropriate unit of employees referred to in paragraph (1) hereof."

The learned judge in chambers quashed the order of the board because he considered its action, in sending Elkin to interview the employees and find the fact for them, was so unwarranted and irregular that it gave ground for a reasonable apprehension of bias.

On the argument before us the following grounds of appeal were raised:

"1. That the learned Judge in chambers erred in holding that the securing of evidence by the executive officer of the appellant Board, upon instructions from the said Board was 'unwarranted,' 'irregular' or improper as 'showing a reasonable or any apprehension of bias.'

"2. That the learned Judge below failed to direct himself to section 14 of *The Trade Union Act, 1944*, which section specifically authorizes the appellant Board to direct its agent to ascertain certain facts, and to receive the facts so adduced.

"3. That at common law alone the Board was authorized to direct its agent to ascertain certain facts and to receive the facts so adduced.

"4. That the Board exercised administrative functions only in respect to the order sought to be quashed and the same is not subject to *certiorari*.

"5. That there was no obligation on the part of the Board to have had the parties adduce further evidence or to direct a vote to be taken by secret ballot."

Before dealing with these grounds of appeal I think that reference should be made to some statements of counsel for the appellant board. Counsel contended that *The Trade Union Act, 1944*, contemplated that the board should be "biased" or "weighted" in favour of labour. Further, that this intention of the legislature could be gathered from a reading of the Act. This view is not accepted by us. No matter what the views of the members of the board may have been before being appointed thereto, we feel that while exercising judicial functions they should be strictly impartial. If counsel was correctly expressing the views of the board, the respondent had every reason for being apprehensive of bias.

And if Elkin had been instructed by the board only to obtain evidence on the question as to whether or not a majority of the employees of the respondent had authorized this union to represent them, then he proceeded in an "unwarranted and irregular" manner to obtain it. However, this is not what he was instructed to do. There was no misunderstanding in the matter. Elkin declared in his two statutory declarations as follows:

"2. That I was instructed by the Labour Relations Board at its meeting of June 27th A.D. 1946 to contact the employees employed by George Speers in Speers Funeral Home in the City of Regina, who signed applications for membership or authorization certificates for the Regina Undertakers Employees Federal Union No. 233 with a view to determining their true wishes in the matter of the application of the said union and to report to the Board at its next meeting."

In his evidence under cross-examination he stated:

"My sole object was to find out whether or not they wanted to be represented by this union."

It is quite clear that Elkin understood that he was appointed to determine the question. This was also clearly the intention of the board because in the concluding paragraph of its judgment it states as follows:

"The Board was satisfied, on the evidence of the authorization cards corroborated by the findings of the executive officer, that the applicant union represents a majority of the employees in the appropriate unit."

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In following this course the board surrendered to Elkin its jurisdiction to find the one and only fact in dispute between the parties, and its order is founded not on its own judgment but on that of Elkin. The order is only the formal expression of Elkin's decision.

It might be contended that the board had before it the authorization cards but the board did not feel justified in acting on these and referred the question to Elkin.

This is clearly not a case where the board sent one of its officers to gather evidence to give to the board at a later date. They directed him to determine the matter.

Sec. 5 of *The Trade Union Act, 1944*, gives the board power to make orders in respect to the three matters covered by this particular proceeding. In making such orders we hold that they are exercising judicial functions. There is not a suggestion in the Act that the board has power to refer the finding of any facts on which its judgment must rest to any of its officers or agents. In fact the Act provides in subsec. (3) of sec. 4 [as enacted by 1945, ch. 108, sec. 2] that:

"A decision of the majority of the members of the board present and constituting a quorum shall be the decision of the board * * *."

It was contended on the argument on behalf of the appellant board that sec. 14 of *The Trade Union Act, 1944*, permitted the members of the board and its agents to receive evidence whether admissible in a court of law or not, in this case, unsworn evidence. We do not think that the section can be so read. It is only the board that is given this wide power.

Counsel for the appellant board contends that its proceedings herein were administrative and not judicial. It seems to us that it is almost sufficient to say that the order of the board is already filed with the registrar of the Court of King's Bench and under sec. 9 of *The Trade Union Act, 1944* (if *intra vires*) such order is enforceable as a judgment of that court. Further, in *Bruton v. Regina City Policemen's Assn.* [1945] 2 WWR 273, this court held that the board when making a somewhat similar order was exercising "judicial functions." In *Dominion Fire Brick and Clay Products Ltd. v. Sask. Labour Relations Board* [1947] SCR 336 (reversing [1946] 3 WWR 459) Mr. Justice Estey adopts the finding of this

court that the board exercised judicial functions. See also *In re York By-Law 11990; Grimshaw Bros. Ltd. v. York* [1942] OR 582.

In conclusion we may say that in our opinion the board acted without jurisdiction in making the order attacked. The board in making such order was exercising judicial functions. Its right to make the order rested upon the proof of one fact and the board purported to delegate authority to one of its employees to ascertain that fact. This was unwarranted and irregular. The appeal is dismissed with costs.

SASK.

1947

LABOUR
RELATIONS

BOARD

v.

SPEERS

Appeal

Gordon, J.A.

BRITISH COLUMBIA

COURT OF APPEAL

Before O'Halloran, Sidney Smith and Bird, J.J.A.

Waugh and Esquimalt Lumber Company Limited

(Plaintiffs) Appellants

v. Pedneault (Defendant) Respondent

*Arbitration—Forest Act, S. 55—Appointment of Arbitrators
— Pendency of Action for Injunction as Ground for
Refusing Order — Appeal from Order — Preliminary
Objection That Benefits Taken Thereunder — Railway
Act, s. 55 — Costs.*

On appeal from an order (*ante*, p. 522) under sec. 55 of the *Forest Act*, RSBC, 1936, ch. 102, appointing a board of arbitrators to fix the compensation payable by the respondent to the appellant in respect to a right-of-way, *held* that the order should not have been made since prior to the date of the notice of application therefor the appellant had begun an action, which was pending on the hearing of the application, to determine the respondent's right to acquire the right-of-way.

A preliminary objection to the appeal on the ground that the appellant had taken a benefit under the order by nominating, under the proviso to sec. 55 of the *Railway Act*, RSBC, 1936, ch. 241 (which under sec. 55 of the *Forest Act* applied to the proceedings) an arbitrator to the board appointed by said order, was *held* to be without merit and was overruled.

[Note up with 1 CED (CS) *Arbitration*, secs. 4, 14; 3 CED (CS) *Practice*, sec. 11; *Timber*, secs. 1, 10.]

Appeal from the order of Macfarlane, J. (*ante*, p. 522) (*sub nom. In re Forest Act; In re Pedneault's Application*). Appeal allowed with costs payable forthwith; costs of the application below to be disposed of by the order made on the rehearing of the application.

BRUNSWICK MINING AND SMELTING CORPORATION LTD.
v. UNITED STEELWORKERS OF AMERICA

New Brunswick Supreme Court, Appeal Division
Limerick, Bugold and Ryan, JJ.A.
November 2, 1973.

LABOUR LAW - TOPIC 4102

CERTIFICATION OF A TRADE UNION BY THE INDUSTRIAL RELATIONS BOARD - CONDITIONS PRECEDENT TO A DETERMINATION BY THE BOARD OF THE MEMBERSHIP OF THE TRADE UNION IN GOOD STANDING - THE APPEAL DIVISION SET ASIDE THE CERTIFICATION ORDER OF THE BOARD BECAUSE IT FAILED TO DETERMINE THE APPROPRIATE UNIT FOR BARGAINING BEFORE DETERMINING THE NUMBER OF MEMBERS OF THE UNION IN VIOLATION OF SECTION 15 OF THE INDUSTRIAL RELATIONS ACT.

This case arose out of an application to the Industrial Relations Board by members of a trade union for certification as bargaining agent. Before determining the appropriate unit for bargaining, the Industrial Relations Board authorized an inquiry "as to the number and status of employees" in the proposed unit - see paragraph 6. The Board certified the unit as bargaining agent. The certification order was set aside on application to the Appeal Division of the New Brunswick Supreme Court.

The Appeal Division set aside the certification order because the Board failed to determine the appropriate unit for bargaining before determining the number of union members in violation of section 15 of the Industrial Relations Act.

STATUTES JUDICIALLY NOTICED:

Industrial Relations Act. S.N.B. 1971, c. 9. s. 15(1)
[para. 10], 126 [para. 8].

J. GORDON PITRE, for the applicant,
ROBERT ARSENEAU, for the respondent, United Steel Workers of America,
THOMAS RIORDON, for the Interveners.

The judgment of the court was delivered by LIMERICK, J.A.

- 1 LIMERICK, J.A.: An application for certification as bargaining agent of a unit of employees including all office, clerical and technical employees of Brunswick Mining and Smelting Corporation Limited, with the exception of certain managerial and confidential employees, was

made by the United Steelworkers of America.

- 2 The corporation and two employees included in the proposed unit opposed the application on the following grounds:
 - (a) certain employees do not wish to be represented by the United Steelworkers of America (total - 13):
 - (b) certain other employees have declared they are in opposition to the application and in addition some wish to make formal representations to the Board in this matter (total -8);
 - (c) certain other employees have signed a document which states the employees do not wish to be represented in collective bargaining by the United Steelworkers of America (total - 73);
and
 - (d) total number of employees filing Statements of Desire - 94.
- 3 Two of the employees circulated a petition and obtained signatures from 76 employees, 54 of whom were included in the unit eventually determined by the Industrial Relations Board as the appropriate unit for bargaining. The unit as determined comprised less than 100 employees.
- 4 The 54 employees signed either a resignation from the union or an objection to the union representing them as their bargaining agent. The evidence disclosed that management was not instrumental in obtaining the signatures to the objections or resignations and had no knowledge of the action of the two employees in obtaining the signatures.
- 5 The corporation officials, however, did have inquiries from some employees as to how they could withdraw from the union or object to the certification. The employees were informed by the company they could resign by writing a letter to the union and posted a notice to this effect on a notice board in the plant suggesting that any employee wishing to resign or oppose the certification should consult an independent solicitor.
- 6 The executive committee of the Industrial Relations Board purporting to act under subsections (1) and (2) of section 126 of c. 9, Acts of New Brunswick 1971 appointed

an examiner, one Rolland Pelletier, and authorized him,

to meet with the appropriate representatives of the applicant and respondent parties in the matter set out above, with a view to ascertaining and reporting specific information as to the number and status of employees of the respondent in the unit proposed or as may be appropriate in the matter of the application.

- 7 The authority given to the examiner, Mr. Pelletier, does not come within the scope of authority of the Board as contained in section 126 of the Act. The only authority given by that section is to "make or cause to be made such examination of records or other inquiries, including the holding of hearings as it deems necessary, or take or supervise the taking of such votes as it deems expedient to direct, and an executive committee may prescribe the nature of the evidence to be furnished to the Committee".

- 8 The relevant portions of section 126 are as follows:

126. (1) An executive Committee appointed under section 125, unless the Board or the Construction Division, as the case may be, otherwise directs, may, for the purpose of determining

(a) whether the majority of the employees in a unit are members in good standing of a trade union;

(b) whether a majority of the employees in a unit who have voted have selected a trade union to be their bargaining agent;

(c) whether a trade union or council of trade unions no longer represents a majority of employees in the unit for which it was certified or recognized in a recognition agreement;

make or cause to be made such examination of records or other inquiries, including the holdings of hearings as it seems necessary, or take or supervise the taking of such votes as it deems expedient to direct, and an executive committee may prescribe the nature of the evidence to be furnished to the Committee.

(2) The Board, or a division thereof, or an Executive Committee may appoint a person, to be

known as an examiner, to do any of the things that may be done by an Executive Committee under subsection (1), whether a Committee is appointed or not.

(3) The evidence taken before an Executive Committee or before an examiner may, save for all just exceptions, be received or acted upon by the Board or a division thereof in determining a question before the Board or division, as may be the case.

9 The applicant relies on the following grounds of appeal:

The applicant submits that the Board erred in the following respects:

(a) that the Board wrongly determined that the application for certification was properly executed, thereby proceeding on a matter without jurisdiction;

(b) that the Board improperly conducted an inquiry as to the Statement of Desire of employees without first determining the appropriate unit of employees, as required as a condition precedent under the Act;

(c) that the Board abused its jurisdiction in respect to the inquiry referred to in paragraph (b), and thereby denied to the parties the principles of natural justice;

(d) that the Board improperly delegated its authority to an examiner in respect to determination of an appropriate unit and the employees therein, and, acting on the report of such examiner, the Board thereby exceeded its jurisdiction;

(e) that the Board exceeded its jurisdiction by including within the unit employees of various classifications and skills, contrary to the express provisions of Section 14 of the *Industrial Relations Act*;

(f) that the Board improperly placed an onus upon the applicant in respect to the issue of the appropriate unit, contrary to the *Industrial Relations Act* and the principles of natural justice;

(g) that the Board improperly disregarded the Statements of Desire of employees and thereby exceeded its jurisdiction;

(h) that the Board in its order purports to exclude certain employees from the unit contrary to the evidence and the position of the parties thereby exceeding its jurisdiction;

(i) that the Board failed to inquire into the matter of whether the employees in the unit could be members in good standing of the Respondent Union, thereby abusing its jurisdiction.

- 10 The authorization given to the examiner before the appropriate unit of the employees was determined by the Board was premature and contrary to section 15(1) of the Act which reads as follows:

15. (1) When, pursuant to an application for certification under this Act by a trade union, the Board *has determined that a unit of employees is appropriate for collective bargaining*, the Board shall ascertain the number of employees in the bargaining unit at the date the application was made and the number of employees in the unit who were members of the trade union at such time as is determined under clause (e) of subsection (2) of section 127. (italics added).

- 11 The examiner was not authorized by the Board to examine the books or records of the company nor was he entitled, without the consent of the company, to take union personnel on the company property or hold a meeting on company premises. The authorization given him to ascertain the number of employees in the proposed unit as well as to what may be an appropriate unit was ultra vires the executive committee. That committee had no right under section 126 to delegate such powers to the examiner prior to the determination by it of what constituted the appropriate unit and was in violation of section 15(1) of the Act which permits an inquiry as to the number of employees concerned to be made only after the appropriate unit is defined by the Board.

- 12 It is unnecessary to determine any other grounds submitted by the applicant as the Board clearly exceeded its jurisdiction when it violated the provisions of section 15(1) of the Act and inquired into the number of employees affected prior to defining the appropriate unit for bargaining.

- 13 The certification is set aside, with costs of this application to the applicant and to the respondents

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Loretta Cormier and Bryan Keenan to be paid by the respondent United Steelworkers of America.

Application granted.

1952
 *May 7, 8, 9
 *June 30

THE PRINCE EDWARD ISLAND
 POTATO MARKETING BOARD }
 (Nominal Plaintiff) }

APPELLANT;

AND

H. B. WILLIS INCORPORATED }
 (Nominal Defendant) }

RESPONDENT;

AND

THE ATTORNEY GENERAL OF }
 CANADA and others }

INTERVENERS.

ON APPEAL FROM THE SUPREME COURT (IN BANCO) FOR
 PRINCE EDWARD ISLAND.

*Constitutional Law—Regulation of interprovincial and export trade—
 Competence of Parliament to enact The Agricultural Products Market-
 ing Act (Can.) 1949, 1st Sess. c. 16—Of Governor General in Council
 to delegate powers to provincially organized Board—Validity of
 Scheme established under the Agricultural Products Marketing (P.E.I.)
 Act, 1940, c. 40.*

*The Agricultural Products Marketing (Prince Edward Island) Act, (S. of
 P.E.I., 1940, c. 40) as amended, delegated to the Lt. Governor in
 Council authority to establish schemes for the marketing within
 the Province of any natural products and to constitute boards to
 administer such schemes. On Sept. 5, 1950 the Lt. Governor in
 Council appointed the appellant Board and delegated to it power
 to regulate the marketing of potatoes within the Province. The
 Agricultural Products Marketing Act (Can.) 1949, 1st Sess., c. 16,
 authorized the Governor in Council to delegate to marketing boards
 which had been established under legislation of any province to
 regulate the marketing therein of agricultural products, like powers
 in the interprovincial and export trade. On Oct. 25, 1950 the Governor
 in Council by P.C. 5159 delegated to the appellant Board powers in
 relation to the interprovincial and export trade in P.E.I. potatoes
 similar to those it had had conferred upon it with regard to local
 sales thereof. The Board thereafter issued several orders of which
 No. 1 imposed an annual licence fee on dealers engaged in marketing
 potatoes in P.E.I.; No. 2 a levy on dealers for every cwt. shipped
 from the Island; No. 3 a minimum price below which certain types
 of potatoes could not be bought from local producers and forbade
 consignment or export sales; No. 6 imposed a levy on producers in
 respect of all potatoes marketed by P.E.I. producers and made the
 dealers agents of the Board for the purpose of collecting the levy.
 No. 2 was repealed but any existing liability for the levy under No. 2
 was continued.*

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey,
 Locke, Cartwright and Fauteux JJ.

Held: reversing the judgment of the Supreme Court of Prince Edward Island *in banco*, that the four questions referred to it by the Lieutenant-Governor-in-Council should be answered as follows:

1. Is it within the jurisdiction and competence of the Parliament of Canada to enact *The Agricultural Products Marketing Act*, (1949) 13 George VI., (1st Sess.) c. 16?

Answer: Yes (unanimous).

2. If the answer to question No. 1 is yes, it is within the jurisdiction and competence of the Governor-General-in-Council to pass P.C. 5159?

Answer: Yes (unanimous).

3. Is it within the jurisdiction and competence of the Lieutenant-Governor-in-Council to establish the said Scheme and in particular section 16 thereof?

Answer: Yes except as to s. 19 (Kerwin, Taschereau, Estey, Cartwright, Fauteux, JJ.); Yes (the Chief Justice); Yes except as to ss. 4 and 19 (Rand J.); No (Kellock and Locke JJ.).

4. Is it within the jurisdiction and competence of the Prince Edward Island Potato Marketing Board to make the Orders made under the said Scheme or any of the Orders so made?

Answer: Yes except as to Orders numbers 2 and 6 (Kerwin, Taschereau, Rand, Estey, Cartwright, Fauteux JJ.); Yes (the Chief Justice); No (Kellock and Locke JJ.).

APPEAL from a judgment of the Supreme Court of Prince Edward Island *in banco* (1) upon a reference by the Lieutenant Governor in Council of the four questions set out in the preceding head note. By order of the Chief Justice of Prince Edward Island, the Attorney General of Prince Edward Island and the Attorney General of Canada were at the outset granted leave to intervene at any stage of the proceedings. The Attorneys General of Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Quebec and Newfoundland were by order of the Chief Justice of Canada, notified of the Reference on appeal to this Court. The arguments submitted sufficiently appear in the reasons for judgment that follow.

R. H. Milliken Q.C. and *H. F. MacPhee Q.C.* for the appellant.

J. W. de B. Farris Q.C. and *K. M. Martin Q.C.* for the respondent.

F. P. Varcoe Q.C. and *J. T. Gray* for the Attorney General of Canada, Intervenant.

(1) 29 M.P.R. 93; [1952] 4 D.L.R. 146.

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11852
W. E. Darby Q.C. for the Attorney General of Prince
Edward Island, Intervenant.

C. J. A. Hughes for the Attorney General of New Bruns-
wick, Intervenant.

L. A. Kelley Q.C. for the Attorney General of British
Columbia, Intervenant.

J. R. Dunnet for the Attorney General of Saskatchewan,
Intervenant.

THE CHIEF JUSTICE:—In my opinion, the appeal of the
Prince Edward Island Potato Marketing Board should be
upheld.

The judgment of the Supreme Court of Prince Edward
Island *in banco* was delivered on the 31st of January, 1952.
The Lieutenant-Governor-in-Council had referred to that
Court for hearing and consideration the following questions:

(1) Is it within the jurisdiction and competence of the Parliament
of Canada to enact The Agricultural Products Marketing Act, (1949)
13 George VI, (1st Session) c. 16?

(2) If the answer to question No. 1 is yes, is it within the jurisdiction
and competence of the Governor-General-in-Council to pass P.C. 5159?

(3) Is it within the jurisdiction and competence of the Lieutenant-
Governor-in-Council to establish the said Scheme and in particular s. 16
thereof?

(4) Is it within the jurisdiction and competence of the Prince Edward
Island Potato Marketing Board to make the Orders made under the
said Scheme or any of the Orders so made?

Tweedy J. wrote the main judgment, in which the Chief
Justice and MacGuigan J. concurred, the Chief Justice
simply adding a few additional reasons.

The main ground of the judgment of Tweedy J. appears
to have been that the Supreme Court of Canada in *A.G.
of N.S. v. A.G. of Can.* (1) which held that the Parliament
of Canada and each provincial legislature were not capable
of delegating one to the other the powers with which it had
been vested, nor of receiving from the other the powers
with which the other has been vested. In the opinion of
the Supreme Court *in banco* of Prince Edward Island that
judgment was really decisive with respect to the first two
questions in the reference under appeal.

(1) [1951] S.C.R. 31.

With deference, such is not the effect of the judgment of this Court in the Nova Scotia reference. It was made quite clear in our reasons for judgment that they only applied to the questions as put and which had to deal only with an Act respecting the delegation from the Parliament of Canada to the Legislature of Nova Scotia and *vice versa*. The unanimous opinion of this Court was that each legislature could only exercise the legislative powers respectively given to them by ss. 91 and 92 of the Act, that these sections indicated a settled line of demarcation and it did not belong to the Parliament of Canada or the Legislatures to confer their powers upon the other. At the same time it was pointed out that *In re Gray* (1) and *The Chemical Reference* (2), the delegations there dealt with were delegations to a body subordinate to Parliament and were, therefore, of a character different from the delegation meant by the Bill submitted to the Court in the Nova Scotia reference.

But, on the other hand, the delegations passed upon by this Court *In re Gray* and *The Chemical Reference* were along the same lines as those with which we are concerned in the present appeal. It follows that our judgment in the Nova Scotia reference can be no authority for the decision which we have to give in the present instance. It may be added that at bar counsel did not rely upon that ground in this Court.

The first question submitted to the Supreme Court *in banco* of Prince Edward Island had to do with the jurisdiction and competence of the Parliament of Canada to enact *The Agricultural Products Marketing Act* (1949), 13 George VI, (1st Session) c. 16. That Act was assented to on the 30th of April, 1949. The preamble, among other things, stated that it was "desirable to co-operate with the provinces and to enact a measure respecting the marketing of agricultural products in interprovincial and export trade". S. (2) of the Act reads as follows:—

2. (1) The Governor in Council may by order grant authority to any board or agency authorized under the law of any province to exercise powers of regulation in relation to the marketing of any agricultural product locally within the province, to regulate the marketing of such agricultural product outside the province in interprovincial and export

(1) (1918) 57 Can. S.C.R. 150.

(2) [1943] S.C.R. 1.

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trade and for such purposes to exercise all or any powers like the powers exercisable by such board or agency in relation to the marketing of such agricultural product locally within the province.

(2) The Governor in Council may by order revoke any authority granted under subsection one.

The effect of that enactment is for the Governor-in-Council to adopt as its own a board, or agency already authorized under the law of a province, to exercise powers of regulation outside the province in interprovincial and export trade, and for such purposes to exercise all or any powers exercisable by such board, or agency, in relation to the marketing of such agricultural products locally within the province. I cannot see any objection to federal legislation of this nature. Ever since *Valin v. Langlois* (1), when the Privy Council refused leave to appeal from the decision of this Court (2), the principle has been consistently admitted that it was competent for Parliament to "employ its own executive officers for the purpose of carrying out legislation which is within its constitutional authority, as it does regularly in the case of revenue officials and other matters which need not be enumerated". The latter are the words of Lord Atkin, who delivered the judgment of the Judicial Committee in *Proprietary Articles Trade Association et al v. A.G. for Canada et al* (3). The words just quoted are preceded in the judgment of Lord Atkin by these other words:—

Nor is there any ground for suggesting that the Dominion may not * * * *

It will be seen, therefore, that on that point the Judicial Committee did not entertain the slightest doubt.

In *The Agricultural Products Marketing Act* of 1949 that is precisely what Parliament has done. Parliament has granted authority to the Governor-in-Council to employ as its own a board, or agency, for the purpose of carrying out its own legislation for the marketing of agricultural products outside the province in interprovincial and export trade, two subject-matters which are undoubtedly within its constitutional authority. Moreover, it may be added, that in doing so Parliament was following the advice of the Judicial Committee in the several judgments which

(1) (1879) 5 App. Cas. 115.

(2) (1879) 3 Can. S.C.R. 1.

(3) [1931] A.C. 310.

it rendered on similar Acts and, more particularly, on the Reference concerning the Natural Products Marketing Act, (1) adopted by Parliament in 1934 (S. of C. 24 and 25 George V, c. 57), (1937), that the proper way to carry out legislation of that character in Canada, in view of the distribution of legislative powers under the British North America Act, was for Parliament and the Legislatures to act by co-operation.

I would, therefore, answer question (1) in the affirmative.

Question two was not answered by the Supreme Court *in banco* of Prince Edward Island as a result of the fact that it had answered question one in the negative. As my answer to question one is in the affirmative, so will be my answer to question two.

The Governor-in-Council by P.C. 5159, passed on the 25th October, 1950, has done nothing else, nor more, than act in accordance with the powers conferred upon it by s. (2) of *The Agricultural Products Marketing Act* of 1949. Indeed the text of the Order-in-Council is practically and substantially the same as the text of the Act itself. Applying it to the Prince Edward Island Potato Marketing Board, the Order-in-Council refers to the Scheme for the marketing of potatoes, made by the Lieutenant-Governor-in-Council on the 5th September, 1950, and particularly to paras. (a), (b), (c), (f), (g), (i), (j), (o) and (p) of s. 16 of the Scheme. The evident object of that enumeration was for purposes of interprovincial and export trade to limit the exercise of the powers conferred upon The Potato Marketing Board by the Lieutenant-Governor-in-Council of Prince Edward Island to those powers which are exercisable by The Potato Marketing Board under the paragraphs so enumerated. As the Scheme itself, and, in particular s. 16, are the subject of question three, they will be considered by me in my answer to that question.

It will be noted that no question was put in the reference with regard to the validity of the *Agricultural Products Marketing (Prince Edward Island) Act*, 1940, 4 George VI, c. 40. The reference, therefore, assumes that the Act itself is valid; and the question is merely whether the Lieutenant-Governor-in-Council had the required jurisdiction and competence to establish the Scheme and, in particular, s. 16.

(1) [1937] A.C. 377 at 389.

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[19]

The purpose and intent of the Provincial Act, as stated in s. 4(1), is "to provide for the control and regulation in any or all respects of the transportation, packing, storage and marketing of natural products within the Province, including the prohibition of such transportation, packing, storage and marketing in whole or in part". Ss. (2) of s. 4 is as follows:—

4. (2) The Lieutenant-Governor-in-Council may from time to time establish, amend and revoke schemes for the control and regulation within the Province of the transportation, packing, storage and marketing of any natural products, and may constitute marketing boards to administer such schemes, and may vest in those boards respectively any powers considered necessary or advisable to enable them effectively to control and regulate the transportation, packing, storage and marketing of any natural products within the Province, and to prohibit such transportation, packing, storage and marketing in whole or in part.

Then s. 5, without limiting the generality of any of the other provisions of the Act, authorizes the Lieutenant-Governor-in-Council to vest in any Provincial board any or all of the additional powers enumerated in sub-paras. (a) to (k) inclusive.

When s. 6 was first enacted it stated that every provincial board was authorized to co-operate with the Dominion Board to regulate the marketing of any natural product of the Province and to act conjointly with the Dominion Board, and perform such functions and duties and exercise such powers as were prescribed by the Act or the regulations. This was amended in 1950 by striking out the words "Dominion Board" in the second and fourth lines thereof and substituting therefor in each instance the words "Provincial Marketing Boards of other Provinces".

Then s. 7 of the Prince Edward Island Act enacted that every Provincial Board might, with the approval of the Lieutenant-Governor-in-Council, perform any function or duty and exercise any power imposed or conferred upon it by or pursuant to the Dominion Act, with reference to the marketing of a natural product, to which was added, in 1950, the following:—

and, with the like approval, may accept and exercise all and any powers or authority granted by the Governor-in-Council pursuant to the Dominion Act.

S. (8), which authorizes the Dominion Board to exercise its powers with reference to the marketing of a natural product, was repealed in 1950 and should no longer be considered.

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S. (9) of the Provincial Act, as amended in 1950, no longer contained the words "in co-operation with the Dominion Board", and should now be read without those words.

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I have referred to these amendments merely to indicate the present state of the Provincial Act, but, I repeat, that its validity is not submitted in the Reference, and the question is only whether the Scheme, adopted on the 5th September, 1950, was within the jurisdiction of the Lieutenant-Governor-in-Council to establish.

In fact, the only doubt suggested with regard to the validity of the Scheme concerns s. (16) thereof. Now, it is obvious that the Provincial Act itself had no other object than to deal with the local marketing within the province, and that intention is emphasized throughout the several sections of the Act.

The same intention appears in s. (16) of the Scheme. The opening words give the Potato Board powers exercisable in Prince Edward Island in relation to the marketing of potatoes therein. The Scheme defines what is meant by the words "regulated area" and that area is thereby limited to the Province of Prince Edward Island. Then these same words are repeated throughout the Scheme and, particularly, in the several paras. of s. (16).

It should be noted that although the Scheme is that of the Prince Edward Island Potato Marketing Board, it has received the approval and, in fact, was made by the Lieutenant-Governor-in-Council, and that question No. (3), therefore, should be considered only in respect of the jurisdiction and competence of the latter.

There could be no ground for suggesting that the Lieutenant-Governor-in-Council could not vest in the Boards constituted by it any powers considered necessary or advisable to enable those Boards effectively to control and regulate the transportation, packing, storage and marketing of natural products within the province. This is especially given to the Lieutenant-Governor-in-Council

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by ss. (2) of s. (4) of the Act. I can see nothing in s. (16) of the Scheme which is not covered by the authorities so conferred upon the Lieutenant-Governor-in-Council, either under s. (4) or under s. (5) of the Act. We must come to that conclusion more particularly in view of the absence in the Reference of any question concerning the authority of the Provincial Act and that, therefore, its validity must be assumed for the purpose of considering the Scheme.

In that connection it is significant that the answers of the Supreme Court *in banco* of Prince Edward Island were that the Scheme in general, and s. (16) in particular, were not within the jurisdiction of the Lieutenant-Governor-in-Council "unless and insofar as the Scheme can be limited in its operation to affect only transactions intended to be wholly and ultimately carried out within the Province". That answer would have been more complete if the Supreme Court *in banco* had stated that it could be and should be so limited. It is sufficient for this Court to say that it must of necessity be limited to transactions within the Province. Far from there being any intention on the part of the Legislature of Prince Edward Island to extend its scope to transactions outside the Province, the Act itself and the Scheme took particular care to limit it to the local trade, and under all canons of construction, including, of course, *The Interpretation Act* (s. 31) they must be so understood.

Question (4) of the Reference submits certain orders made by the Prince Edward Island Potato Marketing Board and asks whether they were within the jurisdiction and competence of that Board and again the answer of the Supreme Court *in banco* was in the negative "unless and insofar as the Scheme can be limited in its operation to affect only transactions intended to be wholly and ultimately carried out within the Province". This, in my view, is practically an answer in the affirmative for none of those orders pretend to affect transactions outside the Province. However, Board orders Nos. 2 and 6(2) are singled out in the answer of the Court below. There is no object in directing our attention to Order No. (2), because, prior to the Reference being submitted to that Court, Order No. 2 was repealed.

The objection to Order 6(2) is stated to be that it might be regarded as indirect taxation, and also that the tax or impost levied under that Order "is clearly far in excess of the valid requirements of the Board for *intra vires* administration expenses, and must be taken to be imposed in contemplation of activities beyond the jurisdiction of the Board". For that reason it was held that "the levy is therefore *ultra vires* and invalid".

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The first answer to that objection is that it is based entirely upon a pure question of fact, of which there is not the slightest evidence in the record, and it is not to be assumed that the Board would levy any tax or impost in excess of its requirements. Moreover, the Provincial Act authorizes the Lieutenant-Governor-in-Council to vest in the Board any powers considered necessary or advisable to enable it effectively to control and regulate the transportation, packing, storage and marketing of natural products within the province (s. 4(2) of the Act). The Board is undoubtedly competent to act in accordance with those powers. This Court cannot take judicial notice of facts which may be said to indicate that the levy is beyond the requirements of the Board for the objectives which it is to carry out. No facts of that character appear in the record. It will be time enough to pass upon that question whenever, in some litigation, it is shown that the Board has, in a particular instance, exceeded its requirements.

I have no doubt that the Act itself and the Scheme approved by the Lieutenant-Governor-in-Council were amply sufficient to justify the Orders mentioned in Question (4).

With deference, I am unable to see how the word "regulate" in s. 19 of the Scheme indicates an intention on the part of the Provincial Legislature to extend the scope of this whole enactment beyond the confines of provincial jurisdiction. On the contrary, it seems to me that s. 19 should be "regarded as harmless authority to confer and collaborate informally with representatives of the Nova Scotia Potato Marketing Board, the New Brunswick Potato Marketing Board and the Newfoundland Vegetable Marketing Board", and for those Boards to "act conjointly" with the representatives of the Prince Edward Island Potato Marketing Board. Moreover, it should be pointed

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out that any action of the local potato board is "subject to the approval of the Prince Edward Island Potato Marketing Board".

As to the vague suggestion that the levy provided for in s. 16(k) of the Scheme might be looked upon as "a measure of indirect taxation", it has not been made a point for the decision appealed from, but it would seem to have lost its weight—and I do not consider that it ever had any weight—since the adoption of the Board by the Governor-in-Council.

The ingenious argument of Mr. Farris that the Provincial Board had no capacity to receive the delegation of powers from the Federal Government has failed to convince me. As stated above, Parliament could choose its own executive officers for the carrying out of this legislation, and when so chosen the Provincial Board became the agent authorized by the Governor-in-Council with "all or any powers like the powers exercisable by such Board or agent in relation to the marketing of such agricultural product locally within the province". That, of course, must be understood *mutatis mutandis*. The Board did not need the enabling capacity provided for in s. (7) of the Prince Edward Island Act. It became a body, or an entity, and it was not necessary for the Province to give it the power to "perform any function or duty and exercise any power imposed or conferred upon it by or pursuant to the Dominion Act, with reference to the marketing of a natural product"; or, in the words of the amendment of 1950, "to accept and exercise all and any powers or authority granted by the Governor-in-Council pursuant to the Dominion Act".

Such authority, as contained in s. (7) of the Provincial Act, was not necessary, except perhaps for the province to express its desire that the Provincial Board should not accept any authority from the Governor-in-Council except "with the approval of the Lieutenant-Governor-in-Council". In the present case, the Provincial Board received its powers directly from the Federal Government. But s. (7) can do no harm, since, in the exercise of the powers delegated to the Provincial Board by the Federal Government, the Board becomes the agent of the latter government and gets its powers from such appointment.

On the whole, I would answer each of the questions in the affirmative.

The judgment of Kerwin and Fauteux JJ. was delivered by:—

KERWIN J.:—In delivering the judgment of the Judicial Committee in *A.G. for British Columbia v. A.G. for Canada* (Natural Marketing Act Case) (1), Lord Atkin, at page 389, remarked:—

It was said that as the Provinces and the Dominion between them possess a totality of complete legislative authority, it must be possible to combine Dominion and Provincial legislation so that each within its own sphere could in co-operation with the other achieve the complete power of regulation which is desired. Their Lordships appreciate the importance of the desired aim. Unless and until a change is made in the respective legislative functions of Dominion and Province it may well be that satisfactory results for both can only be obtained by co-operation. But the legislation will have to be carefully framed, and will not be achieved by either party leaving its own sphere and encroaching upon that of the other.

In *A.G. of N.S. v. A.G. of Canada* (2), this Court decided that the method proposed to be adopted by the Legislature of Nova Scotia to meet this test was not authorized. In the present case, in the Court below reliance was placed upon what was there said by the several members of this Court but the opinion of none of the latter justifies the conclusion reached by the Supreme Court of Prince Edward Island *in banco*, or the reasons upon which that conclusion was based. In the Nova Scotia case, it was proposed that the Legislature should enact that the Lieutenant-Governor-in-Council of Nova Scotia might, by proclamation, from time to time delegate to and withdraw from the Parliament of Canada authority to make laws in relation to any matter relating to employment in any industry, work or undertaking in respect of which such matter was, by s. 92 of the British North America Act, 1867, exclusively within the legislative jurisdiction of the Legislature and that any laws so made by Parliament should, while such delegation was in force, have the same effect as if enacted by the Legislature. All the members of this Court decided that this could not be done as a contrary conclusion would be obnoxious to the tenor and scheme of the British North America Act. By that Act certain powers were conferred

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upon the Parliament of Canada and the Legislature of province, and we held that neither could transfer authority to the other.

What is here attempted to carry out Lord Atkin's suggestion is an entirely different matter. At the outset, should be emphasized that no question is submitted as to the validity of the provincial statute "*Agricultural Products Marketing (Prince Edward Island) Act*" (1940, c. 40). In substance, and, as will later appear, in very important respects, that Act is the same as the British Columbia statute which was held to *intra vires* in *Shannon v. Lower Mainland Dairy Products Board* (1). Having provided for the constitution by the Lieutenant-Governor-in-Council of a Board to be known as "Prince Edward Island Marketing Board" s. 4 enacts:—

4. (1) The purpose and intent of this Act is to provide for the control and regulation in any or all respects of the transportation, packing, storage and marketing of natural products within the Province, including the prohibition of such transportation, packing, storage and marketing in whole or in part.

(2) The Lieutenant-Governor-in-Council may from time to time establish, amend and revoke schemes for the control and regulation within the Province of the transportation, packing, storage and marketing of any natural products, and may constitute marketing boards to administer such schemes, and may vest in those boards respectively any powers considered necessary or advisable to enable them effectively to control and regulate the transportation, packing, storage and marketing of any natural products within the Province, and to prohibit such transportation, packing, storage and marketing in whole or in part.

Provision was then made whereby the Lieutenant-Governor-in-Council might vest in any provincial board, without limiting the generality of any of the other provisions, certain specified powers of regulation, including the registration of all persons engaged in the production, packing, transporting, storing or marketing of the regulated product and to fix and collect licence fees therefrom. S. 7 (as amended in 1950) enacts:—

7. Every Provincial board may, with the approval of the Lieutenant-Governor-in-Council, perform any function or duty and exercise any power imposed or conferred upon it by or pursuant to the Dominion Act, with reference to the marketing of a natural product and, with the like approval, may accept and exercise all and any powers or authority granted by the Governor-in-Council pursuant to the Dominion Act.

(1) [1938] A.C. 708.

By the interpretation section, as amended in 1950, "Dominion Act" means "The Agricultural Products Marketing Act" of Canada. This Canadian Act is c. 16 of the Statutes of 1949 (1st Session) and s. 2 thereof provides:—(As to which see p—).

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My answer to the first question as to whether this Act is within the jurisdiction and competence of Parliament is in the affirmative. Parliament, legislating with reference to inter-provincial and export trade which it and not any provincial legislature has the power to do, may validly authorize the Governor General in Council to confer upon a provincial board appointed under the Prince Edward Island statute of 1940, the power to regulate such marketing. This Court held in *Valin v. Langlois* (1), that Parliament could confer authority and impose a duty upon a provincial Court in connection with contested elections under the Canada Elections Act. In refusing leave to appeal (2), the Judicial Committee indicated its approval of that judgment. Admitting, as counsel for the respondent argued, that the Island Board was not made a corporation and that its members are distinct from the Board as a whole, I reiterate the view expressed in *Labour Relations Board, Sask. v. Dominion Fire Brick and Clay Products Ltd.* (3), that such a Board is a legal entity. Having been validly established by the Legislature, it has the capacity to receive and accept the authority authorized by Parliament to be conferred upon it by the Governor-General-in-Council. Counsel for the respondent further submitted that in overruling the judgment of this Court in *Bonanza Creek Gold Mining Co. v. The King* (4), the Judicial Committee (5), drew a distinction between powers and rights exercisable within a province and capacity to accept extra-provincial powers. That is quite true but what was in issue there was the extent of the power of the Ontario Legislature under 92(11) of the British North America Act "The Incorporation of Companies with Provincial Objects". While the judgment of the Judicial Committee in that particular case proceeded upon the basis that the Bonanza Creek Gold Mining Company had really been

(1) (1879) 3 Can. S.C.R. 1.

(3) [1947] S.C.R. 336 at 339.

(2) (1879) 5 App. Cas. 115.

(4) (1914) 50 Can. S.C.R. 534.

(5) [1916] A.C. 566.

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incorporated by virtue of the Royal prerogative, there is nothing in the reasons of Chief Justice Fitzpatrick and Duff J., relied upon by the respondent, to indicate that they were dealing with anything more than the limitation of "provincial objects". In fact the latter pointed out that the question whether capacity to enter into a given transaction is compatible with this limitation was one to be determined upon the particular facts, and he held that on the true construction of the Ontario Companies Act the Company only acquired capacity to carry on its business as an Ontario business and that there was no legislation by the Dominion or the Yukon professing to enlarge that capacity.

The second question is as to the jurisdiction and competency of the Governor-General-in-Council to pass P.C. 5159. That Order-in-Council granted authority to the Prince Edward Island Products Marketing Board, as established by the Lieutenant-Governor of the Province, to regulate the marketing outside the province in interprovincial and export trade of Island products, and that for such purposes the Board might with reference to persons and property situated within the Island exercise powers like the powers exercisable by it in relation to the marketing of Island products locally within the province under certain paragraphs of s. 16 of the Island's Products Marketing Scheme as amended from time to time. It was not contended that, if the answer to the first question be in the affirmative, the answer to the second should not be the same.

Question 3 is as to the jurisdiction and competency of the Lieutenant-Governor-in-Council to establish the Scheme referred to, and particularly s. 16 thereof. In dealing with this question it is necessary to bear in mind the provisions of the Act under which the Scheme was adopted by the Lieutenant-Governor-in-Council. Subsections 1 and 2 of s. 4 have already been extracted and it is important to note that what is being dealt with is the control and regulation of the transportation, packing, storage and marketing of natural products within the Province. This same wording appeared in the British Columbia statute considered in the *Shannon* case. There, the Privy Council stated that it was apparent that the legislation was

confined to regulating transactions that took place wholly within the province. After pointing out that natural products as defined were not confined to those produced in British Columbia, the judgment proceeded: "It was suggested that 'transportation' would cover the carriage of goods in transit from one Province to another, or overseas. The answer is that on the construction of the Act as a whole it is plain that 'transportation' is confined to the passage of goods whose transport begins within the Province to a destination also within the Province." Therefore, in view of the similarity of the British Columbia and Prince Edward Island statutes, unless a fair reading of the Scheme as a whole leads one to the opposite conclusion, it should not be held that the Lieutenant-Governor-in-Council exceeded the powers conferred upon him by the statute and attempted something beyond provincial jurisdiction. For that reason, s. 4 of the Scheme, which provides: "This Scheme shall apply to all persons who grow, pack, store, buy or sell potatoes of any kind or grade thereof in the regulated area", is in my view valid.

