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October 13, 2017
File No.: 240148.00825/18407

VIA E-MAIL

Patrick Wruck
Commission Secretary and Manager, Regulatory Support
British Columbia Utilities Commission
Suite 410, 900 Howe Street,
Vancouver, BC
V6Z 2N3

Dear Mr. Wruck:

Re: SSL-Sustainable Services Ltd. ("SSL")
Status as a Public Utility under the *Utilities Commission Act*

Further to the Regulatory Timetable established by the Commission in this proceeding, we enclose FortisBC Energy Inc.'s Final Submissions in this matter, together with the legal authorities cited in it.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

[original signed by]

David Both

DB/sh

Encl.

BRITISH COLUMBIA UTILITIES COMMISSION

IN THE MATTER OF THE UTILITIES COMMISSION ACT

R.S.B.C. 1996, CHAPTER 473

and

SSL-Sustainable Services Ltd.

Status as a Public Utility under the Utilities Commission Act

Submission of FortisBC Energy Inc.

October 13, 2017

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A. Introduction

1. The primary issue in this proceeding is a narrow question of law: is Sustainable Services Ltd. (SSL) a "public utility" as defined in the *Utilities Commission Act*[1] (the UCA) and therefore subject to the regulatory authority of the British Columbia Utilities Commission (the Commission).

2. The definition of public utility captures "any person … that owns or operates equipment or facilities … for the production, generation, storage, transmission, sale, delivery or provision of [an] agent for the production of light, heat, cold or power to or for the public or a corporation for compensation".[2] The UCA includes a number of excluded persons and classes of persons from that definition, including "a municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries" (the Municipal Exclusion).[3]

3. There is no meaningful factual dispute between the parties in this proceeding. Notwithstanding the exchange of information requests that sought to clarify the nature of the City of Langford's ownership interest (if any) in the Westhills Community Energy System (the CES), it is not disputed that SSL owns and operates most, if not all of the CES equipment for the generation and delivery of heating and cooling services to end-users in Langford.[4] Whether the City of Langford also has an ownership interest in those equipment and facilities does not alter the fact that SSL certainly does. In FEI's submission, whether the City of Langford has an ownership interest in the Westhills CES only impacts whether *it may also be a public utility* under the UCA (subject to the Municipal Exclusion).

4. Against this backdrop, this proceeding has centered on two primary questions:

- whether the Municipal Exclusion operates to insulate SSL from otherwise being captured by the definition of public utility; and

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1 RSBC 1996, c 473.

2 UCA, s. 1.

3 Ibid.

4 Ex. B-5, SSL Information Package, page 2 of 4.

- whether the City of Langford's position that *it* rather than SSL is providing the utility service as a "municipal service" in accordance with a partnering agreement entered under the *Community Charter*[5] insulates SSL from regulation by the Commission.

5. FEI submits that the answers to both of these questions is no. As set out in the following submissions:

- The Municipal Exclusion can only apply to a "municipality or regional district". Once a "person" is found to "own or operate equipment or facilities" for utility service, the Municipal Exclusion can have no application to any entity other than a "municipality" or "regional district". While the City of Langford appears to argue that it is providing the service[6], the fact remains that - even under the scenario advanced by the City of Langford - SSL owns and operates equipment and facilities for the provision of utility service, and is therefore captured by the definition of public utility. There is no reasonable interpretation of the Municipal Exclusion that can support its extension to shield SSL from regulation.

- It is not relevant whether the City of Langford is providing the utility service as a municipal service. Even if that position were accepted, SSL would still be captured by the definition of public utility as it owns and operates the "equipment or facilities" related to the CES.

  Further, both the UCA and *Community Charter* are clear that any conflict between the two acts is resolved in favour of the UCA. Even if the *Community Charter* could be interpreted to somehow bring SSL outside of the Commission's jurisdiction, the Legislature was express in its intention that the UCA (and the authority conferred on the Commission by it) supersedes the *Community Charter*.

6. The conclusion that SSL is a public utility accords with the principles of statutory interpretation and the policy framework that underpins utility regulation in North America. To conclude otherwise would result in the unacceptable outcome that any municipality could partner with a corporate entity for the provision of utility service, bypass the regulatory oversight of the Commission,

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[5] SBC 2003, c 26

[6] See, for example, Ex. C1-11, City of Langford Response to Information Request 4.1

and deprive the public of the statutorily enshrined protection from undue discrimination and unjust and unreasonable rates that the Legislature intended them to enjoy.

(a) Response to the Commission's Request Respecting Section 36(a)(2) of the *Community Charter*

7. In establishing the Regulatory Timetable for this proceeding, the Commission specifically requested that "the parties discuss in particular what relevance, if any, section 36(2)(e) of the *Community Charter* has on this proceeding".[7] Section 36(2)(e) of the *Community Charter* provides:

> (2) The authority of a municipality in relation to highways under any provision of this Act is subject to the following:
>
> …
>
> (e) authority in relation to all electrical transmission and distribution facilities and works that are on, over, under, along or across a highway is subject to the *Utilities Commission Act* and to all orders, certificates and approvals issued, granted or given under that Act.

8. As explained in more detail in the balance of these submissions, whether or not the City of Langford has an ownership interest in some elements of the Westhills CES that pass through highways (or otherwise) is not relevant to the legal question raised in this proceeding. Even if the City of Langford's evidence is accepted and the Commission agrees that it holds an interest in the CES, that does not supplant the fact that SSL is *also* an owner and operator of those equipment and facilities. As set out in more detail below, the terms of the Services Agreement between SSL and the City of Langford, and the terms and conditions under which customers of the Westhills CES take service establish that: (a) SSL owns and operates the CES; (b) SSL is responsible for the construction and maintenance of the CES; and (c) SSL is the sole customer facing entity, responsible for entering services agreements and undertaking all billing to customers.

9. However, to the extent that section 36(a)(2) of the *Community Charter* bears on this proceeding, FEI submits that it supports and is consistent with the overall position advanced below that nothing in the *Community Charter* can be construed to displace the regulatory authority of the Commission over the provision of public utility service. Like the other sections of the *Community*

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[7] Ex. A-16, Commission Letter dated August 30, 2017.

Charter discussed below, this section is a constraint on municipal authority in favour of the Commission, intended to ensure that the Commission remains the exclusive regulatory authority over the provision of utility service.

B. The Principles of Statutory Interpretation Support the Conclusion that SSL is a Public Utility

(a) The Scheme and Object of the UCA confer exclusive regulatory jurisdiction over public utilities on the Commission

10. Fundamentally, the question of whether SSL is captured by the definition of public utility in the UCA is one of statutory interpretation.

11. The "modern rule" of statutory interpretation is that the words of a legislative provision are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the statute, the object of the statute, and the intention of the legislature.[8]

12. The *object* of a statute means the "primary social, economic or political effects that a legislature hoped to produce through the operation of the legislation."[9] The use of the *scheme* of an Act for interpretive purposes is described in a leading legal text on statutory interpretation as follows: "When analyzing the scheme of an Act, the court tries to discover how the provisions or parts of the Act work together to give effect to a plausible and coherent plan. It then considers how the provision to be interpreted can be understood in terms of that plan."[10]

13. The object of public utility legislation such as the UCA is to protect the public interest.

> The whole tenor of the Act [the precursor to the UCA] shows clearly that the safeguarding of the interests of the public, both as to the identity of those who should be permitted to operate public utilities and as to the manner in which they should operate, was a duty vested in the Commission.[11]

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8 *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

9 R. Sullivan, *Sullivan on the Construction of Statutes* (Markham: LexisNexis, 2008), p. 265.

10 R. Sullivan, *Sullivan on the Construction of Statutes* (Markham: LexisNexis, 2008), p. 364.

11 *District of Surrey v. British Columbia Electric Company Limited* [1957] S.C.R. 121. at 126.

14. The Commission has expressed its mandate as "to protect the public interest by regulating public utilities, which tend to be natural monopolies, well positioned to otherwise take advantage of their customers".[12] This is repeated in the Commission's participant guide that provides:

> The Commission's primary responsibility is the regulation of the energy utilities under its jurisdiction to ensure that the rates charged for energy are fair, just and reasonable, and that utilities provide safe, adequate and secure service to their customers.
>
> …
>
> Overall, the Commission has a duty to protect the public interest and, particularly, the interests of ratepayers by ensuring that public utilities provide safe and reliable service at a reasonable price.[13]

15. FEI submits that the protection of the public interest is at the heart of the definition of "public utility". By ensuring that anyone that may receive utility service, subject to limited exception, was captured by the definition, the Legislature has delegated to the Commission the responsibility to ensure (among other things) that all utility service in British Columbia is "adequate, safe, efficient, just and reasonable".[14] The only "plausible and coherent" interpretation of the definition of "public utility", taking into account the UCA and *Community Charter* as a whole, is that the Legislature intended the Commission to have the exclusive regulatory jurisdiction over the provision of utility service, except in very narrowly defined circumstances.

(b) The words of the UCA support the conclusion that SSL is a public utility

16. Against the policy backdrop established by the scheme and object of the UCA, and its historical judicial interpretation, this proceeding calls for an interpretation of the definition of "public utility". FEI submits, for the reasons described below, that the only interpretation of the words of the UCA that can be read harmoniously with the scheme and object of the UCA is that SSL meets the definition of public utility.

17. The UCA dictates the kind of services that the Commission regulates by way of the definition of "public utility". The various regulatory provisions set out in Part 3 of the UCA incorporate

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[12] *Re Terasen Gas Inc.*, Order G-23-10 (July 14, 2010) at para. 45.

[13] *Understanding Utility Regulation - A Participants' Guide to the British Columbia Utilities Commission*, at Chapter 1, page 1 and Chapter 8 page 3.

[14] UCA, s. 38(b)

the term "public utility" and provide the Commission with jurisdiction to oversee the activities of entities that fit within the definition. The key components of the definition in relation to this proceeding are:

a) "owns or operates… equipment or facilities"

b) "for the production, generation, storage, transmission, sale, delivery or provision of…"

c) "electricity, natural gas, steam or any other agent for the production of light, heat, cold or power"

d) "to or for the public or a corporation"

e) "for compensation"[15]

18. Although these points are not in dispute, FEI points out that SSL itself acknowledges that it satisfies each of the constituent elements of the "public utility" definition. In its information package, SSL described the CES, and its ownership of it, addressing each of the elements of the definition of a public utility:

> The Westhills Community Energy System ("CES") was established to provide heating and cooling services to end-users in the community of Westhills in Langford, BC. Like most district energy systems, it employs centralized energy sources to distribute thermal energy to a wider community. Construction of the CES began in 2008, with commissioning of the first phase and utility operations commencing in 2010. The CES now services approximately 400 residential customers, primarily single family homes, but also several townhome and condominium strata users. The CES infrastructure is constructed, owned, operated, and maintained by SSL-Sustainable Services Ltd. ("SSL") as part of a Services Agreement with the City of Langford and consistent with the terms and conditions of Bylaw 1291, 2016, which establishes the CES as a municipal service entirely within its own boundaries.
>
> …
>
> Thermal energy provided by the CES to end-users is measured by a thermal metering device and billed in units of kilowatt-hours (kWh) multiplied by a two tier rate structure …[16] [emphasis added]

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[15] UCA, s. 1.

[16] Ex. B-5, SSL Information Package, page 2 of 4.

19. In establishing the scope of regulation, the UCA involves inclusivity in the first instance, in that any "person"[17] that meets the definition is captured. Once it is determined that a person fits within the definition, a series of narrow exclusions (such as the Municipal Exclusion) is applied to "back out" entities that otherwise would be captured. It is not the case, for example, that only a certain class of entities may be subject to the definition or that an entity may organize itself to avoid its application. Rather, the UCA calls for the consideration of whether any person satisfies the definition, and then - as a second step - excludes certain classes of persons from the definition that satisfy any of subsections (c) through (g) of the definition.

20. In this case, there is no dispute about the satisfaction of the definition at first instance. SSL "owns or operates … equipment of facilities" (the Westhills CES) "for the production, generation, storage, transmission, sale, delivery or provision of…" an "agent for the production of light, heat, cold or power" "to or for the public or a corporation" "for compensation". Neither SSL nor the City of Langford take issue with this fact. Rather, this proceeding has centered on the question of whether the Municipal Exclusion may be interpreted to include SSL, either by way of the (unresolved question of) the City of Langford's residual ownership interest in certain of SSL's assets, or the proposition that it is, in fact, the City of Langford that is providing the utility service as a "municipal service" pursuant to its authority under the *Community Charter*.

(c) The Municipal Exclusion does not (and cannot) apply to SSL

21. As set out above, the Municipal Exclusion applies to exclude a municipality from the definition of public utility that otherwise would be captured by it. In this proceeding the City of Langford appears to argue that as it is a municipality, and it has selected SSL as the entity that will own, operate and provide utility service, that SSL fits within the Municipal Exclusion as well.