S. 16 of the Scheme is the one conferring specified powers upon the Potato Board and as it provides that "The Potato Board shall have the following Powers exercisable in Prince Edward Island in relation to the marketing of potatoes *therein*", it also is valid unless some particular clause thereof clearly goes beyond the statutory powers. The only clauses requiring consideration are (d), (e) and (k). I can find no objection to clause (d) which merely authorizes the licensing of potato dealers. Clause (e) authorizes the Board

- (e) to fix and collect yearly, half-yearly, quarterly or monthly licence fees from any or all persons producing, packing, transporting, storing, or marketing potatoes with power to classify such persons into groups and fix the licence fees payable by the members of the different groups in different amounts and to recover any such licence fees by suit in any Court of competent jurisdiction;

In substance this is the same as s. 5(d) of the Prince Edward Island Act:—

- (d) To fix and collect yearly, half-yearly, quarterly or monthly licence fees from any or all persons producing, packing, transporting, storing or marketing the regulated product; and for this purpose to classify such persons into groups, and fix the licence fees payable by the members of the different groups in different amounts; and to recover any such licence fees by suit in any Court of competent jurisdiction;

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This s. 5(d) is in the same terms as s. 4A(d) of the British Columbia statute considered in the *Shannon* case and as to which the Judicial Committee held (page 721):—

A licence itself merely involves a permission to trade subject to compliance with specified conditions. A licence fee, though usual, does not appear to be essential. But, if licences are granted, it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province, or for both purposes.

Clause (e) of s. 16 of the Scheme is therefore valid. Clause (k) authorizes the Board

(k) to establish a fund in connection with this Scheme to be utilized in such manner as may be deemed necessary or advisable by the Potato Board for the proper administration of the Scheme:

and may stand as it is comparable to section 4A(j) of the British Columbia statute:—

4A(j). To use in carrying out the purposes of the scheme and paying the expenses of the board any moneys received by the board.

which the Judicial Committee also held unobjectionable for the same reasons.

S. 19 of the Scheme reads as follows:—

19. The Potato Board may name two representatives to act conjointly with representatives named by the Nova Scotia Marketing Board, the New Brunswick Potato Marketing Board and the Newfoundland Vegetable Marketing Board as a committee to regulate and co-ordinate the marketing of potatoes produced in the said provinces and in the regulated area, and the Potato Board may, subject to the approval of the Board, delegate to said committee such of its powers as it may deem advisable.

No authority can be found for the kind of sub-delegation therein provided for and, in my opinion, this clause is not within the jurisdiction and competence of the Lieutenant-Governor in Council.

The fourth question is with reference to the jurisdiction and competence of the Board to make certain Orders under the Scheme. Order No. 1 provides that the dealers must take out a licence and pay a fee therefor of five dollars. Order No. 2 provides:—

(1) For the purpose of establishing a fund in connection with the Prince Edward Island Potato Marketing Scheme every dealer shall pay to the Board a charge at the rate of One Cent (1c) for every One hundred pounds of potatoes shipped or exported by such dealer from the Province of Prince Edward Island.

(2) Each dealer shall render to the Potato Board on the 6th day of each month a statement of all cars of potatoes shipped during the preceding month which statement shall correctly show the quantity of

potatoes shipped in each car. With each such statement the dealer shall forward to the Potato Board his remittance to cover the charge or levy provided by paragraph one hereof calculated at the said rate on the volume of potatoes shown by said statement.

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Order 6, made February 14, 1951, by para. (1) repealed Order No. 2 "subject to the provision that every dealer shall continue liable to pay to the Potato Board the full amount of the charge or levy which is now due or accruing due and unpaid in respect of potatoes shipped or marketed up to this date." By paragraphs 2, 3, 4 and 5 of Order No. 6:—

(2) For the purpose of establishing a fund in connection with the Prince Edward Island Potato Marketing Scheme every producer shall pay to the Potato Board a charge or levy at the rate of one cent per hundred pounds of potatoes in respect of all potatoes sold or marketed by such producer.

(3) Every dealer shall be an agent for the Potato Board for the collection of said levy or charge from the producers whose potatoes such dealer ships or exports.

(4) Every dealer when purchasing potatoes in Prince Edward Island shall deduct from the amount payable by him to the Vendor of same the amount of the said levy or charge in respect of the potatoes so purchased by him.

(5) Every dealer shall render to the Potato Board on the 6th day of each month a true and correct statement of all cars of potatoes shipped by such dealer during the preceding month, which statement shall clearly show the quantity of potatoes shipped in each case. With each such statement the dealer shall forward to the Potato Board his remittance to cover the charge or levy provided by paragraph 2 hereof calculated at the said rate on the volume of potatoes shown by said statement.

These paragraphs are clearly referable to export trade and cannot be supported. While Order No. 2 was repealed before the Order of Reference was made by the Lieutenant-Governor in Council, the revoking Order (No. 6) provides for the continuance of any existing liability for the levy.

I would therefore answer the questions as follows:

1. Yes.
2. Yes.
3. Yes, except as to section 19.
4. Yes, except as to Orders Nos. 2 and 6.

TASCHEREAU, J.:—The Lieutenant-Governor-in-Council of the Province of Prince Edward Island has referred for advice to the Supreme Court of that Province *in banco*, four questions which are the following: (As to which see p. 394)

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The unanimous opinion of the Court of Appeal was that the questions should be answered as follows:—

1. No.
2. No answer.
3. As to section 19 of the scheme—No. As to the scheme in general, and section 16 in particular,—No, unless and insofar as the scheme can be limited in its operation to affect only transactions intended to be wholly and ultimately carried out within the Province.

4. As to Board Order Number 6(2), and the now-repealed Board Order Number 2—No. As to the Board Orders in general—No, subject to the proviso set out in the answer to question 3.

I fully concur with the view that the two first questions should be answered in the affirmative. I have no doubt that the Parliament of Canada has the necessary competence to regulate the marketing of agricultural products *in interprovincial and export trade*, and to co-operate with the provinces which have enacted legislation respecting the marketing of such products *within the province*. (Vide *Lawson v. Interior Tree Fruit Committee* (1); (*Marketing Act Reference* (2)) and (3).

It was also I think, within the jurisdiction of the Governor-General to pass P.C. 5159, and to vest in the Board powers which are identical with those authorized to be vested by the statute. (*Shannon v. Lower Mainland* (4); (*Chemicals Reference* (5)).

The Supreme Court of Prince Edward Island relied upon *A.G. of Nova Scotia v. A.G. of Canada* (6) to answer in the negative, but I do not think that that case supports the view that has been adopted. The judgment merely decided that neither Parliament nor the legislatures can delegate powers to each other so as to change the distribution of powers provided for in ss. 91 and 92 of the British North America Act. Here the issue is entirely different. The Federal legislation does not confer any additional powers to the legislature but vests in a group of persons certain powers to be exercised in the interprovincial and

(1) [1931] S.C.R. 357 at 371.

(2) [1936] S.C.R. 398.

(3) [1937] A.C. 377 at 389.

(4) [1935] A.C. 708 at 722.

(5) [1943] S.C.R. 1.

(6) [1951] S.C.R. 31.

export field. It is immaterial that the same persons be empowered by the legislature to control and regulate the marketing of Natural Products within the Province. It is true that the Board is a creature of the Lieutenant-Governor-in-Council, but this does not prevent it from exercising duties imposed by the Parliament of Canada. (*Valin v. Langlois* (1)).

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As to question No. 3, for the reasons given by my brother Kerwin, whose judgment I had the advantage of reading, it is my opinion that the scheme is valid including s. 16. However, s. 19 is not authorized by the Act. We find in s. 6 of the Act the necessary authority given to the Board to co-operate with other Provincial Marketing Boards to regulate the marketing of natural products, but nowhere do we find that the Potato Board is empowered to appoint a committee and delegate to it, subject to the approval of the Board, such of its powers, as it may deem advisable.

The charge or levy imposed in Order No. 2 and in Order No. 6 for the purpose of establishing a fund in connection with the Marketing Scheme, seems in either case to be clearly indirect. In the first case it is imposed upon the dealer, and upon the producer in the second, and, therefore, it remains that it is charged upon an article of commerce in course of trade and not against the final purchaser. The effect of this charge or levy necessarily tends to increase the sale price by the amount of the tax. (*Atlantic Smoke Shops v. Conlon* (2) and (3)). Order No. 2 was repealed by Order No. 6, but as the revoking Order imposed a liability upon every dealer to pay to the Potato Board the full amount of the charge or levy due or accruing due and unpaid in respect of potatoes shipped or marketed, it follows that both must be held invalid.

I would therefore answer the interrogatories as follows:—

1. Yes.
2. Yes.
3. Yes, except as to section 19.
4. Yes, except as to Orders Nos. 2 and 6.

(1) (1879) 5 App. Cas. 115.

(2) [1941] S.C.R. 670.

(3) [1943] A.C. 550.

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RAND J.:—This appeal arises out of a Reference by the Lieutenant-Governor-in-Council of Prince Edward Island to the Supreme Court of that province of questions relating to both Dominion and Provincial legislation dealing with agricultural products.

Under *The Agricultural Products Marketing (Prince Edward Island) Act* of 1940, authority was conferred on the Lieutenant-Governor-in-Council to establish schemes for the regulation within the province of the marketing of any natural product, to be administered by a principal Board and marketing boards.

By such a scheme a board might be authorized, among other things, to require all persons engaged in a trade within the province to register and obtain licences; to prescribe licence fees therefor, and to fix maximum and minimum prices at which the product might be bought or sold in the province. A board could co-operate with the Marketing Board constituted under *The Agricultural Products Marketing Act* of the Dominion, and, conjointly, exercise its powers under the local law. With the approval of the Lieutenant-Governor-in-Council, a board could accept and exercise any power conferred upon it pursuant to the Dominion Act in relation to the marketing of a natural product.

A scheme for the regulation of the marketing of potatoes throughout the province was established by order-in-council of September 5, 1950. A Potato Board was constituted of five members which, besides the general powers already mentioned, was authorized to establish a fund for carrying out the scheme for which it might fix and collect charges in the manner as for licence fees; to borrow money for the objects of the scheme within a maximum aggregate of obligations of \$10,000; to distribute among producers proceeds of the sales of potatoes; and generally to do such things as might be ancillary to these objects.

The Governor-in-Council, under the Dominion Marketing Act, by order-in-council of October 25, 1950 granted authority to the Potato Board "to regulate the marketing outside the province of Prince Edward Island in inter-provincial and export trade of Prince Edward Island potatoes produced" in that province and for such purpose "to exercise powers like the powers exercisable by it in relation to the marketing of Prince Edward Island potatoes

locally within the province" under specified paragraphs of s. 16 of the scheme as from time to time amended. Among the paragraphs omitted were (d) dealing with the licensing of dealers, (e) the collection of licence fees, (k) establishing a fund in connection with the scheme, (l) borrowing money, (m) distributing the proceeds of sales among producers, and (n) establishing technical and advisory committees and the employment of experts.

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The questions submitted to and the answers given by the court were:—

1. Is it within the jurisdiction and competence of the Parliament of Canada to enact The Agricultural Products Marketing Act, (1949) 13 George VI, (1st Session) Chapter 16? Answer, No.

2. If the answer to question No. 1 is yes, is it within the jurisdiction and competence of the Governor-General-in-Council to pass P.C. 5159? No answer.

3. Is it within the jurisdiction and competence of the Lieutenant-Governor-in-Council to establish the said Scheme and in particular section 16 thereof?

Answer: As to section 19 of the Scheme—"No." As to the Scheme in general, and Section 16 in particular—"No, unless and insofar as the Scheme can be limited in its operation to affect only transactions intended to be wholly and ultimately carried out within the Province."

4. Is it within the jurisdiction and competence of the Prince Edward Island Potato Marketing Board to make the Orders made under the said Scheme or any of the Orders so made?

Answer: As to the Board Order Number 6(2), and the now-repealed Board Order Number 2—"No." As to the Board Orders in general—"No, subject to the proviso set out in the answer to Question 3."

From the answers this appeal has been brought.

The validity of the provincial legislation generally was not impugned since its provisions are virtually identical with those of the Act of British Columbia which was approved by the Judicial Committee in *Shannon v. Lower Mainland Dairy Products Board* (1). The Committee there construed the Act as a whole to be limited to transactions strictly within the field of local or provincial trade. The administration of the Act so circumscribed, apart from co-operative Dominion legislation, may encounter serious practical difficulties if not insuperable obstacles; but that cannot affect its constitutional validity nor its administration conjointly with Dominion powers.

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The principal point of attack was the efficacy of the Dominion delegation. Mr. Farris argued that the province was incompetent to confer on the Board capacity to accept such powers from the Governor-in-Council. This question was not involved in Shannon, *supra*, as the administration there was provincial only and s. 7 of the Act was not expressly considered. The Potato Board is not, under the statute, a corporation, and the contention is this: the power to create such an entity and to clothe it with jural attributes and capacities is derived from head 13 of s. 92 of the Act of 1867 which deals with property and civil rights within the province; as the incorporation of companies under head 11 has its source in the prerogative, a body so created may have unlimited "capacities"; the prerogative is not drawn on for a body created under any other head than 11; a board created as here can have, then, only a capacity in relation to local law. From this it follows that the purported grant of authority from the Dominion is inoperative.

The central feature of this argument is the notion of the creation of an "entity". That a group of human beings acting jointly in a certain manner, with certain scope and authority and for certain objects, can be conceived as an entirety, different from that of the sum of the individuals and their actions in severalty, is undoubted; and it is the joint action so conceived that is primarily the external counterpart of the mental concept.

But to imagine that total counterpart as an organic creation fashioned after the nature of a human being with faculties called "capacities" and to pursue a development of it logically, can lead us into absurdities. We might just as logically conceive it as a split personality with co-ordinate creators investing it with two orders of capacities. These metaphors and symbolisms are convenient devices to enable us to aggregate incidents or characteristics but carried too far they may threaten common sense.

What the law in this case has done has been to give legal significance called incidents to certain group actions of five men. That to the same men, acting in the same formality, another co-ordinate jurisdiction in a federal constitution cannot give other legal incidents to other joint actions is negated by the admission that the Dominion by

appropriate words could create a similar board, composed of the same persons, bearing the same name, and with a similar formal organization, to execute the same Dominion functions. Twin phantoms of this nature must, for practical purposes, give way to realistic necessities. As related to courts, the matter was disposed of in *Valin v. Langlois* (1). No question of disruption of constitutive provincial features or frustration of provincial powers arises: both legislatures have recognized the value of a single body to carry out one joint, though limited, administration of trade. At any time the Province could withdraw the whole or any part of its authority. The delegation was, then, effective.

The next challenge was to certain provisions of the scheme. In the approach to them it should be assumed that, generally, they are intended only for the regulation of local trade, but several of them are couched in language that must be examined.

By clause 4 the scheme is declared to apply "to all persons who grow, pack, store, buy or sell potatoes of any kind or grade" in the province. I find it difficult to limit this language to local business, but to answer the question finally I take it in its application to the substantive provisions.

These are to be found chiefly in clause 16. para. (a) which enables the Potato Board to prescribe the manner of marketing generally; (b) to designate the agencies through which potatoes will be marketed; and (c) prohibiting the buying, selling, etc. of potatoes which do not conform to quality standards set by the Potato Board. So considered, there is clearly a regulation of external trade which renders clause 4 ultra vires.

The same result follows in the case of para. (g) which enables the Board to fix the minimum prices at which potatoes may be bought or sold "for delivery in Prince Edward Island". If the latter were an exclusively ultimate delivery for consumption, there would be no excess: but there may be intermediate deliveries in the course of external trade. Likewise, the application of para. (m),

(1) (1879) 5 App. Cas. 115.

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authorizing any agency designated by the Potato Board to distribute among producers the proceeds of the sales of potatoes, carries regulation beyond the provincial field.

Para. (d) (1), providing for licensing dealers and fixing fees, construed to apply to all dealers requires a distinction to be made between fees primarily for revenue and primarily for regulation. In *Brewers & Maltsters' v. A.G. (Ont.)*, (1), distillers and brewers operating under licenses from the Dominion were held subject to a provincial licence carrying a fee of \$100 whether the product was solely for local consumption, for export, or for both. The fee was justified both as direct taxation and under head 9. Lord Herschell emphasized the uniformity of the fee, its relatively small amount, and that it was imposed without regard to the quantity of goods sold.

In *Lawson v. Interior Committee* (2), the levy was part of a local regulation of interprovincial and local trade; the tax imposed might vary with the quantity of the product marketed subject to a minimum and maximum amount of charge; and it was held invalid both as indirect taxation and as not being within head 9.

In *Shannon, supra*, the Judicial Committee held that in the regulation of exclusively local business by a system of licences, fees under head 9 were not restricted to direct taxation.

In *Lower Mainland Products v. Crystal Dairy Ltd.* (3), there were two local levies; a compulsory transfer of money from one set of dealers to another, and an assessment for expenses; in each case the levy was related to the quantity of product sold. Here, too, external trade was affected. Both were held to be indirect taxation and invalid.

The scheme before us is primarily one of trade regulation. Apart from taxation, so far as it extends to external trade it is invalid. Licence fees for revenue purposes with only an incidental regulation on local and external trade, as in the *Maltsters'* case, can be imposed on the latter if not indirect in their incidence, but if related to sales they become a burden on that trade and, as in *Lawson's* case, are *ultra vires*.

(1) [1897] A.C. 231.

(2) [1931] S.C.R. 357.

(3) [1933] A.C. 168.

Clause 19 of the scheme was challenged. This authorizes the Potato Board to name two representatives to act with representatives of the Nova Scotia, New Brunswick and Newfoundland marketing boards as a committee "to regulate and co-ordinate the marketing of potatoes produced in the said provinces and in the regulated area"; and, "subject to the approval of the (Provincial) Board, to delegate to that committee such of its powers as it may deem advisable." Co-operative action between boards of different provinces having the same administrative objects is quite unobjectionable; but I find nothing in the statute permitting a sub-delegation of powers of this nature.

Finally, order No. 6 of the Potato Board was attacked. It provides that "for the purpose of establishing a fund in connection with the scheme, every dealer shall pay to the Board a charge at the rate of one cent (1c) for every hundred pounds of potatoes shipped from the province." As mentioned, neither para. (e) of clause 16, which authorizes licence fees nor (k) which permits the establishment of a fund by means of similar fees, was adopted by the Dominion order-in-council, and I cannot take it that that express omission can be supplied by either (o) or (p) which authorize generally such acts as may be considered necessary to the execution of the scheme. On the contrary view, (o) and (p) would be sufficient in themselves for the entire administration on behalf of the Dominion; but the order-in-council specifies with particularity only nine paragraphs out of sixteen in clause 16 and adopts no other clause. The assessment is clearly a mode of indirect taxation effecting primarily a regulation of trade: and as the cases examined indicate, its application to trade beyond the province puts it ultra the powers of the Board.

This order purported to repeal order No. 2 which provided for a similar assessment and which for the same reasons was invalid; and the purported preservation in order No. 6 of unpaid levies under No. 2 likewise fails.

I would, therefore, answer the questions as follows:—

1. Yes.
2. Yes.
3. Except as to sections Nos. 4 and 19, Yes.
4. Except as to orders Nos. 2 and 6, Yes.

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The judgment of Kellock and Locke, JJ. was delivered by:—

KELLOCK, J.:—The central question in this appeal is as to the respective jurisdictions of Parliament and the provincial legislature with respect to regulation of the marketing of a natural product. It is now settled that neither jurisdiction is competent without the other to cover the entire field of local as well as interprovincial and international marketing. The limitation upon the legislative jurisdiction of Parliament was settled by the decisions in *The King v. Eastern Terminal Elevator Co.* (1), and *A.G. for B.C. v. A.G. for Canada* (2), (Natural Products Marketing Act Reference). While on the other hand, the limitation under which the legislature of a province labours is illustrated by the decision in *Lawson v. Interior Tree, Fruit and Vegetable Committee* (3). It was pointed out by Lord Atkin in the *Natural Products Reference supra*, at 389, that satisfactory results cannot be achieved by either legislature leaving its own sphere and encroaching upon that of the other.

The scheme here in question was established by a provincial Order-in-Council under the provisions of the *Agricultural Products Marketing (P.E.I.) Act* (1940) 4 Geo. VI c. 40, as amended in 1950 by 14 Geo. VI c. 18. The purpose and intent of the statute is stated in s. 4, ss. 1, to be

to provide for the control and regulation in any or all respects of the transportation, packing, storage and marketing of natural products *within the province*, including the prohibition of such transportation, packing, storage and marketing in whole or in part.

By ss. 2, the Lieutenant-Governor-in-Council is authorized to establish, amend and revoke schemes for the control and regulation *within the province* of the transportation, packing, storage and marketing of any natural products, to constitute marketing boards to administer such schemes, and to vest in such boards any powers considered necessary or advisable for the purpose.

(1) [1925] S.C.R. 434.

(2) [1937] A.C. 377.

(3) [1931] S.C.R. 357.

This statute, with some minor differences, is essentially in the form of the statute of British Columbia, in question in *Shannon v. Lower Mainland Dairy Products Board* (1), which was held to be *intra vires* of the provincial legislature. In that case, after pointing out that it is now well settled that s. 91(2) of the British North America Act does not give the Dominion the power to regulate for legitimate provincial purposes particular trades or businesses so far as the trade or business is confined to the province, Lord Atkin said at p. 719:—

And it follows that to the extent that the Dominion is forbidden to regulate within the province, the Province itself has the right under its legislative powers over property and civil rights within the Province.

At p. 720 he added:

The pith and substance of this Act is that it is an Act to regulate particular businesses entirely within the Province, and it is therefore *intra vires* of the Province.

None of the questions on the present reference relates to the competency of the provincial statute here in question, no doubt because of the decision in *Shannon's* case.

The grounds of attack upon the scheme in the case at bar are that (a) its whole purpose and result is to control extra provincial trade; (b) the legislative powers of Parliament cannot be delegated to a provincial legislature or any agency thereof; and (c) the taxes imposed by rules Nos. 2 and 6 of the Potato Board are not authorized by the statute and in any event are indirect.

The provincial Order-in-Council was made on September 5, 1950, subsequent to the Dominion Act which had been assented to on April 30, 1949, but before P.C. 5159 was made thereunder on October 25, 1950. With respect to the second ground of attack, with which I shall deal first, there is in fact no question here of any delegation of legislative authority by Parliament either to the provincial legislature or to the Lieutenant-Governor-in-Council. Neither the Dominion statute nor P.C. 5159 purports to empower either to do anything. Mr. Farris contends that the Canadian Act is incompetent to confer any authority on the provincial board for the reason that the board, although not a corporation, is an entity apart from its

(1) [1938] A.C. 708.

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members, and the provincial legislature is without legislative competence to endow it with capacity to accept powers from Parliament exercisable with respect to international and interprovincial trade. He referred to the judgment of Farwell J. in *Taff Vale Ry. Co. v. Amalgamated Society of Ry. Servants* (1).

In my opinion, the provincial board "is but a name for the individuals that compose it," to adopt the language of Atkin L.J., as he then was in *Mackenzie-Kennedy v. Air Council* (2). Under the legislation there in question, the Air Council was given attributes more closely resembling those of a corporation than in the case of the provincial board. But, like the board, the Council was not expressly created a corporation. It was held by all the members of the court that the Council was not a corporation. Atkin L.J., in the course of his judgment, pointed out that there were in existence prior to the Act of 1917, by which the Air Council was constituted, other statutes expressly constituting department of state, corporations. At p. 534, after referring to the language of Littledale J. in *Tone River Conservators v. Ash* (3), namely, that "To create a corporation by charter or Act of Parliament it is not necessary that any particular form of words be used. It is sufficient if the intent to incorporate be evident," the learned Lord Justice said:

If it had been intended to incorporate the Air Council one would have expected the well known precedents to be followed with express words of incorporation, and express definition of the purposes for which the department was incorporated.

In these circumstances, he found himself unable to find, in the language employed by the Legislature, "the manifest intention to incorporate" which Littledale J. thought essential.

In the case at bar there is, in my opinion, a clear indication to be found in the legislation that it was not the intention of the provincial Legislature to incorporate. The statute of 1940 followed and repealed the earlier P.E.I. Natural Products Marketing Act (1934) 24 Geo. V c. 17. By s. 3 of that statute the Lieutenant-Governor-in-Council

(1) [1901] A.C. 426.

(2) [1927] 2 K.B. 517.

(3) (1829) 10 B. & C. 349 at 384.

was authorized to establish a board for the purposes of the statute, and the board, by ss. 6, was expressly made a body corporate, but when the Act of 1940 was passed, ss. 6 of the earlier legislation was dropped. A further indication of the legislative intention may be gathered from s. 7 of the Act to amend the statute law, c. 1 of the statute of 1951, which adds a new section to the Act of 1940, as follows:

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16. No action shall be brought against any person who since the fifth day of September, 1950, has acted or purported to act or who hereafter acts or purports to act as a member of any board appointed under or pursuant to the provisions of this Act for anything done by him in good faith in the performance or intended performance of his duties under this Act.

I therefore think that there is no question of incorporation in the case of the provincial board, and that the principle to which Mr. Farris called our attention does not apply. There is, accordingly, no lack of capacity on the part of the individuals, from time to time, who make up the potato board to receive authority from Parliament.

Coming to the scheme itself, it must depend for its validity upon the provincial statute alone, as the Lieutenant-Governor-in-Council derives his authority to establish the scheme from that statute and from that statute alone. Para. 4 of the scheme provides that it shall apply to "all" persons who grow, pick, store, buy or sell potatoes of any kind or grade thereof in the regulated area. Para. 16 provides that the Potato Board shall have certain powers exercisable "in Prince Edward Island" in relation to the marketing of potatoes "therein", including the power (a) to prescribe the manner in which potatoes shall be marketed, (b) to designate the agency through which potatoes shall be marketed, (c) to prohibit the buying, selling, packing, storing or transporting of potatoes which do not conform to quality standards, (d) to license potato dealers and determine the amount of licence fees and the terms and conditions upon which dealers may buy, sell, transport and otherwise handle potatoes, (e) to fix and collect licence fees from all or any persons so engaged, (f) to exempt any person or class from the scheme, (g) to fix the minimum price or prices at which potatoes may be bought or sold "in Prince Edward Island for delivery in Prince Edward Island," (h) to require production of records, (i) to regulate

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the shipment and marketing of potatoes in such manner as the board may deem advisable, (j) to establish a fund in connection with the scheme and to fix and collect charges in a similar manner to the collection of licence fees from *all* or any persons producing, packing, transporting, storing or marketing potatoes. Para. 18 provides that *every* person who buys, sells, transports, or otherwise handles potatoes shall have a licence issued by the board, and *no* person may buy, sell, offer for sale, or otherwise deal in potatoes produced in the regulated area unless he is in possession of a licence.

On November 6, 1950, the board issued its Order No. 1 providing that *no* dealer should engage in the marketing of potatoes without a dealer's licence obtained from the board. On December 18, 1950, by Order No. 3 the board fixed certain minimum prices at which potatoes might be bought from producers delivered at "Prince Edward Island shipping points." Sub-para. 3 provided that from and after midnight of December 20, 1950, *no dealer or other person* should sell or market potatoes on consignment or ship potatoes "from" Prince Edward Island for sale on consignment.

On November 6, 1950, Order No. 2 had been passed levying a charge of one cent for every one hundred pounds of potatoes "shipped or exported" by dealers "from" the province, but by Order No. 6 of February 14, 1951, Order No. 2 was repealed, but the liability of dealers for amounts then due was preserved. Order No. 6 goes on to provide that *every* producer shall pay a levy of one cent per one hundred pounds of potatoes in respect of "all potatoes sold or marketed by such producer." *Every* dealer is to be an agent of the board for the purpose of collection of this levy.

By para. 19 the board is authorized to name two representatives to act conjointly with representatives named under the authority of legislation of Nova Scotia and Newfoundland to "regulate and co-ordinate the marketing of potatoes produced in the said provinces" and in Prince Edward Island, and to delegate to such committee the powers of the board.

In my view, the powers so given go beyond the mere regulation of the potato trade within the province or carriage thereof from one provincial point to another, and encroach upon the sphere of the regulation of interprovincial and export trade. There is no attempt to confine the scheme or the orders under it to local as distinguished from export trade, and it is to be remembered, as was admitted at the bar, that the business of marketing potatoes in the province is preponderantly an export business.

The order of the Lieutenant-Governor-in-Council would appear to have been passed on the theory that in so far as it went beyond the matter of regulation of purely local trade, the powers of the board could be supplemented by an Order-in-Council under the Dominion statute. That this is so was quite frankly admitted by the Attorney-General for Prince Edward Island in his argument before this court. The provincial Order-in-Council is to be judged, however, on the basis of that which was authorized by the provincial statute alone, as the competency of the Lieutenant-Governor-in-Council could not be increased by anything which might be done by the Governor-General-in-Council under the Dominion Act; *A.G. for N.S. v. A.G. for Canada* (1). I see no basis upon which the good may be severed from the bad. I therefore conclude that the scheme is invalid. While the Dominion Order-in-Council is valid to clothe the designated individuals with authority to regulate interprovincial and international trade, it is clear, in my view, that the orders made by the board apply and were intended to apply indiscriminately over the whole field, local, interprovincial and international, and are therefore incapable of being supported in the restricted field.

In the result, while it is clearly within the competence of Parliament and a provincial legislature to authorize an agency such as the agency contemplated by the legislation here in question so as to bring about regulation of the whole field of trade in a natural product, it is necessary that the Dominion and provincial legislation respectively be confined to the legislative jurisdiction of each legislature.

(1) [1951] S.C.R. 1.

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In this reference the validity of the provincial act is not questioned, no doubt because its provisions are, in all material particulars, to the same effect as those of the act of British Columbia declared to be within the competence of the provincial legislature in *Shannon v. Lower Mainland Dairy Products Board* (1).

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On September 5, 1950, as authorized by the provisions of the above-mentioned provincial statute, the Lieutenant-Governor-in-Council, by Order-in-Council, established a scheme "for the control and regulation within the Province of the transportation, packing, storage and marketing" of potatoes. The Order-in-Council also provides for a board of five members designated as the Prince Edward Island Potato Marketing Board (hereinafter referred to as the Potato Board) to carry out the provisions of the scheme. The board elects its own chairman and may appoint a secretary-treasurer and such other officers and employees as the members may deem expedient. In para. 16 in the Order-in-Council its powers are particularly set out.

The Governor General in Council, under the authority of s. 2 of *The Agricultural Products Marketing Act*, passed P.C. 5159, October 25, 1950, granting to the Potato Board "powers like the powers exercisable by" that board "in relation to the marketing of Prince Edward Island potatoes locally within the province" as set out in nine of the subparas. of para. 16 of the scheme under the provincial Order-in-Council.

The Government of Prince Edward Island referred to the Supreme Court of that province the following four questions: (As to which see p. 394).

This is an appeal from the answers given to the questions by the Supreme Court of Prince Edward Island.

The *Agricultural Products Marketing Act* is restricted to the interprovincial and export trade and neither purports to nor does it interfere with provincial trade as did earlier legislation declared to be *ultra vires*. *Re The Natural*

(1) [1938] A.C. 708; Plax. 379.

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Products Marketing Act 1934, as amended, 1935, (1) and (2). It is, however, contended that the statute is *ultra vires* in so far as it provides for the delegation of power by the Governor in Council as set forth in s. 2:

2. (1) The Governor in Council may by order grant authority to any board or agency authorized under the law of any province to exercise powers of regulation in relation to the marketing of any agricultural product locally within the province, to regulate the marketing of such agricultural product outside the province in interprovincial and export trade and for such purposes to exercise all or any powers like the powers exercisable by such board or agency in relation to the marketing of such agricultural product locally within the province.

(2) The Governor in Council may by order revoke any authority granted under subsection one.

The Supreme Court of Prince Edward Island concluded that the Parliament of Canada, in the foregoing s. 2, had provided for a delegation of a type this Court held to be *ultra vires* in *A.G. of N.S. v. A.G. of Canada* (3). It was there held the delegation of legislative powers by the Parliament of Canada to a provincial legislature, or by a provincial legislature to the Parliament of Canada, of their respective legislative powers was beyond the competence of these bodies. The problem here presented is quite different in that it is the delegation by the Governor General in Council to the Potato Board, an agency created by the Legislature of the province.

The constitution of this Potato Board is similar to that of the Labour Relations Board of Saskatchewan in respect of which Mr. Justice Kerwin, with whom my Lord the Chief Justice concurred, stated: " * * * the Board is a legal entity, and * * * 'has a right to be heard in Court' " *Labour Relations Board, Sask. v. Dominion Fire Brick and Clay Products Limited* (4).

It is, however, contended that the Parliament of Canada cannot confer upon this Potato Board the powers the Governor General in Council sought to do by Order-in-Council P.C. 5159. Our attention was directed to the

(1) [1936] S.C.R. 398.

(2) [1937] A.C. 377; Plax. 327.

(3) [1951] S.C.R. 31.

(4) [1947] S.C.R. 336.

distinction between capacity and powers as expressed by Viscount Haldane in *The Bonanza Creek Gold Mining Co. v. Rex* (1), where he stated:

But actual powers and rights are one thing and capacity to accept extraprovincial powers and rights is quite another * * * In the case of a company the legal existence of which is wholly derived from the words of a statute, the company does not possess the general capacity of a natural person and the doctrine of ultra vires applies.

That the legislature appreciated the foregoing distinction between capacity and powers is evidenced both by the history of the legislation and the language adopted in the enactment itself. The legislature, in passing The Agricultural Products Marketing Act in 1940, repealed (s. 14) The Natural Products Marketing Act 1934 (S. of P.E.I. 1934, c. 17), which provided that the Lieutenant Governor in Council might establish a board to be known as the Provincial Marketing Board and, under s. 3(6) thereof, it was expressly created "a body corporate." In the 1940 act the Lieutenant Governor in Council was again authorized to constitute a board to be known as the "Prince Edward Island Marketing Board" and to "constitute marketing boards," but it does not contain a provision making either a body corporate.

The language of the 1940 statute is equally indicative of the intention of the legislature where, in relation to the marketing boards, it authorizes only the vesting of powers therein. S. 4(2), under which the Potato Board was created, provides that the Lieutenant-Governor-in-Council "may constitute marketing boards to administer such schemes, and may vest in those boards respectively any powers" and again in s. 5 the Provincial Board (which includes the Potato Board) may be vested with "additional powers." Then the Lieutenant-Governor-in-Council, in constituting the board, provided in the opening words of para. 16 that it "shall have the following powers." Whatever the precise nature and character of such a statutory

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(1) [1916] 1 A.C. 566; 2 Cam. 75 at 89.

judges in the Appellate Court who held a contrary opinion. I think question No. 1 should be answered in the affirmative.

The Governor General's Order-in-Council P.C. 5159 appears to be within the provisions of the *Agricultural Products Marketing Act* as enacted by the Parliament of Canada in 1949 and, therefore, the answer to question No. 2 should be in the affirmative.

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Under question No. 3, if the Lieutenant-Governor-in-Council has established the scheme within the limits of the act of 1940, the competence of which is here not questioned, it is valid. It is suggested, however, that the Lieutenant-Governor-in-Council, in passing para. 4 of the scheme, has exceeded the limits of the power authorized by the provincial act. Para. 4:

4. This Scheme shall apply to all persons who grow, pack, store, buy or sell potatoes * * * *

The respective provisions of the scheme must be read and construed together. The general language setting forth the scope and application of the scheme in para. 4 must be read with the provisions of para. 16 granting to the board its powers. This para. 16 at the outset expressly states:

The Potato Board shall have the following powers exercisable in Prince Edward Island in relation to the marketing of potatoes therein.

The several powers enumerated in subparas. (a) to (k) are in accord with the opening words. When, therefore, the general language of para. 4 is read in relation to the powers as vested in the board under para. 16, it becomes clear that it was intended para. 4 should be construed and ought to be construed to apply only within the field of competent provincial jurisdiction.

In so far as the Lieutenant-Governor-in-Council, in para. 16(d) and (e), authorized the Potato Board to require licences and to impose fees therefor, the act was within the competence of the province. *Shannon v. Lower Mainland Dairy Products Board supra* at p. 391:

A licence itself merely involves a permission to trade subject to compliance with specified conditions. A licence fee, though usual, does not appear to be essential. But, if licences are granted, it appears to be

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no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province, or for both purposes. The object would appear to be in such a case to raise a revenue for either local or Provincial purposes.

It was also contended that subpara. 16(k) is invalid. It provides for the establishment of a fund "for the proper administration of the scheme" and contemplates that it shall be fixed and collected in the manner provided by subpara. 16(e). Such an imposition would appear to be within the competence of the Province, so long as it is not made in a manner and an amount that would cause it to enter into the price of the commodity and, therefore, to be in reality an indirect tax. Lord Herschell, in relation to the imposition of a uniform licence fee of \$100, when considering it as a matter of direct or indirect taxation, stated:

They do not think there was either an expectation or intention that he should indemnify himself at the expense of some other person. No such transfer of the burden would in ordinary course take place or can have been contemplated as the natural result of the legislation in the case of a tax like the present one, a uniform fee trifling in amount imposed alike upon all brewers and distillers without any relation to the quantity of goods which they sell. *Brewers and Malsters' Association of Ont. v. A.G. for Ont.* (1).

The language of para. 16(k) so read and construed does not appear to be objectionable.

Para. 19 of the scheme provides for an interprovincial committee "to regulate and co-ordinate the marketing of potatoes produced" in the provinces of Prince Edward Island, Nova Scotia, New Brunswick and Newfoundland and provides that, subject to the approval of the Prince Edward Island Marketing Board, the Potato Board may delegate to that committee "such of its powers as it may deem advisable." This provision contemplates the provinces dealing with interprovincial and export trade and is beyond the competence of the province to enact. I would, therefore, answer question No. 3 yes, except para. 19.

(1) [1897] A.C. 231; 1 Cam. 529 at 534.

The scheme, as constituted by the Lieutenant-Governor-in-Council, may be valid, and yet the board, in adopting orders and regulations, may exceed its authority and it is suggested in question No. 4 that the board has done so. The board has made seven orders, an examination of which would indicate that all but Orders Nos. 2 and 6 are within the authority of the board. Under Order No. 2 the board imposed, for the purpose of establishing a fund in connection with the scheme, upon every dealer a charge or levy at the rate of one cent for every 100 pounds of potatoes shipped or exported by such dealer. This Order was repealed by Order No. 6, but it was provided that any amount due or accruing due and unpaid under Order No. 2 remained an outstanding liability. Order No. 6 then proceeded to impose a similar charge or levy of one cent per 100 pounds of potatoes upon every producer in respect of all potatoes sold or marketed by such producer. It might be sufficient to say that neither the act nor the scheme authorizes the Potato Board to make a levy of the sort contemplated by these Orders, but there is a further objection to their validity. This charge or levy is in relation to a sale of potatoes and its nature and character is such that it would be passed on by the dealer as part of, and, therefore, would enter into, the price of the commodity. It is, therefore, in substance an indirect tax and cannot be competently enacted by the province or any agency thereof. Question No. 4 should be answered yes, except as to Orders Nos. 2 and 6.

The questions submitted should be answered: Question No. 1, yes; Question No. 2, yes; Question No. 3, yes, except as to para. 19; Question No. 4, yes, except as to Orders Nos. 2 and 6.

Appeal allowed.

1952
P.E.I.
POTATO
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1952
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POTATO
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v.
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INC.
—

REPORTER'S NOTE: Following the Reference by the Lieutenant-Governor-in-Council to the Supreme Court of Prince Edward Island *in banco*, by order of Campbell C.J. the appellant as a representative of the class interested in maintaining the affirmative of the questions put, and the respondent as representative of the class interested in maintaining the negative, were named nominal plaintiff and defendant respectively. On the filing of pleadings it appeared to the Court *in banco* that questions were raised as to the validity of Acts of the Parliament of Canada and the Legislature of Prince Edward Island, and the Attorney General thereof and the Attorney General of Canada having been granted leave to intervene at any stage of the proceedings and the Attorney General of Prince Edward Island having intervened, and it appearing to the Court *in banco* that a conclusive determination of the said questions by the Court of highest resort was desired by the parties and that such determination could be more expeditiously obtained by removing the case to the Supreme Court of Canada, it was ordered by the Court *in banco* that the Reference be so removed. Pursuant to this Court's direction argument as to its jurisdiction was heard on Oct. 25, 1951. H. F. McPhee K.C. appeared for the appellant and K. M. Martin K.C. for the respondent. Judgment was reserved and on Nov. 2, 1951, Cartwright J. delivered the unanimous judgment of the Court holding that under s. 37 of the *Supreme Court Act* an appeal lies only from the opinion of the highest court of final resort in the province in any matter referred to it by the Lieutenant-Governor-in-Council and no such opinion having been pronounced the appeal should be quashed but with no order as to costs.

ALBERTA

SUPREME COURT

APPELLATE DIVISION

Before Johnson, McDermid and Allen, J.J.A.

' Figol v. Edmonton City Council

*Municipal Corporations — Development Permit — Appeal from
Decision of Development Appeal Board — Procedure.*

Sec. 146 (substituted 1967, ch. 60, amended 1968, ch. 77) of *The Planning Act*, 1963, ch. 43, gives a right of appeal from an order of a tribunal pursuant to secs. 20, 110 or 128 of the Act on a question of jurisdiction or on a question of law, subject to leave being granted by a judge of the appellate division, but the section does not require an appellant to give a notice of appeal setting out the grounds upon which his appeal is based; he is merely required to give notice to the persons affected that the case has been set down for hearing in appeal. However, the practice to be followed is that the specific questions of law or jurisdiction must be set out in the order granting leave to appeal so that the respondent and other persons affected may know with certainty what is to be urged on the appeal itself. While there is authority for the proposition that a tribunal, or an individual, may not delegate to another the exercise of powers conferred upon them by statute, a distinction is to be drawn between the delegation of such powers and the exercise of them subject to conditions: *Michie v. Rocky View Mun. Dist. No. 44* (1968) 64 WWR 178, Can Abr (2nd) Cum Supp 43 (Alta.); *Sask. Labour Relations Board v. Speers* [1947] 2 WWR 927, affirming [1947] 1 WWR 616, 1 Can Abr (2nd) 1418 (Sask. C.A.); *Vine v. Nat. Dock Labour Board* [1957] AC 488, [1957] 2 WLR 106; *Vic Restaurant Inc. v. Montreal (City)* [1959] SCR 58, reversing [1957] Que QB 1, 1 Can Abr (2nd) 1414 distinguished.

[Note up with 16 CED (2nd ed.) *Municipal Corporations*, sec. 42.]

W. A. Stevenson, for appellant.

H. F. Wilson, for respondent.

A. G. Macdonald, Q.C., for Marathon Realty Co. Ltd.

November 13, 1969.

The judgment of the court was delivered by

ALLEN, J.A. — This is an appeal by the appellant, Olga Figol, from a decision of the development appeal board of the city of Edmonton denying an appeal of the appellant from the decision of the development officer who granted permission to Marathon Realty Co. Ltd. to construct "a 255 suite apartment house, 625 car parkade and an office building * * * 20 storeys, 15 storeys, all existing buildings to be demolished" in so far as the development applied to the apartment building and parking structure. The development permit as so limited was granted subject to certain conditions to be complied with by the developer prior to the issuance of a building permit,

which conditions were annexed to and formed part of the decision of the development officer from whom the appeal to the development appeal board was taken.

The land in question is in a part of the city of Edmonton subject to interim development control as provided for in *The Planning Act*, 1963, ch. 43 and amendments thereto.

In sec. 100 (amended 1967, ch. 60) of the said Act it is provided that a council, on passing a resolution authorizing the preparation of a general plan, or a bylaw adopting a general plan, shall apply to the minister for an order authorizing the exercise or the continuance of the exercise of development control in the areas included or to be included in the general plan or parts thereof, and that control shall be exercised over development on the basis of the merits of each individual application for permission to carry out the development, having regard to the proposed development conforming with the general plan being prepared or as adopted. Such an order was made by the minister in 1964 with respect to certain areas within the city, including the lands upon which the development proposed herein was to be constructed.

Pursuant to the minister's order and in accordance with the provisions of sec. 102 of *The Planning Act* the council of the city of Edmonton enacted bylaw No. 2624 as a development control bylaw on March 26, 1965. Among other things the bylaw established the office of development control officer and provided for an appeal from his decisions to a development appeal board, also established by the bylaw, all as authorized by *The Planning Act*.

As authorized by the provisions of secs. 106 and 107 of *The Planning Act* the city council, on November 23, 1964, passed a resolution that a certain map entitled "The Land Use Classification Guide No. DCR-1" and the regulations entitled "Schedule of Permitted Land Uses and Regulations for areas not included under the zoning by-law," which were attached to and formed part of the resolution, should govern the development control officer in advising the general public and in determining applications for development on all lands not included in the zoning bylaw. Curiously enough, as was conceded by counsel, while by sec. 106 of *The Planning Act* the development control officer is to be governed by such guide in dealing with applications, it is not similarly made binding upon the development appeal board. It should also be noted that sec. 107 of *The Planning Act* makes it clear that such a guide is not to be deemed part of the development control bylaw.

The development control bylaw provided in sec. 3 that while the bylaw was in effect no development other than that designated as "Permitted Development" by the development control order above referred to should be undertaken unless and until an application for the same had been approved and a development permit issued pursuant to the terms of the said bylaw.

The development proposed by the developer, Marathon Realty Co. Ltd., hereinafter referred to as "Marathon," as set out in its application for a development permit and as dealt with by the development officer, was for the construction of the apartment house, car parkade and office building upon the lands briefly described as follows, namely:

"Lots 1 to 5 and the south half of Lot 6, Lots 79 to 86 and 83 feet east, west 400 feet north-south measured portion of the Canadian Pacific Railway right-of-way, all in Block 9, Plan B, Edmonton."

The site plans filed with the application indicated that the property in question lies between 109th St. and 110th St. north of 97th Ave. in the city of Edmonton; the entire southern portion of the property abuts on 97th Ave. for a distance of approximately 267 feet. Lots 1 to 5 and the south half of lot 6 lie west of the right of way of the C.P.R. and an unused lane running along the western boundary of the right of way and abut for a distance of approximately 235 feet on 110th St. The site plan provides for a lane through the south half of lot 6 leading from 110th St. to the westerly limits of the C.P.R. right of way, which runs right through the property affected, which lane will constitute the northern boundary of all of that property comprised in the site lying to the west of the C.P.R. right of way and the site plan includes the unused lane between the westerly boundary of the C.P.R. right of way and the easterly boundaries of lots 1 to 5 and the south half of lot 6. From the intersection of the proposed lane through lot 6 with the C.P.R. right of way the property comprised in the site runs along the western limit of the C.P.R. right of way northerly about 145 feet, thence easterly across the right of way to the north-west corner of the most easterly 50 feet of lot 77, then southerly through lots 77 to and including lot 86 to 97th Ave.

It will thus be seen that the property embraces the whole of the C.P.R. right of way from the northern boundary of lot 77 and 97th Ave. and the unused laneway above referred to intervening between the existing eastern boundaries of lots 1 to 6 and the western boundary of the C.P.R. right of way. It is

noted that while the application specifies lots 77 to 86, the site plan covering all of the development originally proposed does not in fact comprise all of these lots but only those portions thereof which may lie within the C.P.R. right of way, that is to say, those portions lying to the west of the easterly 50 or 55 feet thereof. No part of the site actually abuts on 109th St.

The inclusion of all of lots 79 to 86 in the application was probably due to the fact that in the original plans, which embraced the office tower as well as the apartment building, provision was made for a ramp from 109th St. to the parking structure and office building which would have to cross the easterly portion of some of the lands comprised in lots 79 to 86. However, it appears that when the application came before the development appeal board the application to construct the office tower was abandoned or refused, and it may be fairly inferred from the evidence before the board that this involved an abandonment of the proposed ramp; in fact, on the cross-examination of Mr. Sykes, the manager of the developer, upon his affidavit filed in opposition to the application for leave to appeal to this division, it is made clear that the plans for the apartment building and related parking structure did not include the proposed ramp over the area owned by the province, namely, the easterly 50 or 55 feet of lots 79 to 86 lying to the east of the C.P.R. right of way. This being so, it appears unnecessary for us to consider the implications of the restrictive provisions with respect to the use of those portions of lots 79 to 86 for park purposes which are contained in a transfer thereof from the Calgary & Edmonton Railway Company to the crown in the right of the province of Alberta executed in 1910, to which some detailed reference was made on the hearing of the appeal to the development appeal board and to this division.

The appellant, Mrs. Figol, is the owner of an apartment house upon lot 7 and the north half of lot 6, in block 9, which is adjacent to the lands covered by the said permit on the north, and claims to be a person affected by the decision of the board.

The application of Marathon for a development permit was in due course heard by the development officer and on April 10 a development permit covering the whole of the development originally planned was granted, subject to certain conditions outlined in a letter attached thereto dated April 10, 1969, signed by Mr. P. Ellwood, assistant director of the city planning department, which read as follows:

"Attached To And Forming Part of Development Permit
Application No. 8-8563

City Planning Department
City Hall
Edmonton 15,
Alberta

"The City Of Edmonton

April 10, 1969

"Mr. Keith Hand,
Marathon Realty Co. Ltd.,
202 C.P.R. Building,
Edmonton, Alberta.

“Dear Sir:

"Re: Application to construct a 255 suite apartment house, 625 car parking garage and an office building in Block 9, Plan B, on the north side of 97 Avenue between 109 & 110 Streets (C.P.R. right-of-way) Application No. 8-8563.

"I wish to advise that I am approving the above described application subject to the following conditions.

- "1. The finalization of negotiations in connection with the adjustment of the lanes, and the passage of the necessary bylaws;
- "2. The parking layout being to the satisfaction of the Traffic Engineer;
- "3. The adjustment of the shown access points to the site to be to the satisfaction of the City Engineer;
- "4. The provision, by the developer, of a loading bay on 109 Street to serve the proposed office complex;
- "5. Drainage of the site and buildings to be to the satisfaction of the City Engineer;
- "6. A Waiver of Damage agreement protecting the City in the event access characteristics to the site change as a result of roadway changes in the vicinity of the site; and
- "7. The completion of the above conditions prior to the issuance of a building permit.

"Yours truly,

"[Sgd.] P. ELLWOOD

P. Elwood

Assistant Director,

“PE/s

cc. Commissioner D. B. Menzies
Commissioner S. J. Hampton
Mr. George Hodge, City Engineer — Attention:
W. E. Gillespie
B. Huffman

Mr. D. L. MacDonald, Superintendent, Edmonton Transit."

On April 16, 1969 a document entitled "Notice to Property Owner" was mailed to Mrs. Figol in which notice was given of the granting of the development permit pursuant to the provisions of sec. 122 of *The Planning Act*.

On April 25, 1969 Mrs. Figol gave notice of appeal from the decision of the development officer to the development appeal board in which her reasons for appeal were stated as follows:

- "1. Improper lane stoppage.
- "2. Encroachment on parkland.
- "3. Insufficient set back.
- "4. Excessive encroachment on lane areas.
- "5. Poor traffic access.
- "6. Excessive density.
- "7. Interference with future roadways.
- "8. Encroachment on development area.
- "9. Excessive height.
- "10. Commercial development in residential area."

On May 6, 1969 the matter came before the development appeal board for hearing. A number of persons claiming to be affected by the granting of the permit appeared on this hearing, including Mrs. Figol, who was represented by counsel, Mr. W. N. Richards.

Marathon Realty was represented by its manager, Mr. Rodney Sykes.

At this hearing an objection was taken by Mr. Richards to the granting of the permit mainly on the grounds that part of the development planned on the site was commercial in nature and encroached upon an R-6 residential district, that the proposed builder did not have title to or an interest in much of the property comprised in the site and that there were restrictions on the titles to the property, which it would

have to acquire in order to proceed with construction, which prohibited the type of construction which was contemplated. He pointed out that the site embraced a lane which had not been closed and he also contended that the density and setback requirements of the Land Use Classification Guide were not complied with.

The representative of Marathon Realty stated that the proposed apartment structure and parkade was the immediate project and suggested the board consider approving them and refusing the office towers, the plans for which were not complete, and stated that the development of the office structure might not proceed for another year. He pointed out that while the footings for the proposed office tower would extend into the R-6 area, if this were not agreeable to the city they could be moved back into the area to the east, which was C-6 (commercial) and on which such a structure would be permitted.

As it appeared that some of the lands included in the site, or rather the access thereto proposed from 109th Ave. at that time, stood in the name of the provincial government and came within a public works development area prescribed by the provincial government, the board stated that it wished to hear something further from the provincial government before proceeding further with the appeal. Accordingly, the hearing was adjourned to May 20 and resumed at that time.

At the resumed hearing a letter from E. E. Wilson, property administrator of the government of the province of Alberta, was read for the benefit of those present, which indicated that the government was prepared to exchange certain lands owned by it in the area of the site for other lands owned by Marathon and generally indicated no objection by the government to the development proposed by Marathon in this area. The board then undertook to deal only with the apartment and the parkade, stating that no plans of the office structure had been submitted.

At the hearing on May 20 Mrs. Figol was represented by Mr. Cote, who again raised the question that the developer did not have clear title to build on all of the properties in question, that the development was poorly conceived and thought out and encroached on parkland. He pointed out that there was a restrictive covenant affecting the C.P.R. right of way to the effect that, if any part was not used for railway purposes, the Hudson's Bay Company, from which it had been acquired, would have the right to repurchase it, and contended that this was the property over which the proposed parkade structure

was to be erected. He also referred to a condition contained in a transfer from the Calgary & Edmonton Railway Company to the crown of the easterly portions of lots 77 to 85, which prescribed that these areas were not to be built on and were to be used for park purposes only.

He raised objection to the situation with respect to traffic which would be created by this development and that the proposed apartment and parkade would, on the basis of the number of suites proposed, exceed the permitted density. He stated that the actual total of land and density for it at 300 persons per acre permitted only 244 persons, and that if the lane were closed 298 could be permitted, and that 439 could be permitted if the trackage were included, whereas, on the basis of the number of suites proposed and the formula prescribed for calculating density in such a case, 665 persons could be anticipated to occupy the building. He stated that he did not understand how the provincial property which he claimed was dedicated for park purposes adjacent to the site could be taken as part of the development application, and he felt that the proposed density was excessive.

Here it must be pointed out that, as the appeal with respect to the office building had been allowed and if, in fact, as contended by Mr. Sykes, no part of the apartment building or the parkade encroached upon the land owned by the provincial government, it seems that some of the arguments urged upon the appeal board were unnecessary and served only to confuse the issues.

However, it would seem that one of the objections which was raised at this hearing, although not mentioned in the notice of appeal to the development appeal board and apparently not extensively argued on that appeal, was directed to the conditions attached to the development permit and it was contended that by annexing conditions numbered 2, 3 and 5, the development officer had illegally delegated his duty of decision to unauthorized persons, whereas the development officer was the person authorized and required by law to decide applications for development permits with no right to delegate his duty to others.

At the conclusion of the hearing on May 20 it was moved by one of the members of the board that the application be tabled for one week and the traffic engineer be invited to explain how the traffic situation in the area would be handled. On May 27 the board convened again without any of the interested parties being present and received a report from the

traffic engineer for the city of Edmonton which explained how the proposed development would fit in with the city's plan for traffic flow in the area in question, following which the following resolution was moved and passed, namely:

"That the appeal be denied and the development insofar as the development applies to the apartment building and parkade structure granted and subject to the original conditions of approval."

The appellant promptly filed and served a notice of an application to be made before a judge of this division for leave to appeal from the decision of the development appeal board to this court, in which it was stated that the applicant would contend that the decision of the development appeal board was based, *inter alia*, upon one or more of the following errors in law or jurisdiction or both:

(1) Failure or refusal to consider whether the applicant for the development permit had title to, or any interest in, the lands in question, or proposed to acquire either.

(2) Failure or refusal to consider whether the applicant for the development permit could acquire title to, or a sufficient interest in, the said lands.

(3) Confirming a condition of the development permit requiring a traffic entrance ramp leading to 109th St., although such ramp must be built on dedicated parkland, or land comprised in a public works development area, or both.

(4) Failure or refusal to consider whether the proposed development would be built in part over a public laneway, thereby closing or blocking the same without recourse to the city council, or consent by or notice to, adjoining owners.

(5) Considering and including in its calculations pursuant to the provisions of the general plan and Land Use Classification Guide, lands not the subject of the development permit or application, nor owned nor capable of ownership or use by the applicant for the permit, or such use by anyone.

(6) Considering the proposed development to be parking ancillary to a residential development, rather than a commercial parking garage, within the meaning of the general plan and Land Use Classification Guide.

(7) Permitting radical amendment of the development permit in the course of the appeal without renewed consideration by the authority granting the permit.

(8) Considering the definitions of front, side, and rear yards in the general plan and Land Use Classification Guide as not including any reference to the location of the front or main entrance to the building.

(9) Delegating its duty of decision to other unauthorized persons, and approving conditions effecting such a delegation by the official authorized and required by law to decide on applications for development permits.

(10) Failure or refusal to seek or consider evidence of compliance with sec. 254 of the *Railway Act*, RSC, 1952, ch. 234, or in the alternative, in purporting to infringe the jurisdiction given by that section and Act.

(11) Purporting to allow a body other than a railway company to erect a structure over an operating railway, or purporting to allow a railway company to exceed its powers in constructing commercial and residential buildings, or both.

This notice was served upon Marathon Realty Co. Ltd., C.P.R., Edmonton development appeal board and the city of Edmonton. The application for leave to appeal was heard by Kane, J.A. on July 10, 1969 and leave to appeal was granted.

The questions of law or jurisdiction in respect of which such leave to appeal was given were not set out in the formal order giving leave to appeal but in the reasons for judgment delivered orally by Kane, J.A. on July 10 he stated:

"The development permit issued by the Assistant Director was subject to certain conditions, amongst them being:

"(1) the parking layout being to the satisfaction of the Traffic Engineer;

"(2) the adjustment of the access points to the site to be to the satisfaction of the City Engineer;

"(3) drainage of the site and buildings to be to the satisfaction of the City Engineer.

"The power of the Development Officer is to receive, consider and decide upon applications for development permits.

"The effect of the conditions I have referred to may have been to purport to vest in the Traffic Engineer and the City Engineer power to prevent issue of the permit by refusing to be satisfied with the parking layout, the access points and the drainage of the site and the buildings: *Vic*

Restaurant Inc. v. Montreal (City) [1959] SCR 58, 59 and 82, reversing [1957] Que QB 1.

"This, in my view, raises a question of jurisdiction and of law, or both. Accordingly I grant leave to appeal from the decision of the Development Appeal Board to the Appellate Division of the Supreme Court of Alberta.

"I might add that in my opinion the evidence before the Board insofar as the land designated as parks land and standing in the name of the Province is concerned, may not justify a conclusion that the respondent could have obtained title to it clear of any restrictions as to its use."

It will be noted from the learned judge's remarks quoted above that the points with which he was particularly concerned were the ones relating to the alleged delegation by the development officer of his duties to the traffic engineer and the city engineer and the questions raised as to the right of the developer to obtain title clear of restrictions to the land designated as parklands owned by the provincial government, and from this one might gain the impression that the leave granted to appeal was restricted to these points.

At the opening of the appeal the question was raised as to whether the appellant was restricted to arguing the points expressly mentioned in the oral judgment of Kane, J.A., or whether she was entitled to argue all of those points set out in her notice of appeal which raised questions of law or jurisdiction.

During the noon-hour adjournment the court discussed this matter with Kane, J.A. who stated that it was not his intention, by his order, to restrict the appellant to the particular points mentioned in his oral judgment, and that it was his intention and impression that the order he granted entitled the appellant to appeal to this court on all questions of law or jurisdiction which were set out in her notice of motion. Here it might be noted that the grounds of appeal set forth in the notice of appeal to this court are identical with those specified as questions of law or jurisdiction in the notice of motion for leave to appeal with one exception, namely, that item No. 9 is enlarged by the inclusion of the phraseology "or in the alternative receiving evidence or representations from such other unauthorized persons without notice to the appellant and without affording him any opportunity to hear or rebut the same."

On this point judgment was reserved, but the appellant was permitted to argue all of the points of law or jurisdiction set

out in the notice of appeal, subject to the possible elimination from consideration by this court of those points not covered by the oral judgment of Kane, J.A., in the determination of this appeal.

It thus appears that the first matter to be dealt with is the question as to whether the appellant was restricted to arguing, as grounds of appeal, only those questions of law or jurisdiction mentioned in the oral judgment of Kane, J.A.

In view of the statement made to this court by Kane, J.A. that it was his intention by his order to give the appellant leave to urge all of the questions of law or jurisdiction set out in its notice of motion as grounds of appeal, the question perhaps becomes academic in this case. The respondent was not taken by surprise. There were lengthy cross-examinations conducted upon the affidavits filed in support of the notice of motion for leave to appeal, and these cross-examinations dealt at length with the various points raised therein and the extent to which they were dealt with in the hearing before the development appeal board and they were again fully set out in the notice of appeal to this court.

However, perhaps it might be of some assistance to those concerned in dealing with matters of this nature in the future if this court expressed its opinion as to the general practice which should be followed in such cases.

Sec. 146 (substituted 1967, ch. 60, amended 1968, ch. 77) of *The Planning Act* reads as follows:

"146. (1) Subject to subsection (2), upon a question of jurisdiction or upon a question of law and appeal lies from an order of a tribunal made pursuant to section 20, 110 or 128 to the Appellate Division of the Supreme Court of Alberta.

"(2) Leave to appeal shall be obtained from a judge of the Appellate Division upon application made within 30 days after the making of the order or decision of the tribunal sought to be appealed from and upon notices to the parties and to the tribunals affected and upon hearing such of them as appear and desire to be heard, and the costs of the application are in the discretion of the judge.

"(3) Upon leave being obtained the party appealing shall within 10 days after the appeal has been set down, give to the parties affected by the appeal or to the counsel by whom the parties were represented before the tribunal and to the secretary of the tribunals affected, notice in

writing that the case has been set down to be heard in appeal and the appeal shall be heard by the Appellate Division as speedily as practicable.

"(4) The council of the municipality in which a decision is made by an authorized official or a municipal planning commission and which is the subject of an appeal, shall be the respondent at the hearing, notwithstanding that other tribunals may have been affected in accordance with sections 110 and 128."

It will be noted from a perusal of the section that nowhere therein is the applicant expressly required to give a notice of appeal setting out the grounds on which his appeal is based. All he is required to do is to give notice to the persons affected by the appeal that the case has been set down to be heard in appeal, and it is conceivable that circumstances could exist under which the persons affected by the appeal could be left in the dark as to the questions of law or jurisdiction which were to be argued in support of the appeal. It seems, therefore, that leave to appeal should be granted only upon specific questions of law or jurisdiction which should be set out in the order granting leave, and this would eliminate the possibility of an appellant urging, in its application for leave to appeal, certain questions of law or jurisdiction to be determined and upon the appeal itself urging different or additional questions to those upon which the order for leave was granted. Therefore, as a matter of practice, it is my view that the order for leave to appeal should in each case specify those specific questions of law or jurisdiction upon which such leave is granted and that such a practice should be followed in future cases.

However, because of the situation applicable to the present case as outlined above I think the appeal must be dealt with on the basis that leave was granted to appeal on all of those questions of law or jurisdiction which were set out in the appellant's factum and argued on the hearing of the appeal, and I will deal with the matter accordingly.

Those questions of law and jurisdiction may be summarized as follows:

(1) The development control officer and the development appeal board wrongly tried to delegate their duty to decide to others.

(2) The development appeal board refused to consider matters affecting title to the rights of the developer to build upon the site.

(3) Titles to part of the site are dedicated to use as "park land."

(4) Part of the site is in a public works development area.

(5) Part of the site is a public laneway which has not been closed.

(6) The proposed structures will involve building over the right of way of the C.P.R. for which no authority has been obtained.

(7) The board misinterpreted the provisions of the Land Use Classification Guide respecting: (a) Density; (b) Set back; (c) Garages.

(8) The board purported to effect a radical change in the permit before it.

(9) The board received evidence *ex parte* and exceeded its jurisdiction by receiving evidence behind the back of one of the parties.

I propose to deal with these contentions in the order set out above and first I will consider whether the development officer and the development appeal board wrongly delegated or tried to delegate their duty to decide to others.

This contention is based upon the following conditions which were set out in a letter accompanying and incorporated in the development permit as issued by the development officer, and subsequently confirmed so far as the apartment building and parking structure are concerned by the development appeal board, namely:

"Condition No. 2 'The parking layout being to the satisfaction of the traffic engineer.'

"Condition No. 3. 'The adjustment of the shown access points to the site to be to the satisfaction of the City Engineer.'

"Condition No. 5. 'Drainage of the site and the buildings to be to the satisfaction of the City Engineer.'"

Sec. 105 (substituted 1968, ch. 77) of *The Planning Act* provides that a development control bylaw shall authorize the development officer appointed by the municipality to receive, consider and decide on applications for development permits. The development control bylaw No. 2624 provides, in sec. 5, for the establishment of the office of development control officer and that the duties thereof shall be performed by the

chief planner of the city of Edmonton or a subordinate authorized to act for him, and that, in the performance of his duty, the officer shall deal with all applications for development permits. Sec. 7 (3) of the bylaw provides that applications for development permits shall be considered by the development officer who shall approve them, *either unconditionally or subject to conditions* (the italics are mine) or refuse them. Under sec. 128 (5) (substituted 1967, ch. 60) of *The Planning Act* the development appeal board also has the right to impose conditions which it may consider proper and desirable in the circumstances.

A number of cases were cited by the appellant's counsel in support of the argument that the three conditions quoted above amounted to a delegation by the development officer of his decision-making functions, and that the same argument applied to the affirmation and continuance of these conditions by the development appeal board. One of these cases was *Michie v. Rocky View Mun. Dist. No. 44* (1968) 64 WWR 178, a decision of Milvain, J. (now C.J.T.D.). The main question raised in that case was whether the council had delegated its decision-making function when it passed a resolution in the following terms:

"Moved that the Council approve of the development of a feed lot on the N.E. $\frac{1}{4}$ of Section 19-24-2-5 subject to the approval and requirements of the Mount View Health Unit."

This clearly made the granting of the development permit itself subject to the approval of an outside body and, as Milvain, J. pointed out, the effect was to give the Mountview Health Unit practically "carte blanche" in deciding whether or not to grant such approval, the refusal of which could render the permit nugatory.

In *Labour Relations Board of Sask. v. Speers* [1947] 2 WWR 927, affirming [1947] 1 WWR 616 (C.A.), another case cited by the appellant, a labour relations board delegated to an employee the duty of finding as a fact whether or not a trade union represented a majority of employees in a specified bargaining unit. It was the board's function to find this fact and it was held that it could not delegate this duty to another officer, as the finding of fact went directly to the question of the jurisdiction of the board to deal with the application.

Vine v. Nat. Dock Labour Board [1957] AC 488, [1957] 2 WLR 106, was a case where the National Dock Labour Board delegated to a local labour board, as it was entitled to do by the law and regulations by which it was governed, certain

disciplinary powers over a member of the union. The local board purported to delegate such disciplinary powers to a committee of that local board, and it was held that such a delegation was illegal.

In *Vic Restaurant Inc. v. Montreal (City)*, *supra*, the city of Montreal was vested by its charter with power to grant licences for restaurants. However the bylaw passed by the city of Montreal required the prior approval of the director of the police department to the granting of such licences and it was held by the court that, for the council to say that before the licence was issued the director in his discretion might prevent its issue by refusing his approval, was not to fix the terms but was rather an attempt to vest the director with power to prescribe the terms upon which the right to a licence depends and that this amounted to an unlawful delegation of powers vested in the council by the charter.

I think these cases are all clearly distinguishable from the one we have under consideration and cannot be applied thereto. The development officer did not in this case delegate to anyone else the duty of making the decision as to whether or not the permit should be approved. He approved the development permit but prescribed certain conditions to be complied with before the issuance of a building permit, which the developer would have to obtain before commencing construction on the site, and the development appeal board approved and continued these conditions. Both the development control officer and the development appeal board were entitled to impose conditions either under the development control bylaw or *The Planning Act*. The conditions to which objection was taken relate only to certain phases of the construction of the proposed development which would, it appears to me, normally be dealt with by the officials referred to therein. I cannot therefore give any effect to the argument advanced by counsel in this connection.

Next we come to the contention that the development appeal board refused or neglected to consider restrictions on the titles to part of the site making the proposed development illegal, and also other impediments to the development of the site in the manner proposed by the director, arising from the fact that a part of the site is alleged to be dedicated for parkland, that part of the site comprises a lane which must be closed and part of the structure envisaged construction over the railway tracks of the C.P.R.

It is common ground that all of these restrictions and impediments were, in fact, drawn to the attention of the develop-

ment appeal board by counsel for the appellant at the hearings before that board. There is no evidence that the board did, in fact, refuse or neglect to consider these circumstances, but it is clear that the board rejected them as a ground for denying the permit. Let us now examine the nature of these various restrictions and impediments.

First dealing with the restriction of the use of part of the site for parkland. This arises as follows:

Lots 79 to 85 in block 9, plan B, Edmonton were among other properties sold by Hudson's Bay Company to the Calgary & Edmonton Railway Company in 1910 and under date of July 7, 1910 the railway company entered into an agreement with the Hudson's Bay Company that the said lands should be forever thereafter used for railway purposes and that, if any part or parts of the said lands should at any time thereafter cease to be used for railway purposes, the Hudson's Bay Company should have the right to repurchase the part or parts of the said lands not used for railway purposes, together with all mines and minerals, for certain specified prices. Under this agreement the Hudson's Bay Company filed a caveat against the lands in question which still appears on the titles thereto. The rights of the Hudson's Bay Company under this agreement could clearly be waived by the Hudson's Bay Company but there was no evidence before the development appeal board to indicate whether or not such waiver had or would be obtained or whether as a matter of fact it might not have been obtained prior to the hearing.

It also appears from the appeal book that the most easterly 50 feet in perpendicular depth of these same lots were transferred, along with other property, by the Calgary & Edmonton Railway Company to His Majesty the King in the right and to the use of the province of Alberta by transfer dated October 7, 1932 with the following conditions annexed thereto, namely:

"Subject to the conditions which shall be deemed annexed to and to run with the land, that the said land is not to be built on and is to be used for park purposes only."

It seems clear the only portion of the structures originally proposed to be erected by the developer which would involve the easterly 50 feet of lots 79 to 85 was an access ramp from 109th St., intended to serve the office building originally proposed to be erected on the site because the construction of the office structure has been postponed and is not now included in the development permit. This being so, the question of the availability of the parkland appears now to be academic, as

the ramp will not be built under the present development permit.

Thus it does not appear necessary to go at length into the question as to whether or not the condition set out in the transfer could be abrogated by agreement between the Hudson's Bay Company and the C.P.R. as successor to the Calgary & Edmonton Railway Company, or whether this constituted a dedication of the land for public park purposes which could only be abrogated by legislation, in which event the land could possibly revert to the Hudson's Bay Company. See in this connection *Wright and Maginnis v. Long Branch (Village)* [1959] SCR 418, reversing [1957] OWN 278, particularly the remarks of Rand, J. delivering the judgment of the majority of the court at pp. 422 and 423 and other cases therein cited.

However, the plans for the apartment and parking structure filed with the development appeal board do show that the parking structure encroaches by about six feet on the westerly portion of the C.P.R. right of way in lots 79 to 86, block B, and part of this land is subject to the caveat of the Hudson's Bay Company filed under the agreement entitling the latter to repurchase any portions not used for railway purposes. This restriction or right could undoubtedly be waived by Hudson's Bay Company but no evidence was introduced at the hearings before the board that it had been waived or that any approach had been made by the developer or the C.P.R. to the Hudson's Bay Company for such a waiver. In so far as the consent of the C.P.R. to this encroachment is concerned, it is reasonable to suppose that the developer was assured of this, being a subsidiary of that company.

The next point in connection with restrictions or impediments to construction is the fact that the site embraces a portion of a designated but unused city lane and a number of authorities were cited by the appellant to the effect that this lane could not be closed in the interests of the developer only and it must be in the public interests that such a closure be effected. However, it seems to me that secs. 175, 175a and 175b of *The Municipal Government Act*, 1968, ch. 68, as amended, put no restriction on the council of a city in passing bylaws for the purpose of closing the whole or any portion of a lane or public highway and leasing or selling the part so closed, provided that prescribed formalities are complied with when such a bylaw is passed, for instance, notices must be given to persons registered or assessed as the owners of land abutting thereon, giving such persons the opportunity to be

heard, and compensation must be provided for any damages suffered by persons as a result of the closure.

It appears from a letter dated May 15, 1968 from the city commissioners to the appellant's counsel, Ex. G to the affidavit of J. E. L. Cote, that the commissioners proposed to submit a request to council for closure of the lane on May 26, 1968. This letter does not appear to have been produced at the hearing before the development appeal board, at least it is not referred to in its record of the proceedings, but was authorized for inclusion in the appeal book.

I do not think that the decisions of courts in Alberta which were cited in support of the proposition that the city council could not pass the bylaw for the benefit of the developer unless it was in the public interest, the latest of which was delivered in 1907, have any application to the present situation in the light of the extensive provisions of secs. 175, 175a and 175b of *The Municipal Government Act* referred to above.

With regard to the contention that part of the site was within a "Public Works Development Area" it appears that this would only require the consent of the minister to the purpose for which it was to be used and his approval of the design of the proposed structures, and it was obvious from correspondence produced at the hearing that the minister was prepared to grant such a consent.

Dealing with the last contention under this heading, namely, that there was no evidence of permission to construct a structure over the C.P.R. railway tracks, I have pointed out that the plans of the apartment and parking structure as filed with the board do not indicate that any structure comprised in the permit, as now limited, will extend over the tracks.

Before closing my remarks on the subject of these restrictions and impediments to title I feel that I should point out that nowhere in *The Planning Act* or the development control bylaw is either the development control officer or the development appeal board expressly required to inquire into questions of title. It is true that under the development control bylaw the development control officer may require evidence of title to a legal or equitable estate and interest in land comprised in the said site but he is not required or directed to do so, nor is it reasonable to suppose the development control officer, or indeed the development appeal board, should have to go into lengthy and perhaps complicated questions of law as to whether or not construction may or may not be permitted on a site

because of restrictions, conditions or the like. It seems to me that the development appeal board may quite reasonably assume that a developer who proposes to erect a multi-million dollar structure on lands to be comprised in a development permit will not do so if his right to erect it can be successfully challenged by some outside party claiming under building restrictions or other interests in the land in question. It would, in my opinion, be rather unreasonable to expect a developer to spend the money which might be required to obtain perfect legal title or equitable interest in and to the lands to be comprised in the site before finding out whether or not the development he proposes will be permitted under *The Planning Act*.

The development permit is effective for a period of 12 months from the date of its issuance. If construction is not commenced within that period it ceases to be valid. In fact, the development control bylaw provides that the permit is good for only six months but this is in conflict with sec. 107 of *The Planning Act* prescribing that construction must be commenced within 12 months and the latter section probably overrides the provision in the development control bylaw which Mr. Wilson, counsel for the city of Edmonton, conceded on the hearing. Thus, if the developer is not able to get the land together for his site within the period of 12 months that the development permit remains in effect, it is only reasonable to suppose that he will not proceed with the construction thereby authorized.

For the reasons I have stated the arguments advanced by the appellant on the questions enumerated as 2, 3, 4, 5 and 6 above must also fail.

I will now proceed to the contention that the board misinterpreted the Land Use Classification Guide. The appellant alleges that it did so in three respects:

(1) The Land Use Classification Guide allows a development in an R-6 density residential area a maximum density for a development of this nature of 300 persons per acre. The appellant told the board that an inspection of the plans filed with it showed the density of persons to be far in excess of what the Guide allows unless the public lane, railway right of way and parkland were included. However, the board was informed that the density had been calculated by the city planning department in such a manner that the figure reached was acceptable. The board accepted this evidence and it was clearly within its jurisdiction to do so. It is questionable in any event whether the board is bound to observe all of the

provisions of the Land Use Classification Guide, although this is binding upon the development officer. Sec. 128 (3) (c) (added 1968, ch. 77) of *The Planning Act* appears only to require the development appeal board to:

"128 (3) (c) - * * * consider each appeal having due regard to the circumstances and merits of the case and to the purpose, scope and intent of a general plan that is under preparation or is adopted and to the development control or zoning by-law which is in force, as the case may be."

As stated above the Land Use Classification Guide is not part of the development control bylaw and there is no evidence that this development conflicts with the purpose, scope and intent of the general plan.

(2) The appellant contended that the plans filed with the board showed the front yard of the building, which it argued was that part of the site abutting on 110th St., to be less than the Land Use Classification Guide calls for. However, the developer contended that the portion abutting on 97th Ave. in question was really the front yard and the development appeal board obviously accepted this contention, and was acting within its jurisdiction in doing so.

(3) The appellant also argued that part of the structure permitted was from its nature and size a "commercial garage" and that such a development was not allowed in a residential area, such as R-6, but only in commercial areas and only a portion of the lands comprised in the site falls within the latter classification. The developer contended that the parking structure was in fact ancillary to the apartment building and as such was a permitted type of construction and was not to be used for commercial purposes. The board accepted this evidence and I do not think its decision can be questioned on this appeal. While it is true that the original plans called for the construction of a parking structure which could accommodate 625 automobiles, it must be remembered, as was pointed out to the board, that this was in connection with the original plan which envisaged the construction of the office building and the provision of parking ancillary thereto, and it was made clear that it was unlikely that such a large structure would be erected to be appurtenant to the apartment only, although its design might to some extent be governed by the future structures which the developer hoped to be able to erect upon the premises. There was no evidence that the area would, in fact, be operated as a commercial gar-

age or parkade, and the plans of the parking structure as filed make provision only for 481, rather than 625, parking spaces, not an excessive number for a 255-suite apartment.

A further contention of the appellant was that the board permitted a radical amendment in the development permit. It is true that the development control officer approved the structure with an office tower as well as the apartment, and that the development appeal board purported, with the consent of the developer, to amend the permit by deleting the office tower. It is contended that *The Planning Act* and the development control bylaw contain no provisions allowing this and call for the issuance of permits by the development control officer, not by the development appeal board. However, it is pointed out that sec. 128 (5) (substituted 1968, ch. 77) of *The Planning Act* expressly provides that:

"128. (5) In determining an appeal, a development appeal board may

"(a) confirm, reverse or vary the decision appealed from and it may impose such conditions or limitations as it considers proper and desirable in the circumstances * * *."

The variation in the permit did not take the appellant by surprise. It was agreed to at the first hearing before the development appeal board on May 6 and further consideration of the matter was deferred until May 20, at which time argument centred upon the apartment building, the parking structure and things appurtenant thereto, and the office building was not taken into consideration. Therefore no one was prejudicially affected by the amendment or variation of the permit affected by the development appeal board.

The final point that appears to require consideration in this case is the contention that the board heard evidence behind the back of the appellant. What actually occurred was that at the hearing on May 20 the board moved that the application be tabled for one week and that the traffic engineer be invited to appear to explain how the traffic situation in the area would be handled. In other words, all parties were notified or should have been aware that the traffic engineer would be heard on May 27. When the board reconvened on May 27 for this purpose, neither the appellant nor Marathon was represented but Mr. Huffman, the traffic engineer for the city of Edmonton, appeared at the request of the board to explain how the proposed development would fit in with the city's plans for traffic flow in the area in question, following which the motion was passed that the appeal be denied

and that the development permit, in so far as it applied to the apartment building and parking structure, be granted, subject to the original conditions of approval. However, if the appellant had taken the time and trouble to note the purpose of the action of the board on May 20, she would have had an opportunity to attend and to hear the evidence given by Mr. Huffman, and presumably to cross-examine him if she so desired. She either failed to note the purpose of the adjournment or did not take advantage of this opportunity and this cannot be held to be a case where evidence was heard behind her back and *ex parte* by the board. This contention also fails.

Having regard to the foregoing it follows that the appeal must be dismissed and it is unnecessary for me to consider the status of the appellant and any rights that she may have had to advance this appeal as a person affected by the decision of the board, it having been argued by counsel for Marathon that she did not fall into this category.

Before closing I feel that I must say that I found this case most difficult to deal with satisfactorily for the reason that neither the record of the proceedings before the development appeal board nor the documentation of the decision makes it clear that the board was asked to deal with only those portions of the site of the original office tower and apartment complex which were comprised in the site of the apartment house and the parking structure annexed thereto. Much of the argument recorded in the report of the proceeding before the board was directed to the parkland comprised in the easterly 50 feet to 55 feet of lots 79 to 86, registered in the name of the crown, whereas it is apparent from the plans filed that the site of the apartment and parkade does not in any way encroach upon this area, which was only to be affected by the ramp for access to the office tower from 109th St. and the permit, so far as that structure is concerned, was refused. I can only assume that this situation was made clear to the board but it is not apparent from the record, and indeed the board's decision does not specifically indicate a deletion from the site for the apartment and the parkade of the lands which would have constituted the site of the office tower.

Moreover, the argument advanced before the board that the parking structure might be used as a commercial garage which, of course, was denied by Marathon, loses most of its force when a perusal of the plans for the parking structure annexed to the apartment shows that it makes provision for only 481 stalls — probably an appropriate number for an apartment of 255 suites. No reference to this situation appears

in the record of the discussions before the board, although it does appear that Marathon's representative did state that the parkade might not be constructed on the larger scale (625 cars) specified for in the original application.

In fact, much of the information necessary for a complete appreciation of the true situation had to be gleaned from the affidavits filed on the application for leave to appeal to this division, the cross-examinations thereon and certain other material, which by order of Kane, J.A. settling the contents of the appeal book, were directed to be included in the appeal book "for the purpose of determining the evidence before the Development Appeal Board."

For this reason and because I think Marathon's representative could have made the true situation much clearer to all concerned than he appears to have done at the hearing, I would not be prepared to allow any costs of this appeal.

The appeal will accordingly be dismissed without costs to either party.

BRITISH COLUMBIA

COURT OF APPEAL

Before Davey, C.J.B.C., Bull and Nemetz, JJ.A.

Regina v. Palmer

Criminal Law — Possession of Stolen Property — Doctrine of Recent Possession — Charging Jury in Cases Where Doctrine Not Applicable — Exhorting Jury to Unanimity — Principles.

In cases where the doctrine of possession of recently stolen property is not involved there is no duty on the judge to instruct himself, or a jury, that consideration must be given to the question whether any explanation of possession given by the accused might reasonably be true, and the refusal by a trial judge to direct a jury to consider this question is perfectly proper in a case in which the doctrine of recent possession is clearly not applicable. There is no authority for the proposition that the test of whether or not an explanation given by an accused might reasonably be true is not confined to cases of recent possession but extends to all cases of possession of stolen property, whether recently stolen or not; it was only in cases of possession of recently stolen property that a presumption of fact arose in favour of the crown, amounting to a *prima facie* case against an accused so that a burden was cast upon him to explain his possession: *Reg. v. Exall* (1866) 4 F & F 922, 176 ER 850, at 851; *Reg. v. Langmead* (1864) Le & Ca 427, 9

[HIGH COURT OF JUSTICE]

Township of Madoc v. Quinlan et al.

GALLIGAN, J.

16TH JULY 1971.

Municipal law — By-laws — Validity — By-law to regulate public entertainments, festivals and parades — By-law passed to prevent rock festival planned by defendants — Attempt at prohibition under guise of regulation — By-law invalid.

Municipal law — By-laws — Validity — Delegation of authority — By-law to regulate public entertainments, festivals and parades delegating all regulatory powers in area of health protection to medical officer of health — Invalid delegation.

[*R. v. Joy Oil Co. Ltd.*, [1964] 1 O.R. 119, 41 D.L.R. (2d) 291, [1963] 3 C.C.C. 260, 41 C.R. 223, distd]

APPLICATION by a municipality for an interim injunction prohibiting the advertising and holding of a rock festival within the municipality.

B. W. Hurley, for plaintiff.

I. W. Brady, for defendants.

GALLIGAN, J.:—This is an application by the plaintiff to prohibit the defendants from holding a rock festival on or about August 6, 7 and 8, 1971, in the Township of Madoc in the County of Hastings, and for an interim injunction prohibiting various methods of advertising the festival.

The plaintiff is a municipal corporation. The Township of Madoc is a mainly rural community north of the City of Belleville. The defendants, James Quinlan and Margaret Quinlan, are husband and wife and are the owners of farm premises in the township. The defendants, James Quinlan, Jr., and Leon Quinlan, are sons of the previously mentioned defendants and apparently have obtained their parents' permission to hold a rock festival on their parents' farm. The latter two defendants are the organizers and moving spirits of the rock festival.

I should mention that there is, before me, no application to quash certain by-laws to which I will refer shortly. The application is by the municipality seeking an injunction restraining the defendants from violating the provisions of the by-laws. Accordingly, I approach the issue on the basis of deciding whether the plaintiff has a *prima facie* right to the relief claimed and in doing so it is necessary for me to consider the validity and effects of the two by-laws.

The matter is one of particular urgency to the parties involved and, accordingly, I am unable to give as long and

detailed reasons for judgment as I would like to give in the circumstances of this case.

The first by-law that I must consider is By-law 514, which was passed by Council of the plaintiff on April 21, 1971. The by-law is stated to be a by-law to regulate and license the holding of public entertainments, festivals and parades within the Township of Madoc.

Because this is an application for an injunction, which involves the exercise of the Court's discretion, I think it worth mentioning and I think I must take into account that the only inference that I can come to, on the material before me, is that Council passed this by-law to prevent a rock festival planned by these defendants which was to be held in July, 1971. I do not mention this in a critical sense because I am certain that the members of Council were reflecting the opinion of the vast majority of ratepayers in the township and I am certain that that opinion was that the majority of persons in that municipality wanted no part of a rock festival within the municipality.

It is my opinion that the Council of this municipality was given power under the *Municipal Act*, R.S.O. 1960, c. 249 [now R.S.O. 1970, c. 284] to regulate and license only. The *Municipal Act* does not give the Council power to prohibit the holding of such a rock festival even if the vast majority of the inhabitants of the municipality wish that the holding of such a festival be prohibited. It is trite law that a municipal council cannot prohibit under the guise of regulation.