22. If accepted, this interpretation could lead to the unacceptable result that any municipality and third party could avoid Commission regulation (and the public interest protection that underpins it) by organizing itself as the City of Langford and SSL have done. That is, without taking on any investment or operational risk, a municipality could designate a third party to provide public utility service in any manner it desired, beyond the Commission oversight contemplated by the UCA.

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[17] Though this is not in dispute, FEI notes that section 8(1) of the *Community Charter* establishes that a municipality such as the City of Langford is a "person".

23. Not only would this be inconsistent with the scheme and object of the UCA, but it would also lead to an outcome where utility customers could be put at risk. To be clear, FEI has no doubt that the City of Langford is guided by the its mandate to govern in the public interest of its community[18] as it highlighted in response to an information request[19], and FEI does not question the intentions or integrity of the City of Langford. However, the Courts are clear (and the Commission has previously affirmed) that the "public interest" that the Commission is obligated to protect is that of the broader public, not a single group of ratepayers or a municipality.[20] If the Westhills CES is beyond Commission jurisdiction, those customers (and the customers of any other utility organized the way the City of Langford and SSL are) would have no recourse to the Commission over the quality, reliability or rates at which utility service is provided, and could be subject to rates that are unjust or unreasonable, or service that is unsafe, inadequate or unreasonably discriminatory.

SSL is not a Municipality or Regional District

24. The Municipal Exclusion provides that the definition of public utility excludes: "a municipality or regional district in respect of services provided by the municipality or regional district…". These words are clear and precise. The Municipal Exclusion cannot apply to an entity that is not a "municipality or regional district" - as such, SSL cannot benefit from it.

25. FEI submits that this should be both the beginning and end of the analysis. The plain and ordinary words of the UCA prescribe that any person that provides utility service is a public utility. The only exclusion argued in this proceeding exclusively applies to municipalities and regional districts.

The City of Langford is not the "service provider" of the Westhills CES

26. In its response to a Commission information request, the City of Langford explained its position that *it* was the service provider in Westhills and that as such, the Municipal Exclusion applied:

> In this case, the City is the service provider and the Utilities Commission Act excludes from the definition of public utility "a municipality… in respect of services provided by the municipality …within its own boundaries". This exclusion applies regardless of ownership of the facilities or one or more pieces of equipment. The applicable part of

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[18] *Community Charter,* s.1.

[19] Ex. C1-5, City of Langford Response to Information Request 3.2.

[20] *Sumas Energy 2 Inc. v. Canada (National Energy Board)*, 2005 FCA 377, para. 23., cited with approval by the Commission in Order G-151-16 at p. 23.

> section 1 of the Utilities Commission Act, properly interpreted, provides that the definition of public utility does not, regardless of ownership of any equipment or facilities, include a municipality that provides services directly (or indirectly through a partnering agreement) within its own boundaries.[21]

27. FEI disagrees with this interpretation for two reasons. First, even if true, it only excludes the City of Langford from being captured by the public utilities definition "in respect of the services provided by the municipality". It has no application to the *services provided by SSL*. Second, the evidence in this proceeding is clear that SSL is the entity that actually provides the utility service. For example:

- the preamble to the "Services Agreement" between the City of Langford and SSL establishes that "SSL will provide the water distribution and district energy services established by the Langford Multi Utility Bylaw".[22]
- the Services Agreement provides that SSL, not the City of Langford, shall "construct, own, operate and maintain" the Westhills CES.[23]
- the Multi-Utility Bylaw under which the utility service is provided in Westhills defines the "Service Provider" as "another person or organization". It expressly contemplates that the City may not be (and in fact is not) the entity providing the "Services". [24]
- Schedule F to the Multi-Utility Bylaw, which are the Terms and Conditions of Service (the Terms and Conditions) for the Westhills CES defines "Service Provider" as: "the person who provides Service to Customers in accordance with the General Terms and Conditions, including without limitation SSL and its successors…"[25]

28. Not only is SSL, (and not the City of Langford) defined as the "Service Provider", the Terms and Conditions under which a customer receives service from the Westhills CES contemplates every aspect of the utility / customer relationship being with SSL. This includes:

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[21] Ex. C1-5, City of Langford Response to Information Request 4.1.

[22] Ex. C1-4, City of Langford Information Package, Section 5.2: Services Agreement between the City of Langford and SSL, p.2

[23] Ex. C1-4, City of Langford Information Package, Section 5.2: Services Agreement between the City of Langford and SSL, s.8

[24] Ex. C1-4, City of Langford Information Package, Section 2.1: Bylaw No. 1291 - Multi-Utility Bylaw, section 7.

[25] Ex. C1-4, City of Langford Information Package, Section 2.2: Excerpts of Bylaw No. 1291, Schedule F, p.2

- all requests for utility service are to be made to SSL, not the City of Langford (section 3.1).

- the Service Agreement is between the customer and SSL, not the City of Langford (section 4.1).

- All billing for utility service is issued by SSL, not the City of Langford (section 15.1).

29. The record of this proceeding discloses no suggestion at all that the City of Langdon has any involvement in the provision of utility service. In essence, the City of Langford seemingly says that it can shield a provider of utility service from Commission regulation by entering a private contract with it that governs its operation. Aside from the fact that this contract looks very much like a "privilege, concession or franchise", which requires Commission approval in any event[26], this is fundamentally inconsistent with the plain and ordinary meaning of the words of the UCA. It would be no different than FEI entering a contract with municipalities across British Columbia similar in substance to the Services Agreement, and then arguing that doing so brought it beyond the jurisdiction of the Commission.

C. The Arrangements between the City of Langford and SSL under the *Community Charter* do not bring SSL outside of the Commission's jurisdiction

30. The City of Langford has maintained throughout this proceeding that its authority under the *Community Charter* to provide municipal services is sufficient to override the Commission's jurisdiction over public utilities in British Columbia. FEI disagrees for two reasons: First in FEI's submission, the *Community Charter* provides no such authority. Second, even if it could be interpreted in that way, the Legislature and the Supreme Court of Canada have conclusively affirmed that any such purported authority is subservient to the Commission's jurisdiction.

31. In response to a Commission information request, the City of Langford stated that in partnering with SSL for the provision of utility service in Westhills it:

> … exercised its jurisdiction under the *Community Charter*, including sections 7, 8(3), 11, 18 and 21 of the *Community Charter*, to create a City service.[27]

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[26] UCA, s.45(7).

[27] Ex. C1-5, City of Langford Response to IR1.1.3.

32. Those sections do not include any authority for a municipality to contract with a private third party for the provision of public utility service, outside the purview of Commission jurisdiction. To the contrary, while section 8 of the *Community Charter* establishes the "fundamental powers" of a municipality to, among other things, "provide any service[28] that the council considers necessary or desirable"[29], section 8(10)(a) specifically provides that any authority conferred on a municipality under section 8 is subservient to other Acts in force in British Columbia:

> (10) Powers provided to municipalities under this section
>
> > (a) are subject to any specific conditions and restrictions established under this or another Act, …[30]

33. Section 10 of the *Community Charter* also reinforces the bounds of a municipality's jurisdiction. It states that "a municipal bylaw has no effect if it is inconsistent with a Provincial enactment".[31]

34. The UCA also addresses the potential for conflict between Commission and municipal authority. Section 121 of the UCA states:

> **121** (1) Nothing in or done under the *Community Charter* or the *Local Government Act*
>
> > (a) supersedes or impairs a power conferred on the commission or an authorization granted to a public utility, or
> >
> > (b) relieves a person of an obligation imposed under this Act or the *Gas Utility Act*.[32]

35. In this respect, the *Community Charter* and UCA are consistent. The *Community Charter* constrains a municipality's authority only to the matters expressly conferred on it, and the UCA makes clear that it (and the Commission's authority) prevails over any contrary authority a municipality may attempt to advance.

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[28] FEI notes that "service" is a defined term in both the UCA and the *Community Charter*. The use of "service" in the text of the UCA related to the Municipal Exclusion necessarily relates to the definition of "service" in the UCA, and the use of "service" in the *Community Charter* necessarily relates to its within definition.

[29] *Community Charter,* s.8(2).

[30] Ibid. s.8(10).

[31] Ibid. s. 10(1).

[32] UCA, s. 121.

36. This mirrors the well accepted common-law principle that a municipality's jurisdiction is confined to that granted to it from the Legislature. It may not overstep that authority merely to further its goals:

> . . . as statutory bodies, municipalities may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation.[33]

37. Finally, if there were any doubt, the potential conflict between municipal and Commission authority has been considered and determined by the Supreme Court of Canada. The *Surrey* case is clear that any attempt by a municipality to wade into the regulation of utility service is *ultra vires* its jurisdiction.

38. In that decision, the Supreme Court of Canada emphasized the paramountcy of the Commission's jurisdiction relative to municipalities:

> The whole tenor of the Act shows clearly that the safeguarding of the interests of the public, both as to the identity of those who should be permitted to operate public utilities and as to the manner in which they should operate, was a duty vested in the Commission. It is quite impossible, in my opinion, to hold that these powers and those which might be asserted by a municipality to regulate the operations of such companies under s.58, cls. 55 and 109, were intended to co-exist. […]
>
> In discharging its important duties under the *Public Utilities Act* the Commission is required to consider the interests not merely of single municipalities but of districts as a whole and areas including many municipalities. The duty of safeguarding the interests of the municipalities and their inhabitants, to the extent that they may be affected by the operations of public utilities, has by these statutes been transferred from municipal councils to the Public Utilities Commission, subject, inter alia, to the right of municipalities of insuring a supply of gas by municipal enterprise of the nature referred to in the reasons delivered by the Chairman of the Public Utilities Commission [i.e., a municipal utility]. This right the Commission was careful to preserve.[34]

39. This is consistent with the legislative scheme outlined above. Just as Surrey was precluded from utilizing its bylaw making authority in a manner that impinged on the Commission's jurisdiction over public utilities, the City of Langford's desire to regulate the provision of utility service through the Westhills CES is *ultra vires* its jurisdiction.

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[33] *R. v. Sharma*, 1993 165 (SCC), [1993], at p. 668,

[34] *Surrey*, at paras. 15, 17.

D. Conclusion

40. In FEI's submission, the answer to the narrow question of whether SSL is a public utility is found squarely within the UCA. The parties agree on the determining factor - that SSL owns and operates equipment and facilities for the provision of utility service. Once that threshold is met, the UCA is clear that SSL is captured by the definition of "public utility". As the Municipal Exclusion can only - by definition - apply to municipalities and regional districts, SSL cannot benefit from it and the City of Langford's submission that *it* rather than SSL is the utility service provider rings hollow.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: October 13, 2017

[original signed by]

David Both
Counsel for FortisBC Energy Inc.

BOOK OF AUTHORITIES

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1. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27
2. *R. Sullivan, Sullivan on the Construction of* Statutes (Markham: LexisNexis, 2008)
3. *District of Surrey v. British Columbia Electric Company Limited* [1957] S.C.R. 121
4. *Sumas Energy 2 Inc. v. Canada (National Energy Board)*, 2005 FCA 377
5. *R. v. Sharma*, 1993 165 (SCC), [1993]

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("*ESA*") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appelants*

c.

Zittrer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

Nº du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «*LNE*») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le

ance, termination or vacation pay under the *ESA*. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40*a* of the *ESA* suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's *Interpretation Act* provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the *ESA* and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40*a* to be inapplicable in bankruptcy situations is incompatible with both the object of the *ESA* and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbi-

motif que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*. En appel, le ministère a eu gain de cause devant la Cour de l'Ontario (Division générale) mais la Cour d'appel de l'Ontario a infirmé ce jugement et a rétabli la décision du syndic. Le ministère a demandé l'autorisation d'interjeter appel de l'arrêt de la Cour d'appel mais il s'est désisté. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé et obtenu l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. En l'espèce, il s'agit de savoir si la cessation d'emploi résultant de la faillite de l'employeur donne naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*.

Arrêt: Le pourvoi est accueilli.

Une question d'interprétation législative est au centre du présent litige. Bien que le libellé clair des art. 40 et 40*a* de la *LNE* donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé, l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. Il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur. Au surplus, l'art. 10 de la *Loi d'interprétation* ontarienne dispose que les lois «sont réputées apporter une solution de droit» et qu'elles doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

L'objet de la *LNE* et des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. Conclure que les art. 40 et 40*a* sont inapplicables en cas de faillite est incompatible tant avec l'objet de la *LNE* qu'avec les dispositions relatives aux indemnités de licenciement et de cessation d'emploi. Le législateur ne peut avoir voulu des conséquences absurdes mais c'est le résultat auquel on arriverait si les employés congédiés avant la faillite avaient droit à ces avantages mais pas les employés congédiés après la faillite. Une distinction serait établie entre les employés sur la seule base de la date de leur

trarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the *Employment Standards Amendment Act, 1981* exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the *ESA* is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40*a* are examined in their entire context, the words "terminated by an employer" must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *Bankruptcy Act* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. It was not necessary to address the applicability of s. 7(5) of the *ESA*.