In my opinion, the by-law, as a whole, is an attempt to prohibit under the guise of regulation. It is not my intention to deal specifically with all of the sections of the by-law. For the purposes of my decision I think I need only consider the provisions of s. 3. Section 3 of the by-law requires that the organizers of a festival, such as this, deposit a sum of money to provide for adequate police protection. In this case, the amount demanded was the sum of \$125,000 being apparently the estimated costs of the Ontario Provincial Police to police such a large gathering as is expected. If the ratepayers of this township were legally obligated to pay to the Province the costs of such police protection, then s. 3 might be a reasonable one as there would be no reason why the relatively few ratepayers of the township should have to subsidize to such a large extent a profit-making adventure of the defendants. I have not been referred to any existing statutory provision, or agreement, whereby the plaintiff would have to pay to the Province an amount of approximately \$125,000

or, indeed, any amount to pay for the additional police protection that might be required. If there is no obligation on the part of the municipality to pay that sum I do not see any basis for the requirement of such a deposit. The requirement of such a deposit appears to me to be a stratagem to prevent compliance with the by-law so that a licence could be refused. The amount is so substantial that I am certain that it was well known to Council that the defendants will not be able to pay the amount. This section, in my opinion, appears to be clearly an attempt to prohibit under the guise of regulation.

Mr. Hurley strongly urged that should I come to this conclusion I should consider the by-law as if that section were severed and grant the injunction notwithstanding that I considered the section to be invalid. I have given this suggestion careful consideration but, when I consider that section and all of the circumstances of the case, there is indicated a clear legislative intention to prohibit and I would feel remiss if I exercised the discretion entrusted to me in favour of the plaintiff in these circumstances.

There appear, to me, to be other substantial defects in the by-law which would give me reason to doubt whether I should exercise my discretion in favour of granting the injunction. One of such provisions is s. 4. That section appears to me, in the over-all context of the by-law, to purport to be an illegal delegation of an important part of the regulatory power. Council is given power to regulate a festival but it does not have power to delegate that power in a very vital respect to the medical officer of health. This section appears to be a complete abdication of the power to regulate. Mr. Hurley relies upon the decision of the Court of Appeal in *R. v. Joy Oil Co. Ltd.*, [1964] 1 O.R. 119, 41 D.L.R. (2d) 291, [1963] 3 C.C.C. 260. It is my opinion that the circumstances of the alleged delegation in that case are very different from this. In this case, there is a complete delegation of all power to regulate in the vital area of health protection. The delegation here is, in my opinion, so wide that it constitutes an invalid delegation of Council's powers.

It is my view that I should not grant an injunction to prevent the apprehended violation of a municipal by-law when I have serious doubts as to the essential legal validity of that by-law. Accordingly, I will not exercise my discretion to issue an injunction to prohibit apprehended violation of By-law 514.

Mr. Hurley also relies on a zoning By-law 522 which was passed by Council on May 15, 1971, but did not receive Ontario Municipal Board approval until June 24, 1971, over three

weeks after the writ upon which this motion is based was issued. As I have indicated earlier, the whole history of this case indicates, to me, an intention on the part of the Council to block this particular rock festival and, indeed, any other rock festivals within the municipality. I do not think I should exercise my discretion to assist the plaintiff by granting relief under legislation which had no legal validity at the time this action was commenced. Indeed, by the time the approval by the Municipal Board and probably before By-law 522 was even passed by Council, the defendants had already taken steps to make the premises suitable for the purposes of the rock festival and had clearly indicated their intention to use the premises for the purposes of a rock festival. It may well be that by the time this by-law was approved, if not by the time it was passed, that the defendants had established a non-conforming use by the steps that they had taken up to that time.

It has not been established, to my satisfaction, that the plaintiff will sustain irreparable harm if an interim injunction is refused. If any harm does come to the township, as a result of the festival being held, it strikes me that such harm could be adequately compensated for in damages.

The Court, in granting an injunction, grants an extraordinary remedy and it should guard the exercise of its discretion in granting that remedy very carefully. In all of these circumstances of this case I find that I must refuse to exercise my discretion in favour of the plaintiff and the request for an interim injunction is refused. The motion, accordingly, is dismissed with costs in the cause.

Before concluding, there is one matter that I think I should comment upon. My brother Lieff came to a different conclusion than that at which I have arrived in an application which was made to him by this plaintiff to prevent these defendants from holding a rock festival on the same premises in the month of July, 1971. It is with great hesitation that I do not follow the decision which he made at that time because I have such high regard for his opinion. On the proceedings before him, Lieff, J., did not have the benefit of an argument by counsel for the defendants because they appeared, at that time, without counsel. Further, I conceive it my duty to consider the matter of the exercise of my discretion, in these circumstances, independently from his judgment. I have come to the conclusion I have with the greatest deference for the contrary opinion of my brother Lieff.

Order accordingly.

James H. Brooker (*Applicant*)

v.

Attorney General of Canada (*Respondent*)

Court of Appeal, Jackett C.J., Pratte J. and Cameron D.J.—Ottawa, April 3 and 4, 1973.

Public service—Selection of public employees—Constitution of selection boards—Not restricted to public employees—Public Service Employment Act, R.S.C. 1970, c. P-32, secs. 6(1) and (5), 10.

An unsuccessful candidate for a public service appointment moved to set aside the decision of an appeal board rejecting his appeal. He contended that the selection board set up by the Department for the competition was improperly constituted in that one of its members was not a public employee.

Held, the application must be dismissed.

In carrying out its statutory duty under section 10 of the *Public Service Employment Act* to select persons for appointment to the public service, the Public Service Commission may use a selection board as its instrumentality and is not restricted to using public service employees on such boards. Where pursuant to section 6(1) the Commission delegates its selection power to a deputy head or, under section 6(5), a deputy head sub-delegates that power to a person under his jurisdiction, the deputy head or the sub-delegate may also make use of a selection board whose membership is similarly unrestricted.

APPLICATION.

COUNSEL:

M. W. Wright, Q.C., and J. L. Shields for applicant.

I. G. Whitehall and P. Bétournay for respondent.

SOLICITORS:

Soloway, Wright, Houston, Killeen and Greenberg, Ottawa, for applicant.

Deputy Attorney General of Canada for respondent.

JACKETT C.J. (orally)—This is a section 28* application to review and set aside a decision delivered on September 11, 1972, by a board established by the Public Service Commission to conduct an inquiry under section 21 of the *Public Service Employment Act* in respect of an appeal by the applicant in respect of the

James H. Brooker (*Requérant*)

c.

Le procureur général du Canada (*Opposant*)

^a Cour d'appel, le juge en chef Jackett, le juge Pratte et le juge suppléant Cameron—Ottawa, les 3 et 4 avril 1973.

^b *Fonction publique—Sélection des fonctionnaires—Constitution du comité de sélection—Composition non limitée aux fonctionnaires—Loi sur l'emploi dans la Fonction publique, S.R.C. 1970, c. P-32, art. 6(1) et (5), 10.*

^c Un candidat non reçu à un poste de la Fonction publique demande l'annulation de la décision d'un comité d'appel rejetant son appel. Il a soutenu que le comité de sélection constitué par le ministère pour le concours était irrégulier car un de ses membres n'était pas fonctionnaire.

Arrêt: sa demande est rejetée.

^d Dans l'exercice des fonctions que lui confère l'article 10 de la *Loi sur l'emploi dans la Fonction publique* pour choisir les personnes à nommer à des postes de la Fonction publique, la Commission de la Fonction publique peut avoir recours à un comité de sélection et elle n'est pas tenue de limiter sa composition à des fonctionnaires. Quand, en vertu de l'article 6(1), la Commission délègue ses pouvoirs de sélection à un sous-chef ou qu'en vertu de l'article 6(5), ce dernier les délègue à son tour à une personne sous son autorité, le sous-chef ou cette personne peuvent aussi avoir recours à un comité de sélection dont la composition est tout aussi libre.

^e DEMANDE.

AVOCATS:

M. W. Wright, c.r., et J. L. Shields pour le requérant.

I. G. Whitehall et P. Bétournay pour l'opposant.

PROCUREURS:

^h Soloway, Wright, Houston, Killeen et Greenberg, Ottawa, pour le requérant.

Le sous-procureur général du Canada, pour l'opposant.

ⁱ LE JUGE EN CHEF JACKETT (oralement)—Il s'agit d'une demande, présentée en vertu de l'article 28*, tendant à l'annulation d'une décision rendue le 11 septembre 1972 par un comité constitué par la Commission de la Fonction publique pour mener une enquête en vertu de l'article 21 de la *Loi sur l'emploi dans la Fon-*

appointment or proposed appointment¹ of the successful candidate in a competition for the position of Assistant District Superintendent of Education in the Department of Indian Affairs and Northern Development at London, Ontario.

The ground for the application that was relied on at the hearing is that the appointment or proposed appointment is based on an eligible list established as a result of a report by a selection board set up by the Department in question for the competition in question and that such selection board was improperly constituted because one of its members was not an employee of the Federal Public Service.

As a background to understanding the point, it is sufficient to recall

(a) that, under the *Public Service Employment Act*, R.S.C. 1970, c. P-32, the exclusive right and authority to make appointments to or from within the Public Service, with exceptions that are immaterial here, is vested in the Public Service Commission (section 8) and that such appointments must be based on "selection according to merit" by competition or otherwise (section 10),

(b) that the Public Service Commission may, for the purpose of the process leading up to the "selection" in question, establish selection or rating boards as its instrumentalities to aid it in carrying out that statutory function,² and

(c) that a "deputy head" or a person under his jurisdiction may be authorized to exercise and perform any of the powers, functions and duties of the Public Service Commission³ (section 6).

The provisions in question read as follows:

8. Except as provided in this Act, the Commission has the exclusive right and authority to make appointments to or from within the Public Service of persons for whose appointment there is no authority in or under any other Act of Parliament.

tion publique sur l'appel interjeté par le requérant contre la nomination, effective ou envisagée,¹ du candidat reçu au concours pour le poste de directeur adjoint des services d'éducation du ministère des Affaires indiennes et du Nord canadien pour le district de London (Ontario).

A l'audience le requérant a soutenu à l'appui de sa demande que cette nomination effective ou envisagée se fonde sur une liste d'admissibilité établie à la suite du rapport du comité de sélection constitué par le ministère pour le concours en question, et que ce comité de sélection a été constitué illégalement parce que l'un de ses membres n'était pas un employé de la Fonction publique fédérale.

Il y a lieu de rappeler certains faits pour faire comprendre la question en litige:

a) en vertu de la *Loi sur l'emploi dans la Fonction publique*, S.R.C. 1970, c. P-32, la Commission de la Fonction publique possède de façon exclusive, sous réserve de quelques exceptions qui sont ici sans intérêt, le droit et l'autorité de nommer à des postes de la Fonction publique des personnes qui sont déjà membres de la Fonction publique ou qui n'en font pas partie; ces nominations doivent être faites selon «une sélection établie au mérite» à la suite d'un concours ou autrement (article 10),

b) pour permettre la «sélection» en question, la Commission de la Fonction publique peut établir des comités de sélection ou des jurys d'examen, qui constituent ses intermédiaires dans l'exercice de ses compétences,² et

c) un «sous-chef» ou une personne placée sous son autorité peut être autorisée à exercer l'un des pouvoirs, fonctions ou devoirs de la Commission de la Fonction publique³ (article 6).

Les dispositions en question se lisent comme suit:

8. Sous réserve de la présente loi, la Commission possède de façon exclusive le droit et l'autorité de nommer à des postes de la Fonction publique des personnes qui sont déjà membres de la Fonction publique ou qui n'en font pas partie, dont aucune autre loi du Parlement n'autorise ou ne prévoit la nomination.

10. Appointments to or from within the Public Service shall be based on selection according to merit, as determined by the Commission, and shall be made by the Commission, at the request of the deputy head concerned, by competition or by such other process of personnel selection designed to establish the merit of candidates as the Commission considers is in the best interests of the Public Service.

6. (1) The Commission may authorize a deputy head to exercise and perform, in such manner and subject to such terms and conditions as the Commission directs, any of the powers, functions and duties of the Commission under this Act, other than the powers, functions and duties of the Commission in relation to appeals under sections 21 and 31 and inquiries under section 32.

(5) Subject to subsection (6) a deputy head may authorize one or more persons under his jurisdiction to exercise and perform any of the powers, functions or duties of the deputy head under this Act including, subject to the approval of the Commission and in accordance with the authority granted by it under this section, any of the powers, functions and duties that the Commission has authorized the deputy head to exercise and perform.

What the applicant says, as I understand it, is that, where there has been a delegation by the Commission to the appropriate deputy head, of a power related to the making of an appointment to a Public Service position, that power must be exercised by the deputy head himself or by some person under his jurisdiction to whom he has duly delegated such power and, based on that self-evident proposition, the argument proceeds that, if a person who is not under the jurisdiction of the deputy head has served on a selection or rating board, that board was improperly constituted and the resultant "selection" is invalid. This can only be so if a member of a selection or rating board, as such, exercises powers of the Public Service Commission that can only be exercised if he has been authorized to exercise or perform powers, functions or duties of the Commission under section 6 or some other provision of the same kind. This, in effect, as I understand it, is the applicant's case.

To test the applicant's position, consideration must be given first to the position under the statute in a case in which the Commission itself exercises the appointing power. The relevant

10. Les nominations à des postes de la Fonction publique, faites parmi des personnes qui en sont déjà membres ou des personnes qui n'en font pas partie, doivent être faites selon une sélection établie au mérite, ainsi que le détermine la Commission. La Commission les fait à la demande du sous-chef en cause, à la suite d'un concours, ou selon telle autre méthode de sélection du personnel établie afin de déterminer le mérite des candidats que la Commission estime la mieux adaptée aux intérêts de la Fonction publique.

6. (1) La Commission peut autoriser un sous-chef à exercer, de la manière et aux conditions qu'elle fixe, tout pouvoir, fonction et devoir que la présente loi attribue à la Commission, sauf les pouvoirs, fonctions et devoirs que la Commission détient en ce qui concerne les appels prévus aux articles 21 et 31 et les enquêtes prévues à l'article 32.

(5) Sous réserve du paragraphe (6), un sous-chef peut autoriser une ou plusieurs personnes placées sous son autorité à exercer l'un des pouvoirs, fonctions ou devoirs que lui confère la présente loi, y compris, sous réserve de l'approbation de la Commission et en conformité de l'autorité par elle attribuée en vertu du présent article, l'un des pouvoirs, fonctions et devoirs que la Commission a autorisé le sous-chef à exercer.

Si j'ai bien compris l'argument du requérant, ce dernier soutient que, lorsque la Commission a délégué au sous-chef concerné un pouvoir se rapportant à la nomination à un poste de la Fonction publique, ce pouvoir doit être exercé par le sous-chef lui-même ou par une personne placée sous son autorité à laquelle il a dûment délégué ce pouvoir; de cette affirmation évidente par elle-même, le requérant conclut que si l'on a nommé au comité de sélection ou au jury d'examen une personne qui n'est pas sous l'autorité du sous-chef, ce comité ou ce jury est illégalement constitué et la sélection qu'il a effectuée est nulle. Il ne peut en être ainsi que si un membre d'un comité de sélection ou d'un jury d'examen exerce en cette qualité des pouvoirs appartenant à la Commission de la Fonction publique qu'il ne peut exercer qu'en vertu d'une autorisation d'exercer les pouvoirs et fonctions ou d'accomplir les devoirs de la Commission, donnée conformément à l'article 6 ou à quelque disposition similaire. Voilà, telle qu'elle m'apparaît, la thèse du requérant.

Pour apprécier la valeur des arguments du requérant, il convient d'examiner d'abord les dispositions législatives visant le cas où c'est la Commission elle-même qui exerce le pouvoir de

provision⁴ is section 10 of the *Public Service Employment Act* which, in so far as relevant, reads as follows:

10. Appointments . . . shall be based on selection according to merit, as determined by the Commission, and shall be made by the Commission . . . by competition or by such other process of personnel selection designed to establish the merit of candidates as the Commission considers is in the best interests of the Public Service.

As I read this, there must be

(a) first, a "selection according to merit, as determined by the Commission", and

(b) second, an appointment by the Commission based on that "selection".

The question here is not *how* that "selection" process may be carried on. The section is clear that it may be carried on by competition or by such other process of personnel selection designed to establish the merit of candidates as the Commission considers in the best interest of the Public Service. The question here is, rather, *by whom* can the mechanics of such process be carried on. The "selection" must be "determined" by the Commission and what is raised for consideration here is what agencies or instrumentalities, if any, are available to the Commission for the purpose of carrying on the competitions or other processes of personnel selection that must be utilized to put it in a position to determine a "selection".

To begin with, I think it must be clear that Parliament did not have in mind that the Commission itself, which consists of only three members,⁵ would personally run every competition and personally carry on the mechanics of each of the other processes of personnel selection that might be adopted. Obviously, the size of the Public Service when the *Public Service Employment Act* was adopted in 1967 was such that Parliament must have intended that those three members utilize the services of a very large number of other persons in the selection processes. If this were otherwise in doubt, it is

nomination. La disposition applicable⁴ est l'article 10 de la *Loi sur l'emploi dans la Fonction publique*, dont les passages pertinents se lisent ainsi:

10. Les nominations à des postes de la Fonction publique, faites parmi des personnes qui en sont déjà membres ou des personnes qui n'en font pas partie, doivent être faites selon une sélection établie au mérite, ainsi que le détermine la Commission. La Commission les fait à la demande du sous-chef en cause, à la suite d'un concours, ou selon telle autre méthode de sélection du personnel établie afin de déterminer le mérite des candidats que la Commission estime la mieux adaptée aux intérêts de la Fonction publique.

Cet article me paraît exiger

a) premièrement, une «sélection établie au mérite, ainsi que le détermine la Commission», et

b) deuxièmement, une nomination par la Commission, fondée sur cette «sélection».

La question en l'espèce n'est pas de savoir *comment* est organisée la procédure de «sélection». L'article indique clairement que cette sélection peut être effectuée par concours ou selon telle autre méthode de sélection du personnel permettant de déterminer le mérite des candidats que la Commission estime la mieux adaptée aux intérêts de la Fonction publique. La question consiste bien plutôt à savoir *qui* peut appliquer cette procédure. La «sélection» doit être «déterminée» par la Commission; ce que nous devons analyser ici est la nature des agents ou des intermédiaires auxquels peut éventuellement avoir recours la Commission pour procéder au concours ou appliquer les autres méthodes de sélection du personnel qu'elle doit utiliser pour se mettre en mesure de faire une «sélection».

Dès le départ, il m'apparaît que le Parlement n'avait manifestement pas l'intention de charger personnellement les trois membres de la Commission⁵ de procéder eux-mêmes à chaque concours et d'appliquer eux-mêmes les méthodes de sélection du personnel qu'ils pouvaient éventuellement choisir. Il est évident que l'effectif de la Fonction publique, en 1967, au moment où la *Loi sur l'emploi dans la Fonction publique* a été adoptée, était si considérable, que le Parlement devait nécessairement envisager que ces trois commissaires aient recours aux services de très nombreuses personnes pour procéder à la

made clear by section 12 of the Act, which authorizes the Commission "in determining . . . the basis of assessment of merit in relation to any position" to "prescribe selection standards . . .".

Who, then, was the Commission intended to use for the operation of competitions and other selection processes? A review of the Act does not reveal an express provision for the creation of a branch of the public service to act as the supporting staff for the Commission in connection with the performance of the very onerous duties imposed on it although this is obviously contemplated and such a branch has been created and is the main instrumentality of the Commission for the carrying out of its duties.⁶ What is expressly provided for in the statute is an authority in the Commission to "engage competent persons to assist the Commission in the performance of its duties" (section 5(c)). This I take to be an authority to enter into contracts for services with persons who do not become servants of the Commission. I have no doubt that the Commission can use either its own employees or persons engaged under section 5(c) to carry on the selection processes contemplated by section 10. What is more, I find nothing in the Act or in the spirit of the Act that would restrict the Commission to using only such persons in the selection processes. Certainly, I would consider it an unnecessary fetter on the Commission's powers if it could not invite a knowledgeable public servant in one of the various departments and agencies to be a member of a selection board whether or not his particular department or agency has any interest in the particular appointment. I go further and I express the view that there is no limit on the class of persons whose services can be so utilized provided they can and will serve the objectives of the legislation. It may well be that a person outside the Public Service is able to make a contribution to "selection" for an "appointment" to an important post in the Public Service although, by virtue of his position in the community, it would not be appropriate for him to accept an engagement such as is contemplated by section 5(c) of the Act. I find nothing in the statute to limit the Commission's use of

sélection. Si l'on pouvait encore douter de cette intention, elle ressort clairement de l'article 12 de la loi, qui autorise la Commission «en déterminant . . . le principe de l'évaluation du mérite en ce qui concerne tout poste» à «prescrire des normes de sélection . . .».

Quelles étaient donc, dans l'esprit du législateur, les personnes auxquelles la Commission pouvait avoir recours pour procéder aux concours ou appliquer les autres méthodes de sélection? Un examen de la loi ne fait apparaître aucune disposition prévoyant expressément la création au sein de la Fonction publique d'un service chargé d'aider la Commission à s'acquitter des lourdes responsabilités que lui impose la loi; toutefois, cette possibilité y est manifestement envisagée; ce service a effectivement été créé et constitue l'intermédiaire principal de la Commission dans l'exercice de ses fonctions.⁶ La loi confie par contre expressément à la Commission le pouvoir «d'engager des personnes compétentes qui aideront la Commission dans l'accomplissement de ses fonctions» (article 5(c)). Je pense que cette disposition confère à la Commission le pouvoir de conclure des contrats de louage de services, sans que ses co-contractants deviennent des employés de la Commission. Il me paraît certain que la Commission peut utiliser soit ses propres employés soit des personnes engagées en vertu de l'article 5(c) pour appliquer les méthodes de sélection que vise l'article 10. De plus, ni la lettre, ni l'esprit de la loi n'astreignent la Commission à n'utiliser que ces personnes pour appliquer ses méthodes de sélection. De toute évidence, l'impossibilité pour la Commission d'inviter un fonctionnaire compétent appartenant à l'un ou l'autre des divers ministères ou organismes gouvernementaux à faire partie d'un comité de sélection, que ce ministère ou organisme en particulier soit ou non concerné par la nomination en question, constituerait une entrave inutile aux pouvoirs de la Commission. J'irais jusqu'à déclarer qu'il me paraît n'y avoir aucune limite quant aux catégories de personnes dont on peut utiliser les services à cette fin, pourvu simplement qu'elles soient en mesure et désireuses de promouvoir les buts de cette loi. Il se peut fort bien qu'une personne étrangère à la Fonction publique soit capable d'apporter un concours efficace à la

persons in the selection process by reference to their membership in the Public Service or any other particular class and, in the absence of any compelling reason to imply any such limitation, I am of the view that no such limitation can be implied.

The situation is, of course, that no matter whose services are utilized by the Commission in operating competitions or other selection processes, the resultant "selection" must, in law, be one "determined by the Commission". Whether that must be accomplished by adoption after the selection process has been worked out or can be accomplished alternatively by an adoption in advance is a matter upon which it is not necessary to express any opinion at this time.

What flows from this analysis as far as this matter is concerned is that, while rating or selection boards do play an important part, as a practical matter, in the selection process, they do so as part of the machinery established by the Commission to carry out and perform its powers, functions and duties under the Act. The Commission has not authorized them to exercise or perform its powers, duties or functions but has used them as an instrumentality by which it carries out its statutory functions. This is what occurs whenever responsibilities of comparable magnitude are imposed by statute on a minister or a statutory agency and is a means of exercising statutory powers well recognized by the law.⁷

When, however, we turn to the exercise of the Commission's powers by a deputy head we have a change in the legal position. In such a case, by virtue of section 6(1), the deputy head

«sélection» en vue d'une «nomination» à un poste important de la Fonction publique, même si sa situation à l'extérieur de la Fonction publique ne lui permettrait pas d'accepter un engagement dans les conditions envisagées par l'article 5c) de la loi. Le texte de la loi ne me paraît pas susceptible de limiter la possibilité pour la Commission de recourir aux services de diverses personnes pour l'application de ses méthodes de sélection, ni aux seules personnes faisant partie de la Fonction publique, ni d'ailleurs à quelque catégorie de personnes que ce soit; ne voyant d'autre part aucune raison contraignante de considérer qu'une telle limitation figure implicitement dans la loi, j'estime qu'il n'y a pas lieu de retenir l'hypothèse d'une limitation implicite à cet égard.

Au total, donc, quelles que soient les personnes employées par la Commission pour procéder aux concours ou appliquer d'autres méthodes de sélection, la «sélection» qui en résulte doit, en droit, être une sélection «que détermine la Commission». La question de savoir si cela exige une ratification après que la méthode de sélection a été élaborée, ou s'il est également possible de procéder par ratification à l'avance, ne me paraît pas devoir nécessairement être tranchée pour le moment.

Il ressort de cette analyse que, pour ce qui est de la question en litige, bien que les jurys d'examen ou les comités de sélection jouent en pratique un rôle important dans le processus de sélection, ils ne constituent en cela qu'un rouage du mécanisme créé par la Commission pour exercer les pouvoirs et fonctions et accomplir les devoirs que lui confère la loi. La Commission ne les a pas autorisés à exercer ces pouvoirs ou fonctions ou à accomplir ces devoirs; elle les utilise à titre d'intermédiaires pour exercer ses fonctions. C'est ce qui se passe chaque fois qu'une loi impose des responsabilités d'une telle ampleur à un ministre ou à un organisme gouvernemental; c'est là un moyen, parfaitement valide en droit, d'exercer des pouvoirs d'origine législative.⁷

Toutefois, lorsque c'est un sous-chef qui exerce les pouvoirs de la Commission, la situation juridique change complètement. En vertu de l'article 6(1), le sous-chef est alors autorisé

has been authorized "to exercise and perform . . . powers, functions and duties of the Commission" under the Act. To the extent of such authority⁸ it is the deputy head, and not the Commission, who makes the selections and makes the appointments because he has been vested, under the statute, with the legal authority to do so, even though, just like the Commission, he must seek the aid of others to carry out the mechanics of operating the selection processes. *b*

Similarly, when a person under the jurisdiction of a deputy head exercises the Commission's powers, such person has, by virtue of section 6(5), been authorized "to exercise and perform . . . powers, functions and duties that the Commission has authorized the deputy head to exercise and perform", and, to the extent of such authority, it is such person under the deputy head, and not the deputy head or the Commission, who makes the selections and makes the appointments, because he has been vested, under the statute, with the legal authority to do so, even though, just like the deputy head and the Commission, he must seek the aid of others to carry out the mechanics of operating the selection processes. *c*

If my conclusion that there is no limitation of the kind contended for on the class of persons whose services can be utilized by the Commission when it is operating a competition for an appointment that it is going to make under section 10, I think it follows that there is no such limitation when a deputy head, or a person under a deputy head, is operating a competition for an appointment that he is going to make by virtue of powers conferred on him under section 6. As far as I know, there is no rule of law that any other departmental function must be performed by employees of the department as opposed to persons other than employees performing services under contract or gratuitously;⁹ and I do not know of any rule of law that would make it illegal for a department to make use of the services of persons willing to make available to the government their special abilities by serving on selection boards whether they do it for a fee or gratuitously.¹⁰ *d*

«à exercer tous pouvoirs, fonctions et devoirs que la présente loi attribue à la Commission». Dans la mesure de cette autorisation⁸, c'est le sous-chef et non la Commission qui établit la sélection et fait les nominations, parce qu'en vertu de la loi, c'est lui qui a la compétence de les faire, même si, comme la Commission elle-même, il doit recourir à l'aide d'autres personnes pour appliquer les méthodes de sélection.

Il en est de même lorsqu'une personne sous l'autorité d'un sous-chef exerce les pouvoirs de la Commission; cette personne est autorisée par l'article 6(5) «à exercer l'un des pouvoirs, fonctions et devoirs que la Commission a autorisé le sous-chef à exercer»; et dans la mesure de cette autorisation, c'est cette personne, sous l'autorité du sous-chef, et non le sous-chef ou la Commission, qui établit la sélection et fait les nominations, parce qu'en vertu de la loi, c'est elle qui a compétence pour les faire même si, comme le sous-chef et la Commission, elle doit recourir à d'autres personnes pour appliquer les méthodes de sélection. *e*

Si c'est à bon droit que j'ai conclu que la Commission n'est pas limitée, comme on le prétend, dans le choix des personnes qu'elle désire utiliser lorsqu'elle procède à un concours en vue d'une nomination en vertu de l'article 10, il me paraît s'ensuivre qu'il n'intervient aucune restriction de ce genre lorsqu'un sous-chef ou une personne sous l'autorité d'un sous-chef procède à un concours en vue d'une nomination en vertu des pouvoirs que lui confère l'article 6. Pour autant que je sache, il n'est pas obligatoire que les attributions d'un ministère soient exercées par son personnel, à l'exclusion de personnes étrangères au ministère, qui fourniraient ces services en vertu d'un contrat ou à titre gratuit;⁹ et je ne connais pas de règle juridique interdisant à un ministère d'utiliser les services de personnes désireuses de mettre leur compétence particulière à la disposition de l'État, en siégeant à des comités de sélection ou des jurys d'examen, qu'elles le fassent à titre onéreux ou gratuit.¹⁰ *f*

In my view, the application should be dismissed.

J'estime que la requête doit être rejetée.

* * *

* * *

PRATTE J. and CAMERON D.J. concurred.

LE JUGE PRATTE et LE JUGE SUPPLÉANT CAMERON ont souscrit à l'avis.

* Section 28 of the *Federal Court Act*, subsection (1) of which reads as follows:

28. (1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal

- (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
- (c) 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.

¹ The appeal was brought by letter dated July 18, 1972, which is, in terms, an appeal against the decision taken in the competition. However, it has been treated throughout the proceedings as an appeal under section 21 of the *Public Service Employment Act*, which reads as follows:

21. Where a person is appointed or is about to be appointed under this Act and the selection of the person for appointment was made from within the Public Service

- (a) by closed competition, every unsuccessful candidate, or
- (b) without competition, every person whose opportunity for advancement, in the opinion of the Commission, has been prejudicially affected,

may, within such period as the Commission prescribes, appeal against the appointment to a board established by the Commission to conduct an inquiry at which the person appealing and the deputy head concerned, or their representatives, are given an opportunity of being heard, and upon being notified of the board's decision on the inquiry the Commission shall,

- (c) if the appointment has been made, confirm or revoke the appointment, or
- (d) if the appointment has not been made, make or not make the appointment,

accordingly as the decision of the board requires.

² See *Nanda v. Public Service Commission* [1972] F.C. 277 at page 297.

³ There are exceptions that are immaterial here.

⁴ I have in mind the provisions of the statute concerning the operation of competitions but, in my view, what is

* L'article 28 de la *Loi sur la Cour fédérale*, dont voici le paragraphe (1):

28. (1) Nonobstant l'article 18 ou les dispositions de toute autre loi, la Cour d'appel a compétence pour entendre et juger une demande d'examen et d'annulation d'une décision ou ordonnance, autre qu'une décision ou ordonnance de nature administrative qui n'est pas légalement soumise à un processus judiciaire ou quasi judiciaire, rendue par un office, une commission ou un autre tribunal fédéral ou à l'occasion de procédures devant un office, une commission ou un autre tribunal fédéral, au motif que l'office, la commission ou le tribunal

- a) n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
- b) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier; ou
- c) a fondé sa décision ou son ordonnance sur une conclusion de fait erronée, tirée de façon absurde ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

¹ Le requérant a interjeté appel par une lettre en date du 18 juillet 1972, qui se veut un appel de la décision prise à la suite du concours. Toutefois, cet appel a été considéré à tous les échelons comme un appel en vertu de l'article 21 de la *Loi sur l'emploi dans la Fonction publique*, qui se lit ainsi:

21. Lorsque, en vertu de la présente loi, une personne est nommée ou est sur le point de l'être et qu'elle est choisie à cette fin au sein de la Fonction publique

- a) à la suite d'un concours restreint, chaque candidat non reçu, ou
- b) sans concours, chaque personne dont les chances d'avancement, de l'avis de la Commission, sont ainsi amoindries,

peut, dans le délai que fixe la Commission, en appeler de la nomination à un comité établi par la Commission pour faire une enquête au cours de laquelle il est donné à l'appelant et au sous-chef en cause, ou à leurs représentants, l'occasion de se faire entendre. La Commission doit, après avoir été informée de la décision du comité par suite de l'enquête,

- c) si la nomination a été faite, la confirmer ou la révoquer, ou
- d) si la nomination n'a pas été faite, la faire ou ne pas la faire,

selon ce que requiert la décision du comité.

² Voir l'arrêt *Nanda c. Commission de la Fonction publique* [1972] C.F. 277, p. 297.

³ Cette affirmation comporte certaines exceptions qui sont ici sans intérêt.

⁴ Je n'ignore pas l'existence des dispositions législatives visant le déroulement des concours, mais j'estime que la

involved here is the more general question as to what means are available to the Commission to carry on personnel selection processes generally.

⁵ See section 3 of the *Public Service Employment Act*.

⁶ Members of the public service in such branch may loosely be referred to as employees of the Commission.

⁷ Compare *Local Government Board v. Arlidge* [1915] A.C. 120 at pages 132 et seq.

See also S. A. de Smith's "*Judicial Review of Administrative Action*", Second Edition, at pages 290-92, where there is a review of some of the relevant authorities in a passage reading as follows:

Special considerations arise where a statutory power vested in a Minister or a department of State is exercised by a departmental official. The official is the *alter ego* of the Minister or the department, and since he is subject to the fullest control by his superior he is not usually spoken of as a delegate. (A different analysis must, of course, be adopted where powers are explicitly conferred upon or delegated to an official by a law-making instrument.) The courts have recognised that "the duties imposed on ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case." In general, therefore, a Minister is not obliged to bring his own mind to bear upon a matter entrusted to him by statute but may act through a duly authorised officer of his department. The officer's authority need not be conferred upon him by the Minister personally; it may be conveyed generally and informally by the officer's hierarchical superiors. Whether it is necessary for the authorised officer explicitly to profess to act on behalf of the Minister is not certain. Some matters, however, are so important that the Minister must address himself to them personally. It would appear that orders drastically affecting the liberty of the person—e.g., orders for the deportation of aliens, detention orders made under wartime security regulations and perhaps discretionary orders for the rendition of fugitive offenders—fall into this category. Objection to the production of documentary evidence in legal proceedings on the ground that its production would be injurious to the public interest must be taken by the Minister or the permanent head of the department, certifying that personal consideration has been given to the documents in question. It has been said that when a Minister is required to consider an inspector's report on objections to a new town designation order he must in fact genuinely consider the report and the objections, but it is not clear whether in this or other contexts the devolution of these functions upon a senior departmental officer would invalidate the order. Indeed, as has already been pointed out, there seems to be no general rule that Ministers when discharging functions of a judicial character must direct their own minds to the cases before them. Nor is it necessary for a Minister to act personally in the exercise of powers of a legislative character; statutory instruments are in fact signed by senior departmental officials acting under a general grant of authority from the Minister concerned.

question en litige dans la présente affaire est plus générale et porte sur les moyens dont dispose la Commission pour appliquer les processus de sélection des employés.

⁵ Voir l'article 3 de la *Loi sur l'emploi dans la Fonction publique*.

⁶ Le personnel de la Fonction publique qui est rattaché à ce service peut être considéré, sans prétendre à la précision, comme le personnel de la Commission.

⁷ Voir l'arrêt *Local Government Board c. Arlidge* [1915] A.C. 120, pp. 132 et suiv.

Voir aussi l'ouvrage de S. A. de Smith *Judicial Review of Administrative Action*, deuxième édition, pages 290-292, où il analyse la jurisprudence en la matière dans les termes suivants:

[TRADUCTION] Lorsqu'un fonctionnaire d'un ministère exerce un pouvoir conféré par une loi au Ministre ou au ministère, il faut tenir compte de certaines considérations particulières. Ce fonctionnaire est l'*alter ego* du Ministre ou du ministère; puisqu'il est soumis au contrôle de son supérieur hiérarchique, le pouvoir qu'il exerce n'est généralement pas qualifié de pouvoir délégué. (Bien sûr, le problème se pose différemment lorsqu'un texte législatif confère explicitement des pouvoirs à un fonctionnaire ou les lui délègue.) Les tribunaux ont admis que «les devoirs et les pouvoirs attribués aux Ministres sont normalement exercés sous leur direction par les fonctionnaires du ministère. L'administration ne pourrait fonctionner, s'il en était autrement.» Par conséquent, en général, le Ministre n'est pas obligé d'examiner personnellement les questions qui sont de sa compétence en vertu d'une loi: il peut autoriser un fonctionnaire de son ministère à le faire à sa place. Il n'est pas nécessaire que le Ministre accorde lui-même ce pouvoir au fonctionnaire; ce pouvoir peut être accordé au fonctionnaire d'une manière générale et sans formalité par ses supérieurs hiérarchiques. Il n'est pas certain que le fonctionnaire autorisé doit mentionner explicitement qu'il agit au nom du Ministre. Toutefois, certaines questions sont d'une importance telle que le Ministre doit les examiner lui-même directement. Il semble que les décisions affectant la liberté des personnes—c.-à-d. les ordonnances d'expulsion des étrangers, les ordonnances d'incarcération rendues en vertu des règlements de sécurité en temps de guerre et peut-être aussi les ordonnances discrétionnaires pour la remise aux autorités compétentes des criminels en fuite—fassent partie de cette catégorie. Le Ministre ou le chef du ministère doit s'opposer lui-même à la production de documents au cours d'une instance judiciaire, au motif que leur production pourrait être contraire à l'intérêt public; il doit alors certifier qu'il a examiné lui-même les documents en question. On a déjà affirmé que lorsque, dans le cas d'opposition à une ordonnance de désignation d'une ville nouvelle, le Ministre est tenu d'examiner le rapport de l'inspecteur à ce sujet, il doit effectivement examiner lui-même ce rapport et les oppositions; mais il n'est pas certain que, dans ce cas précis ou dans d'autres situations, la délégation de ces fonctions à un haut fonctionnaire du ministère entraînerait la nullité de l'ordonnance. De plus, comme nous l'avons déjà fait remarquer, il ne semble pas qu'il soit de règle que les Ministres doivent examiner eux-mêmes les affaires lorsqu'il s'agit

⁸ It is a part of the scheme of section 6(1) that the Commission, when authorizing a deputy head to exercise its powers, etc., may impose limitations on the authority conferred on the deputy head but it has not been suggested that any limitation so imposed on the authority under consideration in this case is relevant to the decision of this application.

⁹ There may, of course, be special statutory provisions or contracts that I do not know of or do not have in mind but no such special rule has been put forward as applicable here.

¹⁰ It has been suggested, although not in argument, that, having regard to the reason traditionally ascribed for the existence of the Public Service Commission and its predecessors—as a bulwark against political patronage—there is reason for placing limits on the extent to which the departmental officials may use outside help that does not apply to the Public Service Commission itself. The answer to this, as it seems to me, is that Parliament, in providing for a partial return of the recruiting power to the departments has provided expressly for safeguarding machinery both by the power provided to the Commission by subsections (1) and (5) of section 6 to impose limitations on the power returned to the departments and by the review and revocation powers given to the Commission by subsections (2), (3) and (4) of section 6. When Parliament has thus explicitly provided safeguarding machinery, as it seems to me, there is no justification for implying other limitations on the powers returned to the departments.

d'exercer des fonctions de caractère judiciaire. Il n'est pas non plus nécessaire que le Ministre agisse lui-même lorsqu'il exerce des pouvoirs de nature législative; de fait, les textes réglementaires sont signés par des hauts fonctionnaires du ministère, qui agissent en vertu d'une délégation générale de pouvoirs de la part du Ministre concerné.

⁸ D'après l'économie de l'article 6(1), lorsque la Commission autorise un sous-chef à exercer ses pouvoirs etc., elle peut imposer certaines restrictions à l'autorisation qu'elle donne au sous-chef; mais en l'espèce, on n'a pas cherché à prétendre que les restrictions qu'on a effectivement imposées à l'autorité administrative dont nous examinons la décision aient une incidence sur la solution du litige soulevé par cette requête.

⁹ Évidemment, il se pourrait qu'interviennent certaines dispositions législatives ou contractuelles dont je ne connais pas l'existence ou qui ne me viennent pas à l'esprit; mais on n'a pas prétendu qu'une telle réglementation particulière s'applique en l'espèce.

¹⁰ On a donné à entendre, sans en tirer formellement argument, que si l'on tient compte des considérations ayant présidé, selon l'opinion traditionnellement reçue, à la création de la Commission de la Fonction publique et de ses prédécesseurs—c'est-à-dire l'élimination du favoritisme politique—, on serait justifié de mettre certaines restrictions à la possibilité pour les fonctionnaires des ministères de faire appel à des compétences extérieures, restrictions qui ne s'appliqueraient pas à la Commission elle-même. On peut à mon avis répondre à cela que lorsqu'il a prévu la possibilité de rendre aux ministères un certain pouvoir de recrutement, le Parlement a donné expressément à la Commission des moyens de contrôle: d'abord, par les paragraphes (1) et (5) de l'article 6, la faculté d'apporter des restrictions aux pouvoirs délégués aux ministères; et ensuite, par les paragraphes (2), (3) et (4) de l'article 6, des pouvoirs d'annulation et de révocation. Le Parlement ayant ainsi explicitement prévu certains mécanismes de contrôle, il ne me paraît pas justifiable de chercher des restrictions implicites aux pouvoirs rendus aux ministères.

of s. 592(1)(b) may properly be applied: *Chibok v. The Queen* (1956), 116 C.C.C. 241, 24 C.R. 354.

Learned counsel contended that the evidence did not establish that Kaylich intended to keep a "gaming house" as defined by the *Code*. I cannot agree with this contention. I am satisfied that there was evidence upon which a jury could find that Kaylich intended both to keep a gaming-house and to unlawfully sell liquor. It is apparent from the jury's verdict, read in the light of the charge by the learned trial Judge, that the jury found Kaylich intended to commit both offences. While some objection might be taken to the learned trial Judge's charge respecting possible verdicts, such instruction was not prejudicial to the appellant nor can it be said that any substantial wrong or miscarriage of justice occurred and resort may be had to the curative provisions of s. 592(1)(b).

The appeal against conviction will be dismissed.

The appellant also appealed against his sentence. The Crown cross-appealed, alleging the sentence to be inadequate. In view of the public position held by the appellant, the seriousness of the offence cannot be minimized. I am satisfied that in imposing the sentence which he did, the learned trial Judge took all factors into consideration and for that reason the sentence imposed should not be disturbed. There are sound reasons, however, why the sentence imposed should be served in a provincial jail rather than the penitentiary, and to accomplish this, the sentence will be reduced to two years less one day.

Appeal dismissed.

REGINA v. JOY OIL CO. LTD.

*Ontario Court of Appeal, Roach, Aylesworth and Kelly, J.J.A.
August 7, 1963.*

Municipal law — By-laws — Validity — Delegation to Fire Chief of power to direct location and quantities of specified fire-extinguishing equipment and materials — Whether delegation involves administrative powers only.