Cases Cited

Distinguished: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343; **referred to:** *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213;

congédiement et un tel résultat les priverait arbitrairement de certains des moyens dont ils disposent pour faire face à un bouleversement économique.

Le recours à l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié. En vertu du par. 2(3) de l'*Employment Standards Amendment Act, 1981*, étaient exemptés de l'obligation de verser des indemnités de cessation d'emploi, les employeurs qui avaient fait faillite et avaient perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale. Le paragraphe 2(3) implique nécessairement que les employeurs en faillite sont assujettis à l'obligation de verser une indemnité de cessation d'emploi. Si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin. En outre, comme la *LNE* est une loi conférant des avantages, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur.

Lorsque les mots exprès employés aux art. 40 et 40*a* sont examinés dans leur contexte global, les termes «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui sont licenciés pour quelque autre raison serait arbitraire et inéquitable. Une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. La cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. Il était inutile d'examiner la question de l'applicabilité du par. 7(5) de la *LNE*.

Jurisprudence

Distinction d'avec les arrêts: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343; **arrêts mentionnés:** *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. c. Hydro-Québec*,

Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. v. Vasil*, [1981] 1 S.C.R. 469; *Paul v. The Queen*, [1982] 1 S.C.R. 621; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025.

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Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5) [rep. & sub. 1986, c. 51, s. 2], 40(1) [rep. & sub. 1987, c. 30, s. 4(1)], (7), 40*a*(1) [rep. & sub. *ibid*., s. 5(1)].
Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40(7).
Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2.
Interpretation Act, R.S.O. 1980, c. 219 [now R.S.O. 1990, c. I.11], ss. 10, 17.
Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, ss. 74(1), 75(1).

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Loi sur la faillite, L.R.C. (1985), ch. B-3 [maintenant la *Loi sur la faillite et l'insolvabilité*], art. 121(1).
Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5) [abr. & rempl. 1986, ch. 51, art. 2], 40(1) [abr. & rempl. 1987, ch. 30, art. 4(1)], (7), 40*a*(1) [abr. & rempl. *ibid*., art. 5(1)].

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Sullivan, Ruth. *Driedger on the Construction of Statutes*, 3rd ed. Toronto: Butterworths, 1994.

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APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and *Kathleen Martin*, for the appellants.

Raymond M. Slattery, for the respondent.

David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

The judgment of the Court was delivered by

IACOBUCCI J. — This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving

Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. nº 586 (QL), qui a infirmé un jugement de la Cour de l'Ontario (Division générale) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, statuant que le ministère du Travail pouvait prouver des réclamations au nom des employés de l'entreprise en faillite. Pourvoi accueilli.

Steven M. Barrett et *Kathleen Martin*, pour les appelants.

Raymond M. Slattery, pour l'intimée.

David Vickers, pour le ministère du Travail de la province d'Ontario, Direction des normes d'emploi.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Il s'agit d'un pourvoi interjeté par les anciens employés d'un employeur maintenant en faillite contre une ordonnance qui a rejeté les réclamations qu'ils ont présentées en vue d'obtenir une indemnité de licenciement (y compris la paie de vacances) et une indemnité de cessation d'emploi. Le litige porte sur une question d'interprétation législative. Tout particulièrement, le pourvoi tranche la question de savoir si, en vertu des dispositions législatives pertinentes en vigueur à l'époque de la faillite, les employés ont le droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi lorsque la cessation d'emploi résulte de la faillite de leur employeur. 1

1. Les faits

Avant sa faillite, la société Rizzo & Rizzo Shoes Limited («Rizzo») possédait et exploitait au Canada une chaîne de magasins de vente au détail de chaussures. Environ 65 pour 100 de ces magasins étaient situés en Ontario. Le 13 avril 1989, une pétition en faillite a été présentée contre la 2

order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

chaîne de magasins. Le lendemain, une ordonnance de séquestre a été rendue sur consentement à l'égard des biens de Rizzo. Au prononcé de l'ordonnance, les employés de Rizzo ont perdu leur emploi.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

Conformément à l'ordonnance de séquestre, l'intimée, Zittrer, Siblin & Associates, Inc. (le «syndic») a été nommée syndic de faillite de l'actif de Rizzo. La Banque de Nouvelle-Écosse a nommé Peat Marwick Limitée («PML») comme administrateur séquestre. Dès la fin de juillet 1989, PML avait liquidé les biens de Rizzo et fermé les magasins. PML a versé tous les salaires, les traitements, toutes les commissions et les paies de vacances qui avaient été gagnés par les employés de Rizzo jusqu'à la date à laquelle l'ordonnance de séquestre a été rendue.

4 In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "*ESA*"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

En novembre 1989, le ministère du Travail de la province d'Ontario, Direction des normes d'emploi (le «ministère») a vérifié les dossiers de Rizzo afin de déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi*, L.R.O. 1980, ch. 137 et ses modifications (la «*LNE*»). Le 23 août 1990, au nom des anciens employés de Rizzo, le ministère a remis au syndic intimé une preuve de réclamation pour des indemnités de licenciement et des paies de vacances (environ 2,6 millions de dollars) et pour des indemnités de cessation d'emploi (14 215 $). Le syndic a rejeté les réclamations et a donné avis du rejet le 28 janvier 1991. Aux fins du présent pourvoi, les réclamations ont été rejetées parce que le syndic était d'avis que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave

Le ministère a interjeté appel de la décision du syndic devant la Cour de l'Ontario (Division générale) laquelle a infirmé la décision du syndic et a admis les réclamations en tant que réclamations non garanties prouvables en matière de faillite. En appel, la Cour d'appel de l'Ontario a cassé le jugement de la cour de première instance et rétabli la

to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "*BA*"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "*ESA*") respectively.

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7. —

(5) Every contract of employment shall be deemed to include the following provision:

> All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act.*

40. — (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;

(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

décision du syndic. Le ministère a demandé l'autorisation d'en appeler de l'arrêt de la Cour d'appel, mais il s'est désisté le 30 août 1993. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. L'ordonnance de notre Cour faisant droit à ces demandes a été rendue le 5 décembre 1996.

2. Les dispositions législatives pertinentes

Aux fins du présent pourvoi, les versions pertinentes de la *Loi sur la faillite* (maintenant la *Loi sur la faillite et l'insolvabilité*) et de la *Loi sur les normes d'emploi* sont respectivement les suivantes: L.R.C. (1985), ch. B-3 (la *«LF»*) et L.R.O. 1980, ch. 137 et ses modifications au 14 avril 1989 (la *«LNE»*). 6

Loi sur les normes d'emploi, L.R.O. 1980, ch. 137 et ses modifications:

7 . . .

(5) Tout contrat de travail est réputé comprendre la disposition suivante:

> L'indemnité de cessation d'emploi et l'indemnité de licenciement deviennent exigibles et sont payées par l'employeur à l'employé en deux versements hebdomadaires à compter de la première semaine complète suivant la cessation d'emploi, et sont réparties sur ces semaines en conséquence. La présente disposition ne s'applique pas à l'indemnité de cessation d'emploi si l'employé a choisi de maintenir son droit d'être rappelé, comme le prévoit le paragraphe 40a (7) de la *Loi sur les normes d'emploi.*

40 (1) Aucun employeur ne doit licencier un employé qui travaille pour lui depuis trois mois ou plus à moins de lui donner:

a) un préavis écrit d'une semaine si sa période d'emploi est inférieure à un an;

b) un préavis écrit de deux semaines si sa période d'emploi est d'un an ou plus mais de moins de trois ans;

(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;

(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;

(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;

(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . .

40*a* . . .

(1a) Where**,**

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

c) un préavis écrit de trois semaines si sa période d'emploi est de trois ans ou plus mais de moins de quatre ans;

d) un préavis écrit de quatre semaines si sa période d'emploi est de quatre ans ou plus mais de moins de cinq ans;

e) un préavis écrit de cinq semaines si sa période d'emploi est de cinq ans ou plus mais de moins de six ans;

f) un préavis écrit de six semaines si sa période d'emploi est de six ans ou plus mais de moins de sept ans;

g) un préavis écrit de sept semaines si sa période d'emploi est de sept ans ou plus mais de moins de huit ans;

h) un préavis écrit de huit semaines si sa période d'emploi est de huit ans ou plus,

et avant le terme de la période de ce préavis.

. . .

(7) Si un employé est licencié contrairement au présent article:

a) l'employeur lui verse une indemnité de licenciement égale au salaire que l'employé aurait eu le droit de recevoir à son taux normal pour une semaine normale de travail sans heures supplémentaires pendant la période de préavis fixée par le paragraphe (1) ou (2), de même que tout salaire auquel il a droit;

. . .

40*a* . . .

[TRADUCTION] (1a) L'employeur verse une indemnité de cessation d'emploi à chaque employé licencié qui a travaillé pour lui pendant cinq ans ou plus si, selon le cas:

a) l'employeur licencie cinquante employés ou plus au cours d'une période de six mois ou moins et que les licenciements résultent de l'interruption permanente de l'ensemble ou d'une partie des activités de l'employeur à un établissement;

b) l'employeur dont la masse salariale est de 2,5 millions de dollars ou plus licencie un ou plusieurs employés.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2. — (1) Part XII of the said Act is amended by adding thereto the following section:

. . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C., 1985, c. B-3

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. *Ontario Court (General Division)* (1991), 6 O.R. (3d) 441

Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22

[TRADUCTION]

2. (1) La partie XII de la loi est modifiée par adjonction de l'article suivant:

. . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

Loi sur la faillite, L.R.C. (1985), ch. B-3

121. (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date de la faillite, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à la date de la faillite, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

Loi d'interprétation, L.R.O. 1990, ch. I.11

10 Les lois sont réputées apporter une solution de droit, qu'elles aient pour objet immédiat d'ordonner l'accomplissement d'un acte que la Législature estime être dans l'intérêt public ou d'empêcher ou de punir l'accomplissement d'un acte qui lui paraît contraire à l'intérêt public. Elles doivent par conséquent s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables.

. . .

17 L'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit.

3. L'historique judiciaire

A. *La Cour de l'Ontario (Division générale)* (1991), 6 O.R. (3d) 441

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

Après avoir tranché plusieurs points non soulevés dans le présent pourvoi, le juge Farley est passé à la question de savoir si l'indemnité de licenciement et l'indemnité de cessation d'emploi sont des réclamations prouvables en application de la *LF*. S'appuyant sur la décision *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (C.S. Ont. en matière de faillite), il a conclu que manifestement, l'indemnité de licenciement et l'indemnité de cessation d'emploi sont prouvables en matière de faillite lorsque l'obligation légale d'effectuer ces versements a pris naissance avant la faillite. Par conséquent, il a estimé que le point essentiel à résoudre en l'espèce était de savoir si la faillite était assimilable au licenciement et entraînait l'application des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* de manière que l'obligation de verser ces indemnités prenne naissance également au moment de la faillite.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

Le juge Farley a abordé cette question en faisant remarquer que l'objet et l'intention de la *LNE* étaient d'établir des normes minimales d'emploi et de favoriser et protéger les intérêts des employés. Il a donc conclu que la *LNE* visait à apporter une solution de droit et devait dès lors être interprétée de manière équitable et large afin de garantir la réalisation de son objet selon ses sens, intention et esprit véritables.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

Le juge Farley a ensuite décidé que priver les employés en l'espèce du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi aurait pour conséquence injuste et arbitraire que l'employé licencié juste avant la faillite aurait droit à une indemnité de licenciement et à une indemnité de cessation d'emploi, alors que celui qui a perdu son emploi en raison de la faillite elle-même n'y aurait pas droit. Ce résultat, a-t-il dit, irait à l'encontre du but visé par la loi.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in

Le juge Farley ne voyait pas pourquoi les réclamations des employés en l'espèce ne seraient pas généralement considérées comme des réclamations concernant les salaires ou comme d'autres réclamations présentées en application de la *LF*. Il a souligné que les anciens employés en l'espèce

the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

n'avaient pas soutenu que les indemnités de licenciement et de cessation d'emploi devaient être prioritaires dans la distribution de l'actif, mais tout simplement qu'elles étaient des réclamations prouvables en matière de faillite (non garanties et non privilégiées). Pour ce motif, il a conclu qu'il ne convenait pas d'invoquer la jurisprudence et la doctrine portant sur l'interprétation des dispositions relatives à la priorité de la *LF*.

Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

11 Même si la faillite ne met pas fin à la relation entre l'employeur et l'employé de façon à faire jouer les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNF*, le juge Farley était d'avis que les employés en l'espèce avaient néanmoins droit à ces indemnités, car il s'agissait d'engagements contractés avant la date de la faillite conformément au par. 7(5) de la *LNE*. Il a conclu d'une part qu'aux termes du par. 7(5), tout contrat de travail est réputé comprendre une disposition prévoyant le versement d'une indemnité de licenciement et d'une indemnité de cessation d'emploi au moment de la cessation d'emploi et d'autre part que l'employeur en faillite est assujetti à l'obligation conditionnelle de verser ces indemnités depuis le début de la relation entre l'employeur et l'employé, soit bien avant la faillite.

Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the "*ESAA*"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

12 Le juge Farley a également examiné le par. 2(3) de l'*Employment Standards Amendment Act, 1981*, L.O. 1981, ch. 22 («l'*ESAA*»), qui est une disposition transitoire exemptant certains employeurs en faillite des nouvelles obligations relatives au paiement de l'indemnité de cessation d'emploi jusqu'à ce que les modifications aient reçu la sanction royale. Il était d'avis que cette disposition n'aurait pas été nécessaire si le législateur n'avait pas voulu que les obligations auxquelles sont tenus les employeurs au moment d'un licenciement s'appliquent aux employeurs en faillite en vertu de la *LNE*. Le juge Farley a conclu que la réclamation présentée par les anciens employés de Rizzo en vue d'obtenir des indemnités de licenciement et de cessation d'emploi pouvait être traitée comme une créance non garantie et non privilégiée dans une faillite. Par conséquent, il a accueilli l'appel formé contre la décision du syndic.

B. *Ontario Court of Appeal* (1995), 22 O.R. (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or who proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40*a*(1)(*a*) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40*a* does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a peti-

B. *La Cour d'appel de l'Ontario* (1995), 22 O.R. (3d) 385

Au nom d'une cour unanime, le juge Austin a commencé son analyse de la question principale du présent pourvoi en s'arrêtant sur le libellé des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE*. Il a noté, à la p. 390, que les dispositions relatives à l'indemnité de licenciement utilisent des expressions comme «[a]ucun employeur ne doit licencier un employé» (par. 40(1)), «le préavis qu'un employeur donne pour licencier» (par. 40(2)) et les «employés qu'un employeur a licenciés ou se propose de licencier» (par. 40(5)). Passant à l'indemnité de cessation d'emploi, il a cité l'al. 40*a*(1)*a*), à la p. 391, lequel contient l'expression «l'employeur licencie cinquante employés». Le juge Austin a conclu que ce libellé limite l'obligation d'accorder une indemnité de licenciement et une indemnité de cessation d'emploi aux cas où l'employeur licencie des employés. Selon lui, la cessation d'emploi résultant de l'effet de la loi, notamment de la faillite, n'entraîne pas l'application de la *LNE*.

À l'appui de sa conclusion, le juge Austin a examiné les arrêts de principe dans ce domaine du droit. Il a cité *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (C.S. en matière de faillite), dans lequel le juge Houlden (maintenant juge de la Cour d'appel) a statué que les dispositions relatives à l'indemnité de licenciement de la *LNE* n'étaient pas conçues pour s'appliquer à l'employeur en faillite. Il a également invoqué *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (C.S. Ont. en matière de faillite), à l'appui de la proposition selon laquelle la faillite d'une compagnie à la demande d'un créancier ne constitue pas un congédiement. Il a conclu ainsi, à la p. 395:

> [TRADUCTION] Le libellé clair des art. 40 et 40*a* ne crée une obligation de verser une indemnité de licenciement ou une indemnité de cessation d'emploi que si l'employeur licencie l'employé. En l'espèce, la cessation d'emploi n'est pas le fait de l'employeur, elle résulte d'une ordonnance de séquestre rendue à l'encontre de Rizzo le 14 avril 1989, à la suite d'une pétition présentée par l'un de ses créanciers. Le droit à une indemnité

tion by one of its creditors. No entitlement to either termination or severance pay ever arose.

Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40*a*.

Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

5. Analysis

The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40*a*(1a) begins with

de licenciement ou à une indemnité de cessation d'emploi n'a jamais pris naissance.

15 En ce qui concerne le par. 7(5) de la *LNE*, le juge Austin a rejeté l'interprétation du juge de première instance et a estimé que cette disposition ne créait pas d'engagement. Selon lui, elle ne faisait que préciser quand l'engagement contracté par ailleurs devait être acquitté et ne se rapportait donc pas à la question dont la cour était saisie. Le juge Austin n'a pas accepté non plus l'opinion exprimée par le tribunal inférieur au sujet du par. 2(3), la disposition transitoire de l'*ESAA*. Il a jugé que cette disposition n'avait aucun effet quant à l'intention du législateur, comme l'attestait la terminologie employée aux art. 40 et 40*a*.

16 Le juge Austin a conclu que, comme la cessation d'emploi subie par les anciens employés de Rizzo résultait d'une ordonnance de faillite et n'était pas le fait de l'employeur, il n'existait aucun engagement en ce qui concerne l'indemnité de licenciement, l'indemnité de cessation d'emploi ni la paie de vacances. L'ordonnance du juge de première instance a été annulée et la décision du syndic de rejeter les réclamations a été rétablie.

4. Les questions en litige

17 Le présent pourvoi soulève une question: la cessation d'emploi résultant de la faillite de l'employeur donne-t-elle naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*?

5. Analyse

18 L'obligation légale faite aux employeurs de verser une indemnité de licenciement ainsi qu'une indemnité de cessation d'emploi est régie respectivement par les art. 40 et 40*a* de la *LNE*. La Cour d'appel a fait observer que le libellé clair de ces dispositions donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé. Par exemple, le par. 40(1) commence par les mots suivants: «Aucun employeur ne doit

the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legisla-*

licencier un employé . . .» Le paragraphe 40*a*(1a) contient également les mots: «si [. . .] l'employeur licencie cinquante employés ou plus . . .» Par conséquent, la question dans le présent pourvoi est de savoir si l'on peut dire que l'employeur qui fait faillite a licencié ses employés.

La Cour d'appel a répondu à cette question par la négative, statuant que, lorsqu'un créancier présente une pétition en faillite contre un employeur, les employés ne sont pas licenciés par l'employeur mais par l'effet de la loi. La Cour d'appel a donc estimé que, dans les circonstances de l'espèce, les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNE* n'étaient pas applicables et qu'aucune obligation n'avait pris naissance. Les appelants répliquent que les mots «l'employeur licencie» doivent être interprétés comme établissant une distinction entre la cessation d'emploi volontaire et la cessation d'emploi forcée. Ils soutiennent que ce libellé visait à dégager l'employeur de son obligation de verser des indemnités de licenciement et de cessation d'emploi lorsque l'employé quittait son emploi volontairement. Cependant, les appelants prétendent que la cessation d'emploi forcée résultant de la faillite de l'employeur est assimilable au licenciement effectué par l'employeur pour l'exercice du droit à une indemnité de licenciement et à une indemnité de cessation d'emploi prévu par la *LNE*.

Une question d'interprétation législative est au centre du présent litige. Selon les conclusions de la Cour d'appel, le sens ordinaire des mots utilisés dans les dispositions en cause paraît limiter l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi aux employeurs qui ont effectivement licencié leurs employés. À première vue, la faillite ne semble pas cadrer très bien avec cette interprétation. Toutefois, en toute déférence, je crois que cette analyse est incomplète.

Bien que l'interprétation législative ait fait couler beaucoup d'encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994) (ci-après «*Construction of Statutes*»); Pierre-André Côté, *Interprétation des lois* (2e éd.

tion in Canada (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of "... the interests of employees by requiring employers to comply with

1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2e éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Parmi les arrêts récents qui ont cité le passage ci-dessus en l'approuvant, mentionnons: *R. c. Hydro-Québec*, [1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

22 Je m'appuie également sur l'art. 10 de la *Loi d'interprétation*, L.R.O. 1980, ch. 219, qui prévoit que les lois «sont réputées apporter une solution de droit» et doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

23 Bien que la Cour d'appel ait examiné le sens ordinaire des dispositions en question dans le présent pourvoi, en toute déférence, je crois que la cour n'a pas accordé suffisamment d'attention à l'économie de la *LNE*, à son objet ni à l'intention du législateur; le contexte des mots en cause n'a pas non plus été pris en compte adéquatement. Je passe maintenant à l'analyse de ces questions.

24 Dans l'arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, à la p. 1002, notre Cour, à la majorité, a reconnu l'importance que notre société accorde à l'emploi et le rôle fondamental qu'il joue dans la vie de chaque individu. La manière de mettre fin à un emploi a été considérée comme étant tout aussi importante (voir également *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701). C'est dans ce contexte que les juges majoritaires dans l'arrêt *Machtinger* ont défini, à la p. 1003, l'objet de la *LNE* comme étant la protection «. . . [d]es intérêts des employés en exigeant que

certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, ". . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

les employeurs respectent certaines normes minimales, notamment en ce qui concerne les périodes minimales de préavis de licenciement». Par conséquent, les juges majoritaires ont conclu, à la p. 1003, qu'«. . . une interprétation de la Loi qui encouragerait les employeurs à se conformer aux exigences minimales de celle-ci et qui ferait ainsi bénéficier de sa protection le plus grand nombre d'employés possible est à préférer à une interprétation qui n'a pas un tel effet».

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.)

L'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. L'article 40 de la *LNE* oblige les employeurs à donner à leurs employés un préavis de licenciement raisonnable en fonction des années de service. L'une des fins principales de ce préavis est de donner aux employés la possibilité de se préparer en cherchant un autre emploi. Il s'ensuit que l'al. 40(7)a), qui prévoit une indemnité de licenciement tenant lieu de préavis lorsqu'un employeur n'a pas donné le préavis requis par la loi, vise à protéger les employés des effets néfastes du bouleversement économique que l'absence d'une possibilité de chercher un autre emploi peut entraîner. (Innis Christie, Geoffrey England et Brent Cotter, *Employment Law in Canada* (2e éd. 1993), aux pp. 572 à 581.)

26 Similarly, s. 40*a*, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

De même, l'art. 40*a*, qui prévoit l'indemnité de cessation d'emploi, vient indemniser les employés ayant beaucoup d'années de service pour ces années investies dans l'entreprise de l'employeur et pour les pertes spéciales qu'ils subissent lorsqu'ils sont licenciés. Dans l'arrêt *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, le juge Robins a cité en les approuvant, aux pp. 556 et 557, les propos tenus par D. D. Carter dans le cadre d'une décision rendue en matière de normes d'emploi dans *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), à la p. 19, où il a décrit ainsi le rôle de l'indemnité de cessation d'emploi:

Severance pay recognizes that an employee does make an investment in his employer's business — the extent of this investment being directly related to the length of

[TRADUCTION] L'indemnité de cessation d'emploi reconnaît qu'un employé fait un investissement dans l'entreprise de son employeur — l'importance de cet investis-

the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

sement étant liée directement à la durée du service de l'employé. Cet investissement est l'ancienneté que l'employé acquiert durant ses années de service [. . .] À la fin de la relation entre l'employeur et l'employé, cet investissement est perdu et l'employé doit recommencer à acquérir de l'ancienneté dans un autre lieu de travail. L'indemnité de cessation d'emploi, fondée sur les années de service, compense en quelque sorte cet investissement perdu.

In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88). 27

À mon avis, les conséquences ou effets qui résultent de l'interprétation que la Cour d'appel a donnée des art. 40 et 40*a* de la *LNE* ne sont compatibles ni avec l'objet de la Loi ni avec l'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes. Selon un principe bien établi en matière d'interprétation législative, le législateur ne peut avoir voulu des conséquences absurdes. D'après Côté, *op. cit.*, on qualifiera d'absurde une interprétation qui mène à des conséquences ridicules ou futiles, si elle est extrêmement déraisonnable ou inéquitable, si elle est illogique ou incohérente, ou si elle est incompatible avec d'autres dispositions ou avec l'objet du texte législatif (aux pp. 430 à 432). Sullivan partage cet avis en faisant remarquer qu'on peut qualifier d'absurdes les interprétations qui vont à l'encontre de la fin d'une loi ou en rendent un aspect inutile ou futile (Sullivan, *Construction of Statutes*, *op. cit.*, à la p. 88).

The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up 28

Le juge de première instance a noté à juste titre que, si les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* ne s'appliquent pas en cas de faillite, les employés qui auraient eu la «chance» d'être congédiés la veille de la faillite auraient droit à ces indemnités, alors que ceux qui perdraient leur emploi le jour où la faillite devient définitive n'y auraient pas droit. À mon avis, l'absurdité de cette conséquence est particulièrement évidente dans les milieux syndiqués où les mises à pied se font selon l'ancienneté. Plus un employé a de l'ancienneté, plus il a investi dans l'entreprise de l'employeur et plus son droit à une indemnité de licenciement et à une indemnité de cessation d'emploi est fondé. Pourtant, c'est le personnel ayant le plus d'ancienneté qui risque de travailler

until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *ESAA* introduced s. 40*a*, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

2. . . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional

jusqu'au moment de la faillite et de perdre ainsi le droit d'obtenir ces indemnités.

Si l'interprétation que la Cour d'appel a donnée des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi est correcte, il serait acceptable d'établir une distinction entre les employés en se fondant simplement sur la date de leur congédiement. Il me semble qu'un tel résultat priverait arbitrairement certains employés d'un moyen de faire face au bouleversement économique causé par le chômage. De cette façon, les protections de la *LNE* seraient limitées plutôt que d'être étendues, ce qui irait à l'encontre de l'objectif que voulait atteindre le législateur. À mon avis, c'est un résultat déraisonnable.