A municipal by-law declaring that bulk storage facilities for flammable liquids "shall be provided with foam fire-extinguishing

equipment and such quantities of foam-producing materials . . . as may be directed by the Chief of the Fire Department" is not *ultra vires* as involving the delegation of legislative powers. The power of direction conferred on the Fire Chief is an administrative power only. No discretion is vested in him as to the type of equipment or materials to be used and the capacity, location and sufficiency thereof are matters that of sheer necessity must be left to the decision of the Fire Chief as matters of administration.

[*Bridge v. The Queen ex rel. Skalski*, 104 C.C.C. 170, [1953] 1 D.L.R. 305, [1953] 1 S.C.R. 8; *R. ex rel. Fletcher v. Joy Oil Co. Ltd.*, 98 C.C.C. 161, [1951] 1 D.L.R. 632, [1950] O.R. 766; *Russell v. City of Toronto* (1907), 15 O.L.R. 484, *referred to*]

APPEAL from decision of Shea, Co.Ct.J., affirming conviction for breach of municipal by-law.

Joseph Sedgwick, Q.C., for appellant.

M.E. Fram and *J.R.N. Sintzel*, for respondent, informant.

The judgment of the Court was delivered by

ROACH, J.A.:—This is an application by Joy Oil Company Limited for leave to appeal and, if leave be granted, by way of appeal from an order of His Honour Judge Shea, a Judge of the County Court of the County of York, dated June 27, 1960, dismissing with costs its appeal against its conviction on January 31, 1958, by Magistrate Robert Taylor, on the charge that in the month of September, 1957, at the City of Toronto in the County of York it did unlawfully fail to provide property where flammable liquids are stored in bulk storage with foam fire-extinguishing equipment and such quantities of foam-producing materials ready for immediate use as directed by the Chief of the Fire Department, contrary to the provisions of s. 11, c. 22, of By-law 9868 of the Corporation of the City of Toronto as amended.

Section 11 is, in part, as follows:

"Every wholesale storage depot, port terminal, and other property, where flammable liquids are stored in bulk storage shall be provided with foam fire-extinguishing equipment and such quantities of foam-producing materials ready for immediate use as may be directed by the Chief of the Fire Department."

At the relevant time, the appellant owned and had control and possession of two 10,000-gallon storage tanks which, among others, had been erected by it on certain lands on Unwin Ave. in the City of Toronto that had been leased to it by the Toronto Harbour Commission for a term of 21 years, expiring on April 14, 1959. At the relevant time, those tanks were in

use by the appellant for the bulk storage of gasoline, and they were not equipped with foam fire-extinguishing equipment and, not being so equipped, of course there were no foam-producing materials ready for immediate use there.

On May 2, 1957, Mr. Roy Brown, the informant, who is an Assistant Fire Marshall in the employ of the City of Toronto Fire Department, inspected those tanks and found that they were not so equipped.

On May 13, 1957, a written notice, signed by the Chief of the Fire Department, was served on the appellant, reading as follows:

"Re: Oil Storage Tanks
— 400 Unwin Avenue, Toronto.

Under City of Toronto By-law Number 9868, Chapter 22, Section 11, every wholesale storage depot, port terminal and other property where flammable liquids are stored in bulk storage, shall be provided with foam fire extinguishing equipment, and such quantities of foam producing material ready for immediate use as may be directed by the Chief of the Fire Department. Your outdoor storage tanks located on the property at the above address are without foam fire extinguishing equipment, and my direction to you is, that a fixed foam discharge outlet installation be provided on all tanks used for storage of flammable materials. My requirements for such an installation are embodied in section 111 of the enclosed National Board of Fire Underwriters Pamphlet No. 11, which I have marked for your reference. As these tanks are now in use in contravention of these requirements, I must ask that the required equipment be provided without delay. Will you please advise as to what action you take in the matter."

Enclosed with the notice was the pamphlet referred to, which is entitled, "Standards of the National Board of Fire Underwriters for Foam Extinguishing Systems As Recommended By The National Fire Protection Association". Across the front of this pamphlet, written in red ink, is the following: "Please Note Section 111, Pages 17 to 22 inclusive".

In this Court, three submissions were made on behalf of the appellant.

First, it was submitted that the direction contained in the notice was not sufficient. That submission was directed to what is contained in s. 111 of the pamphlet. It was urged that

what is contained therein is expressed in part in technical language not readily understood by the untutored. I would not give effect to that submission. A "fixed foam discharge outlet" is defined in the pamphlet as, "A device permanently attached to a tank by means of which foam is introduced into the tank", and it is clear from what follows that it is so introduced by piping or hose from or through which foam is directed onto the surface of the liquid in the tank at not less than minimum rates of discharge depending on the type of flammable material in the tank and the area of the surface. It is clear from the evidence of Mr. Austin, of the defendant company, who, it would appear, was in charge of such matters as this for the company, that the omission of the company to install the equipment as directed was not because what was contained in the pamphlet was not understood by him but because of the expense involved in its installation and because he thought that some other oil companies with bulk storage tanks in the same area had not been required to comply with this by-law. The company, through Mr. Austin, had actually obtained prices for the installation of the equipment as specified, so that the submission with respect to the contents of the pamphlet describing the equipment falls rather flat.

On the evidence, I think it can be fairly said that this by-law was being uniformly applied to all companies that had bulk storage tanks in use in that area. Even if it were not, inequalities in enforcement of the by-law would not be a defence to this charge. Those companies that did not have this type of equipment were, as the evidence shows, co-operating with the Fire Chief in making provision for its installation. The defendant, on the other hand, virtually defied the Fire Chief.

Next, it was submitted that the part of the by-law that I earlier quoted is *ultra vires* in that it delegates to the Chief of the Fire Department a power that could only be exercised by the Council. I do not agree with that submission.

I think the words "as may be directed by the Chief of the Fire Department" qualify both the "foam fire-extinguishing equipment" and the "quantities of foam-producing materials ready for immediate use", but I also think that the power of direction thereby conferred on the Fire Chief is an administrative power only and it was competent for the Council to delegate that power to him. Legislatively the by-law is as specific as it could possibly be, having regard to the great variety of conditions or hazards that might arise in the circumstances,

with respect to which the Council was exercising its legislative powers. It specifies that the equipment shall be "foam fire-extinguishing equipment" and the materials shall be "foam-producing materials". Accordingly there is no discretion vested in the Fire Chief as to the type of fire-extinguishing equipment or the materials to be used therein. The capacity and location of that equipment and its efficiency and the sufficiency of the materials will, of course, vary, and are matters that of sheer necessity would have to be left to the decision of the Fire Chief as matters of administration. Reference to *Bridge v. The Queen ex rel. Skalinski*, 104 C.C.C. 170 at p. 179, [1953] 1 D.L.R. 305 at p. 314, [1953] 1 S.C.R. 8 at p. 13; *R. ex rel. Fletcher v. Joy Oil Co.*, 98 C.C.C. 161 at pp. 170-2, [1951] 1 D.L.R. 632 at pp. 641-2, [1950] O.R. 766 at pp. 778-9; *Russell v. City of Toronto* (1907), 15 O.L.R. 484 at p. 505. These are all cases in which powers delegated to municipal officials were held to be administrative only and exercisable by the official as a matter of practicality.

Finally, it was submitted that the by-law failed to specify who should install the equipment. It is implicit in the by-law that the obligation to comply therewith is thereby imposed on the persons or firms in control, as in this case, of the storage tanks and using them for the storage of flammable materials.

For the foregoing reasons, in my opinion this appeal fails and should be dismissed and the conviction affirmed.

Appeal dismissed.

REGINA v. ROMBOUGH (YATES)

Alberta Supreme Court, Riley, J.

June 27, 1963.

Imprisonment — Sentence of 10 years in Federal penitentiary following conspiracy conviction — Accused lodged in provincial common gaol pending appeal — No warrant of committal executed — Habeas corpus proceedings alleging imprisonment illegal and seeking release from detention — Discretion of Court — Cr. Code, s. 681.

Accused, convicted of conspiring to live off the avails of prostitution and sentenced to 10 years' imprisonment at Kingston Federal Penitentiary was lodged, pending her appeal, in a common gaol

My conclusion is that the rule in *Howe v. Dartmouth* has no application either to the 100 shares in Talisman Offices Ltd. or to the unsecured loan, since cl. 8 (g) constitutes, in my opinion, an expression of intention by the testator that the property ought not to be converted. As to the shareholder's loan, I note in particular the power given to the trustees "to augment or diminish the capital employed therein".

The answers to the questions are as follows:

Question 1. (a) No, subject to reservation I have expressed about item 1 in Class A.

(b) No answer is necessary.

Question 2. (a) Classes B, C and D — No. Class E — item 17 — yes, but not to be credited until realization. Items 19 and 23 — No.

(b) Five per cent per annum.

(c) At the date of death.

Question 3. No, as agreed.

ALBERTA SUPREME COURT

[APPELLATE DIVISION]

Johnson, Sinclair and Clement JJ.A.

Alberta Teachers' Association v. Board of Trustees of Edmonton School District No. 7 et al.

Schools and school districts — Deduction from teachers' salaries of Association membership fees by School Board — Imposition by Association of special levy in contemplation of strike — Demand that School Board deduct special levy — Legality of — The Teaching Profession Act, R.S.A. 1970, c. 362, s. 13.

Appeal from the judgment of Milvain C.J.T.D., [1973] 1 W.W.R. 269.
Appeal dismissed.

Appellant had passed a bylaw which empowered it to impose a special levy on its members to be used for the creation of a strike fund; the bylaw provided that the money so collected should "be deemed to be additional membership dues" and the appellant called on respondent Board to deduct the special levy from teachers' salaries, as it deducted the regular membership fees, and remit the money so deducted to the Association, under the authority of s. 13 of The Teaching Profession Act, which reads: "13. Every school board shall deduct the membership fee to the association from the salary of every teacher it employs other than as a superintendent and shall pay the membership fees and furnish a list of teachers in

its employ each month to the association". The Board refused to deduct the special levy and the Association's action to recover money which the Board had refused to deduct was dismissed by Milvain C.J.T.D.

Held, the appeal should be dismissed; the special levy applied only to full-time teachers, whereas the authority conferred by s. 13 applied to every teacher employed, including part-time teachers but excluding superintendents. It followed that the appellant could not invoke s. 13.

Per Johnson J.A.: cl. 9 of the bylaws, purporting to authorize the special levy, was ultra vires and a nullity; there was no authority in the Act for its passing and it was in open defiance of the provisions of the Act.

[Note up with 20 C.E.D. (2nd ed.) *Schools and School Districts*, s. 14.]

P. M. Owen, Q.C. and *C. P. Clarke*, for appellant.

H. L. Irving, Q.C. and *K. F. Bailey*, for respondents.

17th July 1973. JOHNSON J.A.:—I agree that this appeal cannot succeed for the reasons given by my brother Sinclair. However, I do not share his view as to cl. 9 of the General Bylaws of the Association. That clause has been relied upon by the appellant Association as its authority to pass the by-law in question. The learned trial Judge did not decide upon the validity of this clause, putting his judgment on a narrower ground [[1973] 1 W.W.R. 269]. I think that it is necessary to determine if this clause of the bylaw could validly be passed.

It is axiomatic that the power to pass bylaws is limited by the provisions of the Act creating and governing the corporate body. To make doubly sure that this applied to The Teaching Profession Act, R.S.A. 1970, c. 362, the words "by-laws not inconsistent with the provisions of this Act or any Act or regulation of the Province" were inserted in the opening sentence of s. 8, the section which enumerated the subjects concerning which bylaws could be passed at general meetings of the Association.

That section is:

"8. The association in general meeting may pass by-laws not inconsistent with the provisions of this Act or any Act or regulation of the Province concerning . . .

"(d) the maintenance of the association and the fixing and collection of annual and other fees",

and s. 12 reads:

"12. Every active, associate and student member shall pay such fees as may be fixed by by-law."

It is clear that the only way that membership fees could be fixed was by bylaw at a general meeting of the Association. This was recognized by cl. 7(1) of the General Bylaws of the Association:

"(1) The fees for membership in the Association shall be those recommended by the Provincial Executive Council and prescribed from time to time by a two-thirds majority vote of the Annual Representative Assembly",

and in cl. 7(2) to (6) membership fees are set for the various classes of membership.

Clause 9 of these bylaws is a complete departure from this procedure, for it delegates to the executive the power to legislate concerning the fixing of fees which, while they are not membership fees, are "deemed" to be so by this clause. No authority for passing this bylaw is found in the Act and it is in open defiance of the provisions of the Act.

Section 8(g) of the Act was relied upon:

"8. The association in general meeting may pass by-laws not inconsistent with the provisions of this Act or any Act or regulation of the Province concerning . . .

"(g) all such other matters as are considered necessary or convenient for the management of the association and the promotion of its welfare or the conduct of its business."

This is not unlike the "good government clauses" found in Municipal Acts. Locke J. in *Vic Restaurant Inc. v. Montreal*, [1959] S.C.R. 58 at 76, 17 D.L.R. (2d) 81, points out that where specific authority in respect of a matter is given to a body, such a clause does not enlarge the power given by it, and he specifically refers to the delegation of authority to implement the powers that are given by the Act.

Clause 9 of the General Bylaws, being beyond the powers of the Association to enact, it is a nullity, and cannot be validated by the resolution that purported to do so. That resolution, because it seeks to retroactively impose a liability when no previous liability existed, is also bad for that reason.

SINCLAIR J.A.:—The appellant ("the Association") appeals from a judgment of Milvain C.J.T.D. [[1973] 1 W.W.R. 269]. The issue involves the obligation, if any, of the respondent School Boards to deduct from the salaries of certain of their teachers, and to remit to the Association, a special levy made by the latter's provincial executive council ("the council").

The obvious purpose of the levy was to maintain a strike fund. The learned trial Judge held in favour of the Boards.

While three School Boards are concerned with the proceedings, the evidence, which is not in dispute, relates only to the Board of Trustees of Edmonton School District No. 7 ("the Board"). It is agreed that any decision relating to the Board will apply to the others. The amount of damages, if such are awarded, is left for future determination.

Before referring precisely to the matters in issue, let me describe generally the statutory relationship that exists between school boards, teachers and the Association.

The Association is established by The Teaching Profession Act, R.S.A. 1970, c. 362 ("the Act"). Generally speaking, school boards can only employ teachers who are active members of the Association. Members must pay fees to the Association. The Association is also a trade union, since The School Act, R.S.A. 1970, c. 329, provides that The Alberta Labour Act, R.S.A. 1970, c. 196, applies to boards and teachers. Indeed, the bylaws of the Association provide that it is the bargaining agent for its active members. By a check-off procedure boards must deduct and remit the amount of the membership fees to the Association. It is in this context of labour relations, if you will, that the question in issue arises. Having regard to the objects of the Association, there can, in my view, be no question but that the use by it of fees for the maintenance of a strike fund is perfectly proper.

The dispute has as its origin the following resolution passed by the Council on 3rd April 1971:

"THE CALGARY PUBLIC SCHOOL DISPUTE

"The question of institution of a supplementary levy in event of a strike in the Calgary Public School Dispute had been referred to the table officers.

"VAN ORMAN -- resolved, that all School Boards be notified on the second school day of the strike of a \$10.00 supplementary levy and that, when the strike terminates, they be notified to discontinue this levy, with the effective date of the discontinuance to be such that one week's salary is collected for each two days' duration of the strike. *Carried.*

"WOOLSEY -- Resolved, that, in the event that the strike lasts only one school day, the School Board should be notified of a one-time only additional fee of \$5.00. *Carried.*"

An Annual Representative Assembly, as the Association's annual general meeting is called, was held 12th, 13th and 14th April 1971, but the question of the supplemental levy was not considered by it.

On 22nd April the Association sent to the Board a letter saying:

"This will advise you that, effective as of April 22, 1971, The Alberta Teachers' Association fees for all full time teachers have been increased in the amount of \$10.00 per member per week. The \$10.00 per member per week is in addition to the present fee schedule which you have on file.

"This increase will remain in effect until further notice and is authorized according to by-laws of the Association which have been approved and registered as required by *The Teaching Profession Act*.

"We expect that, if possible, first deductions should be made from the April cheques or failing that from the May cheques paid to your full time teaching staff."

A further letter was sent by the Association to the Board on 27th April:

"This is to advise you that the increase in fees as outlined in our letter of April 22, will be discontinued at the end of 1½ weeks.

"The total amount to be deducted from full-time teachers, in addition to regular fees, will then be \$15.00. If you have made a deduction from the April pay cheques, only the balance, to a maximum of \$15.00, will be deducted from the May cheques.

"Once again may we outline the authority we have for making these deductions. Section Nine of *The Teaching Profession Act* gives the Association the right to affix and collect annual and other fees. Section 13 of the same *Act* makes it mandatory for school boards to deduct a membership fee and remit it to the Association. In addition to this the Association's bylaws set regular and special fees of which this latter is an example."

The Board refused to deduct or remit the levy, taking the position that it was not authorized to do so.

No effort was made by the Association itself to collect the levy from its members, nor did non-payment of the levy affect their status as members.

At the Annual Assembly held about a year later, the Association passed a resolution purporting to ratify the imposition by the council of the levy.

The resolution of the appeal turns largely around the interpretation to be given to a number of sections of the Act, and of bylaws passed by the Association.

The Act

"5. (1) Subject to this section the employment of a teacher by a school board, other than as a superintendent, is conditional upon the teacher being and continuing to be an active member of the association.

"(2) When a school board employs a teacher, other than as a superintendent, the board shall notify the association in writing of the name of the teacher, the date of commencement of employment and the amount of salary to be paid, and notwithstanding subsection (1), the employment of the teacher by the school board is valid until the association notifies the school board in writing that the teacher is not an active member.

"(3) When a teacher who is employed by a school board, other than as a superintendent, ceases to be an active member, the board may continue to employ the teacher until the association notifies the board in writing that the teacher is not an active member.

"6. (1) The membership of the association is composed of active, associate, life, honorary and student members.

"(2) Only teachers who are employed by school boards, other than as superintendents, may be active members of the association.

"(3) The association may grant associate membership to any person who meets the conditions prescribed by the by-laws.

"(4) The association may grant life memberships to retired teachers under such conditions as may be prescribed by by-law.

"(5) The executive council may confer honorary membership in the association on any person.

(6) Students who are enrolled in full-time courses of study above high school level either leading to or after first certification as teachers in the Province may become student members of the association under such conditions as may be prescribed by by-law.

"7. (1) Active members have the right to vote and to hold office in the association and are subject to the provisions of this Act and the by-laws.

"(2) Associate members have the right to vote and to hold office in the association but are not subject to the disciplinary provisions contained in this Act or the by-laws.

"(3) Life, honourary and student members do not have the right to vote or to hold office in the association and are not subject to the disciplinary provisions contained in this Act or the by-laws.

"8. The association in general meeting may pass by-laws not inconsistent with the provisions of this Act or any Act or regulation of the Province concerning

"(a) the election of the executive council and officers of the association,

"(b) the formation, government, management and dissolution of local associations,

"(c) the management of its property and affairs and its own internal organization and administration,

"(d) the maintenance of the association and the fixing and collecting of annual and other fees,

"(e) the time, place and conduct of the annual and other meetings of the association,

"(f) standards of professional conduct, a code of ethics and the establishment of a discipline committee and the discipline of members for breaches of such standards, and

"(g) all such other matters as are considered necessary or convenient for the management of the association and the promotion of its welfare or the conduct of its business . . .

"12. Every active, associate and student member shall pay such fees as may be fixed by by-law.

"13. Every school board shall deduct the membership fee to the association from the salary of every teacher it employs other than as a superintendent and shall pay the membership fees and furnish a list of teachers in its employ each month to the association."

Bylaws

Bylaws were passed by the Association, and registered 4th January 1971 under The Regulations Act, R.S.A. 1970, c. 318:

"3. (1) Active membership in the Association shall be determined by the provisions of The Teaching Profession Act.

"(2) The following persons are eligible to become associate members of the Association by applying personally and by paying the prescribed fee. [Then follow 12 categories, including superintendents, teachers in public service, at universities and so on.]

"7. (1) The fees for membership in the Association shall be those recommended by the Provincial Executive Council and prescribed from time to time by a two-thirds majority vote of the Annual Representative Assembly.

"(2) Until varied pursuant to Bylaw 7(1) the fees payable by an active member shall be computed upon the following basis: where the annual salary of a member does not exceed \$5,000 - \$6.50 per calendar month or \$78.00 per annum, where it exceeds \$5,000 - \$7.50 per calendar month or \$90.00 per annum.

"(3) In addition to the fees prescribed in the schedule in subsection (2) hereof, a member of a local shall be required to pay such fee as the local of which he is a member may determine.

"(4) The monthly fee for a substitute or a part-time teacher shall be assessed at the rate of one percent (1%) of such teacher's total earnings for the month, providing that no fee shall be assessed in cases where a teacher's gross monthly earnings are less than one hundred dollars (\$100).

"(5) The fee payable by an associate member shall be twelve dollars (\$12.00) per annum.

"(6) The fee for a student member shall be \$10.00 per annum . . .

"9. Notwithstanding anything in these bylaws otherwise contained, in any case in which, in the opinion of the Provincial Executive Council, an emergency exists, the Provincial Executive Council may levy upon and collect from all members, except recipients of money from the special emergency fund, an additional assessment not exceeding \$10 per week per member. During the continuance of the emergency and for so long thereafter as the Provincial Executive Council deems advisable, the assessment determined upon may continue to be levied and collected. Money so collected shall be deemed to be additional membership dues and shall be added to the special emergency fund to be disbursed from time to time in such

manner and to such persons as the Provincial Executive Council in its discretion may determine."

The question to be decided is whether, in the present circumstances, the supplementary levy was covered by s. 13. If it was, the Board would have been obliged to make the check-off. The learned trial Judge held that the section did not apply. I agree with that finding, but for different reasons.

To me, the key to the problem lies in the fact that the supplementary levy was clearly intended to apply only to full-time teachers. Section 13 of the Act requires the Board to deduct the membership fee from the salary of "every" teacher it employs other than as a superintendent. The section is obviously tied in with s. 5, which provides that the employment of a teacher by a school board, other than as a superintendent, is conditional upon the teacher being an "active member" of the Association, and with s. 6(2), which says that only such teachers may be active members.

It is clear that the Board employs part-time and substitute teachers who are obviously not full-time teachers, but who, by virtue of their being employed by the Board as teachers, are nevertheless active members of the Association. The Board's obligation under s. 13, as I have said, requires it to deduct and to remit the membership fee from the salary of *every* teacher it employs (other than as a superintendent). Even if the supplementary levy could be characterized as a membership fee, it clearly was not intended to be applied to every teacher employed by the Board, and, for that reason, in my opinion the check-off provided by s. 13 cannot be invoked by the Association.

Bylaw 9 was relied upon by the Association as giving to the supplementary levy the character of a membership fee. The learned trial Judge rejected this argument, on the basis that the bylaw provides that only money "collected" shall be deemed to be additional membership dues, and that, in fact, as nothing had been collected, bylaw 9 was inoperative.

Were the bylaw otherwise applicable, I would not myself place such a restrictive interpretation upon it. However, as I see it, the bylaw affords no help to the Association for another reason. It provides that in a case of emergency the council may levy upon and collect an additional assessment "from *all* members, except recipients of money from the special emergency fund". (The italics are mine.) Again, since the supplementary levy was only to apply to full-time teachers (other than those employed by the Calgary Public School Board), and

thus to a group which did not even constitute all of the active members of the Association, I believe the levy to have been invalid.

For these reasons, I am of the opinion that the Board was not bound by s. 13 of the Act to deduct the supplementary levy from the salary paid to its full-time teachers, and to turn it over to the Association.

The Board also takes the position that bylaws fixing fees must be enacted by the Association in general meeting, and, for that reason, the purported delegation by the Association of its fee-fixing power to the council under bylaw 9 is ultra vires and void. The point is important, and I propose to deal with it. I do not intend to consider this aspect of the appeal in the light of the present wording of bylaw 9 which, as I have said, in the circumstances of the present case, is ineffective to trigger the Board's check-off obligation under s. 13 of the Act. I prefer to deal with the question on a broader basis.

The fee-fixing powers of the Association are to be found in two sections of the Act, ss. 8 and 12. I shall deal first with s. 12. It says that every active, associate and student member shall pay such fees as may be fixed by bylaw. I consider that to be the basic section, imposing, as it does, on every member in each of three categories the obligation to pay such fees as may be *fixed* by bylaw. So far as concerns the question at hand, it is the meaning to be ascribed to the word "fixed" that is fundamental. An examination of leading dictionaries and collections of words and phrases judicially considered discloses that the word "fix" has been given many meanings, usually depending upon the statutory context in which it was used. As a useful guide, I adopt what was said by Dixon J. in *Fraser Henleins Proprietary Ltd. v. Cody; Crowther v. Cody* (1945), 70 C.L.R. 100 at 128:

"It may be conceded, and, indeed, it appears to have been decided, that a bare power to 'fix' a price cannot be validly exercised without naming a money sum, or prescribing a certain standard by the application of which it can be calculated or ascertained definitely. Otherwise the price is not 'fixed.'"

The second section of the Act which has to do with fees, s. 8, provides, by subs. (d), that the Association, in general meeting, may pass bylaws not inconsistent with the provisions of the Act concerning the maintenance of the Association and the fixing and collecting of annual and other fees. I consider s. 8 to be complementary to s. 12 in the sense that it vests in the Association the power, to be exercised in general meeting,

of fixing the fees that its members are required to pay by virtue of s. 12. The fees that may so be fixed are "annual and other fees".

It is, therefore, left to the Association, in general meeting, to establish the types of fees that it considers necessary for its purposes, provided that one of the fees is an "annual" fee. The Act does not say that the membership fee must be an "annual" fee. The only reference in the Act to the "membership fee", as such, is that contained in s. 13, the "check-off" section.

In my opinion the Association has the power, by bylaw enacted at a general meeting, to establish, as a special fee, or as an element of its membership fee, a levy of the kind envisaged by bylaw 9. Provided a specific sum is mentioned, or a formula is employed by means of which the levy can be calculated precisely, and there is a mechanism, such as a decision of the Council, prescribed for its implementation, I consider such a fee to be "fixed" by the Association.

I do not think it necessary to deal with the interesting proposition put forward by the Association to the effect that the Board had no status to assert that the supplementary levy was ultra vires. In my opinion, it was the Board's duty to ensure that what it was called upon to do in this instance was authorized by s. 13, for otherwise it had no power to deduct the membership fee from the salary paid to any of its teachers. As I have said earlier in this judgment, when the Board was asked to deduct the levy from only some, and not from all, of the teachers it employed, it was requested to do something that it was not required to do, something that in fact it could not do. That, in my view, is the short answer to this point, as it is to the attempt by the Association to validate the earlier proceedings by means of a retroactive resolution passed a year later.

The appeal is dismissed, with costs in double col. 5.

CLEMENT J.A.:—This appeal is concerned only with the obligation imposed on the Board by s. 13 of The Teaching Profession Act, R.S.A. 1970, c. 362, to "deduct the membership fee to the association from the salary of every teacher it employs other than as a superintendent" and remit the deduction monthly to the Association. The issue is whether the supplementary levy resolved upon by the council of the Association on 3rd April 1971, for the purpose of creating a strike fund, is a membership fee within the intendment of s. 13. I agree with my brother Sinclair that, in the context of the Act, s. 13

applies only to those teachers who are active members of the Association within the definition of s. 6(2).

I am of opinion that the membership fee contemplated by s. 13 is that prescribed by cl. 7 of the bylaws of the Association, which, so far as relevant, is in these terms:

"7. (1) The fees for membership in the Association shall be those recommended by the Provincial Executive Council and prescribed from time to time by a two-thirds majority vote of the Annual Representative Assembly.

"(2) Until varied pursuant to Bylaw 7(1) the fees payable by an active member shall be computed upon the following basis: where the annual salary of a member does not exceed \$5,000 - \$6.50 per calendar month or \$78.00 per annum, where it exceeds \$5,000 - \$7.50 per calendar month or \$90.00 per annum."

Clause 9 of the bylaw, upon which the Association rests heavily, has no relationship to such membership fees. It provides in terms, not for a defined membership fee, but for an assessment, for a period of time to be determined by council, to meet a situation which, in the opinion of council, constitutes an emergency of some unspecified nature. Such an assessment is alien in nature to membership fees which, I think it reasonable to assume, are intended to provide for the budgeted expense of the Association and are controlled by the prescribed vote of the Annual Representative Assembly. The income to meet this budget is assured in large measure by the provisions of s. 13 of the Act, and I cannot construe it as responsive to special levies, indeterminate in extent, that may be imposed from time to time by council for special occasions. Nor do I think that the sentence in cl. 9, "Money so collected shall be deemed to be additional membership dues and shall be added to the special emergency fund to be disbursed from time to time in such manner and to such persons as the Provincial Executive Council in its discretion may determine", assists the Association. The resolution of 3rd April 1971 can only have validity if it comes within the powers granted to council by that clause, and which are exercisable as an emergency measure. The resulting assessment therefore is, in its inherent characteristic, an emergency assessment, and the quoted sentence cannot change its character and transform it into a membership fee for the purposes of s. 13. The sentence affords direction to the Association in the internal management of the moneys which such an assessment yields, but that is not a matter with which the Board is concerned.

This is sufficient to dispose of the main issue in the appeal, and I agree with Sinclair J.A. on the subsidiary issues. On consideration I do not think that this is a case in which the Court should determine the validity of cl. 9, nor pronounce views on the powers of the Association in annual meeting to enact a bylaw resembling that clause in some respects. The latter would be obiter, since it would be hypothetical, and might in the end result turn out to be misleading. The former would affect rights and obligations existing between the Association as a corporation, and its constituent members. It may be that, as between them, a delegation of power, suitably defined, to the council to impose special levies, would create a legal obligation on a dissentient member as a matter of internal regulation, to which the views expressed in *Hole v. Garnsey*, [1930] A.C. 472, would apply. (See the judgment of this Court in *Case v. Edmonton Country Club Ltd.*, [1973] 3 W.W.R. 14, 30 D.L.R. (3d) 211 at 223.) This aspect was not argued, nor could it be satisfactorily argued, in the absence of representation of the members.

I agree that the appeal should be dismissed with costs in double col. 5.

MANITOBA COUNTY COURT

Hewak Co. Ct. J.

Decker v. Kushner

Automobiles — Collision in parking lot — Whether right of way rules applicable — Determination of fault — The Highway Traffic Act, R.S.M. 1970, c. H60, s. 2(23).

By s. 2(23) of The Highway Traffic Act "any area designed and intended, and primarily used, for the parking of vehicles and the necessary passage ways thereon" is excluded from the definition of "highway", so that the provisions of the Act dealing with right of way do not apply. Where a collision occurs between two vehicles travelling on the lanes of a parking lot the question of fault is to be determined by the application of the ordinary principles governing the law of negligence in the light of the particular facts of each case: *Gill v. Elwood*, [1969] 2 O.R. 46, 4 D.L.R. (3d) 322, affirmed [1970] 2 O.R. 59, 9 D.L.R. (3d) 681 (C.A.); *Noort v. Oeppen*, 13 W.W.R. (N.S.) 410, [1955] 1 D.L.R. 395 (B.C.C.A.) applied.

[Note up with 1 C.E.D. (2nd ed.) *Automobiles*, ss. 7, 11, 19, 20.]

R. T. Willis, for plaintiff.

A. H. Hogue, for defendant.

17th July 1973. HEWAK Co. Ct. J.:—This is an action brought by plaintiff against defendant for damages to plain-

[COURT OF APPEAL]

**Re Peralta et al. and The Queen in right of Ontario et al.
Peralta et al. v. Warner et al.**

MACKINNON A.C.J.O., THORSON
AND GOODMAN JJ.A.

8TH FEBRUARY 1985.

a Administrative law — Delegation — Governor in Council empowered to make regulations for management and control of fisheries — Delegating licensing function to provincial Minister without setting quotas for individual species — Minister issuing licences with quotas for individual species — Power to delegate necessarily implied in federal legislation — Fisheries Act, R.S.C. 1970, c. F-14, s. 34 — Ontario Fishery Regulations, C.R.C. 1978, c. 849 — Game and Fish Act, R.S.O. 1980, c. 182.

b Constitutional law — Delegation — Governor in Council empowered to make regulations for management and control of fisheries — Delegating licensing function to provincial Minister without setting quotas for individual species — Minister issuing licences with quotas for individual species — Delegation of administrative rather than legislative power — Fisheries Act, R.S.C. 1970, c. F-14, s. 34 — Ontario Fishery Regulations, C.R.C. 1978, c. 849 — Game and Fish Act, R.S.O. 1980, c. 182.

c Pursuant to s. 34 of the *Fisheries Act*, R.S.C. 1970, c. F-14, enacted pursuant to Parliament's authority under s. 91(12) of the *Constitution Act, 1867*, to legislate with regard to "Sea Coast and Inland Fisheries", the Governor in Council promulgated the *Ontario Fishery Regulations*, C.R.C. 1978, c. 849. Section 34 of the Act permits the Governor in Council to make regulations, *inter alia*, for the proper management and control of the sea-coast and inland fisheries, respecting the issuance of licences, and respecting the terms and conditions under which a licence is to be issued. The *Ontario Fishery Regulations* require a licence under the *Game and Fish Act*, R.S.O. 1980, c. 182. Pursuant to s. 29(4) of the *Ontario Fishery Regulations*, the provincial Minister of Natural Resources may, in any commercial fishing licence, designate the waters and the species, size and quantity for which the licence is valid. Section 29(5) permits the Minister to impose such terms and conditions as are necessary for the conservation of fish, so long as they are not inconsistent with these regulations. Schedule VII of the regulations establishes, for commercial fishing, territorial quotas for different species of fish for specific waters for specific times, and Schedule VIII establishes minimum size limits. The *Game and Fish Act* provides for the form of fishing licences and fees.

d The Minister of Natural Resources of Ontario imposed fishing quotas for individual species in the licences of commercial fishermen based on past performance. In the past, the Minister had issued commercial fishing licences without specifying quotas for fish other than yellow pickerel.

e On an application for judicial review of the Minister's determination to insert individual species quotas in commercial fishing licences, the trial judge granted the application on the ground that there was an unlawful delegation of power to the Minister on both administrative and constitutional law grounds. Following that decision, the Minister closed the commercial fishing season for two species in Lake Erie. For one species he set the quota at zero for the rest of the season. On appeal from the trial judgment and on a reference to the Court of Appeal of a subsequent application for judicial review to determine the validity of the two variation orders

made by the Minister, held, the appeal should be allowed and the application on the referred matter dismissed.

The quotas were inserted by the Minister pursuant to the federal regulations, not the provincial. The Governor in Council has authority to subdelegate the power to set quotas in fishing licences, because s. 34(g) of the *Fisheries Act* allows the Governor in Council to make regulations "respecting" the terms and conditions under which a licence may be issued. It could not have been expected that the Governor in Council would exercise all the administrative power given to him and make individual licensing decisions, for there is a myriad of situations existing in the fisheries across Canada. The Governor in Council did not abdicate all his power to the Minister, for he set general conditions applicable to commercial fishing and to gill-nets and trawl-nets, established global quotas for commercial fishing of particular species from particular waters, and set minimum sizes. In setting individual quotas within these general policy guide-lines, the Minister acted in a fashion consistent with the regulations.

The action of the Minister in setting individual quotas for commercial fishermen for particular waters was administrative, as it involved the application of a general policy in relation to particular situations in the province. Thus, it did not fall within the constitutional prohibition of interdelegation of legislative power.

The Minister had authority to close the commercial fishing season for two species after the trial judge's decision, for s. 6(1) of the *Ontario Fishery Regulations* permits the Minister to vary any quota fixed by the regulations, and s. 5(3) allows the Minister to vary any closed season fixed by the regulations.

Coughlin v. Ontario Highway Transport Board et al., [1968] S.C.R. 569, 68 D.L.R. (2d) 384, folld

R. ex rel. Fletcher v. Joy Oil Co. Ltd., [1950] O.R. 766, [1951] 1 D.L.R. 632, 98 C.C.C. 161, 11 C.R. 169, apld

Brant Dairy Co. Ltd. et al. v. Milk Com'n of Ontario et al., [1973] S.C.R. 131, 30 D.L.R. (3d) 559, distd

Reference re Validity of Regulations as to Chemicals, [1943] S.C.R. 1, [1943] 1 D.L.R. 248, 79 C.C.C. 1, sub nom. *Reference re Regulations (Chemicals) under War Measures Act*, consd

R. v. Tenale et al. (1982), 145 D.L.R. (3d) 521, 3 C.C.C. (3d) 254, 42 B.C.L.R. 91, not folld

Other cases referred to

A.-G. Can. v. A.-G. Ont., *A.-G. Que. and A.-G. N.S.*, [1898] A.C. 700; *A.G. N.S. v. A.G. Can.*, [1951] S.C.R. 31, [1950] 4 D.L.R. 369; *Reference re Agricultural Products Marketing Act, R.S.C. 1970, c. A-7 et al.*, [1978] 2 S.C.R. 1198, 84 D.L.R. (3d) 257, 19 N.R. 361; *A.-G. Can. v. Brent*, [1956] S.C.R. 318, 2 D.L.R. (2d) 503, 114 C.C.C. 296; *Canadian Institute of Public Real Estate Companies et al. v. City of Toronto et al.*, [1979] 2 S.C.R. 2, 103 D.L.R. (3d) 226, 8 O.M.B.R. 385, 7 M.P.L.R. 39; *Re Shoal Lake Band of Indians No. 39 et al. and The Queen in right of Ontario* (1979), 25 O.R. (2d) 334, 101 D.L.R. (3d) 132; *Re British Columbia Development Corp. et al. and Friedmann et al.* (1984), 14 D.L.R. (4th) 129, [1985] 1 W.W.R. 193, 55 N.R. 298 sub nom. *British Columbia Development Corp. v. Ombudsman; Desrosiers v. Thinel*, [1962] S.C.R. 515; *Bank of England v. Vagliano Brothers*, [1891] A.C. 107

Statutes referred to

- Canadian Bill of Rights*, R.S.C. 1970, App. III
- a *Canadian Charter of Rights and Freedoms*
- Constitution Act, 1867*, ss. 91(12), 92(9), (13), (14), (16)
- Factory, Shop and Office Building Act*, R.S.O. 1937, c. 194, ss. 82(3), 82a (enacted 1948 (Ont.), c. 27, s. 2)
- Fisheries Act*, R.S.C. 1970, c. F-14, ss. 2, definition "close time" (rep. & sub. R.S.C. 1970, c. 17 (1st Supp.) s.1); 7, 34(a) to (f), 34(g) (rep. & sub. *idem*, s. 4); 34(h) to (m)
- b *Fisheries Improvements Loan Act*, R.S.C. 1970, c. F-22
- Game and Fish Act*, R.S.O. 1980, c. 182, ss. 3, 4, 5, 92
- Judicature Act*, R.S.O. 1980, c. 223, ss. 34(1), 35 (repealed by s. 187 of, and replaced by *Courts of Justice Act*, 1984 (Ont.), c. 11)
- Judicial Review Procedure Act*, R.S.O. 1980, c. 224, ss. 4, 6(2)
- War Measures Act*, R.S.C. 1927, c. 206, s. 3

c Rules and regulations referred to

- Ontario Fishery Regulations*, C.R.C. 1978, c. 849, ss. 2(1), definitions "closed season", "Department", "licence" (rep. & sub. SOR/84-112, s.1); "Minister" (rep. & sub. SOR/80-265, s. 1(2)); 3(1), 5(3), 6(1), 12(1), (3), 29(1)(b), (4), (5) (rep. & sub. *idem*, s. 4); (6), 30, 31, 32, 33 (rep. & sub. SOR/80-895, s. 8); 34, 35 (rep. & sub. *idem*, s. 9); 36 (rep. & sub. *idem*, s. 10); 37, 38 (rep. & sub. *idem*, s. 11); 39 (rep. & sub. *idem*, s. 12); 40, 41 (rep. & sub. *idem*, s. 13); 42 (rep. & sub. *idem*, s. 14); 43 (rep. & sub. *idem*, s. 15); 46 (rep. & sub. *idem*, s. 18); 57 (rep. & sub. *idem*, s. 23); 58, 59, Schedule VII (rep. & sub. *idem*, s. 25; SOR/82-500, s. 10); Schedule VIII (rep. & sub. SOR/80-895, s. 25; SOR/81-293, s. 10)
- d
- e R.R.O. 1980, Reg. 414, ss. 1 to 3, 4a(1) (enacted by O. Reg. 254/84); 5, 6, Form 24 (enacted *idem*)

f APPEAL from a judgment of Smith J. granting an application for judicial review of a decision of the Minister of Natural Resources of Ontario; and REFERENCE to the Court of Appeal on an application for judicial review of a subsequent decision of the Minister pursuant to s. 34(1) of the *Judicature Act*, R.S.O. 1980, c. 223.

Blenus Wright, Q.C., and *Peter Jacobsen*, for appellant, Minister of Natural Resources.

g *John Cavarzan*, Q.C., for appellant, Attorney-General of Ontario.

T. L. James, for appellant, Attorney-General of Canada.

Ian G. Scott, Q.C., and *Edward P. Belobaba*, for respondents.

The judgment of the court was delivered by

h MACKINNON A.C.J.O.:—The matters before the Court were an appeal, and a reference pursuant to s. 34(1) of the *Judicature Act*, R.S.O. 1980, c. 223. The Minister of Natural Resources of Ontario appeals an order of The Honourable Mr. Justice Smith delivered on October 15, 1984. In that order he granted the respondents'

application for judicial review and declared the *Ontario Fishery Regulations*, C.R.C. 1978, c. 849, as amended, made under the *Fisheries Act*, R.S.C. 1970, c. F-14, and R.R.O. 1980, Reg. 414, as amended, made under the *Game and Fish Act*, R.S.O. 1980, c. 182, in so far as individual fishing quotas are concerned to be *ultra vires* and of no effect. He heard the application as a matter of urgency under s. 6(2) of the *Judicial Review Procedure Act*, R.S.O. 1980, c. 224.

On November 2, 1984, two variation orders were made by the Minister of Natural Resources under the *Ontario Fishery Regulations*. The applicants applied on November 5th pursuant to s. 6 of the *Judicial Review Procedure Act* to The Honourable Mr. Justice O'Brien for judicial review of those two orders. As the arguments and considerations were similar to those made in the application before Smith J., and as the appeal from his order was then fixed for hearing by this Court for November 15th, O'Brien J. referred the application to this Court under s. 34(1) of the *Judicature Act*, to be heard with the appeal. He made an interim order under s. 4 of the *Judicial Review Procedure Act* prohibiting the respondents, their servants and agents from seizing fish, equipment or boats of the applicants until the matter was dealt with by the Court, and he declared that the two orders made by the Minister were "unenforceable".

We directed that counsel for the appellants argue the appeal and the referred application sequentially and then called on the respondents, represented by the same counsel on both matters, to respond.

The Attorney-General of Ontario and the Attorney-General of Canada were served with notice pursuant to s. 35 of the *Judicature Act*, and they appeared by counsel at the hearing and before us to support the validity of the legislation.

The appeal

The application for judicial review sought to review the decision of the appellant Minister imposing fishing quotas on the licences of commercial fishermen. The application was based on four grounds. The first two grounds, namely, that the Minister failed to observe fundamental justice in imposing the quotas and that he had breached certain provisions of the *Canadian Bill of Rights*, R.S.C. 1970, App. III, and the *Canadian Charter of Rights and Freedoms* were rejected by Smith J. and were not pressed before us.

The other two grounds are more serious. The applicants on the

- a motion argued that the *Ontario Fishery Regulations*, passed by the Governor in Council under the federal *Fisheries Act* and Reg. 414 passed by the Lieutenant-Governor in Council under the provincial *Game and Fish Act* constituted an unauthorized subdelegation to the provincial Minister as well as an unconstitutional interdelegation of federal legislative authority to the provincial Minister. The learned Divisional Court judge gave effect to both grounds in coming to his conclusion as to the validity of the actions of the Governor in Council in enacting the *Ontario Fishery Regulations* and of the Minister respecting the quotas.
- b

The facts

- c The issues involved in the appeal are basically legal ones and the facts are not in dispute, although the emphasis placed by the parties on those facts is somewhat different. The respondents are commercial fishermen holding commercial fishery licences for the year 1984, containing individual species quotas, issued by the Minister. In the past the Minister had issued commercial fishery licences to the respondents without restricting the quantities of fish caught by each licensee, with the one exception being a general restriction on yellow pickerel. Once a fisherman obtained a licence he was free to fish. There were no quotas.
- d

- e In the view of the Minister and his advisors, a quota system was necessary because of the depletion of fish stocks in Ontario, particularly in the Great Lakes. Across Ontario, according to the Minister, the destabilization and ultimate degradation of fish stocks had been caused by overfishing, pest species invasion and habitat deterioration. In certain areas of the Great Lakes major commercial stocks of certain fish have collapsed and the catch percentage of commercial fishing has dropped seriously. There are at the present in Ontario close to 1,000 commercial fishermen who land approximately 30 million dollars worth of fish annually.
- f

- g The recreation industry is also seriously affected by the depletion of the fishery resource and according to the material filed, the members of that industry are asking for measures to ensure a stable resource upon which they can plan their business decisions and recreational anglers their recreational pursuits. The Minister filed the affidavits of a number of fishermen which stated that the removal of the quota now imposed would affect irrevocable business decisions they had made on the basis of the quota and, ultimately, would jeopardize the fishery resource.
- h

The respondents take the position that the above-quoted facts are irrelevant. They do not dispute the need for preservation of

the fishery resource nor do they reject quotas as a conservation technique. What they do dispute is the validity of "past performance" quotas and the validity of their imposition by the Minister in March, 1984. a

The facts which the respondents consider significant are that they had hitherto managed their fisheries in reliance on an unlimited catch. Loans, based on an unlimited catch, were guaranteed by the federal Minister of Finance under the *Fisheries Improvements Loan Act*, R.S.C. 1970, c. F-22, to allow fishermen to invest in boats and equipment. Other loans were also guaranteed. The quotas imposed in March, they state, threaten their ability to meet those and other obligations. The respondent Peralta has another concern in that he and his family operate a fish processing plant to which he sells his fish, and which has operated in reliance on that catch. b c

Until 1984, commercial fishery licences were issued annually in January and were in force for the calendar year. However, in January, 1984, the Ministry changed its practice and temporary permits were issued extending the 1983 licences. On March 26th, the respondents received documents entitled "Commercial Fish Allocation". Although discussions had been held since 1980 between the Minister and the commercial fishermen regarding the establishment of a commercial fishing quota the March document was the first notification to them that the Minister had decided to impose a "past performance" system. The quotas were delivered to the licensees in May, 1984, by means of a "Form 24" attached to their commercial fishing licences. d e

There were, apparently, appeals to an *ad hoc* review committee and correspondence with the Minister protesting the basing of licence quotas on "past performance" but the method of establishing the quotas was not changed. On September 7th, shortly before the autumn fishing season was to commence, the respondents brought their application for judicial review, which application was heard on September 26th and October 4th. f g

Submissions on the appeal

Under s. 91(12) of the *Constitution Act, 1867*, Parliament is given exclusive legislative jurisdiction over "Sea Coast and Inland Fisheries". The effect of that subsection was determined by the Judicial Committee of the Privy Council in *A.-G. Can. v. A.-G. Ont., A.-G. Que. and A.-G. N.S.*, [1898] A.C. 700. In dealing with s. 91(12) the Judicial Committee said the following (pp. 712-3): h

Their Lordships have already noticed the distinction which must be borne in

a mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading, "Sea-Coast and Inland Fisheries" in s. 91. Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the provinces respectively remained untouched by that enactment. Whatever grants might previously have been lawfully made by the provinces in virtue of their proprietary rights could lawfully be made after that enactment came into force. At the same time, it must be remembered that the power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion Legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion Legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred.

b On the other hand under s. 92 of the *Constitution Act, 1867* the provincial Legislatures have the following relevant exclusive legislative powers over:

d 9. Shop, Saloon, Tavern, Auctioneer and other Licences in order to the raising of a Revenue for Provincial, Local or Municipal Purposes.

13. Property and Civil Rights in the Province.

e 16. Generally all Matters of a merely local or private Nature in the Province.

f As a result of the 1898 decision, Parliament enacted general fisheries legislation, now the *Fisheries Act*, as amended, and the Governor in Council under s. 34 of that legislation promulgated fishery regulations in relation to each province. Those regulations delegate to provincial Ministers what the Minister here argues, so far as Ontario is concerned, is the administration of the regulations which he does along with the administration of related provincial legislation and regulations. The respondents submit that this is a delegation not authorized by the *Fisheries Act* and if the Act does allow for such delegation it is the delegation of a legislative power and is, accordingly, *ultra vires*, as determined by the Supreme Court in *A.-G. N.S. v. A.-G. Can.*, [1951] S.C.R. 31, [1950] 4 D.L.R. 369.

g The relevant parts of the federal *Fisheries Act*, as amended by R.S.C. 1970, c. 17 (1st Supp.), provide:

h 7. The Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued, leases and licences for fisheries or fishing, wherever situated or carried on; but except as hereinafter provided, leases or licences for any term exceeding nine years shall be issued only under authority of the Governor General in Council.

34. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulations

- (a) for the proper management and control of the seacoast and inland fisheries;
- (b) respecting the conservation and protection of fish;
- (c) respecting the catching, loading, landing, handling, transporting, possession and disposal of fish;
- (d) respecting the operation of fishing vessels;
- (e) respecting the use of fishing gear and equipment;
- (f) respecting the issue, suspension and cancellation of licences and leases;
- (g) respecting the terms and conditions under which a lease or licence may be issued;
- (h) respecting the obstruction and pollution of any waters frequented by fish;
- (i) respecting the conservation and protection of spawning grounds;
- (j) respecting the export of fish or any part thereof from Canada;
- (k) respecting the taking or carrying of fish or any part thereof from one province of Canada to any other province;
- (l) prescribing the powers and duties of persons engaged or employed in the administration or enforcement of this Act and providing for the carrying out of those duties and powers; and
- (m) authorizing a person engaged or employed in the administration or enforcement of this Act to vary any close time or fishing quota that has been fixed by the regulations.

The Governor in Council enacted, purportedly under s. 34, among other regulations, the *Ontario Fishery Regulations*. The following definitions and sections are relevant for the purposes of the appeal.

2(1) . . .

"closed season" means, in respect of any fish, every period that is not an open season in respect of that fish;

"Department" means the Ministry of Natural Resources of Ontario;

"licence" means an instrument issued under *The Game and Fish Act*, R.S.O. 1970, Chapter 186, or the regulations made thereunder, conferring upon the holder the privilege to do the things set forth in the instrument, subject to the conditions, limitations and restrictions contained in it and the Act, the regulations made thereunder and these Regulations, but no licence shall be or operate as a lease;

"Minister" means the Minister of Natural Resources for Ontario and includes any person authorized by him to act on his behalf;

a 3(1) Except as provided in these Regulations, no person shall fish for or take fish from any of the waters of the province.

12(1) Subject to subsection (3), no person shall, except under a licence prescribed therefor, take or attempt to take fish by any means.

b (3) A resident of Ontario may, without an angling licence, take fish by means of angling or pursuant to subsection 4(3).

29(1) Licences other than angling licences include

(b) a commercial fishing licence;

c (4) The Minister may, in any commercial fishing licence, designate

(a) the waters and the species, size and quantity of fish for which the licence is valid;

(b) the means of taking the fish for which the licence is valid;

d (c) the use for which any fish may be taken;

(d) the number of nets and the size of the mesh thereof and any other fishing devices that may be used;

(e) the dimensions of nets or other fishing devices and the materials that may be used in the construction thereof;

e (f) the period of time during which fishing operations may be conducted; and

(g) the person or persons who may conduct fishing operations under the licence.

f (5) The Minister may, in any licence, impose such terms and conditions as are necessary for the conservation of fish and are not inconsistent with these Regulations and, without restricting the generality of the foregoing, may impose terms and conditions respecting the method of

(a) loading,

(b) landing,

(c) handling,

g (d) transporting,

(e) possessing, and

(f) disposing

of commercial fish.

h (6) No holder of a licence shall violate any of the terms or conditions of the licence.

The current definition of "licence" reads:

"licence" means a licence issued under *Game and Fish Act* Ontario that is subject to these Regulations in addition to the conditions, limitations and restrictions referred to in that Act; Amendment

Schedule VII of the regulations establishes for commercial fishing territorial quotas for different species of fish for specific waters for specific times. Schedule VIII establishes the minimum size limits for commercial fishing for different species of fish in the different waters. a

The relevant provincial legislation is the *Game and Fish Act*. The stated purpose of the Act is:

3. . . . to provide for the management, perpetuation and rehabilitation of the wildlife resources in Ontario, and to establish and maintain a maximum wildlife population consistent with all other proper uses of lands and waters. b

The administration of the Act is "under the control and direction of the Minister" (s. 4). "Minister" is defined as the Minister of Natural Resources. All licence fees are to be paid to the Treasurer of Ontario (s. 5). c

The relevant portion of s. 92 of the Act reads:

92. The Lieutenant Governor in Council may make regulations,

1. establishing classes for licences referred to in this Act or the regulations or the Ontario Fishery Regulations, governing the issue, form, renewal, transfer, refusal and cancellation of licences or any class of them, prescribing their duration, territorial limitations, terms and conditions and the fees payable therefor, and limiting the number of licences of any class that may be issued; d

Under s. 92, para. 1 the Lieutenant-Governor in Council enacted Reg. 414 which was amended by O. Reg. 254/84 (made on April 18th and filed April 25, 1984). The relevant portion of the amended regulation states: e

4a(1) A licence issued under paragraph 29(1)(b) of the Ontario Fishery Regulations to take fish for commercial use by means of a gill net, pound net, trap net, trawl net, hoop net, seine net, dip net or trammel net, or by means of hooks, shall be in Form 24. f

Form 24 sets out the form of licence with a space provided for inserting individual species quota. It is headed, "Form 24 Game and Fish Act", and below that it reads:

Under the Game and Fish Act, and the Regulations, and subject to the limitations thereof and the limitations of the Fisheries Act and of the Ontario Fishery Regulations, this licence is granted to . . . g

In the form and its appendices, provision is made for the species, the waters and, most importantly, the quantities (or quotas) of the named fish species which could be taken. Appendix C of the licence is headed "Commercial Fishing Licence Quotas". h

The practical question that has to be answered in this appeal is: is the Minister validly authorized to insert individual species quotas in commercial fishing licences?

a As already stated, the Divisional Court judge held that the imposition of the quotas was invalid and of no force and effect because there had been an unauthorized subdelegation by the Governor in Council to the provincial Minister and, in any event, the subdelegation was, in effect, the delegation of a federal legislative power to the provincial Minister and *ultra vires*. I shall deal with these two findings in that order.

b *Subdelegation*

c In concluding that there had been an unauthorized subdelegation, the Divisional Court judge was of the view that where "regulatory powers as large as those powers are which s. 34 of the Act spells out, are subdelegated by the Governor in Council without any constraints, the subdelegation is unlawful in that it fails to carry out the clear intent of the Act, namely, that the discretionary power be entrusted to and remain with the Governor in Council and no one else".

d Was the Divisional Court judge right in holding that the "clear intent" of the Act was that the Governor in Council was to do everything with regard to the matters covered by s. 34 of the *Fisheries Act*?

e Section 29(4) of the federal *Ontario Fishery Regulations* gives authority to the Minister to set quotas. The Ontario regulation only provides for the form of the licence and ss. 1 to 6 of Regulation 414 is headed "Forms of Licence and Fees". The *Ontario Fishery Regulations*, by its definition of "licence" incorporates that licence (that is, the one issued by the Minister under the *Game and Fish Act*). As authorized by s-ss. 29(4)(a) and 29(5) of the *Ontario Fishery Regulations* the Minister inserts into the licence the individual quotas of the species to be caught within the particular time period. The total of these quotas, we were advised, were within the global figure set by the Governor in Council. Subsection 29(5) of the *Ontario Fishery Regulations* emphasizes that the terms and conditions imposed by the Minister in any licence must not be "inconsistent with these Regulations".

g In my view, the Divisional Court judge erred in holding initially that Reg. 414, as amended by O. Reg. 254/84, passed under the *Game and Fish Act*, authorized individual fishing quotas. Rightly or wrongly this authority came from the *Fisheries Act*, through
h the *Ontario Fishery Regulations*, to the provincial Minister. There is no question that under s-s. 92(9) and s-s. 92(14) of the *Constitution Act, 1867*, the province has the legislative power to license and to impose fees for those licences. The Ontario

regulation goes no further than that. It was agreed that the licence, now in Form 24, is blank and that it is the Minister who sets and inserts the individual species quotas in the space provided, under the authority of s-ss. 2(1), 29(4)(a) and (5) of the *Ontario Fishery Regulations* quoted above. The quota is inserted, in my view, as I stated earlier, pursuant to the federal legislation and not pursuant to provincial legislation as asserted by the Divisional Court judge.

This conclusion does not, of course, answer the fundamental question, is there authority to subdelegate? Section 34(g) of the *Fisheries Act* allows for the Governor in Council to make regulations "respecting the terms and conditions under which a lease or licence may be issued" (emphasis added). In dealing with this subsection the Divisional Court judge quoted the wording of the subsection as it stood prior to the amendment by R.S.C. 1970, c. 17 (1st Supp.). That wording was "prescribing the terms and conditions under which a licence or lease is to be issued" (emphasis added). By the amendment it can be seen that the wording of the subsection was brought in line with s. 34(b) to (k). The amendment must have had some purpose and significance and, in my opinion, Parliament was ensuring that the Governor in Council was empowered to delegate to others the administration of its regulations. Accordingly, I differ from the view expressed by the Divisional Court judge that "the clear intent" of Parliament was that the "discretionary power" was entrusted to the Governor in Council and no one else. It is difficult to accept that Parliament intended that the Governor in Council administer in detail the myriad of situations existing across Canada from the suburban areas to the remote north. If the respondents are right, the Governor in Council, in administering the regulations in the instant case, would be expected to allocate the thousands of individual quotas within the over-all maximum quota it had set with relation to yellow pickerel as well as divide up the various water areas.

It is of interest to note that before the amendment changing the word "prescribing" to "respecting" in para. 34(g), when the other paragraphs at that time used the word "respecting", the French language version of both "respecting" and "prescribing" was the single word "concernant". The word "concernant" was also used to introduce the French language version of s. 34(a) which reads in English "for the proper management and control of the seacoast and inland fisheries". In using the same word "concernant" throughout, it reinforces my view that it was always the intention

a of Parliament that the Governor in Council would have the power to subdelegate under paras. 34(a) to (k), even though the word "prescribing" was originally used in para. 34(g) and had to be changed.

b The use of the word "respecting" allows for a delegation of the administration of the regulations. Counsel for the appellant Minister argued that the wisdom and common sense of this interpretation is shown by the fact that it is the provincial ministers, familiar with the multiplicity of situations and problems in their own province, to whom these powers are delegated. However, I believe Mr. Scott to be right when he argued that we must find the right to subdelegate from the wording of the legislation itself and not from the manner in which the power is exercised. In the Act there is no indication of the person or body to whom the Governor in Council may delegate, and the fact that it has been to provincial ministers cannot by itself establish the right. However, the exercise of the right may be considered to show that interpreting the legislation as conferring the power of subdelegation does not lead to an absurdity.

c When courts have considered whether delegation of ministerial powers was intended, considerable weight has been given to "administrative necessity", that is, it could not have been expected that the Minister (in this case the Governor in Council) would exercise all the administrative powers given to him. Further, in such cases the suitability of the delegate has been a material factor in determining whether such delegation is intended and lawful: see Lanham, "Delegation and the Alter Ego Principle", 100 L.Q.R. 587 (1984).

d "There is no rule or presumption for or against subdelegation": Driedger, "Subordinate Legislation", 38 Can. Bar Rev. 1 (1960), at p. 22. The language of the statute must be interpreted in light of what the statute is seeking to achieve. As Professor Willis pointed out, the maxim *delegatus non potest delegare* "does not state a rule of law; it is 'at most a rule of construction' and in applying it to a statute 'there, of course, must be a consideration of the language of the whole enactment and of its purposes and objects'": Willis, "Delegatus Non Potest Delegare", 21 Can. Bar Rev. 257 (1943), at p. 257.

e The first particular power given under the regulation-making power of the Governor in Council is "for the proper management and control of the sea coast and inland fisheries" (para. 34(a)). This states the general purpose of the entire section and a wide authority is conferred in the following paragraphs by the use, as

noted earlier, of the word "respecting", "embracing any regulation for any purpose coming within the defined subject" matter: Driedger, *The Composition of Legislation*, 2nd ed. (1976), at p. 192. Driedger (at p. 193) points out that the distinction between purposes or subjects on the one hand and powers on the other is relevant to subdelegation:

For example, if a Minister had powers to make regulations *respecting tariffs and tolls* he could authorize some other person to fix a tariff or toll; such a regulation would clearly be one *respecting* tariffs and tolls. But if the Minister's authority is to make regulations *prescribing tariffs and tolls* then the Minister must himself prescribe, and cannot delegate that authority to another. Expressions commonly used to introduce specific powers are *prescribing, fixing, determining, prohibiting, requiring, establishing*.

Looking at the nature and purpose of the statute, and the use of the word "respecting" ("concernant"), I am persuaded that subdelegation was intended by necessary implication, and the *prima facie* rule of construction *delegatus non potest delegare* gives way to the intent of the legislation.

... the courts will readily mould the literal words of a statute to such a construction as will best achieve its object; because they will, recognizing the facts of modern government, readily imply in an authority such powers as it would normally be expected to possess; because the presumption of deliberate selection, strong when applied to the case of a principal who appoints an agent or a testator who selects a trustee, wears thin when applied to a statute which authorizes some governmental authority, sometimes with a fictitious name such as "Governor-in-Council" or "Minister of Justice", to exercise a discretion which everyone, even the legislature, knows will in fact be exercised by an unknown underling in the employ of the authority, the *prima facie* rule of *delegatus non potest delegare* will readily give way, like the principles on which it rests, to slight indications of a contrary intent.

(Willis, *op cit.*, at p. 260.)

We were referred to a number of authorities by counsel for the parties in dealing with this question. The starting point for the submissions on this point by counsel for all parties were the statements of principle found in *Reference re Validity of Regulations as to Chemicals*, [1943] S.C.R. 1, [1943] 1 D.L.R. 248, 79 C.C.C. 1, *sub nom. Reference re Regulations (Chemicals) under War Measures Act*. In that case it was held that regulations respecting chemicals made pursuant to the power conferred by the *Department of Munitions and Supply Act*, 1939 (Can.), c. 3, and by the *War Measures Act*, R.S.C. 1927, c. 206, were not *ultra vires* the Governor in Council. The court also held that the Governor in Council had the power under the wording of s. 3 of the *War Measures Act*, to delegate his powers, whether legislative or administrative, to subordinate agencies. The wording of s. 3 was as follows:

3. The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:—

- a*
- b*
 - (a) Censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;
 - (b) Arrest, detention, exclusion and deportation;
 - (c) Control of the harbours, ports and territorial waters of Canada, and the movement of vessels;
- c*
 - (d) Transportation by land, air, or water and the control of the transport of persons and things;
 - (e) Trading, exportation, importation, production and manufacture;
 - (f) Appropriation, control, forfeiture and disposition of property and of the use thereof.

d Chief Justice Duff in dealing with the argument that the subdelegation to subordinate agencies was *ultra vires* said (p. 11 S.C.R., p. 254 D.L.R.):

I do not think that in their natural meaning the scope of these words is so narrow as to preclude the Governor General in Council from acting through subordinate agencies having a delegated authority to make orders and rules.

e The duty of the Governor General in Council to safeguard the supreme interests of the state, as contemplated by section 3, may, it seems plain, necessitate for its adequate performance the appointment of subordinate officers endowed with such delegated authority. I find it impossible to suppose that the authors of that enactment did not envisage the likelihood of the Executive finding itself obliged, in discharging its responsibility in relation to the matters enumerated in sub-paragraphs (a) to (f), to make use of such agencies.

and p. 12 S.C.R., p. 255 D.L.R.:

g I repeat, there is nothing in the words of section 3 that, when read according to their natural meaning, precludes the appointment of subordinate officials, or the delegation to them of such powers as those in question. *Ex facie* such measures are plainly within the comprehensive language employed, and I know of no rule or principle of construction requiring or justifying qualification that would exclude them.

and p. 13 S.C.R., p. 256 D.L.R.:

h One observation of a general character remains. It is possible that in what has been said above it has not been sufficiently emphasized that every order in council, every regulation, every rule, every order, whether emanating immediately from His Excellency the Governor General in Council or from some subordinate agency, derives its legal force solely from the *War Measures Act*, or some other Act of Parliament. All such instruments

- a the instant case. However, Chief Justice Laskin dealt with that suggestion in *Reference re Agricultural Products Marketing Act, R.S.C. 1970, c. A-7 et al.*, [1978] 2 S.C.R. 1198 at p. 1226, 84 D.L.R. (3d) 257 at p. 278, 19 N.R. 361, as follows:

The matter of delegation in depth is covered by the judgment of this Court in *Reference re Regulations (Chemicals) under the War Measures Act*, and I would not limit its rationale to emergency legislation.

- b The respondents, as did the Divisional Court judge, relied on *A.-G. Can. v. Brent*, [1956] S.C.R. 318, 2 D.L.R. (2d) 503, 114 C.C.C. 296, and *Brant Dairy Co. Ltd. et al. v. Milk Com'n of Ontario et al.*, [1973] S.C.R. 131, 30 D.L.R. (3d) 559, as well as on *Canadian Institute of Public Real Estate Companies et al. v. City of Toronto et al.*, [1979] 2 S.C.R. 2, 103 D.L.R. (3d) 226, 8 O.M.B.R. 385, to support their position that there had been an illegal subdelegation in the instant case.

- d In *A.-G. Can. v. Brent*, the Supreme Court was considering the effect of an Order in Council passed by the Governor in Council under the regulation-making power conferred on it by s. 61 of the *Immigration Act*, R.S.C. 1952, c. 325. The Governor in Council delegated all its powers and what it was directed to do to subdelegates, special inquiry officers. In holding this action *ultra vires*, Kerwin C.J.C. said on behalf of the court (p. 321 S.C.R., p. 505 D.L.R.):

- e . . . Parliament had in contemplation the enactment of such regulations relevant to the named subject matters, or some of them, as in His Excellency-in-Council's own opinion were advisable and not a wide divergence of rules and opinions, everchanging according to the individual notions of Immigration Officers and Special Inquiry Officers. There is no power in the Governor General-in-Council to delegate his authority to such officers.

- f Once again in *Brant Dairy Co. Ltd. et al. v. Milk Com'n of Ontario et al.*, the majority of the Supreme Court held that a regulation of similar effect was *ultra vires*. Spence J. speaking for the court in applying the principle of the *Brent* and *Brant Dairy* cases in *Canadian Institute of Public Real Estate Companies et al. v. City of Toronto et al.*, summarized the *Brant Dairy* case as follows (p. 9 S.C.R., p. 231 D.L.R.):

- g In the *Brant Dairy* case, the regulations of the Commission permitting the action of the Board in enacting its regulations there in question provided for, *inter alia*, the fixing and allotting to persons of quotas for the marketing of a regulated product on such basis as the Board deems proper. In each case, the subordinate legislating body purported to exercise the power by, to quote
h Laskin J., as he then was, in the *Brant Dairy* case, at p. 146:

"What the Board has done has been to exercise the power in the very terms in which it was given. It has not established a quota system and allotted quotas, but has simply repeated the formula of the statute, specifying no standards and leaving everything in its discretion."

I am of the opinion that those words may be exactly adopted to the action of the municipal council in the enactment of by-law 419-74. There has been the mere simple repetition of the power and not the exercise of the power by the enactment of a by-law defining the desired regulations. Laskin, J., as he then was, continued on the same page:

"A statutory body which is empowered to do something by regulation does not act within its authority by simply repeating the power in a regulation in the words in which it was conferred. That evades exercise of the power and, indeed, turns a legislative power into an administrative one. It amounts to a redelegation by the Board to itself in a form different from that originally authorized; and that this is illegal is evident from the judgment of this Court in *Attorney General of Canada v. Brent*, [1956] S.C.R. 318."

As noted by the Divisional Court judge, the opening two sentences of the [D.L.R.] headnote of *Canadian Institute of Public Real Estate Companies et al.* accurately summarizes for our purposes the facts and conclusion of that case (p. 226):

Section 35a of the *Planning Act*, R.S.O. 1970, c. 349, as amended (1973, c. 168, s. 10), is enabling legislation which permits municipalities to pass by-laws "to prohibit or require the provision, maintenance and use" of certain facilities. However, a by-law passed by a municipality which simply repeats verbatim the provisions of the enabling legislation, specifying no standards and leaving everything to council's discretion, is an invalid exercise of the legislative power granted by the section.

In the instant case the Minister (the subdelegate) did not purport to do, and was not empowered to do, the same thing that the delegate, that is, the Governor in Council, was empowered to do. The regulation here, in my view, does not "simply [repeat] the power in a regulation in the words in which it was conferred".

The learned Divisional Court judge was fortified in his conclusion that the licensing powers and other activities delegated to the Minister were not merely administrative, but were "at the heart" of the scheme of the *Fisheries Act*, by the judgment of the British Columbia Court of Appeal in *R. v. Tenale et al.* (1982), 145 D.L.R. (3d) 521, 3 C.C.C. (3d) 254, 42 B.C.L.R. 91. The court there held that the county court judge from whom the appeal was taken was correct when he stated (p. 525):

"... I do not find in the *Fisheries Act* itself any wording to support an argument that delegation was either intended or contemplated other than to those limited persons described in s. 34(m). Unlike the licensing cases referred to, the *Fisheries Act* contains no specific authority to delegate and certainly contains no suggestion that the whole subject of inland fisheries may be subdelegated to a Province with power and authority to legislate or regulate."

Mr. Justice Seaton went on to say (p. 525):

Both the broad introductory words to s. 34 and the specific provisions that follow contemplate the Governor in Council making the regulations.

a It may be that on the facts of *Tenale* the Minister there was exercising the regulation-making power of the Governor in Council. However, in the instant case, with deference I am of the view that the *Ontario Fishery Regulations* were properly enacted. As stated earlier, the language used in s. 34 of the *Fisheries Act* allows for the Governor in Council to delegate the necessary powers to carry out the object of the regulations.

b Although commercial fishing licences are issued under the *Game and Fish Act*, the definition of "licence" makes it clear that such licences are subject to "these Regulations". Further, in the outlining of the kinds of licence in s. 29 of the *Ontario Fishery Regulations*, s-s. 29(5) states that the Minister may impose "in
c any licence . . . such terms and conditions . . . [that] are not inconsistent with these Regulations . . .". The Minister as subdelegate is not called on merely to repeat the regulations as was the case in *Brant Dairy*.

d Mr. Scott forcefully argued that by virtue of s. 29(4) of the *Ontario Fishery Regulations*, the Governor in Council had effectively abdicated to the Minister all its powers which it and it alone could exercise. However, when one examines the regulations it is clear that this is not so. For example, they detail the general conditions applicable to commercial fishing and to gill-nets and trawl-nets (ss. 30 to 43, 46, 57 to 59). They divide the waters of
e Ontario special areas and they establish global quotas for commercial fishing of particular species from those waters (ss. 34, 39(5) and (6), 46(2), 59(1)). Commercial fish are defined in the definition section, and their minimum sizes are set out in Sch. VIII of the *Ontario Fishery Regulations*. The effect of the
f regulations was to set general policy and in setting the individual quotas within those policy guide-lines, the Minister was acting in a fashion consistent with the regulations.

g An authority in this province to which we were referred is the judgment of Cory J. in *Re Shoal Lake Band of Indians No. 39 et al. and The Queen in right of Ontario* (1979), 25 O.R. (2d) 334, 101 D.L.R. (3d) 132. In dealing with the validity of the *Ontario Fishery Regulations*, SOR/63-157, the learned judge held that by means of the regulations the federal *Fisheries Act* adopted the machinery provided by the provincial *Game and Fish Act*, R.S.O. 1970, c. 186, with respect to the issuance of commercial fishing
h licences. He concluded, and this is relevant to the second issue before us, that the delegation (or adoption) was of administrative authority and was a proper exercise of Parliament's legislative authority.

The Divisional Court judge held that Cory J. had not dealt with the subject of subdelegation, although counsel for the appellants argued that he had indeed dealt with that subject in the following passage (at pp. 344-5 O.R., pp. 142-3 D.L.R.):

As I stated earlier, the provisions of the federal *Fisheries Act* and the Ontario Fishery Regulations passed pursuant to the federal *Fisheries Act* comprise the substantive law with respect to licences for commercial fishing in Ontario. There is adopted pursuant to those Regulations the machinery provided by the *Game and Fish Act*, R.S.O. 1970, c. 186, for the issuance of required licences. Although the Ontario *Game and Fish Act* provides that a licence may be issued by the issuer of a licence, his family and employees, that provision does not, in my opinion, apply to the licence to be issued under the federal *Fisheries Act*. Such a licence can only be issued by the issuer of licences under the *Game and Fish Act*. Indeed the issuer of licences is by Order in Council so designated. Although it is cumbersome, the machinery is adequate to comply with the provisions of the *Fisheries Act*. It is significant that this same procedure has been followed since 1898 following the decision in *A.-G. Can. v. A.-G. Ont., A.-G. Que. and A.-G. N.S.*, [1898] A.C. 700.

I have the same difficulty as the Divisional Court judge in accepting that passage as dealing directly with the issue of subdelegation. Be that as it may, the issue has been raised directly in the instant case and must be dealt with.

The respondent's position, put with his usual persuasive skill by Mr. Scott, was that exclusive jurisdiction to regulate inland commercial fishing was in Parliament and the provinces are powerless to deal with catching fish for commercial purposes. He argued that the provinces can charge licence fees for the purpose of revenue but not for the purpose of regulation. He pointed out that the *Game and Fish Act* does not say anything about commercial fishing and regulates only what the province is empowered to regulate. The broad powers given by s. 34 of the federal Act, he submitted, cannot be passed off, and its general scheme "by-passed" by the Governor in Council and the Minister. He concluded that "virtually" all the aspects of the scheme and the policy were devised by the Minister. I have already indicated that in my view an examination of the Act and the regulations and the actions of the Minister does not bear that out.

Counsel for the appellants submitted that the reasoning of the court in *R. ex rel. Fletcher v. Joy Oil Co. Ltd.*, [1950] O.R. 766, [1951] 1 D.L.R. 632, 98 C.C.C. 161, which was not referred to by the Divisional Court judge, was more apposite to the problem which confronts us than any of the other authorities to which we were referred. In that case, s. 82a of the *Factory, Shop and Office Building Act*, R.S.O. 1937, c. 194, was in issue. Section 82(3) empowered municipal councils to pass a by-law determining the

hours of closing of any class of shops within the municipality, and s. 82a was added in 1948. It read:

- a* 82a. In addition to any matter authorized by section 82, any by-law thereunder applicable to retail gasoline service stations, gasoline pumps and outlets in the retail gasoline service industry as defined in *The Industrial Standards Act* may, —
- (a)* provide that the by-law shall apply only in the portion or portions of the municipality designated in the by-law;
 - b* *(b)* require that during the whole or any part or parts of the year such retail gasoline service stations, gasoline pumps and outlets be closed and remain closed at and during any time or hours between six of the clock in the afternoon of any day and seven of the clock in the forenoon of the next following day and between six of the clock in the afternoon of Saturday and seven of the clock in the forenoon of the next following Monday; and
 - c* *(c)* provide for the issuing of permits authorizing the retail gasoline service station, gasoline pump or outlet for which it is issued to be and remain open, notwithstanding the by-law, during the part or parts of the day or days specified in the permit.

- d* The council of the City of Toronto passed a by-law entitled "A By-law to require the closing of gasoline service stations during certain hours", and this it proceeded to do generally with regard to all the gasoline service stations within the city. The by-law then established an "Advisory Committee" consisting of the chief constable or his representative, a representative of the city
- e* council, three gasoline service-station employees and two employees.

Section 6(1) of the by-law stated:

- f* 6.(1) Notwithstanding anything heretofore contained in this by-law the Chief Constable is hereby authorized to issue, upon the recommendation of the said Committee, permits to allow certain gasoline service stations to be and remain open during the part or parts of the day or days specified in the permit which permit may only be issued in accordance with certain regulations and restrictions as follows, namely:

- g* (a) Permits for Sunday may be issued only for the period from ten of the clock in the forenoon to five of the clock in the afternoon during the months of January, February, March, April, October, November and December and from nine of the clock in the forenoon to four of the clock in the afternoon during the months of May, June, July, August and September.
- h* (b) Permits for Sunday shall not be issued to more than twenty per centum of those gasoline service stations participating in a rotary system of remaining open and not more than one Sunday permit shall be issued in any calendar month in respect to the same gasoline service station.

Mr. Justice Laidlaw, for the Court, reviewed the submissions made (at pp. 777-9 O.R., pp. 640-2 D.L.R.):

It is urged that the power to make exceptions from the by-law rests primarily with the council of a municipality and that power cannot be vested by the

council in any other subordinate authority or agency without power in the council of the municipality so to do, given to it either by the use of express language in a statute or by clear and necessary implication from an enactment of the Legislature.

In support of his argument, and as an illustration of the manner in which the Legislature expresses an intention to give the council of the municipality such power and authority, counsel refers to s. 422 of The Municipal Act, R.S.O. 1937, c. 266. In that section, it appears by the use of express language that by-laws may be passed: "1. For authorizing the city architect or other officer appointed for that purpose to permit in special cases, which in his judgment warrant it, such deviation from the by-laws regulating the erection of buildings as he may deem proper." No such language is used in the legislation now under consideration, and counsel contends that the language which was in fact used does not permit an inference from it that the Legislature intended to empower the council of a municipality to delegate to or confer upon some subordinate agency a power and authority which includes the exercise of a legislative function and which was vested by Provincial enactment in the municipal council and no other person.

Counsel for the appellants argued that the learned judge erred in interpreting the statute as if it had provided that the council itself was required or empowered to issue the permits. It was said by counsel for the appellant Fletcher: "This duty was not delegated to the council by the statute." And: "The only duty that was delegated to the council by the statute was a duty to 'provide for the issue of permits'." Finally, counsel argued that the Chief Constable was not given by the by-law any legislative power, that his authority must be exercised within the limits provided by s. 6 of the by-law and was subject at any time to review or recall by the council itself.

The answer to the question whether s. 6 of By-law 17275 is valid depends, obviously, upon the kind and extent of the power intended to be given to the council of a municipality by s. 82a(c) of The Factory, Shop and Office Building Act. If it was the intention of the Legislature to give to the council of a municipality, and to no other person or authority, the absolute discretion as to the persons and the times to be excepted from the by-law requiring gasoline service stations, pumps and outlets to remain closed, such intention could and no doubt would have been made plain in a simple manner by the use of express language. In the absence of such language, I cannot conclude that the Legislature intended that every application for a permit to keep a gasoline station, pump or outlet open, notwithstanding a by-law requiring such places to remain closed, should be the subject of consideration and action by the council of a municipality. The inconvenience which would be caused to the council of a municipality, to the applicants for permits, and to the public generally by such a procedure and system would be known and appreciated by the legislators, and in my opinion they would regard such procedure and system as impractical.

It is my view that the intention of clause c of s. 82a of The Factory, Shop and Office Building Act was to empower the council of a municipality to establish a system for the issuing of permits which would not require an application to be the subject of consideration and action by it but rather by some subordinate agency or authority subject to the regulations and control of the council. That is what has been done by ss. 5 and 6 of the by-law in question.

a The council of the municipality has not thereby divested itself of power to amend the by-law from time to time by way of making exceptions to it or otherwise. It has made regulations and imposed restrictions in respect of the issue of permits, and those regulations and restrictions are binding on the Advisory Committee and the Chief Constable as provided in the by-law. The council of the municipality retains control in the matter of the issuing of permits and may alter the present regulations and restrictions in such manner and to such extent as in its discretion it deems necessary or advisable. In my opinion, ss. 5 and 6 of the by-law in question fall within the power of the council of a municipality to "provide for the issuing of permits" as contained in s. 82a(c) of The Factory, Shop and Office Building Act and are in accordance with the intention of that enactment. Therefore, I hold that the by-law is valid.

c The authority conferred on the chief constable by the by-law was not the same authority vested in the council by the statute. As counsel for the successful appellant in *Joy Oil* put it (p. 768 O.R.):

d All that has been delegated is the duty of issuing the permits under the system provided by the by-law. The Chief Constable cannot issue permits outside the scheme of the by-law, and his authority can always be revoked. The power to provide for the doing of something is very different from the power to do the thing.

e It should also be noted that the word "provide" in to provide for the issuing of permits, is used, and this Court held that that word allowed for the delegation of the power. As pointed out by counsel, that word appears "narrower" in the context of delegation than the word "respecting" used in s. 34 of the *Fisheries Act*. Mr. Scott seeks to distinguish *Joy Oil* from the facts of the instant case by pointing out that in *Joy Oil* a scheme was first set up by the delegating authority and then the administration delegated to the chief constable. In my view, that is what happened here on a much wider scale, covering, generally, a much more complex, diverse subject, and the same result obtained. The Minister was only empowered to act within the scheme established generally by the *Ontario Fishery Regulations*. I cannot accept that the Minister was delegated what the Governor in Council alone was empowered to do and that the regulations merely repeated what Parliament had given to the Governor in Council. As I have already said, I have concluded that the Governor in Council was empowered by the wording of s. 34 to subdelegate as it did.

h The next question which falls to be decided is whether the delegation was of administrative or ministerial powers, or of legislative powers.

Interdelegation

The Divisional Court judge, although indicating that it was not

necessary to his decision, concluded that there had been, in effect, a transfer of legislative power from Parliament to the province by the passing of the *Ontario Fishery Regulations*. He felt he should deal with the argument in view of the fact that Cory J. in *Re Shoal Lake Band of Indians No. 39 et al. and The Queen in right of Ontario* (1979), 25 O.R. (2d) 334, 101 D.L.R. (3d) 132, had come to the opposite conclusion.

The Divisional Court judge dealt with the authorities which established that there cannot be an interdelegation between Parliament and the provinces of legislative powers. Counsel for the appellants, of course, accept this position and argue that what has occurred here has been a delegation of administrative and not legislative power. I have already indicated my opinion that this is the correct view of what occurred in the instant case.

In coming to his conclusion, the Divisional Court judge relied in part on the decision of the British Columbia Court of Appeal in *R. v. Tenale et al.* (1982), 145 D.L.R. (3d) 521, 3 C.C.C. (3d) 254, 42 B.C.L.R. 91. The majority there appeared to agree with the county court judge that the *Fisheries Act* did not contemplate any delegation "other than to those limited persons described in s. 34(m)" (p. 25). The county court judge sought to distinguish the *Ontario Fishery Regulations* as upheld in the *Shoal Lake* case, from the *British Columbia Fishery (General) Regulations*, C.R.C. 1978, c. 840, but without a detailed analysis of both regulations side by side I am unable to say whether there is any difference in substance between the two. I have concluded that the British Columbia Court of Appeal has held, indirectly if not directly, that both subdelegation and interdelegation was effected by the regulations there and that neither were permitted by the *Fisheries Act* or the general law. Counsel for the appellants argued that interdelegation was not dealt with by the British Columbia Court of Appeal. Mr. Belobaba for the respondents appeared to agree on that point, but submitted that the county court judge in that case had held that there was an *ultra vires* attempt at interdelegation of legislative power. Be that as it may, the basic question which has to be determined under this heading is whether the powers delegated to the Minister under the *Ontario Fishery Regulations* are administrative or legislative.

As the Divisional Court judge pointed out, there is sometimes a fine line to be drawn between whether the powers being exercised are legislative or administrative. S. A. de Smith in his *Judicial Review of Administrative Action*, 4th ed. (1980), states (p. 71):

A distinction often made between legislative and administrative acts is that

a between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice.

b This passage was quoted by Dickson J. speaking for the Supreme Court of Canada in *Re British Columbia Development Corp. et al. and Friedmann et al.* (1984), 14 D.L.R. (4th) 129, [1985] 1 W.W.R. 193, 55 N.R. 298 *sub nom. British Columbia Development Corp. v. Ombudsman*, and he went on to say (p. 148 D.L.R., p. 312 N.R.):

c I find support for this view in the judgment of the Ontario Court of Appeal in *Re Ombudsman of Ontario and Health Disciplines Board of Ontario et al.*, *supra*. The issue in that case concerned the extent of the Ontario Ombudsman's jurisdiction. The word under consideration was "administrative". Morden J.A. said, at p. 608:

d "... it is reasonable to interpret 'administrative' as describing those functions of Government which are not performed by the Legislative Assembly and the Courts. Broadly speaking, it describes that part of Government which administers the law and governmental policy."

In accord are *Booth v. Dillon* (No. 3), [1977] V.R. 143 (S.C.) at p. 144; *Glenister v. Dillon*, [1976] V.R. 550 (S.C.) at p. 558.

e As I said earlier, it cannot have been the intention of Parliament that the Governor in Council would have the obligation to issue individual licences with individual quotas to thousands of commercial fishermen, with regard to the different areas of the large lakes being fished, having set out in part at least the maximum total quotas for the individual species and set out generally the waters from which they might be taken.

f Dickson J. also quoted (p. 147 D.L.R., p. 312 N.R.) from 1 Hals., 4th ed., p. 7, para. 4, under the title "Administrative Law" as follows:

g "The functions of government are classified as legislative; executive or administrative; judicial; and ministerial . . . executive and administrative acts entail the formulation or application of general policy in relation to particular situations or cases, or the making or execution of individual discretionary decisions . . ."

h The action of the Minister in fixing the individual quotas for commercial fishermen for particular waters "was the application of general policy in relation to particular situations or cases" in the province. That action was, accordingly, administrative and did not fall within the ban on interdelegation of legislative power: see also *Desrosiers v. Thinel*, [1962] S.C.R. 515 at pp. 517-8, 519.

In *Coughlin v. Ontario Highway Transport Board et al.*, [1968]

S.C.R. 569, 68 D.L.R. (2d) 384, the Supreme Court dealt with the argument that the *Motor Vehicle Transport Act*, 1953-54 (Can.), c. 59, particularly s. 3, constituted an unlawful delegation by Parliament to the provincial Legislature of the power to legislate in relation to a subject-matter wholly within the legislative jurisdiction of Parliament, namely, interprovincial motor vehicle carriage.