En plus des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi, tant les appelants que l'intimée ont invoqué divers autres articles de la *LNE* pour appuyer les arguments avancés au sujet de l'intention du législateur. Selon moi, bien que la plupart de ces dispositions ne soient d'aucune utilité en ce qui concerne l'interprétation, il est une disposition transitoire particulièrement révélatrice. En 1981, le par. 2(1) de l'*ESAA* a introduit l'art. 40*a*, la disposition relative à l'indemnité de cessation d'emploi. En application du par. 2(2), cette disposition entrait en vigueur le 1er janvier 1981. Le paragraphe 2(3), la disposition transitoire en question, était ainsi conçue:

[TRADUCTION]

2. . . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

La Cour d'appel a conclu qu'il n'était ni nécessaire ni approprié de déterminer l'intention qu'avait le législateur en adoptant ce paragraphe

subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40*a* was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469, at p. 487; *Paul v. The Queen*, [1982] 1 S.C.R. 621, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

provisoire. Néanmoins, la cour a estimé que l'intention du législateur, telle qu'elle ressort des premiers mots des art. 40 et 40*a*, était claire, à savoir que la cessation d'emploi résultant de la faillite ne fera pas naître l'obligation de verser l'indemnité de cessation d'emploi et l'indemnité de licenciement qui est prévue par la *LNE*. La cour a jugé que cette intention restait inchangée à la suite de l'adoption de la disposition transitoire. Je ne puis souscrire ni à l'une ni à l'autre de ces conclusions. En premier lieu, à mon avis, l'examen de l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié et notre Cour y a eu souvent recours (voir, par ex., *R. c. Vasil*, [1981] 1 R.C.S. 469, à la p. 487; *Paul c. La Reine*, [1982] 1 R.C.S. 621, aux pp. 635, 653 et 660). En second lieu, je crois que la disposition transitoire indique que le législateur voulait que l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi prenne naissance lorsque l'employeur fait faillite.

In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

32 À mon avis, en raison de l'exemption accordée au par. 2(3) aux employeurs qui ont fait faillite et ont perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale, il faut nécessairement que les employeurs faisant faillite soient de fait assujettis à l'obligation de verser une indemnité de cessation d'emploi. Selon moi, si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin.

I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows (at p. 89):

33 Je m'appuie sur la décision rendue par le juge Saunders dans l'affaire *Royal Dressed Meats Inc.*, précitée. Après avoir examiné le par. 2(3) de l'*ESAA*, il fait l'observation suivante (à la p. 89):

> . . . any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the E.S.A. . . . it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

> [TRADUCTION] . . . tout doute au sujet de l'intention du législateur ontarien est dissipé, à mon avis, par la disposition transitoire qui introduit les indemnités de cessation d'emploi dans la L.N.E. [. . .] Il me semble qu'il faut conclure que le législateur voulait que l'obligation de verser des indemnités de cessation d'emploi prenne naissance au moment de la faillite. Selon moi, cette intention s'étend aux indemnités de licenciement qui sont de nature analogue.

This interpretation is also consistent with statements made by the Minister of Labour at the time

34 Cette interprétation est également compatible avec les déclarations faites par le ministre du

he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.
>
> . . .
>
> . . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

> . . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legisla-

Travail au moment de l'introduction des modifications apportées à la *LNE* en 1981. Au sujet de la nouvelle disposition relative à l'indemnité de cessation d'emploi, il a dit ce qui suit:

> [TRADUCTION] Les circonstances entourant une fermeture régissent l'applicabilité de la législation en matière d'indemnité de cessation d'emploi dans certains cas précis. Par exemple, une société insolvable ou en faillite sera encore tenue de verser l'indemnité de cessation d'emploi aux employés dans la mesure où il y a des biens pour acquitter leurs réclamations.
>
> . . .
>
> . . . les mesures proposées en matière d'indemnité de cessation d'emploi seront, comme je l'ai mentionné précédemment, rétroactives au 1er janvier de cette année. Cette disposition rétroactive, toutefois, ne s'appliquera pas en matière de faillite et d'insolvabilité dans les cas où les biens ont déjà été distribués ou lorsqu'une entente est déjà intervenue au sujet de la proposition des créanciers.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 4 juin 1981, aux pp. 1236 et 1237.)

De plus, au cours des débats parlementaires sur les modifications proposées, le ministre a déclaré:

> [TRADUCTION] En ce qui a trait à la rétroactivité, l'indemnité de cessation d'emploi ne s'appliquera pas aux faillites régies par la Loi sur la faillite lorsque les biens ont été distribués. Cependant, lorsque la présente loi aura reçu la sanction royale, les employés visés par des fermetures entraînées par des faillites seront visés par les dispositions relatives à l'indemnité de cessation d'emploi.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 16 juin 1981, à la p. 1699.)

Malgré les nombreuses lacunes de la preuve des débats parlementaires, notre Cour a reconnu qu'elle peut jouer un rôle limité en matière d'interprétation législative. S'exprimant au nom de la Cour dans l'arrêt *R. c. Morgentaler*, [1993] 3 R.C.S. 463, à la p. 484, le juge Sopinka a dit:

> . . . jusqu'à récemment, les tribunaux ont hésité à admettre la preuve des débats et des discours devant le corps législatif. [. . .] La principale critique dont a été l'objet ce type de preuve a été qu'elle ne saurait représenter «l'intention» de la législature, personne morale, mais

tive history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

c'est aussi vrai pour d'autres formes de contexte d'adoption d'une loi. À la condition que le tribunal n'oublie pas que la fiabilité et le poids des débats parlementaires sont limités, il devrait les admettre comme étant pertinents quant au contexte et quant à l'objet du texte législatif.

Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2, at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40*a* of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

36 Enfin, en ce qui concerne l'économie de la loi, puisque la *LNE* constitue un mécanisme prévoyant des normes et des avantages minimaux pour protéger les intérêts des employés, on peut la qualifier de loi conférant des avantages. À ce titre, conformément à plusieurs arrêts de notre Cour, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur (voir, par ex., *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2, à la p. 10; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513, à la p. 537). Il me semble que, en limitant cette analyse au sens ordinaire des art. 40 et 40*a* de la *LNE*, la Cour d'appel a adopté une méthode trop restrictive qui n'est pas compatible avec l'économie de la Loi.

The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

37 La Cour d'appel s'est fortement appuyée sur la décision rendue dans *Malone Lynch*, précité. Dans cette affaire, le juge Houlden a conclu que l'art. 13, la disposition relative aux mesures de licenciement collectif de l'ancienne *ESA*, R.S.O. 1970, ch. 147, qui a été remplacée par l'art. 40 en cause dans le présent pourvoi, n'était pas applicable lorsque la cessation d'emploi résultait de la faillite de l'employeur. Le paragraphe 13(2) de l'*ESA* alors en vigueur prévoyait que, si un employeur voulait licencier 50 employés ou plus, il devait donner un préavis de licenciement dont la durée était prévue par règlement [TRADUCTION] «et les licenciements ne prenaient effet qu'à l'expiration de ce délai». Le juge Houlden a conclu que la cessation d'emploi résultant de la faillite ne pouvait entraîner l'application de la disposition relative à l'indemnité de licenciement car les employés placés dans cette situation n'avaient pas reçu le préavis écrit requis par la loi et ne pouvaient donc pas être considérés comme ayant été licenciés conformément à la Loi.

Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were

38 Deux ans après que la décision *Malone Lynch* eut été prononcée, les dispositions relatives à l'in-

amended by *The Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats*, *supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C.S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

demnité de licenciement de l'*ESA* de 1970 ont été modifiées par *The Employment Standards Act, 1974*, S.O. 1974, ch. 112. Dans la version modifiée du par. 40(7) de l'*ESA* de 1974, il n'était plus nécessaire qu'un préavis soit donné avant que le licenciement puisse produire ses effets. Cette disposition vient préciser que l'indemnité de licenciement doit être versée lorsqu'un employeur omet de donner un préavis de licenciement et qu'il y a cessation d'emploi, indépendamment du fait qu'un préavis régulier ait été donné ou non. Il ne fait aucun doute selon moi que la décision *Malone Lynch* portait sur des dispositions législatives très différentes de celles qui sont applicables en l'espèce. Il me semble que la décision du juge Houlden a une portée limitée, soit que les dispositions de l'*ESA* de 1970 ne s'appliquent pas à un employeur en faillite. Pour cette raison, je ne reconnais à la décision *Malone Lynch* aucune valeur persuasive qui puisse étayer les conclusions de la Cour d'appel. Je souligne que les tribunaux dans *Royal Dressed Meats*, précité, et *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (C.S.C.-B.), ont refusé de se fonder sur *Malone Lynch* en invoquant des raisons similaires.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), which cited the decision in *Malone Lynch*, *supra*, with approval.

La Cour d'appel a également invoqué *Re Kemp Products Ltd.*, précité, à l'appui de la proposition selon laquelle, bien que la relation entre l'employeur et l'employé se termine à la faillite de l'employeur, cela ne constitue pas un «congédiement». Je note que ce litige n'est pas fondé sur les dispositions de la *LNE*. Il portait plutôt sur l'interprétation du terme «congédiement» dans le cadre de ce que le plaignant alléguait être un contrat de travail. J'estime donc que cette décision ne fait pas autorité dans les circonstances de l'espèce. Pour les raisons exposées ci-dessus, je ne puis accepter non plus que la Cour d'appel se fonde sur l'arrêt *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), qui citait la décision *Malone Lynch*, précitée, et l'approuvait.

40 As I see the matter, when the express words of ss. 40 and 40*a* of the *ESA* are examined in their entire context, there is ample support for the con-

Selon moi, l'examen des termes exprès des art. 40 et 40*a* de la *LNE*, replacés dans leur contexte global, permet largement de conclure que les

clusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESAA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

mots «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Adoptant l'interprétation libérale et généreuse qui convient aux lois conférant des avantages, j'estime que ces mots peuvent raisonnablement recevoir cette interprétation (voir *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025). Je note également que l'intention du législateur, qui ressort du par. 2(3) de l'*ESAA*, favorise clairement cette interprétation. Au surplus, à mon avis, priver des employés du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi en application de la *LNE* lorsque la cessation d'emploi résulte de la faillite de leur employeur serait aller à l'encontre des fins visées par les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi et minerait l'objet de la *LNE*, à savoir protéger les intérêts du plus grand nombre d'employés possible.

In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

41 À mon avis, les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui ont été licenciés pour quelque autre raison serait arbitraire et inéquitable. De plus, je pense qu'une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. Je conclus donc que la cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. En raison de cette conclusion, j'estime inutile d'examiner l'autre conclusion tirée par le juge de première instance quant à l'applicabilité du par. 7(5) de la *LNE*.

I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections

42 Je fais remarquer qu'après la faillite de Rizzo, les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la

74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, "[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law". As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

LNE ont été modifiées à nouveau. Les paragraphes 74(1) et 75(1) de la *Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi*, L.O. 1995, ch. 1, ont apporté des modifications à ces dispositions qui prévoient maintenant expressément que, lorsque la cessation d'emploi résulte de l'effet de la loi à la suite de la faillite de l'employeur, ce dernier est réputé avoir licencié ses employés. Cependant, comme l'art. 17 de la *Loi d'interprétation* dispose que «[l]'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit», je précise que la modification apportée subséquemment à la loi n'a eu aucune incidence sur la solution apportée au présent pourvoi.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

6. Dispositif et dépens

Je suis d'avis d'accueillir le pourvoi et d'annuler le premier paragraphe de l'ordonnance de la Cour d'appel. Je suis d'avis d'y substituer une ordonnance déclarant que les anciens employés de Rizzo ont le droit de présenter des demandes d'indemnité de licenciement (y compris la paie de vacances due) et d'indemnité de cessation d'emploi en tant que créanciers ordinaires. Quant aux dépens, le ministère du Travail n'ayant produit aucun élément de preuve concernant les efforts qu'il a faits pour informer les employés de Rizzo ou obtenir leur consentement avant de se désister de sa demande d'autorisation de pourvoi auprès de notre Cour en leur nom, je suis d'avis d'ordonner que les dépens devant notre Cour soient payés aux appelants par le ministère sur la base des frais entre parties. Je suis d'avis de ne pas modifier les ordonnances des juridictions inférieures à l'égard des dépens.

Appeal allowed with costs.

Pourvoi accueilli avec dépens.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto.

Procureurs des appelants: Sack, Goldblatt, Mitchell, Toronto.

Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto.

Procureurs de l'intimée: Minden, Gross, Grafstein & Greenstein, Toronto.

Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

Procureur du ministère du Travail de la province d'Ontario, Direction des normes d'emploi: Le procureur général de l'Ontario, Toronto.