Cartwright J., speaking for the majority, set out the problem (p. 574 S.C.R., p. 387 D.L.R.):

From the above brief review of the relevant legislation it will be seen that as matters stand at present the question whether a person may operate the undertaking of an inter-provincial carrier of goods by motor vehicle within the limits of the Province of Ontario is to be decided by a Board constituted by the provincial legislature and which must be guided in the making of its decision by the terms of the statutes of that legislature and the regulations passed thereunder as they may exist from time to time.

In holding that the delegation was not a delegation of law-making power, Cartwright J. stated (p. 575 S.C.R., p. 388 D.L.R.):

In the case before us the respondent Board derives no power from the Legislature of Ontario to regulate or deal with the inter-provincial carriage of goods. Its wide powers in that regard are conferred upon it by Parliament. Parliament has seen fit to enact that in the exercise of those powers the Board shall proceed in the same manner as that prescribed from time to time by the Legislature for its dealings with intra-provincial carriage. Parliament can at any time terminate the powers of the Board in regard to inter-provincial carriage or alter the manner in which those powers are to be exercised. Should occasion for immediate action arise the Governor General in Council may act under s. 5 of the *Motor Vehicle Transport Act*.

In my opinion there is here no delegation of law-making power, but rather the adoption by Parliament, in the exercise of its exclusive power, of the legislation of another body as it may from time to time exist, a course which has been held constitutionally valid by this Court in *Attorney General for Ontario v. Scott* and by the Court of Appeal for Ontario in *Regina v. Glibbery*.

To relate it to the instant case one needs only to substitute "Minister" for Board.

Mr. Justice Ritchie in his dissenting judgment took the same view of the legislation there under consideration that the Divisional Court judge took of the legislation now before us (p. 582 S.C.R., p. 394 D.L.R.):

In the case of the *Motor Vehicle Transport Act*, direct authority has been given to the local board in each province "in its discretion to issue a licence to a person to operate an extra-provincial undertaking into or through the province", and the manner in which that discretion is to be exercised is not limited to such provincial regulations as the Governor-in-Council may designate but is to be exactly the same as if the extra-provincial undertaking were a "local undertaking". In my view the effect of this legislation is that the

- a control of the regulation of licensing of a "connecting undertaking", is turned over to the provincial authority, and in the Province of Ontario this means that the controlling legislation is the *Ontario Highway Transport Act*, R.S.O. 1960, c. 273, and the *Public Commercial Vehicles Act*, R.S.O. 1960, c. 319.

- b The reasoning of the majority is more applicable to the facts of the present case and it must also be noted that the Minister in determining the individual quotas is not the provincial legislator. Mr. Driedger in his article "The Interaction of Federal and Provincial Laws", 54 Can. Bar Rev. 695 (1976), at p. 700, points out that "there are many federal statutes under which powers are conferred on provincial officials (for instance, Food and Drugs Act, Game Export Act, Migratory Birds Convention Act, *Fisheries Act*, Explosives Act)". (Emphasis added.)

- c I have concluded that there has not been an *ultra vires* delegation of legislative power in the Governor in Council granting, through the *Ontario Fishery Regulations*, the Minister the power to fix commercial fishing quotas in commercial fishing licences.

- d The appeal is, accordingly, allowed and the order of the court below set aside.

Questions referred under s. 34, Judicature Act, R.S.O. 1980, c. 223

- e In view of my answer to the first question, it is not necessary to answer the application for judicial review which was referred to this Court. However, we heard argument on the point and were asked to determine it. If the matter should go further, it might be helpful to state the Court's opinion on the referred question.

f *Facts*

- g Mr. Justice Smith delivered his reasons and made his order on October 15th. On November 2nd The Honourable Alan W. Pope, Minister of Natural Resources for Ontario, made two orders. The first order, Order 1984-2 entitled "*Ontario Fishery Regulations Variation Quota Order*" purported to close down the autumn commercial fishing season for yellow perch in Lake Erie from the date of the order. The quota became zero kilograms from November 2, 1984 to December 15, 1984, the time originally fixed in the *Ontario Fishery Regulations* for the end of that season.

- h The second order, Order 1984-6 entitled "*Ontario Closed Season Variation Order*" purported to close the autumn commercial fishing season for yellow pickerel (wall-eye) in the waters of Lake Erie in the counties of Kent and Essex from November 2nd to December 15th.

The applicants are two commercial fishermen who fish the designated waters of Lake Erie under the authority of licences issued to them by the respondent Minister. They brought their application for judicial review of these orders on November 7th, and, as earlier stated, since the appeal from Smith J.'s order was to be heard on November 15th, O'Brien J., under s. 34 of the *Judicature Act*, referred the matter before him to this Court to be heard at the same time as the appeal. In order to maintain the *status quo* he declared the two orders unenforceable and, in addition, granted interim relief by way of an interim injunction prohibiting the Minister, his servants and agents from seizing any fish, equipment or boats of the applicants pending the determination by the Court of the appeal and the reference.

Conclusion

Order 1984-2 was issued pursuant to authority given to the Minister by s. 6(1) of the *Ontario Fishery Regulations* which provides:

6(1) Any fishing quota fixed by these Regulations may be varied by order of the Minister.

By that order the Minister in reducing the quota to zero for the rest of the original fishing season, in effect, fixed the quota at what had been already taken from the designated waters.

Order 1984-6 was issued pursuant to authority given to the Minister by s. 5(3) of the *Ontario Fishery Regulations* which provides:

5(3) Any closed season fixed by these Regulations may be varied by order of the Minister.

The authority for these provisions of the *Ontario Fishery Regulations* is s. 34(m) of the *Fisheries Act* which I quoted earlier. It provides that the Governor in Council may make regulations:

(m) authorizing a person engaged or employed in the administration or enforcement of this Act to vary any close time or fishing quota that has been fixed by the regulations.

One does not have to rely in this question on an implied power to delegate; the power is given explicitly. Having held, on the appeal, that there was an implied power to delegate the administrative powers to carry out the scheme of the *Fisheries Act* it is *a fortiori* that s-s. 5(3) and 6(1) were valid exercises of the power.

Order 1984-2

The applicants submit that the order of the Minister was more than a variation as permitted by the *Fisheries Act* and the *Ontario*

Fishery Regulations; it was a complete elimination of the quotas. In reality that is not so. Clearly there were yellow perch caught by commercial fishermen from June 1, 1984, the beginning of the open season, to November 2, 1984. The effect of the order was to vary the total amount of 9,071,850 kg originally set for the open period, to the number of kilograms caught from June 1st to November 1st. The order was, in my opinion, a valid one.

Order 1984-6

This order, it will be remembered, closed the commercial fishing season for yellow pickerel from November 2nd to December 15th. Prior to this order the open season for commercial fishing for yellow pickerel in the designated area was from the "first Tuesday in September to December 15th".

"Close time" is defined in s. 2 of the *Fisheries Act* as meaning "a specified period during which fish to which it applies may not be fished".

"Closed season" under s. 2(1) of the *Ontario Fishery Regulations* means, "... every period that is not an open season...".

"Open season" under s. 2(1) of those regulations means, "... a specified period during which that fish may be taken".

As noted, under s-s. 5(3) of the regulations, the Minister is empowered to vary any closed season.

The applicants argue that no actual "closed season" was varied or fixed by the regulations. The only season that was fixed in the regulations with regard to yellow pickerel was an "open season" and, they submit, s. 2(1) draws a clear distinction between "open seasons" and "closed seasons". They argue that the order did not vary the December 15th closing date but rather "instantaneously eliminate(d) any such season altogether". The argument became rather refined thereafter and I must admit, after hearing the submissions on this point, to having considerable sympathy with Lord Bramwell in *Bank of England v. Vagliano Brothers*, [1891] A.C. 107 at p. 138, where he said: "This beats me". I cannot see that reducing the "open season", by enlarging the "closed season", thereby varying the closed season, is not a variation of the closed season, even though it at the same time varies an open season. It is irrelevant that the regulations define "closed season", as already stated, merely as "... every period that is not an open season...". I do not think that it is appropriate that the Court should approach the interpretation of such legislation as a matter of pure semantics and so strictly as to, effectively, make nonsense out of it.

I would dismiss the application. The effect of this is to set aside the declaratory order of O'Brien J. and to dissolve the interim injunction granted by him as well as setting aside the order as to costs. There will be no order as to costs either here or below. a

In the result and in summary, the appeal is allowed, the order of Smith J. set aside and on the referred matter the application is dismissed, the declaratory order of O'Brien J. set aside and the interim injunction dissolved. b

*Appeal allowed; application
on referred matter dismissed.*

[HIGH COURT OF JUSTICE] c

**Royal Bank of Canada et al. v. Mohawk Moving
& Storage Ltd. et al.**

ANDERSON J.

28TH JANUARY 1985. d

Debtor and creditor — Priorities — Debentures — Bank account seized on behalf of execution creditors — Proceeds credited to sheriff's account before crystallization of debenture — Execution creditors take priority.

A debtor gave a floating charge debenture to the plaintiff banks. In May the sheriff, on behalf of an execution creditor, served a notice of seizure of the debtor's account at the R bank, and in pursuance of the notice the R bank gave to the sheriff a cheque, which the sheriff deposited in his own account on June 2nd. On June 10th a receiver-manager was appointed under the debenture who demanded the return of the proceeds of the cheque. In an action to determine the question of priority, held, the property affected by the debenture (the bank account at the R bank) ceased to exist when the cheque was deposited to the sheriff's account. The effect of payment into the sheriff's account was that the execution had been completed by payment. Accordingly, the execution creditor had priority. e f

Cases referred to

Ontario Development Corp. v. Trustee of Estate of I. C. Suatac Construction Ltd. (1976), 12 O.R. (2d) 465, 69 D.L.R. (3d) 353, 22 C.B.R. (N.S.) 42; *Industrial Development Bank v. Valley Dairy Ltd. et al.*, [1953] O.R. 70, [1953] 1 D.L.R. 788, [1953] C.T.C. 132; *Collingridge v. Paxton* (1851), S.C. 2 L.M. & P. 654, 21 L.J.C.P. 39, 16 Jur. 18, 11 C.B. 683, 138 E.R. 643; *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627; *Mackay & Hughes (1973) Ltd. v. Martin Potatoes Inc.*; *Dominion Stores Ltd., Garnishee* (1984), 46 O.R. (2d) 304, 9 D.L.R. (4th) 439, 51 C.B.R. (N.S.) 1, 4 P.P.S.A.C. 107 g

Statutes referred to h

Bankruptcy Act, R.S.C. 1970, c. B-3, s. 50(1)
Creditors Relief Act, R.S.O. 1980, c. 103

MOTION to determine a question of priorities.

**MORGAN v. BOARD OF GOVERNORS
OF ACADIA UNIVERSITY et al.**

Nova Scotia Supreme Court [Trial Division],
Grant J.

Heard - June 10, 1985.
Judgment - June 17, 1985.

Procedural fairness - Audi alteram partem - Notice - University disciplinary proceedings leading to convictions on charges of which notice not given - Defect cured by overturning of conviction by appeal board.

Procedural fairness - Audi alteram partem - Legal representation - University disciplinary proceedings - Rule excluding representation by counsel not failure of natural justice.

Delegation of decision-making power - University disciplinary proceedings - Board of Governors delegating disciplinary powers to university officials and committees - Delegation not ultra vires - Ultimate decision-making power over suspensions and expulsions retained by board.

Prescriptive remedies - Certiorari - Availability - University disciplinary process subject to prerogative writs - Powers of intervention to be exercised only where clear breaches of rules of natural justice.

M, a student at AU, was charged with various disciplinary offences as a result of being found with an open bottle of beer in a university residence. The notice to him of the hearing of the charges by the AU's Judicial board cited breach of the Nova Scotia Liquor Control Act and verbal abuse. However, after a hearing at which he admitted the facts alleged against him, he was found guilty and fined on four charges: the two specified, failure to produce his I.D. card and having open liquor in a residence. As well, he was ordered to forfeit a bond and placed on disciplinary probation. He then appealed to the University Discipline Appeals Committee. Before the committee, M was represented by counsel and his claims were bias against members of the board, failure by the board to follow the proper procedures and excessive sanctions. The committee allowed M's appeal to the extent of overturning the convictions for failure to produce I.D. and breach of the provincial Liquor Control Act and it also reversed the penalty

of disciplinary probation with its threat of dismissal proceedings in the event of a subsequent infraction.

M then appealed for relief in the nature of certiorari and an order under s. 24(1) of the Canadian Charter of Rights and Freedoms quashing the decisions of both the board and the committee with respect to the remaining convictions and sanctions.

Held - Application dismissed.

1. In appropriate cases, particularly given the lack of a Visitor to AU, certiorari was available with respect to the disciplinary powers of universities. However, it was a jurisdiction to be exercised sparingly and only in the case of obvious denials of natural justice. Otherwise, the internal, cheap, efficient and educational processes of AU should be allowed to function unhindered.

2. Under the Act of Incorporation of Acadia University, the Board of Governors had authority to discipline the students and this function had been delegated lawfully to the Dean of Students to be exercised through the disciplinary system set up and approved by the Board of Governors. Without such delegations, the operation of a fair disciplinary process would be impractical. (It was also important to note that the Board of Governors retained ultimate jurisdiction with respect to the severe sanctions of suspension and expulsion.) M had also agreed contractually to the disciplinary process when he enrolled at AU and had been made well aware of the AU rules and policies.

3. To the extent that the board had contained a member who had laid a complaint against M with respect to another incident, there might have been room for an allegation of a reasonable apprehension of bias. The board had also not given M notice of the charge of failing to produce I.D. and did not have authority to deal with charges alleging a breach of a provincial statute. Nevertheless, the notice had been sufficient to alert M to the fact that he was being dealt with on the basis of allegations that he had an open bottle of alcohol in residence contrary to University policy and the other defects had been cured by the hearing before the committee in that it had quashed the I.D. and Liquor Control Act convictions as well as tempering the sanctions. Also, the presence on the board of a person who had previously laid a complaint against M, while imprudent, was not technically bias. Particularly given M's admission of the facts throughout, it was not

appropriate for the Court to grant relief in the nature of certiorari to quash the remaining convictions.

4. While the standards of procedure adhered to particularly by the board did not correspond to those that might have been expected of a Court of law (e.g., denial of counsel), the internal disciplinary processes of the AU, operated largely by students for the benefit of students, did not have to adhere to all judicial standards of procedure.

5. While the Canadian Charter of Rights and Freedoms did apply to universities under certain circumstances, it had not been breached here. In terms of s. 7, there had not been a deprivation of "life, liberty [or] security of the person". As for s. 10, M was not a person who had been "arrested or detained". Moreover, he had assented to the board's jurisdiction and its ban on legal counsel. Also, it was arguable that s. 10 did not always entitle one to legal counsel and M had been entitled to non-legal counsel before the board. Section 11 did not apply since it dealt with offences at law, not university disciplinary proceedings. In any event, his hearing was public and it was by an "independent and impartial" tribunal. Also, once again, he had assented to the process. Finally, there was no discrimination such as prohibited by s. 15. M was treated equally before and under the University's disciplinary system.

Cases considered

Calvin v. Carr, [1980] A.C. 574, [1979] 2 All E.R. 440 (P.C.) - referred to.

Doane v. Mount St. Vincent Univ. (1977), 24 N.S.R. (2d) 598, 35 A.P.R. 298, 74 D.L.R. (3d) 297 (N.S. T.D.) - considered.

Harelkin v. Univ. of Regina, [1979] 2 S.C.R. 561, [1979] 3 W.W.R. 676, 96 D.L.R. (3d) 14, 26 N.R. 364, (S.C.C.) - referred to.

King v. Univ. of Sask. (1968), 67 W.W.R. 126, 1 D.L.R. (3d) 721 (Sask. C.A.) affirmed [1969] S.C.R. 678, 68 W.W.R. 745, 6 D.L.R. (3d) 120 (S.C.C.) - considered.

Langlois v. Rector & Members of Laval Univ. (1973), 47 D.L.R. (3d) 674 (Que. C.A.) - referred to.

R. v. Lerke, (1984), 41 C.R. (3d) 172, 55 A.R. 216, 13 C.C.C. (3d) 515, 11 C.C.R. 1, 11 D.L.R. (4th) 185 (Alta. Q.B.) - referred to.

Vanek v. Govs. of Univ. of Alta., [1974] 3 W.W.R. 167, affirmed [1975] 5 W.W.R. 429, 57 D.L.R. (3d) 595 (Alta. C.A.) - distinguished.

class female and an upper class male student and one member of the student representative council.

Counsel agrees that the Board was properly constituted in this case. It is, however, alleged that one of the members should not have been a member of the Board because of bias.

The student may appear personally before the Board or be represented by a student "advisor". Lawyers are not permitted to take part in proceedings before the Board.

Step three is a pre-appeal meeting with the Dean. This may be arranged by either party.

After a hearing by the Board either party has a right to appeal to the Judicial Appeals Committee (the Committee) on grounds of appeal set forth in the student handbook.

The Committee consists of four students and three faculty members. It is agreed that the Committee was properly constituted in this case.

At the Committee hearing the student may be represented by counsel. In this instance the plaintiff was represented by a lawyer of his choice.

Information to Students

Each student, including the plaintiff was given a copy of the student handbook and a university calendar. The procedure relating to complaints and hearings, pre-hearing settlements, sanctions and appeals are set out in detail in the student handbook.

(1) Liquor

The section of the student handbook dealing with drugs and alcohol is as follows:

"Drugs and Alcohol

The consumption of alcoholic beverages in residence is governed by the Liquor Control Act of Nova Scotia. Students under the age of 19 are not permitted to consume alcohol. Open liquor in any area of the residences other than students' rooms is illegal.

In accordance with the Criminal Code of Canada students will be subject to prosecution for the use, possession of or distribution of illegal and/or dangerous drugs. This includes marijuana or marijuana plants.

The Don may consult with his/her residence staff and the Dean of Students concerning students who appear to have

problems relating to the use of alcohol and/or drugs. If an agreement is reached, the Dean of Students may make a mandatory referral of the student to the Detoxication Center in Kentville for an assessment of the student's drinking behavior and/or drug use, and if necessary, treatment. The referral to the Detox Center will be made through the University Medical Center. Refusal by the student to accept the referral will result in his/her dismissal from residence."

(2) Identification Cards

"Identification Cards

All Acadia University students are provided with a photo identification card. The cards are the property of the University and are provided, initially, free of charge.

Identification cards serve a very useful purpose and should be kept on your person at all times. I.D.'s are used to gain access to varsity sports events and are required at all liquor related events held in the Students' Union Building and the Gymnasium in support of our WET/DRY license. For obvious reasons, only valid/current year I.D.'s can be accepted. Invalid cards or cards other than those issued for the current year will be retained by Security.

Lost I.D.'s may be replaced during the academic year in Room 410, located in the Old Students' Union Building.

Processing times are from 1:30 p.m. to 3:00 p.m. every Tuesday and a \$5.00 replacement fee will be charged."

"Sanctions

Types of Sanctions

Before imposing sanctions the Judicial Board shall make reference to the disciplinary records maintained by the Dean of Students. The Judicial Board and the Dean, in cases of pre-hearing settlements, shall have the authority to levy any of the following sanctions:

1. to suspend the imposition of any penalty upon the accused persons conditionally or otherwise.
2. to order restitution to Acadia University or to any person or organization offended.

residence don and the students in that residence.

When approached by the campus police he gave a fictitious name and refused to produce his student identification card on demand. He told the campus policeperson to "fuck off".

The plaintiff submits that there was a lack of jurisdiction by the Board and Committee and that there was a denial of natural justice.

Dr. Fraser cited a disciplinary rule or regulation prohibiting open liquor in any area of the University residence other than students' rooms. This is cited in the student handbook. He deposed that the Liquor Licensing Board in 1984 had given the University authority to establish its own policies "concerning the handling of liquor in university residence building". I find the Board and Committee had jurisdiction to deal with matters outlined in the student handbook.

In order to consider the treatment of the plaintiff I shall examine it at both the Board and Committee levels.

The Board

The October 2nd letter (Ex. F - Fraser) cited a complaint relating to a violation of the Liquor Control Act, R.S.A. 1980, c. L-17, and verbal abuse. The attached report cited the incident involving the plaintiff. I consider a fair interpretation of those documents to convey to the plaintiff that he was to respond to a complaint of having or drinking liquor outside his room.

The hearing was such that the plaintiff and his advisor could cross-examine his accusers and give his side of the incident. This he did.

He was found to have had "open" liquor contrary to university policy and the Liquor Control Act. As well he was dealt with for failure to show his I.D. and verbal abuse.

I find that a reasonable interpretation of the October 15th letter to the plaintiff would inform him that the Board dealt not only with the university policy on open liquor but also with the Liquor Control Act. Clearly the Board had no jurisdiction to act as a Court to administer that Act.

The University submitted that this was merely part of the material used by the Board and it did not purport to assume that jurisdiction.

The Board also dealt with the failure to produce the I.D. The October 2nd letter to the plaintiff makes no mention of such a charge, although there is reference to the fact in the incident report.

I find the Board did have jurisdiction and had given notice to the plaintiff concerning the open liquor and the

verbal abuse. It could deal only with University policy breaches and not the Act.

The plaintiff did not have counsel. He had agreed to the provisions in the student handbook where student advisors were used in lieu of lawyers. He did retain an advisor.

I find the plaintiff had a fair hearing by and before the Board and there was no denial of natural justice.

The Committee

The notice of appeal cites three grounds:

- (1) Bias by members of the Board
- (2) Improper following of procedures
- (3) Disproportionate sanctions

The plaintiff had counsel who presented and prosecuted his appeal.

Ground number one was rule on by the Committee. A member of the Board had signed a complaint against the plaintiff on September 3 on an apparently unrelated matter.

Grounds number two and three were also dealt with fully by the Committee at its hearing. The letter of November 22 makes no reference to the Liquor Control Act. The charge relating to the failure to produce the I.D. was deleted and the sanctions were modified.

There was some delay in the hearing of the appeal. This appears to me to have been agreed upon and the sanctions were suspended pending appeal.

I find that both stages of the procedure must be examined to determine jurisdiction and fairness.

I find that in looking at the disciplinary procedures followed, that is the two stages, there was no lack of jurisdiction to deal with the University disciplinary regulations. Although the Board purported to assume jurisdiction under the Liquor Control Act the Committee did not. Although the Board purported to deal with the failure to produce his I.D., the Committee did not.

I find the plaintiff had a fair hearing, both before the Board and the Committee.

It must be borne in mind, I find, that the Board and the Committee are vehicles to administer internal university discipline, conducted primarily by students, composed primarily of students, for students. This is, as well, a part of their educational experience. These hearings are reasonably formally structured but enable each party to present evidence and to

cross-examine those who give evidence.

Had the plaintiff been tried in a Court he would have had the right to a lawyer and he may have had a good defence on a charge of "illegal possession". However, he was dealt with under university disciplinary procedures which I find the University had the right to administer as it did.

The University has the right and the duty to maintain discipline on campus and in residence. Public and private funds are involved in building and maintaining residences. Discipline, with regulations, must be in place and enforced. Property must be protected and students must have the right to study and live under the residence rules. Those who choose to break the rules must be disciplined.

The incorporating statute has vested the power to discipline in its Board of Governors.

The plaintiff submits that the Governors have no right to delegate.

In an article by Professor John Willis "Delegatus non potest Delegare" (1943, 21 C.B.R. 257, stated:

"When is a delegation permissible? The answer to this question depends entirely on the interpretation of the statute which confers the discretion. A discretion conferred by statute is prima facie intended to be exercised by the authority on which the statute has conferred it and by no other authority, but this intention may be negated by any contrary indications found in the language, scope or object of the statute; . . . This question is answered in practice by comparing the prima facie rule with the known practices or the apprehended needs of the authority in doing its work; the court inquires whether the policy-scheme of the statute is such as could not easily be realized unless the policy which requires that a discretion be exercised by the authority named thereto be displaced;"

I find the very nature of the duty required by the scope and objects of the legislation is such that a delegation be envisioned in interpreting the section. It would, I find, be impractical and inappropriate to consider otherwise. With several residences, with female and male students living in the contemporary university setting, such delegation is only fair and practical. The delegation to the Dean and by him to students and faculty seems to me to be also fair and practical. To hold otherwise I find would be unrealistic today.

The ultimate decision on the suspension or expulsion of a student, the extreme sanction, is exercised by the Governors.

I am satisfied and I find that any defect in fairness or

denial of natural justice at the Board level was cured at the Committee level. This was done in *Harelkin v. Univ. of Regina*, [1979] 2 S.C.R. 561, [1979] 3 W.W.R. 676, 96 D.L.R. (3d) 14, 26 N.R. 364; *King v. Univ. of Sask.*, supra, and in *Calvin v. Carr*, [1980] A.C. 574, 2 All. E.R. 440 (P.C.).

I find the hearings were not arbitrary or malicious or exercised on a principle of bad faith.

I have gone into the merits of this case in considerable detail, perhaps more than I should have done.

I consider that our Courts should only rarely enter the realm of the internal discipline of a University.

In some relatively rare circumstances there may be an obvious denial of natural justice. In this case I find there was no denial of natural justice. In fact the plaintiff, in my opinion, had an abundantly fair hearing at each disciplinary level.

In my opinion, in some comparatively rare circumstances, where the applicant has exhausted all relevant appeal provisions within the University disciplinary system, if there has been an obvious denial of natural justice, then the general supervisory powers of the Courts should be available for appropriate relief.

However, I feel that the supervisory power should be exercised only in rare occasions. The internal disciplinary proceedings are in themselves an educational exercise for students as well as an efficient, inexpensive and fair way of dealing with disciplinary problems. Discipline is being meted out by the peers of the student.

Here the Board should not have purported to exercise jurisdiction under the Liquor Control Act. It was, however, corrected on appeal. Technically the don of Eaton House could sit on the Board even after filing a complaint against the plaintiff in an unrelated matter. However, I feel it would give a more favourable appearance of fairness if he had not done so.

I must also consider if the Charter of Rights and Freedoms (Charter) applies.

I am satisfied and I find that the Charter may apply under certain circumstances to a university. I agree with the finding of Rowbotham J. in *R. v. Lewke* (1984), 41 C.R. (3d) 172, 55 A.R. 216, 13 C.C.C. (2d) 515, 11 C.C.R. 1, 11 D.L.R. (4th) 185.

I have been referred specifically to arts. 7, 10, 11 and 15:

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

Foundations of law

Constitutional and administrative law

S. A. de Smith

Second edition



for that of the local authority, giving due weight to the council's knowledge of local conditions. Indeed, he has a legally enforceable duty to exercise an independent discretion.¹⁰³

It is fairly unusual to provide a full right of appeal to a court against the merits of a statutory discretionary decision. Judicial control of the exercise of discretion is normally limited to two questions: Has the discretion been exercised at all? If so, has it been exercised according to law?

Failure to exercise a discretion

1. The general rule is that, unless expressly authorized to do so, an authority cannot sub-delegate its powers to another person or body: *delegatus non potest delegare*. Application of this principle gives rise to a number of difficult problems – for example, what exactly is meant by ‘delegation’?¹⁰⁴ – which we need not pursue. But it is not hard to illustrate the application of the general rule. A local authority empowered to issue cinema licences subject to conditions cannot validly impose a condition that *no* film shall be exhibited unless approved by the British Board of Film Censors;¹⁰⁵ it must preserve a residual discretion to override the rulings of the Board in an individual case; otherwise it will be held to have abdicated from its statutory duty to exercise its own discretion.¹⁰⁶ Again, in deciding an appeal, Minister X must not dispose of the matter solely on the basis of Minister Y's policy; otherwise the decision becomes Minister Y's.¹⁰⁷

2. One authority cannot lawfully act under the dictation of another unless the other is a superior in the administrative hierarchy or is empowered by law to give instructions to it.¹⁰⁸ Secretaries of State are expressly empowered to give certain instructions to road and air transport licensing authorities although they are largely independent bodies.¹⁰⁹

103. *Sagnata Investments Ltd v. Norwich Corporation* [1971] 2 Q.B. 614. The same principles apply to the Crown Court hearing an appeal from a magistrates' court.

104. In general, the rule against sub-delegation does not preclude powers vested in Ministers from being exercised on their behalf and in their name by departmental officials. See also pp. 186, 351.

105. *Ellis v. Dubowski* [1921] 3 K.B. 621.

106. *Mills v. L.C.C.* [1925] 1 K.B. 213.

107. *Lavender (H.) and Son Ltd v. Minister of Housing and Local Government* [1970] 1 W.L.R. 1231 (planning appeal dismissed because Minister of Agriculture always opposed such development). See also *Ratnagopal v. Att.-Gen.* [1970] A.C. 974 (Governor-General, appointing X to conduct an inquiry, in effect sub-delegated to X power to determine his own terms of reference; appointment therefore invalid).

108. cf. *Lavender's* case (above).

109. Transport Act 1968, s. 59 (2); Civil Aviation Act 1971, s. 4(3).

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Oxygen Co. v. Bo

111. See *Schmid*

112. p. 411. See

113. On assuranc
struction Co. [1951]
[1949] 1 K.B. 227).

114. *Rederaktieb*

115. As in the *Li*

116. cf. the *Boun*

3. An authority must not so fetter its own discretion by self-created rules as to preclude itself from applying its mind to the merits of an individual case before it. The borough council, in our hypothetical illustration, could, however, adopt a general policy of not granting any further massage establishment licences for the time being (because, for example, some of these establishments had been improperly conducted), provided that it was prepared to make an exception in a particular case.¹¹⁰ It must keep its mind ajar. But an authority entitled to take general considerations of national policy into account may be entitled to refuse to consider any application belonging to a particular class. For example, the Home Secretary may validly instruct immigration officers not to admit any alien wishing to enter the country as a student member of a cult which he deems to be harmful to the public welfare.¹¹¹

4. An authority cannot validly bargain away, or otherwise undertake not to exercise, powers vested in it for the purpose of fulfilling an important public purpose. As we have noted,¹¹² a local authority cannot disable itself from making a particular by-law or revoking a grant of planning permission; and in general public bodies cannot be estopped from exercising their powers by erroneous assurances given to members of the public.¹¹³ In matters of national policy, the Crown cannot fetter its own freedom to act for the public good.¹¹⁴ But these rules are easier to formulate than to apply in practice. Considerations of fairness to individuals who have been misled may influence a court's decision in their favour.¹¹⁵

Abuse of discretion

Some discretionary powers are absolute in that the propriety of the grounds on which they have been exercised cannot be canvassed in the courts; the only control is political. This is probably true of the exercise of prerogative powers; and of statutory powers while they are subject to proceedings in Parliament.¹¹⁶ In practice it may also be true of statutory

110. See, for example, *R. v. Port of London Authority, ex p. Kynoch* [1919] 1 K.B. 176. See also *Lavender's case* (above); *Stringer v. Minister of Housing and Local Government* [1970] 1 W.L.R. 1281; *Sagnata case* (note 103, above); *Cumings v. Birkenhead Corporation* [1972] Ch. 12 (allocation of pupils to denominational schools); *British Oxygen Co. v. Board of Trade* [1971] A.C. 610 (policy on investment grants).

111. See *Schmidt v. Home Secretary* [1969] 2 Ch. 149.

112. p. 411. See also *Stringer case* (above).

113. On assurances given by Crown servants, see *Howell v. Falmouth Boat Construction Co.* [1951] A.C. 837 at 845, 849 (contrast *Robertson v. Minister of Pensions* [1949] 1 K.B. 227). For local authorities, see now pp. 402-4.

114. *Rederiaktiebolaget Amphitrite v. R.* [1921] 3 K.B. 500; and see pp. 611-12.

115. As in the *Liverpool Corporation case* (pp. 586-7).

116. cf. the *Boundary Commission cases*; pp. 246-8.

1961
 Oct. 10, 11
 Dec. 15

FOREST INDUSTRIAL RELATIONS LIMITED and INTERNATIONAL WOODWORKERS OF AMERICA and the LABOUR RELATIONS BOARD OF THE PROVINCE OF BRITISH COLUMBIA (<i>Defendants</i>)	}	APPELLANTS;
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AND

INTERNATIONAL UNION OF OPER- ATING ENGINEERS LOCAL 882 (<i>Prosecutor</i>)	}	RESPONDENT.
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ON APPEAL FROM THE COURT OF APPEAL FOR
 BRITISH COLUMBIA

Labour—Administrative law—Oral hearing by Labour Relations Board on union's application for certification—Further representations by union in writing and replies thereto—No opportunity for union to answer replies—Propriety of Board's procedure—Labour Relations Act, 1964 (B.C.), c. 17, s. 62(8).

The respondent union sought from the Labour Relations Board of British Columbia and was refused certification as representative of the engineers and firemen in ten plants of the lumber industry. Its application was opposed by the appellant company as representative of the industry, and by the appellant union, International Woodworkers of America, the certified bargaining agent for the whole industry. Following an oral hearing at which all parties had full opportunity to call evidence, to cross-examine witnesses and submit argument, the Board visited two representative plants. Shortly before the view was held, the respondent suggested that the hearing be reopened for the purpose of making further representations. The Board decided against this but advised the interested parties that it would consider further representations in writing. The respondent made its submissions by letter. The Board sent copies of this letter to the appellant company and the appellant union, and informed the respondent by telephone that it had done so. The company and the I.W.A. replied in writing, but these letters were not sent to the respondent union, which consequently did not have an opportunity of answering the replies. Following the Board's rejection of the application for certification, the respondent brought an application for *certiorari* to quash the decision. This application was dismissed by the trial judge but granted on appeal to the Court of Appeal. The appellants appealed to this Court.

Held: The appeal should be allowed.

Both parties had been given a full opportunity to be heard. After a full oral hearing and a view of two representative plants, the Board merely gave the interested parties an opportunity to make any further submissions they chose. After hearing from one side and hearing from the other side in reply, it was not a departure from the rules of natural

*PRESENT: Locke, Cartwright, Martland, Judson and Ritchie JJ.

justice for the Board to hold that the debate had gone on long enough and that it was time to stop. Furthermore, the Board had fully complied with s. 62(8) of the *Labour Relations Act*, which provides that "The Board shall determine its own procedure but shall in every case give an opportunity to all interested parties to present evidence and make representations."

The Board had every right to afford the company and the I.W.A. a reasonable time to reply to the further submissions of the respondent even if, as in the event, it meant an extension of the time set by the Board.

The record disclosed no basis for the finding below that the company and the I.W.A. had added substantially to the representations made by them at the oral hearing in their replies to the further submissions of the respondent.

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FOREST
INDUSTRIAL
RELATIONS
LTD.
et al.
v.
INTER-
NATIONAL
UNION OF
OPERATING
ENGINEERS
LOCAL 882

APPEAL from a judgment of the Court of Appeal for British Columbia¹, allowing an appeal from a judgment of Verchere J. dismissing an application to quash a decision of the Labour Relations Board. Appeal allowed.

D. A. S. Lanskaill, for defendant, appellant, Forest Industrial Relations Ltd.

A. B. Macdonald, for defendant, appellant, International Woodworkers of America.

A. W. Mercer, for defendant, appellant, Labour Relations Board of B.C.

T. R. Berger, for prosecutor, respondent.

The judgment of the Court was delivered by

JUDSON J.:—This appeal is from the judgment of the British Columbia Court of Appeal¹ which quashed a decision of the Labour Relations Board. The respondent, International Union of Operating Engineers Local 882, had sought from the Board and had been refused certification as representative of the engineers and firemen in ten plants of the lumber industry. Its application was opposed by the appellant, Forest Industrial Relations Limited, as representative of the industry, and by the appellant union, International Woodworkers of America, which wished to retain its position as bargaining agent for the whole industry. Following the Board's rejection of the application, the respondent brought an application for *certiorari* to quash the decision. This application was dismissed by Verchere J. but granted on appeal to the Court of Appeal.

¹ (1961), 34 W.W.R. 659, 28 D.L.R. (2d) 249.

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Judson J.

The respondent's application, which was dated April 26, 1960, was made on behalf of what constituted but a small group of a large body of employees in each of the plants. The appellant union, the I.W.A., is the certified bargaining agent for the whole industry. On receipt of the application, the Board sent the usual notices to all interested parties, namely, to Forest Industrial Relations Limited, as representing the employers, to the appellant union, the I.W.A., and to the employees affected by the applications.

The Board, pursuant to the provisions of s. 12(2) of the *Labour Relations Act*, first made its own inquiries by an examination of the records, and on May 25, 1960, sent a notice of hearing to all interested parties for June 8, 1960. An oral hearing was held on that date in the presence of the appellant union, the appellant employer and the respondent union, at which time all parties had a full opportunity to be heard, to call evidence, to cross-examine witnesses and make their submissions. During the hearing the appellant employer invited the Board to visit representative plants. The Board agreed to do so and notified all parties that it would visit two plants on June 20, 1960.

Shortly before the view was held, the respondent union suggested that the hearing be reopened for the purpose of making further representations. The Board decided against this but advised the interested parties that it would consider further submissions in writing to be made not later than July 12, 1960. Forest Industrial Relations Limited replied that it had completed its submissions but requested an opportunity to reply if representations were made by others. The I.W.A. replied that its case was complete but that it wished to be informed if the hearings were to be reopened. The respondent union made its submissions by letter dated July 7, 1960. The Board sent copies of this letter to Forest Industrial Relations Limited and the I.W.A. by letter dated July 12, 1960, and informed the respondent union by telephone that it had done so. Forest Industrial Relations Limited replied in writing to the submissions of the respondent union by letter dated July 20, 1960, and the I.W.A. by letter dated July 22, 1960. These replies were not sent to the respondent union.

On July 28, 1960, the Board notified the respondent union that its application was rejected on the ground that its units of employees were not appropriate for collective bargaining. On September 26, 1960, the respondent union moved for an *order nisi* to show cause why a *writ of certiorari* should not issue to quash the decision of the Board. It was this application which was rejected by Verchere J. and granted by the Court of Appeal.

I have set out this outline of the course taken by these proceedings because, in my respectful opinion, on these facts the issues of jurisdiction and departure from the rules of natural justice, upon which the judgment of the Court of Appeal was founded, do not arise. The respondent's real complaint is that it should have been afforded an opportunity of replying to the submissions made by Forest Industrial Relations Limited and the I.W.A. in their letters of July 20 and July 22, 1960. Both parties in this case on these facts had been given a full opportunity to be heard. After a full oral hearing and a view of two representative plants, the Board merely gave the interested parties an opportunity to make any further submissions they chose. After hearing from one side and hearing from the other side in reply, it is not a departure from the rules of natural justice for the Board to hold that the debate had gone on long enough and that it was time to stop. Further, the Board fully complied with its own Act (s. 62(8)), which states that "The Board shall determine its own procedure but shall in every case give an opportunity to all interested parties to present evidence and make representations."

It is also urged against the decision that the Board received the representations of the two appellants after the deadline that it had set for July 12, 1960. I cannot see that the mere departure from the date can have any bearing upon the decision in this case. The respondent did not send its written submissions until July 7 and these were not sent on to the two appellants until July 12. The Board had every right to afford these two interested parties a reasonable time to reply to the further submissions of the respondent even if it meant an extension of time.

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LOCAL 882
Judson J.

It was also said in the reasons of the Court of Appeal that Forest Industrial Relations Limited and the I.W.A. in their letters of July 20 and July 22 had added substantially to the representations made by them at the hearing of June 8. An examination of the record discloses no basis for such a finding. There is nothing in the record about the representations made and the evidence given on June 8. No stenographic record was made of this hearing and the material does not attempt to state what went on beyond the fact that there was an oral hearing with all interested parties present and with a full opportunity to adduce evidence, examine and cross-examine and submit argument. The two last mentioned letters of the appellants did no more than reply point by point to the representations made by the respondent in its letter of July 7. Counsel for the respondent was invited to compare his client's letter with the replies received to it and to point to any new material in the replies. He stated that there was no new material but that nevertheless his client had a right of reply and had been deprived of it. I do not think that his client had any such right as he asserted.

I would allow the appeal, set aside the order of the Court of Appeal and restore the order of Verchere J. The respondent, International Union of Operating Engineers Local 882, should pay to the appellants, Forest Industrial Relations Limited and International Woodworkers of America, their costs throughout. There should be no order for costs for the Labour Relations Board.

Appeal allowed with costs to the appellants, Forest Industrial Relations Limited and International Woodworkers of America.

Solicitor for Forest Industrial Relations Limited: D. A. S. Lanskill, Vancouver.

Solicitor for International Woodworkers of America: Alex B. Macdonald, Vancouver.

Solicitors for Labour Relations Board of the Province of British Columbia: Paine, Edmonds, Mercer & Williams, Vancouver.

Solicitors for the respondent: Shulman, Tupper, Gray, Worrall & Berger, Vancouver.

The notice given by the appellants gave notice of appeal and of an application for leave to appeal from the decision of Kirby, J. In the result leave to appeal is granted and the appeal is dismissed.

Appeal dismissed.

REGINA v. QUEBEC LABOUR RELATIONS BOARD,
Ex parte KOMO CONSTRUCTION INC.

*Supreme Court of Canada, Fauteux, Martland, Judson, Hall and
Pigeon, JJ. December 18, 1967.*

Administrative law — Boards and tribunals — Labour Relations Board — Jurisdiction — Exclusive jurisdiction of Board to deal with petitions for certification implies that it is incumbent upon the Board to determine in each case whether provisions of Labour Code (Que.) have been complied with — Board does not lose jurisdiction merely because it misapplies a legislative provision.

[*Bakery & Confectionery Workers International Union of America, Local 468 v. Salmi et al.*; *White Lunch Ltd. v. Labour Relations Board of British Columbia*, 56 D.L.R. (2d) 193, [1966] S.C.R. 282, 55 W.W.R. 129; *Re Galloway Lumber Co. Ltd. and British Columbia Labour Relations Board*, 48 D.L.R. (2d) 587, [1965] S.C.R. 222, 51 W.W.R. 90, folld]

Administrative law — Denial of justice — Audi alteram partem — Rule does not imply that there must always be a hearing, but only that each party be given an opportunity to put forward its arguments.

[*Forest Industrial Relations Ltd. et al. v. International Union of Operating Engineers, Local 882*, 31 D.L.R. (2d) 319, [1962] S.C.R. 80, 37 W.W.R. 43, folld]

APPEAL by an employer from a quashing of a writ of prohibition directed to the Quebec Labour Relations Board.

Guy Letarte and Jean-Claude Royer, for appellant.
Raynold Belanger, Q.C., for respondent.

The judgment of the Court was delivered by

PIGEON, J. (translation) :—This case involves a petition for certification filed by the mise-en-cause with the respondent. Confronted with the petition, service of which was duly effected upon it by respondent, the appellant contested it by filing with the respondent an "inscription in law", in which it asked that the petition be dismissed on the sole ground that it "was not accompanied by a certified copy of the mise-en-cause's constitution and by-laws, nor by a statement showing the conditions for admission, the admission privileges, and the

fee structure imposed upon its members". Without a hearing, the respondent then granted certification on the following grounds:

CONSIDERING that the Board took cognizance of the contestation submitted by counsel for the respondent, dated March 22, 1966;

CONSIDERING that the Board noted that the facts alleged in the said contestation were contradicted by the investigation report made by its own inspection service;

CONSIDERING that the petitioning association has complied with the conditions set out in the *Labour Code*, and in the by-laws of the Board, thereby entitling it to certification.