Sullivan on the Construction of Statutes

Fifth Edition

by

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sons may relate to the primary goals of the legislation, to secondary policies or principles, or to the coherent operation of the legislative scheme. Sophisticated purposive analysis takes these multiple and shifting perspectives into account.

In the following survey, the kinds of reasons that figure in interpretation are reviewed, the significance of the legislative scheme is considered and the problem of balancing competing purposes is discussed.

The "mind" of the legislature. In analyzing the purpose of legislation, the legislature is spoken of as if it were a person, with a mind capable of choosing goals and devising plans to bring them about. However, the mind that formulates legislative purposes must be distinguished from the minds of individual participants in the legislative process, whether drafters, members of Cabinet or voting members of the legislature. Although the desires and intentions of these individuals obviously determine the content and form of bills, the "mind" that approves the content and form of a bill and enacts it into law is the corporate mind of the legislature.

Some commentators object to imputing intention to a corporate entity like a legislature on the grounds that any such "mind" is obviously a fiction; an institution is incapable of forming actual intentions. However, this objection misses an important point. People never have direct access to the content of other people's minds; we are always in the position of inferring what others must have intended based on what was said and the context in which it was said. This inference-drawing process is the same regardless of whether the text to be interpreted issues from Shakespeare in the form of a play, from an acquaintance in the form of an email or from an entity such as a legislature in the form of official texts.[33]

Purpose versus motive. It is important to distinguish the purposes of the legislature from the motives of individual participants in the legislative process. Such motives may range from altruism or a desire to advance public welfare, through partisan political considerations to a self-interested desire to benefit oneself or one's friends. Generally speaking, the motives of participants in the legislative process are irrelevant in interpretation. What matters is the intentions that can be imputed to the legislature as a corporate entity.

To determine purpose, courts sometimes look at statements made by individual legislators about their reasons for introducing a bill or what they expect the legislation to achieve. However, in so far as these statements are admissible, they are admitted as evidence of the assumptions on which legislation was enacted by the legislature as a whole and not as evidence of individual intent.[34]

Aim or object. When interpreters refer to the aims or objects of legislation or the legislature's goals, they usually mean the primary social, economic or political effects that a legislature hoped to produce through the operation of the legisla-

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[33] See R.W. Gibbs, Jr., *The Poetics of Mind: Figurative Thought, Language, and Understanding* (Cambridge: Cambridge University Press, 1994).

[34] For discussion of the use of *Hansard* as evidence of legislative purpose, see *infra*, Chapter 22.

tion. This is the type of purpose Dickson C.J. had in mind when he wrote in the *Big M Drug Mart* case:

> All legislation is animated by an object the legislature intends to achieve. This object is realized through the impact produced by the operation and application of the legislation.[35]

In the traditional language of *Heydon's Case*, the aim or object of legislation is to suppress the "mischief" or cure the "disease of the Commonwealth" with which the legislature was concerned.[36] In the context of modern program legislation, it is the mix of social goods that the legislature hoped to achieve through the operation of a program.[37]

Principles and policies. Principles are values or norms that the legislature wishes to promote or take into account in devising a program or a rule. Dworkin suggests that principles in law are generally associated with judge-made law rather than legislation. He defines them as values or norms that are taken into account by a judge, without any prompting from the legislature, because they form part of the tradition or community in which the judge is working.[38] One should appreciate, however, that in so far as these values or norms belong to the legal tradition or are important in the community, they are likely to be taken into account by the legislature as well.

Policies are preferences for particular interests or a particular balance of competing interests that the legislature wishes to promote or take into account in devising a program or rule. Whereas principles belong to the law, to the pursuit of fairness and justice, policies are the result of expedient compromise. They belong to the political arena where trade-offs and sensitivity to public pressure are expected and even applauded.

Promoting a particular principle or policy is sometimes the primary goal sought by a legislature. Promoting equality, for example, is an aim of most human rights legislation; promoting free competition is an aim of the *Competition Act*. Apart from this central role, principles and policies also play a supporting role in legislation as considerations taken into account in devising the legislative plan. The primary goals of legislation are almost never pursued single-mindedly or whole-heartedly; various secondary principles and policies are inevitably included in a way that qualifies or modifies the pursuit of the primary goals. Some secondary purposes originate with the policy makers. Policies like user cost recovery or administrative accountability are examples. Other secondary purposes are insisted on by the drafter in accordance with government or legislative directives. Ensuring that proposed legislation does not have an adverse impact on women or vulnerable minorities is one example. Ensuring compliance with sus-

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35 *R. v. Big M Drug Mart Ltd.*, *supra* note 32, at 331.

36 See discussion of *Heydon's Case*, *supra*, at pp. 256-57.

37 The distinction between reform and program legislation is explained *supra* at pp. 261-63.

38 R.M. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), at pp. 24-26.

> **75 (1)** Where a *statutory condition* is not applicable ...
>
> **76** ... the *statutory conditions* need not be printed ... if ...
>
> **102** Where there has been imperfect compliance with a *statutory condition* ...
>
> **[167] (2)** The conditions set forth in the Schedule shall be deemed to be part of every contract ... and shall be printed ... with the heading "*Statutory Conditions*" ...
>
> **[168] (2)** The ... manner of giving the notice ... shall be the same as notice ... under the *statutory conditions* in the contract.
>
> The latter demonstrates how the legislature is not shy to explicitly refer to the specific type of condition in other sections of the Act. This additional factor further steers the analysis toward the non-application of s. 171 to statutory conditions.[18]
>
> [Emphasis in original]

Even though the *Insurance Act* is a sprawling document that has been amended many times and is often inconsistent in its wording, Bastarache J. was able to document a pattern of consistent reference and to some extent consistent treatment in the case of statutory conditions. This pattern was relied on to justify his inference that the legislature did not intend to include this type of condition in the relief accorded "stipulations, conditions and warranties" in s. 171.

The legislative scheme. When analyzing the scheme of an Act, the court tries to discover how the provisions or parts of the Act work together to give effect to a plausible and coherent plan. It then considers how the provision to be interpreted can be understood in terms of that plan. The court's reasoning is described by Greschuk J. in *Melnychuk v. Heard*:

> The court must not only consider one section but all sections of an Act including the relation of one section to the other sections, the relation of a section to the general object intended to be secured by the Act, the importance of the section, the whole scope of the Act and the real intention of the enacting body.[19]

The fundamental presumption in scheme analysis is that modern legislation (unlike much early legislation) is not just a series of rules. It typically includes a mix of interpretation provisions, application provisions, office- and institution-establishing provisions, power conferring provisions, dispute resolution provisions and transitional provisions as well as traditional prohibitions and entitlements, all of which are meant to operate together in a particular institutional setting. The fundamental skill in scheme analysis is being able to grasp and explain the basic structure on which the Act is built and how the various parts and provisions were meant to function within this structure to achieve the desired

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[18] *Ibid.*, at paras. 96-97. See also *R. v. C.D.; R. v. C.D.K.*, [2005] S.C.J. No. 79, [2005] 3 S.C.R. 668 (S.C.C.).

[19] [1963] A.J. No. 72, 45 W.W.R. 257, at 263 (Alta. S.C.).

THE CORPORATION OF THE DISTRICT OF SURREY, THE CORPORATION OF THE TOWNSHIP OF CHILLIWHACK, THE CORPORATION OF THE CITY OF CHILLIWACK ..... APPELLANTS;

AND

BRITISH COLUMBIA ELECTRIC COMPANY LIMITED ..... RESPONDENT.

1956
*Dec. 10
1957
Jan. 22

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Public utilities—Jurisdiction of Public Utilities Commission to issue certificate of public convenience and necessity without consent of municipality affected—The Public Utilities Act, R.S.B.C. 1948, c. 277, ss. 12, 14—The Gas Utilities Act, 1954 (B.C.), c. 13, s. 3—The Municipal Act, R.S.B.C., c. 232, as amended.

The Public Utilities Commission of British Columbia has jurisdiction, under the *Public Utilities Act* and the *Gas Utilities Act*, to grant a certificate of public convenience and necessity for the operation of a public utility within the boundaries of a municipality, without the consent of the municipality affected.

Per Rand, Locke and Nolan JJ.: The words "if required" at the conclusion of the first sentence of s. 14 of the *Public Utilities Act*, must be construed as meaning "if required by law", and there is no provision requiring the municipality's consent in such circumstances.

APPEAL by the three municipalities from a judgment of the Court of Appeal for British Columbia (1), affirming the decision of the Public Utilities Commission of British Columbia to grant the respondent company a certificate of convenience and necessity. Appeal dismissed.

T. G. Norris, Q.C., for the municipalities, appellants.

Hon. J. W. deB. Farris, Q.C., A. Bruce Robertson, Q.C., and *R. Dodd*, for the respondent.

THE CHIEF JUSTICE:—This is an appeal by leave of the Court of Appeal for British Columbia from its decision (1) dismissing an appeal from a certificate of public convenience and necessity, dated December 13, 1955, granted by the Public Utilities Commission of that Province to the respondent, British Columbia Electric Company Limited.

*PRESENT: Kerwin C.J. and Rand, Locke, Cartwright and Nolan JJ.

(1) 19 W.W.R. 49, 4 D.L.R. (2d) 29.

1957

DISTRICT OF SURREY, *et al.* *v.* B.C. ELECTRIC CO. LTD.

Kerwin C.J.

Although the application by the respondent to the Commission states that it was made under s. 12 of the *Public Utilities Act,* which is R.S.B.C. 1948, c. 277, it is quite apparent from what will be stated shortly and from a perusal of the two clauses of that section that that part of the application with which we are concerned is really under s. 12(*b*).

The respondent, among other things, carries on the business of manufacturing gas and has entered into a contract for the purchase of natural gas, with a view to its distribution. The territory in respect of which the respondent applied was divided into the Greater Vancouver area and the Fraser Valley area. A certificate of public convenience and necessity was granted as to the former on July 29, 1955, but decision was reserved with respect to the Fraser Valley area. Ultimately a certificate was also granted as to that area, subject to certain conditions, and the real dispute is as to the power of the Commission to grant this certificate without the consent of the appellant municipalities.

The only provisions of the *Public Utilities Act* requiring consideration are s. 12 and the first sentence in s. 14, which read as follows:

> 12. Except as hereinafter provided:—
>
> (*a*) No privilege, concession, or franchise hereafter granted to any public utility by any municipality or other public authority shall be valid unless approved by the Commission. The Commission shall not give its approval unless, after a hearing, it determines that the privilege, concession, or franchise proposed to be granted is necessary for the public convenience and properly conserves the public interest. The Commission, in giving its approval, shall grant a certificate of public convenience and necessity, and may impose such conditions as to the duration and termination of the privilege, concession, or franchise, or as to construction, equipment, maintenance, rates, or service, as the public convenience and interest reasonably require:
>
> (*b*) No public utility shall hereafter begin the construction or operation of any public utility plant or system, or of any extension thereof, without first obtaining from the Commission a certificate that public convenience and necessity require or will require such construction or operation (in this Act referred to as a "certificate of public convenience and necessity").
>
> 14. Every applicant for a certificate of public convenience and necessity under either of the clauses of section 12 shall, in case the applicant is a corporate body, file with the Commission a certified copy of its memorandum and articles of association, charter, or other document of incorporation, and in all cases shall file with the Commission such evidence

as shall be required by the Commission to show that the applicant has received the consent, franchise, licence, permit, vote, or other authority of the proper municipality or other public authority, if required. . . .

It is clear that the relevant part of respondent's application was not made under clause (*a*) of s. 12, because it had no "privilege, concession, or franchise" from the appellant municipalities. That part of the application being under s. 12(*b*), and the opening words of s. 14 referring to an application for a certificate under either of the clauses of s. 12, it is too clear for argument that the latter part of s. 14 refers only to a "consent, franchise, licence, permit, vote, or other authority" when one of them is required on an application under s. 12(*a*). The matter does not lend itself to extended discussion and it is unnecessary to deal with the judgment of the Court of Appeal for British Columbia in *The Veterans' Sightseeing and Transportation Company Limited v. Public Utilities Commission and British Columbia Electric Railway Company, Limited* (1). Notwithstanding the various provisions of the *Municipal Act* to which counsel for the appellants drew our attention, the matter is left to the Commission to take into account the interests of all parties concerned, public and private, and this is corroborated by the provisions of the *Gas Utilities Act,* 1954 (B.C.), c. 13.

The appeal should be dismissed with costs.

The judgment of Rand, Locke and Nolan JJ. was delivered by

LOCKE J.:—The respondent company is a public utility within the meaning of that term, as defined in s. 2 of the *Public Utilities Act,* R.S.B.C. 1948, c. 277, and by a letter dated May 15, 1955, applied to the Public Utilities Commission, constituted under that statute, for a certificate of public convenience and necessity for a project for the supply of natural gas for a portion of the lower mainland area of British Columbia, which included the District of Surrey and the Township of Chilliwhack and the City of Chilliwack.

The application to the Commission was opposed by the present appellants. Lengthy public hearings were held, at which a similar application by a competing gas distributing company was also considered.

(1) 62 B.C.R. 131, [1946] 2 D.L.R. 188, 59 C.R.T.C. 63.

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DISTRICT OF SURREY, *et al.* v. B.C. ELECTRIC CO. LTD.

Locke J.

The respondent has for many years sold manufactured gas through various subsidiary companies in a number of municipalities in the greater Vancouver area. The project proposed was for the supply in additional areas in the lower mainland of the Province of natural gas brought by a pipeline company from the Peace River areas of Alberta and British Columbia.

By s. 2 of the *Gas Utilities Act*, 1954 (B.C.), c. 13, a "gas utility" is defined as a corporation which owns or operates in the Province facilities for, *inter alia*, the production, transmission or delivery of gas, a word defined to include natural gas, and the respondent company falls within this definition. By s. 3 of that Act, every such company to which a certificate of public convenience and necessity is thereafter granted under the *Public Utilities Act* shall in the municipality or area mentioned in such certificate be empowered to carry on, subject to the provisions of that Act, its business as a gas utility, including power to transmit, distribute and sell gas and to place its pipes and other equipment and appliances under any public street or lane in a municipality upon such conditions as the gas utility and the municipality may agree upon. If the parties fail to agree upon these terms, the Public Utilities Commission is empowered by s. 40 of the *Public Utilities Act* to settle them.

Section 12 of the *Public Utilities Act* provides for applications to the Commission for a certificate of public convenience and necessity in cases where a franchise has been granted to a public utility by any municipality or other public authority after the coming into force of the Act, and also in cases where no such franchise has been granted, these being dealt with in clauses (*a*) and (*b*) respectively. The respondent had not applied to any of the appellant municipalities for any concession or franchise to supply gas within their boundaries and, while the written application to the Commission merely states that it was being made under the provisions of s. 12 of the Act, it is clear that the application was made under clause (*b*) of that section.

According to s. 14 of the statute, upon an application for such a certificate under either of the clauses of s. 12, the applicant, if a corporate body, shall file a certified copy of its memorandum and articles of association or other docu-

ment of incorporation, and such evidence as shall be required by the Commission to show that the applicant has received the consent or permission of the municipality or other public authority *if required.*

It was the contention of the appellants that their prior consent or permission was a condition precedent to the right of the Commission to grant the certificate applied for and they contend that this construction of the statute is supported by the language of the section. For the company, it is said that the words "if required" should properly be construed as meaning "if required by law" and that, by virtue of the provisions of the *Public Utilities Act* and the *Gas Utilities Act,* no such consent is required.

The contention that the utility cannot carry on its activities in a municipality without its consent is based upon certain provisions of the *Municipal Act,* R.S.B.C. 1948, c. 232, which, standing alone, would indicate that such consent was required. By s. 58 of that statute a municipality is authorized to pass by-laws regulating the operations of a wide variety of businesses and other activities and prohibiting the carrying on of certain of them, other than by leave and licence of the municipality. Thus, by cl. 55 of that section, by-laws may be passed

> For regulating the construction, installation, repair and maintenance of pipes, valves, fittings, appliances, equipment, and works for the supply and use of gas:

and by cl. 109 for licensing and regulating any gas company and authorizing the use of the public highways by such company. Section 328 of the Act, by cl. 29, fixes the payment to be made by gas companies semi-annually for the licences held by them, failure to pay which renders the licence liable to cancellation. The provisions for the licensing and regulation of gas companies by municipalities in British Columbia have been for many years part of the municipal law of the Province: see *Municipal Clauses Act,* R.S.B.C. 1897, c. 144, s. 50(36); *Municipal Act,* R.S.B.C. 1911, c. 170, s. 53(92); *Municipal Act,* R.S.B.C. 1936, c. 199, s. 59(99).

The *Public Utilities Act* was first enacted in 1938 and was designed to place the operations of persons engaged in the production, generation, transmission or sale of gas and electricity and a wide range of other undertakings designed

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DISTRICT OF SURREY, *et al.* v. B.C. ELECTRIC CO. LTD.

Locke J.

to render service to the public, under the control of a commission constituted by the Act. The statute imposes upon every public utility the obligation, *inter alia,* to supply to all persons who apply therefor and are reasonably entitled thereto suitable service without discrimination or delay, to maintain its property and equipment in proper condition to enable it to furnish adequate, safe and reasonable service, to obey all orders of the Commission made pursuant to the Act in respect of its business or service and to refrain from demanding unjust or discriminatory rates for its service. By Part V of the Act the Commission is given general supervision of all public utilities falling within the definition in the Act and is empowered, *inter alia,* to make such regulations or orders regarding equipment, appliances, safety devices and extensions of works as are necessary for the safety, convenience or service of the public. Further wide powers of supervision and control are given over the rates which may be imposed, the manner in which money can be raised by the sale to the public of shares or bonds and over the mortgage, sale or licensing of the utilities' property. No utility to which a certificate of public convenience and necessity has been issued and which has commenced operations may cease operating without the Commission's consent.

The whole tenor of the Act shows clearly that the safeguarding of the interests of the public, both as to the identity of those who should be permitted to operate public utilities and as to the manner in which they should operate, was a duty vested in the Commission. It is quite impossible, in my opinion, to hold that these powers and those which might be asserted by a municipality to regulate the operations of such companies under s. 58, cls. 55 and 109, were intended to co-exist.

It is unnecessary for the determination of this matter to decide whether, apart from the provisions of the *Gas Utilities Act,* the appellant municipalities might insist that a licence under the licensing provisions of the *Municipal Act* was a condition precedent to the granting of a certificate under s. 12(*b*) of the *Public Utilities Act.* The language of s. 3 of the *Gas Utilities Act* is clear and free from ambiguity.

The words "if required" at the conclusion of the first sentence of s. 14 must be construed, in my opinion, as meaning "if required by law". The municipality, of necessity, being a statutory body could only require its licence or consent if authorized by statute to do so and, from the date the *Gas Utilities Act* became the law, no such licence or consent was necessary. The effect of s. 3 of that statute was, in my opinion, to impliedly repeal the licensing provisions of the *Municipal Act* relating to such utilities.

In discharging its important duties under the *Public Utilities Act* the Commission is required to consider the interests not merely of single municipalities but of districts as a whole and areas including many municipalities. The duty of safeguarding the interests of the municipalities and their inhabitants, to the extent that they may be affected by the operations of public utilities, has by these statutes been transferred from municipal councils to the Public Utilities Commission, subject, *inter alia,* to the right of municipalities of insuring a supply of gas by municipal enterprise of the nature referred to in the reasons delivered by the Chairman of the Public Utilities Commission. This right the Commission was careful to preserve.

Reliance was placed by the appellants on certain passages from the judgments delivered by the Court of Appeal in *The Veterans' Sightseeing and Transportation Company Limited v. Public Utilities Commission and British Columbia Electric Railway Company, Limited* (1), but I think what was there said does not affect the present matter. The provisions of the *Gas Utilities Act* of 1954 are decisive, in my opinion.

I would dismiss this appeal with costs.

CARTWRIGHT J.:—At the conclusion of the argument I had doubts as to whether the provisions of the *Gas Utilities Act* and the *Public Utilities Act* manifest a clear intention on the part of the Legislature to confer power on the Public Utilities Commission to authorize the respondent to carry on operations in the appellant municipalities without their consents, which consents would otherwise have been necessary under sections of the *Municipal Act* which have not been expressly amended or repealed.

(1) 62 B.C.R. 131, [1946] 2 D.L.R. 188, 59 C.R.T.C. 63.

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Cartwright J.

I cannot say that these doubts have been entirely dispelled but as the other members of this Court and the unanimous Court of Appeal are satisfied that the relevant statutory provisions should be so construed, I concur in the dismissal of the appeal.

Appeal dismissed with costs.

Solicitors for the Corporation of the District of Surrey, appellant: Norris & Cumming, Vancouver.

Solicitor for the Corporation of the Township of Chilliwhack and the Corporation of the City of Chilliwack, appellants: F. Wilson, Chilliwack.

Solicitor for the respondent: A. Bruce Robertson, Vancouver.

Case Name:

Sumas Energy 2, Inc. v. Canada (National Energy Board)

Between
Sumas Energy 2, Inc., appellant, and
National Energy Board and others, respondents

[2005] F.C.J. No. 1895

[2005] A.C.F. no 1895

2005 FCA 377

2005 CAF 377

[2006] 1 F.C.R. 456

[2006] 1 R.C.F. 456

343 N.R. 345

144 A.C.W.S. (3d) 148

Docket A-462-04

Federal Court of Appeal
Vancouver, British Columbia

Létourneau, Noël and Sharlow JJ.A.

Heard: November 7-9, 2005.
Oral judgment: November 9, 2005.

(43 paras.)

Administrative law -- Judicial review and statutory appeal -- Review for lack or excess of jurisdiction -- Appeal by Sumas Energy from the National Energy Board's dismissal of its application for a certificate of public convenience and necessity to construct an international power line connecting Sumas's proposed power plant in Washington to a substation just north of the international border dismissed -- The Board did not err in considering the environmental impact in

Canada of the power plant in the United States in its assessment of the public convenience and necessity -- National Energy Board Act, R.S.C. 1985, c. N-7, s. 58.16.

Natural resources law -- Hydro-electricity -- Regulation -- Appeal by Sumas Energy from the National Energy Board's dismissal of its application for a certificate of public convenience and necessity to construct an international power line connecting Sumas's proposed power plant in Washington to a substation just north of the international border dismissed -- The Board did not err in considering the environmental impact in Canada of the power plant in the United States in its assessment of the public convenience and necessity -- National Energy Board Act, R.S.C. 1985, c. N-7, s. 58.16.

Appeal by Sumas Energy from the National Energy Board's dismissal of its application for a certificate of public convenience and necessity to construct an international power line connecting Sumas's proposed power plant in Washington to a substation just north of the international border. Washington authorities had approved construction of the power plant on the recommendation of the Washington State Energy Facility Site Evaluation Council, which had conducted an environmental review. The Board considered the fact that the plant was expected to emit over 800 tons of pollutants annually into the Fraser Valley airshed. After weighing the benefits and adverse effects, it decided that the power line did not meet the test of public convenience and necessity.

HELD: Appeal dismissed. The Board did not err in considering the environmental impact in Canada of the power plant in the United States in its assessment of the public convenience and necessity. It was not obliged to defer to the Washington State Energy Facility Site Evaluation Council or to alter its assessment of the factors that it considered relevant. There was evidence to support the Board's conclusion that the power line was not in the public interest and was not required for public convenience and necessity. The Board's decision was not arbitrary in any respect. It did not fail to give effect to NAFTA as required by section 20.1 of the National Energy Board Act.

Statutes, Regulations and Rules Cited:

Canadian Environmental Assessment Act, S.C. 1999, c. 37

National Energy Board Act, R.S.C. 1985, c. N-7, ss. 22(1), 58.16, 58.16(1), 58.16(2), 58.23, 120.1

North American Free Trade Agreement, [1994] Can. 7 s. No.2

Counsel:

Russell W. Lusk, Q.C., W.K. McNaughton and Robert J.C. Deane, for the appellant.

George Copley, Q.C. and James G. Yardley, for the respondents, Province of British Columbia et al.

Thomas R. Berger, Q.C., Howard L. Mann and Timothy J. Howard, for the respondents, Society Promoting Environmental Conservation et al.

Patrick K. McMurchy, for the respondent, Abbotsford Downtown Business Association.

Andrew Hudson and Jody Saunders, for the respondent, National Energy Board.

[Editor's note: An amendment was released by the Court on January 10, 2006. The changes were not indicated. This document contains the amended text.]

The following is the judgment of the Court delivered by

1 THE COURT (orally):-- Sumas Energy 2, Inc. ("SE2") applied under sections 58.16 and 58.23 of the National Energy Board Act, R.S.C. 1985, c.N-7 (the "NEB Act"), for a "Certificate of Public Convenience and Necessity" ("Certificate") to construct an international power line ("IPL") connecting its proposed power plant in Sumas, Washington, to B.C. Hydro and Power Authority's Clayburn substation just north of the international border. Those provisions read as follows:

> 58.16 (1) The Board may, subject to section 24 and to the approval of the Governor in Council, issue a certificate in respect of
>
> (a) an international power line in relation to which an order made under section 58.15 is in force,
> (b) an international power line in relation to which an election is filed under section 58.23, or
> (c) an interprovincial power line in relation to which an order made under section 58.4 is in force,
>
> if the Board is satisfied that the line is and will be required by the present and future public convenience and necessity.
>
> (2) In deciding whether to issue a certificate, the Board shall have regard to all considerations that appear to it to be relevant.
>
> [...]
>
> 58.23 The applicant for or holder of a permit or certificate may file with the Board in the form prescribed by the regulations an election that the provisions of

this Act referred to in section 58.27 and not the laws of a province described in section 58.19 apply in respect of the existing or proposed international power line.