Opposing this decision, the appellant petitioned for a writ of prohibition, raising two arguments:

1. failure to produce the above-mentioned material with the petition, as required by the *Labour Code*;
2. violation of the *audi alteram partem* rule.

The Superior Court ordered that the writ of prohibition be issued, using the following language:

CONSIDERING that, according to the facts set out in the petition, this Court feels justified in authorizing a writ of prohibition to issue.

In accordance with the provisions of s. 122 of the *Labour Code*, R.S.Q. 1964, c. 141, two Judges of the Court of Queen's Bench quashed the writ on the following grounds:

CONSIDERING that the Board alone had the power to make a finding on the point raised by the K S L;

CONSIDERING that even if the statements contained in the reasons for judgment under attack by the K S L were false — and this has not been established — the decision of the Board would none the less remain an act relating to "the exercise of its functions" (s. 121).

The grounds on which this decision is based are unassailable. Unless, in each of the legislative provisions addressed to the Labour Relations Board, a restriction upon its jurisdiction can be found, it cannot be argued that it has exceeded its jurisdiction by deciding that a legislative provision has been complied with. Such an interpretation would conflict with a fundamental purpose of the *Labour Code* which is to confer *exclusive* jurisdiction upon the Board to deal with petitions for certification, and this implies that it is incumbent upon the Board to determine in each case whether the provisions of the *Labour Code* have been complied with in this connection.

The principle to be applied is the one laid down in *Bakery & Confectionery Workers International Union of America, Local 468 v. Salmi et al.*; *White Lunch Ltd. v. Labour Relations Board of British Columbia*, 56 D.L.R. (2d) 193, [1966]

S.C.R. 282, 55 W.W.R. 129, where this Court refused to interfere with the power conferred by law on the British Columbia Labour Relations Board to revise or annul any decision. Speaking for himself, Hall, J., said at p. 204:

Nothing . . . shows that it lost jurisdiction for any of the reasons which the law recognizes as ousting jurisdiction, i.e., bias, interest, fraud, denial of natural justice or want of qualification.

An entity such as the Board does not lose jurisdiction merely because it misapplies a legislative provision; it only loses jurisdiction when it goes beyond its field of activity or fails to comply with the conditions essential to the exercise of that jurisdiction. It is quite evident that the section of the *Labour Code* relied on by the appellant is not intended to narrow the scope of the Board's activity, but is, rather, a provision which the Board is obliged to apply by making final decisions not subject to appeal. As this Court decided in *Re Galloway Lumber Co. Ltd. and British Columbia Labour Relations Board*, 48 D.L.R. (2d) 587, [1965] S.C.R. 222, 51 W.W.R. 90, the validity of the exercise by such a Board of its jurisdiction does not depend upon whether its decision is right or wrong. The only question to be determined is whether the matter falls within "the assigned area of the exercise of the power".

Turning now to the application of the *audi alteram partem* rule, it is important to note that that rule does not imply that there must always be a hearing. The rule does require that each party be given the opportunity to put forward its arguments. In the case at bar, faced with a contestation raising only a question of law, the Board did not abuse its discretion by deciding that it was unnecessary to conduct a hearing prior to rendering its decision. As this Court decided in *Forest Industrial Relations Ltd. et al. v. International Union of Operating Engineers, Local 882*, 31 D.L.R. (2d) 319, [1962] S.C.R. 80, 37 W.W.R. 43, a Board is not obliged to hold a hearing with respect to all the arguments raised in any matter with which it is seised. When the matter has been presented in a manner deemed adequate by it, it is empowered to make a finding without further delay. It must not be forgotten that the Board exercises its jurisdiction in matters where, in general, any delay can cause serious and irreparable harm. While upholding the rule that the fundamental principles of justice must be respected, it is important to refrain from imposing a code of procedure upon an entity which the law has sought to make master of its own procedure.

In view of my conclusions concerning the two grounds of appeal raised by the appellant, it is unnecessary for me to make any finding concerning the meaning to be given to the section which prohibits recourse to the Courts "on account of any act, proceeding or decision relating to the exercise" by the Board of its functions. When such a finding becomes necessary, not only must account be taken of *Jarvis v. Associated Medical Services Ltd.*, 44 D.L.R. (2d) 407, [1964] S.C.R. 497, and the other cases mentioned therein, but reference must also be made to *Board of Health for Saltfleet Township v. Knapman*, 6 D.L.R. (2d) 81, [1956] S.C.R. 877, wherein this Court held that it was not prevented from quashing, because of a violation of the *audi alteram partem* rule, a decision rendered in the enforcement of the *Public Health Act*, R.S.O. 1950, c. 306, s. 143 of which read as follows:

143. No order or other proceeding, matter or thing, done or transacted in or relating to the execution of this Act shall be vacated, quashed or set aside for want of form, or be removed or removable by *certiorari* or otherwise into the Supreme Court.

I have italicized the words "relating to" because they are the same as those found in the English translation of s. 121 of the *Labour Code*.

I am thus of the opinion that this appeal should be dismissed with costs.

Appeal dismissed.

RE BROOKS AND REGISTRAR OF TITLES

British Columbia Supreme Court, Gould, J., in Chambers.
October 28, 1968.

Real property — Licences — Logging agreement — No time limit expressly provided — Licensee entitled to reasonable time to remove timber — Whether registration of agreement cancellable after delay of ten years.

Where an agreement whereby one party is licensed to enter the other's lands to cut and remove timber contains no express agreement as to time, the licensee is entitled only to a reasonable time within which to remove the timber. Certainly after a delay of ten years the licensor may apply to the Registrar of Titles and thence to the Court to have the registration of the timber agreement cancelled.

[*Dolan v. Baker et al.* (1905), 10 O.L.R. 259, folld; *Johnson v. Dunn* (1905), 11 B.C.R. 372, consd; *Re Nosalek and Registrar of Land Titles* (1967), 65 D.L.R. (2d) 505, 61 W.W.R. 659, apld]

102(3) Where subsection (1) and subsection (2) are complied with employees may strike and during the continuance of the strike

(a) the employer shall not replace the striking employees or fill their position with any other employee, and

(b) no employee shall picket, parade or in any manner demonstrate in or near any place of business of the employer.

102(3) Les employés peuvent faire la grève lorsqu'ils se sont conformés au paragraphe (1) et au paragraphe (2) et pendant toute la durée de la grève

a) l'employeur ne doit pas remplacer les grévistes ou attribuer leurs postes à d'autres employés, et

b) les employés ne doivent pas participer à un piquet de grève, à un défilé ou à quelque démonstration que ce soit à l'établissement de l'employeur ou près de cet établissement.

On one point there can be little doubt—section 102(3)(a) is very badly drafted. It bristles with ambiguities. Mr. Justice Limerick of the New Brunswick Appeal Division, in the course of his reasons in the present litigation, said: "Four possible interpretations immediately come to mind."

Au départ, le moins que l'on puisse dire est que l'al. 102(3)a) est très mal rédigé. Il est hérissé d'ambiguïtés. Dans ses motifs de jugement en l'espèce, le juge Limerick de la Division d'appel du Nouveau-Brunswick a déclaré: [TRADUCTION] «Quatre interprétations possibles viennent immédiatement à l'esprit.»

The Public Service Labour Relations Board

In argument before the Public Service Labour Relations Board, counsel for the employer contended that the words "with any other employee" referred to the word "replace" as well as the words "fill their positions". He went on to argue that the activities of the employer were not a violation of the Act, because management personnel are not "employees" as defined in the *Public Service Labour Relations Act*. Seven different classes of people are excluded from the definition of "employee" in s.1 of the Act, including "(g) a person employed in a managerial or confidential capacity." Counsel buttressed his argument by a reference to s. 6 of the Act which reads:

6(1) Nothing in this Act affects the right of the employer to determine the organization of the Public Service and to assign duties to and classify positions therein.

6(2) Subject to paragraph 102(3) (a), nothing in this Act affects the right of the employer to engage private contractors or contract work out for any purpose whatsoever.

Whereas the right to contract out in s. 6(2) is expressly restricted by reference to s. 102(3)(a), s.

La Commission des relations de travail dans les services publics

Dans sa plaidoirie devant la Commission des relations de travail dans les services publics, l'avocat de l'employeur prétend que les mots «à d'autres employés» se réfèrent autant au mot «remplacer» qu'à l'expression «attribuer leurs postes». Il allègue que l'employeur n'a pas contrevenu à la Loi par son activité parce que les cadres ne sont pas des employés au sens de la *Loi relative aux relations de travail dans les services publics*. L'article 1 de la Loi exclut de la définition d'«employé» sept catégories de personnes, y compris «g) une personne qui est préposée à la gestion ou à des fonctions confidentielles». Pour étayer son argument, l'avocat a invoqué l'art. 6 de la Loi, dont voici le texte:

6(1) Aucune disposition de la présente loi ne porte atteinte au droit que possède l'employeur de déterminer comment doivent être organisés les services publics, de fixer les fonctions afférentes aux postes et de classer ces derniers.

6(2) Sous réserve de l'alinéa 102(3)a), aucune disposition de la présente loi ne porte atteinte au droit que possède l'employeur d'engager des entrepreneurs privés ou de passer des marchés avec des entrepreneurs pour faire effectuer des travaux à quelque fin que ce soit.

Étant donné que le par. 6(2) assujettit expressément aux dispositions de l'al. 102(3)a) le droit de

6(1), in the employer's view, gave him the right to assign to management personnel the duties otherwise performed by the striking employees. The Board rejected this view. The words "assign duties to", the Board considered, must be read with the words with which they were associated, namely, "determine the organization" and "classify positions". In that context "assign duties to" could only refer to the "sort of head office activity that lays out organizational tables, job descriptions and matters of that sort." Although the Appeal Division of the Supreme Court of New Brunswick reversed the Board, the Appeal Division equally found "no merit" in this argument of the employer. The Appeal Division took the further point that the section empowers the employer to "assign duties to. . . positions therein" and not to personnel. More specifically, it does not confer upon the employer the right to assign duties to personnel who did not occupy the appropriate classified positions. I agree with the Appeal Division and the Board that the s. 6(1) argument does not assist the employer in the interpretation of s. 102(3)(a).

The major argument of the employer before the Board was that to which I have alluded, quite simply that the phrase "with any other employee" in s. 102(3)(a) covered *both* earlier branches of that paragraph, i.e. "replace the striking employees" or "fill their position". The only intent of the section, on this view, was to ensure that the jobs remained open for the employees after the strike was over. This interpretation was rejected by the Board. It was the opinion of the Board that when the Legislature saw fit to grant the right to strike to public employees, it intended through the enactment of s. 102(3) to restrict the possibility of picket-line violence by prohibiting strikebreaking, on the one hand, and picketing, on the other. This apparent intention, the Board held, would be frustrated if the words "with any other employee" were to be interpreted as modifying "replace" as well as "fill their position", "for in that case there would be nothing to stop the Employer from replacing the strikers with anyone not coming

l'employeur de passer des marchés avec des entrepreneurs, le par. 6(1), selon l'employeur, lui donne le droit de confier les fonctions des grévistes à des cadres. La Commission a rejeté cette thèse. Elle a considéré que les mots «fixer les fonctions» devaient être interprétés en corrélation avec les expressions «déterminer comment doivent être organisés» et «classer [les postes]». Dans ce contexte, les mots «fixer les fonctions» désignent uniquement [TRADUCTION] «cette activité de l'administration centrale qui élabore les organigrammes, les descriptions de postes et autres sujets semblables». Bien qu'elle ait infirmé la décision de la Commission, la Division d'appel de la Cour suprême du Nouveau-Brunswick a également conclu que cette thèse de l'employeur n'était «pas fondée». La Division d'appel a aussi fait remarquer que l'article autorise l'employeur à «fixer les fonctions afférentes aux postes» et non aux membres du personnel. Plus précisément, l'article ne donne pas à l'employeur le droit d'attribuer des fonctions aux employés qui n'occupent pas les postes de la catégorie appropriée. Je partage l'opinion de la Division d'appel et de la Commission selon laquelle l'argument fondé sur le par. 6(1) n'est d'aucun secours à l'employeur dans l'interprétation de l'al. 102(3)a).

Le principal argument de l'employeur devant la Commission se limite à la thèse, à laquelle j'ai déjà fait allusion, que l'expression «à d'autres employés» se rapporte aux *deux* interdictions mentionnées dans l'alinéa, savoir «remplacer les grévistes» ou «attribuer leurs postes». De ce point de vue, l'article vise uniquement à garantir aux employés leurs emplois après la grève. La Commission n'a pas retenu cette interprétation. Elle a conclu que lorsque le législateur a décidé d'accorder le droit de grève aux employés des services publics, il a voulu, par l'adoption du par. 102(3), limiter la possibilité de violence par suite d'un piquet de grève en interdisant, d'une part, les briseurs de grève et, d'autre part, le piquet de grève même. La Commission a jugé qu'on ne pourrait parvenir à ce but manifeste si les mots «à d'autres employés» devaient se rapporter à la fois à «remplacer» et à «attribuer leurs postes», [TRADUCTION] «car, dans ce cas, rien n'empêcherait l'employeur de remplacer les grévistes par des personnes qui n'entrent

within the definition of 'employee' in the *Public Service Labour Relations Act* The result of such an interpretation would be that the strikers would have been deprived of their right to picket, but the employer would not have been deprived of the right to employ strike-breakers." The Board recognized the reach of their decision: "In coming to this conclusion we have been mindful of the fact that the result of our decision will force the Employer to close down some of the operations which are now being carried on and that this may have far reaching effects." The Board ordered the employer to refrain from the use of management personnel to do work normally done by the members of the bargaining unit in any of the employer's places of business.

Before entering upon a discussion of the conflicting interpretations of s. 102(3)(a) found in the judgments in the Court of Appeal, there is the critical characterization of the interpretation of s. 102(3) as a "preliminary or collateral matter" by that court, in the reasons of Mr. Justice Limerick:

The Board is empowered to inquire into a complaint that the employer *has failed to observe a prohibition* in the *Act* and not to determine what is prohibited by the *Act* or to interpret it except as necessary to determine its jurisdiction.

Two questions are therefore raised by the complaint,

1. Does the *Act* prohibit management personnel replacing striking employees? and if so
2. Did management personnel replace employees?

It is the latter question which is the subject matter of the complaint and the primary matter for enquiry by the Board. The first question is a condition precedent to and collateral to determining the second.

It is true the Board must determine the first question to vest itself with the jurisdiction to enquire into the second, but it is equally true the Board cannot by wrongly deciding the first question confer a jurisdiction on itself it cannot otherwise acquire. See judgment of Pigeon J. in *Roland Jacmain v. The Attorney General of Canada et al.*, 30th September, 1977 (S.C.C.), (not yet reported). See also *Jarvis v. Associated Medical Services Ltd. et al.* (1964), 44 D.L.R. (2d) 407 et seq. (S.C.C.), and *Parkhill Bedding & Furniture Ltd. v. International Molders & Foundry Workers Union of*

pas dans le cadre de la définition du mot «employé» selon la *Loi relative aux relations de travail dans les services publics* Cette interprétation aurait pour effet de priver les grévistes de leur droit de faire un piquet de grève sans pour autant priver l'employeur du droit d'avoir recours à des briseurs de grève. La Commission a reconnu la portée de sa décision: [TRADUCTION] «Nous sommes conscients que notre décision obligera l'employeur à interrompre certaines activités qu'il a poursuivies jusqu'à maintenant et que cela peut avoir de graves conséquences.» La Commission a ordonné à l'employeur de cesser d'avoir recours aux cadres pour faire faire le travail normalement exécuté par les membres de l'unité de négociation et ce, dans tous ses établissements.

Avant d'aborder l'étude des interprétations contradictoires de l'al. 102(3)a) dans les jugements de la Cour d'appel, il y a lieu d'examiner un point crucial, savoir que, dans ses motifs, le juge Limerick a considéré l'interprétation du par. 102(3) comme une «question préliminaire ou accessoire»:

[TRADUCTION] La Commission est habilitée à tenir une enquête sur toute plainte portant que l'employeur *n'a pas observé une interdiction* prévue dans la *Loi*, mais non pour déterminer ce que la *Loi* interdit ni pour interpréter cette dernière à moins que cela ne soit nécessaire pour déterminer si elle a compétence.

La plainte soulève donc deux questions:

1. La *Loi* interdit-elle de remplacer les grévistes par des cadres? et, dans l'affirmative,
2. Des cadres ont-ils remplacé des employés?

C'est cette dernière question qui a donné lieu à la plainte et qui constitue le principal objet de l'enquête de la Commission. La première question énonce une condition préalable et accessoire à toute décision relative à la seconde.

Il est vrai que la Commission doit d'abord trancher la première question pour avoir compétence à l'égard de la deuxième, mais il est également vrai que la Commission ne peut, en rendant une décision erronée sur la première question, s'attribuer une compétence qu'elle n'aurait pas autrement. Voir le jugement du juge Pigeon dans *Roland Jacmain c. Procureur général du Canada et autres*, 30 septembre 1977 (C.S.C.), (encore inédit). Voir également *Jarvis v. Associated Medical Services Ltd. et al.* (1964), 44 D.L.R. (2d) 407 et suiv., (C.S.C.) et *Parkhill Bedding & Furniture Ltd. v. International*

North America, Local 174 and Manitoba Labour Board (1961) 26 D.L.R. (2d) 589 at 593.

With respect, I do not think that the language of "preliminary or collateral matter" assists in the inquiry into the Board's jurisdiction. One can, I suppose, in most circumstances subdivide the matter before an administrative tribunal into a series of tasks or questions and, without too much difficulty, characterize one of those questions as a "preliminary or collateral matter". As Wade suggests in his *Administrative Law* (4th ed., 1977) at p. 245, questions of fact will naturally be regarded as "the primary and central questions for decision", whereas the "prescribed statutory ingredients will be more readily found to be collateral". This is precisely what has occurred in this case, the existence of the prohibition described in the statute becoming the "collateral matter", and the facts possibly constituting breach of the prohibition, however interpreted, the "primary matter for enquiry". Underlying this sort of language is, however, another and, in my opinion, a preferable approach to jurisdictional problems, namely, that jurisdiction is typically to be determined at the outset of the inquiry.

The question of what is and is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.

Broadly speaking, the Public Service Labour Relations Board acquires its jurisdiction to consider a complaint of violation of the Act under s. 19(1) (a):

19(1) The Board shall examine and inquire into any complaint made to it that the employer, or any person acting on its behalf, or that an employee organization, or any person acting on its behalf, or any other person, has failed

(a) to observe any prohibition or to give effect to any provision contained in this Act or the regulations under this Act.

The parties before the Board, a separate employer identified in the Act, and a bargaining

Molders & Foundry Workers Union of North America, Local 174 and Manitoba Labour Board (1961) 26 D.L.R. (2d) 589, à la p. 593.

Avec égards, je ne pense pas que parler de «question préliminaire ou accessoire» facilite la détermination de la compétence de la Commission. Je pense que l'on peut subdiviser presque toutes les affaires soumises à un tribunal administratif en plusieurs points ou questions et en qualifier un, probablement sans trop de difficultés, de «question préliminaire ou accessoire». Comme le suggère Wade dans son ouvrage *Administrative Law* (4^e éd. 1977) à la p. 245, les questions de fait sont naturellement considérées comme [TRADUCTION] «les questions primordiales et fondamentales à trancher» alors que [TRADUCTION] «les conditions légales sont plutôt considérées comme accessoires». C'est exactement ce qui s'est produit en l'espèce, où l'interdiction décrite dans la Loi est devenue une «question accessoire» et les faits pouvant constituer une violation de l'interdiction, quelle que soit son interprétation, le «principal objet de l'enquête». Cependant, sous-jacente à ce genre d'énoncé, se situe une autre approche des problèmes de compétence qui me paraît préférable, savoir, que la compétence doit ordinairement être établie au début de l'enquête.

Il est souvent très difficile de déterminer ce qui constitue une question de compétence. A mon avis, les tribunaux devraient éviter de qualifier trop rapidement un point de question de compétence, et ainsi de l'assujettir à un examen judiciaire plus étendu, lorsqu'il existe un doute à cet égard.

Généralement parlant, c'est l'al. 19(1)a) qui donne compétence à la Commission des relations de travail dans les services publics en matière de plainte pour violation de la Loi:

19(1) La Commission doit faire un examen et une enquête au sujet de toute plainte qui lui est soumise et selon laquelle l'employeur, ou son représentant, ou une association d'employés, ou son représentant, ou toute autre personne

a) n'a pas observé une interdiction prévue par la présente loi ou par ses règlements d'application ou n'a pas donné effet à une disposition de ces textes.

Les parties devant la Commission, un employeur distinct mentionné dans la Loi et un agent négo-

agent duly certified under the Act, were certainly those entitled to initiate the inquiry according to s.19(1), and to be parties to that inquiry. The general subject-matter of the dispute between the parties unquestionably fell within the confines of the Act, that is, the situation of a strike by employees which is considered lawful by the very provisions of the Act. The Board was asked by the parties to determine whether certain activities of the Union and of the employer during that lawful strike were in violation of a prohibition in the Act, i.e. s. 102(3). The Union took no jurisdictional objection to the ban on picketing contrary to s. 102(3)(b), nor did the employer. The employer, in its reply to the Union complaint of violation of s. 102(3)(a), only contended that the Liquor Corporation "has not in any way violated" that provision. One cannot therefore suggest that the Board did not have "jurisdiction in the narrow sense of authority to enter upon an inquiry": *Service Employees' International Union v. Nipawin Union Hospital*², at p. 389.

On this view of the matters before the Board, it is difficult to conceive how the existence of the prohibition, can be a question "preliminary" to the Board's jurisdiction, in the sense of determining the scope of the Board's capacity to hear and decide the issues before them. Thus, the cases cited by the Court of Appeal in support of their view do not have any application in the case at bar. In *Jacmain v. Attorney General of Canada*³, the adjudicator's characterization of the employer's action as a disciplinary dismissal, or a rejection for unsuitability, could be seen as crucial to his ability even to enter upon a consideration of the grievance. In *Parkhill Bedding and Furniture, supra*, the issue was whether the Board could hear the Union's application under the successor rights provisions of the Manitoba *Labour Relations Act* and, therefore, rule the purchaser of the defunct company's assets bound by the existing agreement. Had the Board not found the purchaser to be a "successor" employer, then the Union would have had to apply anew for certification under the normal certification procedures. In the *Jarvis* case,

ciateur dûment accrédité en vertu de la Loi, sont certainement habilités, aux termes du par. 19(1), à amorcer une procédure d'enquête et à y participer. Il ne fait aucun doute que l'objet général du litige opposant les parties relève des dispositions de la Loi, savoir le statut d'une grève d'employés qui est licite aux termes mêmes de cette loi. Les parties ont demandé à la Commission d'établir si certaines activités du Syndicat et de l'employeur durant cette grève légale contreviennent à l'interdiction prévue au par. 102(3) de la Loi. Ni le Syndicat ni l'employeur n'ont soulevé d'exception d'incompétence vis-à-vis de l'interdiction de participer à un piquet de grève prévue à l'al. 102(3)b). En réponse à la plainte du Syndicat alléguant que l'employeur avait violé l'al. 102(3)a), ce dernier a simplement affirmé que la Société des alcools n'a [TRADUCTION] «en aucune façon violé» cette disposition. On ne peut donc pas prétendre que la Commission n'avait pas «compétence dans le sens strict du pouvoir de procéder à une enquête»: *Union internationale des employés des services c. Nipawin Union Hospital*², à la p. 389.

Si l'on définit ainsi les points soumis à la Commission, on comprend difficilement comment l'existence d'une interdiction peut être considérée comme une question «préliminaire» à la compétence de la Commission, en ce sens qu'il faudrait déterminer l'étendue du pouvoir de cette dernière d'entendre et de trancher les points en litige qui lui sont soumis. En conséquence, la jurisprudence citée par la Cour d'appel à l'appui de son opinion n'est aucunement pertinente en l'espèce. Dans l'affaire *Jacmain c. Procureur général du Canada*³, le fait que l'arbitre ait qualifié l'acte de l'employeur de renvoi disciplinaire, ou de renvoi pour inaptitude, pouvait être considéré comme déterminant vis-à-vis de sa compétence à connaître du grief. Dans l'affaire *Parkhill Bedding and Furniture*, précitée, il s'agissait de déterminer si la Commission pouvait entendre la requête du Syndicat en vertu des droits du successeur prévus à *The Labour Relations Act* du Manitoba et, en conséquence, juger que l'acheteur des biens de la compagnie dissoute était lié par la convention en vigueur. Si la Commission n'avait pas conclu que

² [1975] 1 S.C.R. 382.

³ [1978] 2 S.C.R. 15.

² [1975] 1 R.C.S. 382.

³ [1978] 2 R.C.S. 15.

the interpretation given to the Ontario *Labour Relations Act* by this Court was that the unfair practice provisions of that Act were only intended to benefit persons who were "employees" as defined by the Act. In this context, the Board's finding that Mrs. Jarvis was not an "employee" left the Board without jurisdiction to inquire into whether she was dismissed contrary to the Act, or to exercise its remedial powers of reinstatement. In each of these cases, at the threshold of the inquiry, the Board or the adjudicator had to determine whether the case before them was one of the kind upon which the empowering statute permitted entering an inquiry.

At this stage, it is important to have in mind the privative clause found in s.101 of the Act, which protects the decisions of the Board made within jurisdiction. Section 101 reads:

101(1) Except as provided in this Act, every order, award, direction, decision, declaration, or ruling of the Board, the Arbitration Tribunal or an adjudicator is final and shall not be questioned or reviewed in any court.

101(2) No order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto*, or otherwise, to question, review, prohibit or restrain the Board, the Arbitration Tribunal or an adjudicator in any of its or his proceedings.

Section 101 constitutes a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided by the Board. Privative clauses of this type are typically found in labour relations legislation. The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurispru-

l'acheteur était un employeur «successeur», le syndicat aurait été obligé de demander une nouvelle accréditation par la procédure ordinaire. Dans l'affaire *Jarvis*, cette Cour a interprété les dispositions de *The Labour Relations Act* de l'Ontario relatives aux pratiques déloyales comme au seul avantage des personnes qui étaient des «employés» au sens de la Loi. Dans ce contexte, en jugeant que M^{me} Jarvis n'était pas une «employée», la Commission perdait toute compétence pour tenir une enquête visant à déterminer si elle avait été congédiée en contravention de la Loi ou pour ordonner sa réintégration. Dans chacun de ces cas, la Commission ou l'arbitre devait, au début de l'enquête, déterminer si le litige devant lui pouvait faire l'objet d'une enquête, en vertu de la loi habilitante.

Il est important à ce stade de faire état de la clause privative de l'art. 101 de la Loi qui protège les décisions de la Commission lorsqu'elles relèvent de sa compétence:

101(1) Sous réserve des dispositions contraires de la présente loi, toute ordonnance, sentence, directive, décision ou déclaration de la Commission, du Tribunal d'arbitrage ou d'un arbitre, est définitive et ne peut être contestée devant aucun tribunal ni révisée par aucun tribunal.

101(2) Aucune ordonnance ne peut être rendue, aucune action intentée et aucune procédure entamée devant un tribunal, par voie d'injonction, de *certiorari*, de prohibition, de *quo warranto*, ou autrement, pour contester, réviser, supprimer ou restreindre les pouvoirs de la Commission, du Tribunal d'arbitrage ou d'un arbitre dans l'une quelconque de leurs procédures.

L'article 101 révèle clairement la volonté du législateur que les différends du travail dans le secteur public soient réglés promptement et en dernier ressort par la Commission. Des clauses privatives de ce genre sont typiques dans les lois sur les relations de travail. On veut protéger les décisions d'une commission des relations de travail, lorsqu'elles relèvent de sa compétence, pour des raisons simples et impérieuses. La commission est un tribunal spécialisé chargé d'appliquer une loi régissant l'ensemble des relations de travail. Aux fins de l'administration de ce régime, une commission n'est pas seulement appelée à constater des faits et

First, s. 102(3)(a) is not required to "prohibit the employer from terminating the employment of an employee who is engaged in a legal strike". That purpose is fully accomplished by other provisions. The very definition of "employee" in s. 1 concludes with "and for the purposes of this definition a person does not cease to be employed in the Public Service by reason only of his ceasing to work as a result of a lawful strike . . .", and s. 7(3) in edited form further provides:

Except as otherwise provided in a collective agreement no person (a) shall refuse . . . to continue to employ any person . . . because the person . . . was or is exercising any right under this *Act*.

These provisions, standard in labour legislation, would seem more than sufficient, without s. 102(3)(a), to ensure the maintenance of an employee's status while he is out on legal strike.

Nor do I see why of necessity the contracting out of work need be for any fixed term. The *Act* contains no definition of contracting out and surely s. 6(2) is intended to maintain a very broad notion of contracting out, considering its wide language. To restrict contracting out to a fixed term would severely cut down the employer's freedom to contract out work, and would be a somewhat surprising result. If anything, the contracting out of work would more commonly be on a temporary basis.

Chief Justice Hughes develops a contrary, and far more wide-ranging, version of s. 102(3)(a). In very brief reasons, he first states that the opening words of s. 6(2) are no more than an exception in the instance of a legal strike, and that exception applies generally to both branches of s. 102(3)(a). The Chief Justice also takes the position that meaning must be given to both branches of the paragraph, by giving "some larger meaning" to the second branch. Thus, he concludes:

In my opinion the first branch forbids the employer to "replace the striking employee" that is, replacing him temporarily while the employee is on strike. The second branch forbids the employer to "fill their positions with any other employee," implying that the employer may not treat the striking employee's position as vacant and

Premièrement, il n'est pas nécessaire d'invoquer l'al. 102(3)a) pour «interdire à l'employeur de mettre fin à l'emploi d'un employé qui participe à une grève légale». D'autres dispositions permettent d'atteindre ce but. La définition même du mot «employé» à l'art. 1 se termine par ces mots «et, aux fins de la présente définition, nul ne cesse d'être employé dans les services publics simplement parce qu'il cesse de travailler par suite d'une grève licite . . .»; et le par. 7(3) en abrégé dispose:

Exception faite de dispositions contraires établies par convention collective, nul ne peut a) refuser . . . de continuer à employer quelqu'un, . . . parce que cette personne . . . a exercé ou exerce quelque droit que ce soit en application de la présente loi.

Ces dispositions, courantes dans la législation du travail, sont amplement suffisantes, sans l'al. 102(3)a), pour garantir son emploi à un employé qui participe à une grève légale.

Je ne vois pas non plus pourquoi les marchés passés avec des entrepreneurs privés seraient nécessairement d'une durée déterminée. La Loi ne définit pas ce qu'elle entend par passation de marchés et, vu les termes généraux du par. 6(2), on veut certainement donner un sens très large à ce concept. Le restreindre à la passation de marchés d'une durée déterminée amputerait considérablement la liberté d'action de l'employeur à cet égard et serait un résultat pour le moins étonnant. En réalité, ces marchés sont plus souvent passés sur une base temporaire.

Le juge en chef Hughes a interprété différemment l'al. 102(3)a) et lui a donné une portée beaucoup plus vaste. Dans de très courts motifs, il indique d'abord que les termes introductifs du par. 6(2) annoncent seulement une exception en cas de grève légale et rendent cette exception applicable aux deux parties de l'al. 102(3)a). Le juge en chef se dit également d'avis qu'il faut donner effet à ces deux parties en [TRADUCTION] «interprétant plus largement» la seconde partie. Ainsi il conclut:

[TRADUCTION] A mon avis, la première partie interdit à l'employeur de «remplacer les grévistes», c'est-à-dire de remplacer temporairement un employé pendant qu'il est en grève. La seconde partie lui interdit d'«attribuer leurs postes à d'autres employés», ce qui signifie qu'il ne peut considérer le poste d'un gréviste comme vacant et l'attri-

fill it permanently with any other employee. In my view the words "with any other employee" apply to both branches of the prohibition. [Emphasis added.]

As for the problem of "permanently" filling the position, the comments above would again apply. The very definition of "employee" and the unfair practice provision of s. 7(3) supply protection without need of s. 102(3)(a).

The consequence that striking employees could be replaced by any non-employee under the Act, and not just managerial personnel, is dismissed as "a defect in the wording of the clause".

At this point, it might be useful to review the purpose of s. 102(3)(a) within the general context of the New Brunswick *Public Service Labour Relations Act*. Clearly s. 102(3) is an attempt to maintain the balance of power with a *quid pro quo*. Its intent, no doubt, is to avoid picket lines outside government buildings, for two reasons: as the Board indicates, to avoid picket line violence, but also to avoid the impact of picket lines for one bargaining group upon the remainder of government operations in a given building. Collective bargaining in the New Brunswick public service takes place in bargaining units formed out of "occupational groups" and thus, there are a large number of bargaining units in any one government operation. In one department, there may be employees in units of "scientific and professional", "technical", "administrative", "administrative support", "operational," or other employees. Also, in any one government building, there will typically be more than one department as well as one bargaining unit of employees. As a consequence, if one of the bargaining agents chooses the conciliation-strike route under the Act, some employees may go on strike while their fellow employees in the department and other departments stay on the job.

buer de façon permanente à un autre employé. A mon avis, les mots «à d'autres employés» s'appliquent aux deux parties de l'interdiction. [C'est moi qui souligne.]

En ce qui concerne le problème de l'attribution de postes «de façon permanente», les remarques formulées ci-dessus s'appliquent également. La définition même du mot «employé» et le par. 7(3) relatif aux pratiques déloyales protègent l'employé sans qu'il soit nécessaire de recourir à l'al. 102(3)a).

L'argument qu'un gréviste pourrait être remplacé par un non-employé aux termes de la Loi, et non seulement par un membre du personnel de direction, est écarté en tant que simple conséquence d'un [TRADUCTION] «vice de rédaction de la disposition».

Il convient à ce stade d'examiner le but de l'al. 102(3)a) dans le contexte général de la *Loi relative aux relations de travail dans les services publics* du Nouveau-Brunswick. Il est manifeste que le par. 102(3) vise à maintenir un équilibre entre les pouvoirs en établissant des interdictions équivalentes. Il vise sans aucun doute à interdire tout piquet de grève à l'extérieur des immeubles gouvernementaux pour deux raisons: pour éviter, comme l'a souligné la Commission, tout risque de violence par suite d'un piquet de grève, mais aussi pour éviter les répercussions du piquet de grève d'une unité de négociation sur les autres employés du gouvernement qui travaillent dans le même immeuble. Dans les services publics du Nouveau-Brunswick, la négociation collective se déroule au sein d'unités de négociation formées selon différents «groupes professionnels», de sorte qu'il peut exister beaucoup d'unités de négociation au sein d'un même organisme. Un ministère peut regrouper des employés membres d'unités faisant partie des catégories «emplois scientifiques et professionnels», «emplois techniques», «emplois administratifs», «emplois du soutien administratif», «exploitation» et autres. En outre, il y a normalement plusieurs ministères et plusieurs unités de négociation dans un même immeuble. En conséquence, lorsqu'un des agents négociateurs choisit, conformément à la Loi, la conciliation et la grève, certains employés peuvent se retrouver en grève alors que leurs collègues du ministère et des autres ministères continuent de travailler.

By reference to the private sector strike, one can see the importance of s. 102(3). The traditional view of the picket line is that it is simply informative. But its real purpose, as recognized by Mr. Justice Limerick, goes beyond that. Generally, the purpose is to shut down the employer's operation, or at least to make it difficult to maintain the operation. This is done by dissuading various groups and individuals from having anything to do with the employer. In a heated confrontation, this attempt to discourage extends also to managerial personnel. The employer, by contrast, tries to maintain his operations by using managerial personnel to do the work of the strikers, by hiring strike-breakers, and by maintaining lines of communication for incoming supplies and services, and outgoing products. In private sector labour relations, these efforts on both sides are typically legal and an integral part of the economic conflict.

Hence, the enactment of s. 102 (3). On the one hand, the striking employees are barred from picketing "in or near any place of business of the employer." On the other hand, the employer is barred either from "replacing" the striking employees, or from "filling their positions with any other employee." Both branches are purely temporary in nature, i.e. "during the continuance of the strike." The latter branch of the clause can be seen as cutting two ways: for the benefit of the striking employees, it bars the employer from temporarily filling the positions of the striking employees, and at the same time protects the "employees" in other bargaining units, who are still at work in the same government department or some other government department, from being required to fill the positions of their striking fellow employees during the period of the strike. The first branch ensures similar protection to the striking employees in a more general manner, in that they cannot be "replaced" by any person and not simply "with any other employee."

If one were to read "with any other employee" as applicable to "replace", then there is the obvious problem that any individual not an employee under the Act in s. 1 could work in maintaining the employer's operation. Aside from individuals completely outside the ambit of the Act, the defi-

Lorsqu'on pense aux grèves du secteur privé, on comprend bien l'importance du par. 102(3). La conception traditionnelle du piquet de grève est qu'il sert simplement à informer. Mais, comme l'a reconnu le juge Limerick, son but réel va plus loin. En général, le but est d'interrompre l'activité de l'employeur ou de la rendre difficile, en dissuadant divers groupes et particuliers d'entretenir des relations avec lui. Dans une confrontation serrée, cette tentative de dissuasion peut même s'étendre aux cadres. En revanche, l'employeur essaie de poursuivre son activité en faisant accomplir le travail des grévistes par des cadres, en embauchant des briseurs de grève et en assurant la continuité des approvisionnements, des services et des livraisons de marchandises. Dans les relations de travail du secteur privé, ces actions contradictoires sont parfaitement légales et font intégralement partie du conflit économique.

De là, la promulgation du par. 102(3). D'une part, les grévistes ne doivent pas participer à un piquet de grève «à l'établissement de l'employeur ou près de cet établissement». D'autre part, l'employeur ne doit pas «remplacer» les grévistes ni «attribuer leurs postes à d'autres employés». Ces deux interdictions sont purement temporaires, c'est-à-dire qu'elles valent «pendant toute la durée de la grève». On peut considérer que la seconde partie de l'alinéa est à deux tranchants: elle protège les grévistes en interdisant à l'employeur d'attribuer temporairement leurs postes à d'autres et elle protège en même temps les «employés» membres d'autres unités de négociation qui travaillent pour le même ministère ou pour un autre, en ce qu'ils ne peuvent être obligés de remplir les postes normalement occupés par les grévistes. La première partie de l'alinéa procure une protection semblable quoique plus générale aux grévistes, en interdisant leur remplacement par quiconque et non simplement par «d'autres employés».

Si l'on doit appliquer l'expression «à d'autres employés» au mot «remplacer», il devient évident que toute personne qui n'est pas un employé au sens de l'art. 1 de la Loi peut être embauchée afin d'aider l'employeur à poursuivre ses activités. Outre les personnes ne relevant pas de la Loi, la

nition of "employee" in s. 1 excludes a number of categories within the potential application of the Act—not just clause (g) managerial and confidential employees, but also (a) Order in Council appointments, (d) part-time employees, and (e) casual or temporary employees employed for less than six months. The result would be that the striking employees would be deprived of their right to picket, while the employer could maintain a high level of services, in the absence of the picket line, with suppliers and customers coming and going at will and the work being performed by anyone other than "employees" under the Act. The right to strike would be sterilized and the supposed choice of settlement techniques, spelled out in ss. 70 to 75, would become illusory.

Nor should one ignore the provisions of s. 50 of the Act which require the "designation" of essential employees by the parties or the Board prior to any legal strike and, indeed, even before the appointment of a conciliation board. Designated employees must continue to work during the currency of a strike, being barred from taking part in any strike by s. 102(1). Accordingly, all of the above refers only to employees who have not been designated under the Act.

I have discussed the possible interpretations of s. 102(3)(a) at some length only because, to some, the Board's interpretation may, at first glance, seem unreasonable if one draws too heavily upon private sector experience. Upon a careful reading of the Act, the Board's decision, and the judgments in the Court of Appeal, however, I find it difficult to brand as "patently unreasonable" the interpretation given to s. 102(3)(a) by the Board in this case. At a minimum, the Board's interpretation would seem at least as reasonable as the alternative interpretations suggested in the Court of Appeal. Certainly the Board cannot be said to have so misinterpreted the provision in question as to "embark on an inquiry or answer a question not remitted to it."

définition du mot «employé» à l'art. 1 exclut également plusieurs groupes de personnes de son application possible—non seulement les employés préposés à la gestion ou à des fonctions confidentielles (al. g)), mais également les employés nommés par décret (al. a)), les employés à temps partiel (al. d)) et les employés à titre occasionnel ou temporaire pour une période inférieure à six mois (al. e)). En conséquence, les grévistes seraient donc privés de leur droit de participer à un piquet de grève alors que l'employeur pourrait continuer à fournir des services de haute qualité, sans subir les inconvénients d'un piquet de grève; les fournisseurs et clients pourraient circuler librement et le travail serait accompli par des personnes autres que des «employés» au sens de la Loi. Le droit de grève serait alors rendu inefficace et le prétendu choix entre les modes de règlement énumérés aux art. 70 à 75 deviendrait illusoire.

Il faut également tenir compte des dispositions de l'art. 50 de la Loi qui exige que, par les parties ou la Commission, les employés dont les services sont essentiels soient «désignés», avant toute grève légale et, en fait, avant la constitution d'une commission de conciliation. Les employés désignés doivent continuer de travailler durant la grève et, en vertu du par. 102(1), ils ne peuvent participer à aucune grève. En conséquence, l'analyse précédente ne concerne que les employés non désignés en vertu de la Loi.

Je me suis arrêté aux interprétations possibles de l'al. 102(3)a) uniquement parce que, pour certains, l'interprétation retenue par la Commission peut, à première vue, sembler déraisonnable si l'on établit une comparaison trop étroite avec le secteur privé. Après une lecture attentive de la Loi, de la décision de la Commission et des jugements de la Cour d'appel, il me semble difficile de taxer l'interprétation de l'al. 102(3)a) qu'elle a retenue de [TRADUCTION] «manifestement déraisonnable». L'interprétation de la Commission semble tout au moins aussi raisonnable que les autres interprétations proposées par la Cour d'appel. On ne peut certainement pas dire que la Commission a mal interprété la disposition en question «de façon à entreprendre une enquête ou répondre à une question dont [elle] n'est pas saisie».

I would allow the appeal, set aside the judgment of the Appeal Division of the Supreme Court of New Brunswick, and restore the Order and Decision of the Public Service Labour Relations Board, with costs in this Court and in the Supreme Court of New Brunswick.

Judgment accordingly.

Solicitors for the appellant: Bryden, DiPaolo & Breen, Fredericton.

Solicitor for the respondent: The Attorney General for New Brunswick, Fredericton.

Je suis donc d'avis d'accueillir le pourvoi, d'infirmer l'arrêt de la Division d'appel de la Cour suprême du Nouveau-Brunswick et de rétablir l'ordonnance et la décision de la Commission des relations de travail dans les services publics, avec dépens en cette Cour et en Cour suprême du Nouveau-Brunswick.

Jugement en conséquence.

Procureurs de l'appellant: Bryden, DiPaolo & Breen, Fredericton.

Procureur de l'intimée: Le Procureur général du Nouveau Brunswick, Fredericton.

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