* * *

58.16 (1) Sous réserve de l'agrément du gouverneur en conseil et de l'article 24, l'Office peut, s'il est convaincu de son caractère d'utilité publique, tant pour le présent que pour le futur, délivrer un certificat pour une ligne internationale visée par un décret ou une décision pris au titre des articles 58.15 ou 58.23 ou d'une ligne interprovinciale visée par un décret pris au titre de l'article 58.4.

(2) Pour déterminer s'il y a lieu de délivrer un certificat, l'Office tient compte de tous les facteurs qu'il estime pertinents.

[...]

58.23 Le demandeur ou le titulaire de permis ou de certificat peut notifier sa décision à l'Office, en la forme réglementaire, portant que les dispositions de la présente loi mentionnées à l'article 58.27, et non la loi provinciale visée à l'article 58.19, s'appliquent à toute ligne internationale, existante ou projetée.

2 SE2 intends to locate its power plant one kilometre south of the international border in Sumas, Washington. It is proposed that the power plant will burn Canadian natural gas and transmit electricity via the proposed IPL through the Clayburn substation to the main electrical grid which services British Columbia, Alberta and eleven western states in the United States.

3 The construction and operation of the power plant have been approved by the Governor of the State of Washington, in accordance with the recommendation of the Washington State Energy Facility Site Evaluation Council ("EFSEC"). The EFSEC evaluation included an environmental review that dealt with substantially the same evidence as that before the National Energy Board ("NEB"). On the factual questions relating to the environmental issues, the EFSEC reached substantially the same conclusions. The power plant is expected to emit over 800 tons of pollutants annually into the Fraser Valley airshed.

4 On March 4, 2004, the Board dismissed SE2's application (EH-1-2000). SE2 then applied under subsection 22(1) of the NEB Act for leave to appeal the Board's decision. That provision reads as follows:

22. (1) An appeal lies from a decision or order of the Board to the Federal Court of Appeal on a question of law or of jurisdiction, after leave to appeal is obtained from that Court.

* * *

22. (1) Il peut être interjeté appel devant la Cour d'appel fédérale, avec l'autorisation de celle-ci, d'une décision ou ordonnance de l'Office, sur une question de droit ou de compétence.

5 Leave to appeal was granted on July 26, 2004. SE2 seeks an order setting aside the decision of the Board and referring the matter back to the Board with a direction that the Certificate be issued or that the matter be redetermined by a different panel in a manner consistent with the reasons of this Court.

6 The main hearing lasted 30 days (between May and September 2003). SE2 called numerous witnesses. Provincial and municipal governments contested SE2's case through their own expert witnesses. A large number of other intervenors, including the respondents Society Promoting Environmental Conservation, David Suzuki Foundation, Province of British Columbia, City of Abbotsford, Fraser Valley District, and Abbotsford Downtown Business Association, also opposed the application.

Alleged errors

7 In support of its appeal, SE2 claims that the Board (1) exceeded its jurisdiction by considering the potential environmental effects in Canada of the power plant, (2) did not apply proper tests, (3) acted in an arbitrary and discriminatory manner, and (4) failed to give effect to the North American Free Trade Agreement, [1994] Can. T.S. No.2 ("NAFTA ").

Standard of review

8 The interpretation of section 58.16 of the NEB Act, and in particular the interpretation of the phrase "public convenience and necessity" as it appears in section 58.16, is a question of law. Whether the Board has the jurisdiction to consider the environmental effects in Canada of the power plant is also a question of law. Counsel for SE2 submits that the Board's determination of those two issues should be reviewed on the standard of correctness. We agree.

9 As to the standard of review applicable to the Board's decision on the question of "public convenience and necessity", we note that Parliament has required the Board to determine for itself what factors it will take into account in determining whether an IPL "is and will be required by the present and future public convenience and necessity". Section 58.16 provides that the Board must "have regard to all the factors it considers relevant". Given the broad and permissive language of section 58.16, the nature of the Board as a specialized tribunal, and the intensely factual nature of the Board's inquiry into matters covered by section 58.16, which lie at the heart of the Board's expertise, Parliament could not have intended the Court to intervene lightly with the Board's determination as to what it considers relevant. In our view, the standard of review on that point is more deferential than correctness. As will be seen, we need not decide for the purposes of this

appeal whether the standard is reasonableness or whether the Board is entitled to the broader degree of deference for which the patently unreasonableness standard calls.

1st Issue -- Jurisdiction

10 According to SE2, the Board did not have the jurisdiction under the NEB Act to consider the potential environmental effects in Canada of the U.S. power plant. It refers in this respect to the Canadian Environmental Assessment Act, S.C. 1999, c. 37 ("CEAA"), a statute which is in pari materia with the NEB Act, and submits that the NEB Act should be construed the same way.

11 In particular, SE2 argues that the Board having found that, under the CEAA, it did not have the jurisdiction to consider environmental effects whose source is outside Canada, it was bound to hold that its jurisdiction was limited in the same manner under the NEB Act.

12 We respectfully disagree. As the Board explained in its reasons, its ability to enforce its orders can serve to delineate the extent of the jurisdiction granted to it by Parliament. Under the CEAA, the Board would be unable to enforce any mitigation measure within the U.S. as its decision would have no binding effect outside Canada. It is unlikely that Parliament intended the Board to have jurisdiction to make orders which it cannot enforce.

13 In contrast, the decision in issue shows that in disposing of SE2's application under the NEB Act, the Board did have the ability to mitigate or negate the negative environmental impact in Canada resulting from the power plant in the U.S., if it was of the view that this consideration tilted the scales against the issuance of the Certificate. Under subsections 58.16(1) and (2) of the NEB Act, the Board had to be satisfied that the IPL "is and will be required by the present and future public convenience and necessity" and, in doing so, was to have regard "to all considerations that appear to it to be relevant". The Board identified the negative environmental impact in Canada stemming from the plant in the U.S. as a relevant consideration. After weighing the benefits and adverse effects, the Board decided that the IPL did not meet the test of "public convenience and necessity", and proceeded to deny the Certificate.

14 That is the context in which the Board held that it had the jurisdiction to consider the environmental impact in Canada of the power plant in the U.S. under the NEB Act, but not under the CEAA. In our view, no error can be attributed to the Board in this regard.

15 SE2 further submits that, in finding that it had the requisite jurisdiction, the Board departed from its earlier decision in CanStates Marketing, (November 1994), GH-3-94 (NEB) ("CanStates"), where the Board held that it had no jurisdiction under the NEB Act to consider the environmental effects in Canada stemming from facilities in the U.S.

16 The Board distinguished CanStates. It first noted that:

> At issue were the greenhouse gas emissions that would result from the

> combustion of the gas by the power plant and the impact of those emissions on the global commons. The Board considered the narrower issue of whether it had jurisdiction to consider the environmental effects on federal areas of jurisdiction of the end use of the gas in the U.S.
>
> The Board first examined its jurisdiction under the EARPGO, which has now been replaced by the CEA Act. It found that the only reference to matters outside of Canada in the EARPGO was a provision allowing the review of the environmental effects that moved from Canada to another nation. There was no explicit direction to consider effects that migrated into Canada. The Board stated that, if Parliament had intended the Board to consider environmental effects migrating into Canada, it would have done so explicitly. It therefore concluded that there was neither explicit nor implicit authority under the EARPGO to consider these effects.
>
> The Board went on to note that the NEB Act did not establish any explicit jurisdiction to look at environmental effects from outside Canada. The Board stated therefore that it reached the same conclusion on the NEB Act as it reached on the EARPGO.
>
> (Reasons, p. 137)

17 The Board then explained that in CanStates, it was dealing with a different factual situation:

> In CanStates the Board did not examine the connection that existed between the gas export licence and the environmental effects migrating into Canada and did not examine whether a direct connection would render those effects relevant to its considerations. Although the Board, for the purpose of its analysis in that case, considered the effects on areas of federal jurisdiction, the real issue was greenhouse emissions that have world-wide rather than local effects.
>
> In this case, the close connection between the Power Plant and the IPL is recognized by the Board. In addition, the concerns raised by intervenors are specific to environmental effects such as those that may affect air quality within their local communities rather than effects on the more amorphous global commons.
>
> (Reasons, p. 138)

18 The Board went on to explain its identification of the close connection and why it had, as a result of that connection, the jurisdiction to consider the environmental impact in this case:

> The Board considers that the Power Plant and the IPL are interlinked. Without the Power Plant there would be no need for the IPL. If the IPL were not built, the Power Plant might not proceed. The IPL would have no other function than to transmit all of the electrical output of the Power Plant. The two undertakings would in fact be components of a single enterprise. Any benefits or burdens that would arise from the IPL itself are clearly relevant considerations in determining the Canadian public interest. In the Board's view, any burdens (as well as benefits) that might be felt in Canada from the Power Plant are directly linked to the IPL and are, therefore, similarly relevant. Accordingly, the Board has concluded that it has the authority under the NEB Act to consider the environmental effects in Canada from the Power Plant in Washington, as a matter relevant to its determination of whether the proposed IPL is in the Canadian public interest.
>
> (Reasons, p. 140)

19 In our view, the Board properly held that the close connection between the power plant and the IPL, coupled with the environmentally sensitive and localized area in Canada which would be impacted by the project, gave rise to a situation with which it had not been confronted in CanStates.

20 SE2 argues that it was not open to the Board to consider the potential effects in Canada of the power plant on the basis that it was "connected" to the power line. According to SE2, this "connectedness test" appears nowhere in the NEB Act, and is a novel "self created test" (SE2's written notes, paragraph 121).

21 With respect, in emphasizing this connection, the Board was not purporting to set out a legal test. Rather, it was showing that any burden (as well as benefit) that might be felt in Canada from the power plant was directly linked to the IPL and was, therefore, relevant to the exercise of the Board's discretion in deciding whether to issue the Certificate. In doing so, the Board was merely exercising its authority pursuant to subsection 58.16(2) of the NEB Act "to have regard to all considerations that appear to it to be relevant".

22 The Board went on to deal with the argument that express language would be required to give it jurisdiction to consider the effects in Canada of the power plant in the U.S. The Board referred to Quebec (Attorney General) v. Canada (National Energy Board), [1994] 1 S.C.R. 159, in which it had taken into consideration matters that previously had been specifically included in the NEB Act, but which had been removed by Parliament. The Supreme Court confirmed that the Board's authority to consider matters that were relevant gave it the power to consider matters that were not specifically set out in the NEB Act.

23 More on point is the decision of this Court in Nakina (Township) v. Canadian National Railway Co. [1986] F.C.J. No. 426 (F.C.A.). In that case, the Canadian Transport Commission, through a Committee, held hearings regarding the closing of a railway station in Nakina Township. Nakina presented evidence of the negative effects of the closure on the economy of the region. The Committee decided that it was not entitled to consider these effects since the legislation under which it operated only mentioned technical operation, safety and service. The Court noted that the Committee acknowledged that it was required to have regard for the public interest and stated (page 2):

> I find this conclusion startling. The Committee concedes that it must have regard to the public interest. I would have thought that, by definition, the term "public interest" includes the interests of all the affected members of the public. The determination of what is in the public interest involves the weighing and balancing of competing considerations. Some may be given little or no weight; others much. But surely a body charged with deciding in the public interest is "entitled" to consider the effects of what is proposed on all members of the public. To exclude from consideration any class or category of interests which form part of the totality of the general public interest is accordingly, in my view, an error of law justifying the intervention of this Court.

24 The Court later explained (page 3):

> While it is true, of course, that the Railway Act gives the Commission special responsibilities in the three areas identified by the Committee, namely, technical operation, safety and service, its power of decision making is by no means limited to a narrow consideration of those matters only. Indeed in some cases the Commission is directed to decide in only the most general terms such as in accordance with the public convenience and necessity. To put the matter another way, while the Commission may have the jurisdiction, in the public interest, to regulate questions of technical operation, safety and service, those fields of jurisdiction do not themselves constitute either a limitation or a definition of what the public interest is, either generally or with regard to any particular case.

25 The statutory standard referred to in these cases was sufficiently similar to the standard reflected in subsection 58.16(1) to make these comments apposite. In our view, the Board was on solid ground when it concluded that the absence of any specific reference in the NEB Act, or its regulations, to a matter that the Board otherwise considers relevant does not in any way restrict the Board from considering that matter.

26 Lastly, SE2 argues that in assessing whether it had jurisdiction to consider the effects in Canada of the power plant, the Board should have been mindful of the decision of the EFSEC and the role played by the principles of "international comity". The suggestion is that this might have

led the Board to a different conclusion.

27 It is not necessary to explore in depth the principles of "international comity" to address this argument (see Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077 at 1095-1096). Suffice it to say that the EFSEC was concerned with the impact of the project from a U.S. perspective, while the Board had to consider the Canadian perspective. Both were seeking to advance their respective public interests, which in this case did not coincide. In that context, the Board was not obliged to defer to the EFSEC or to alter in any way its assessment of the factors which it considered relevant.

28 We, therefore, conclude that the Board committed no error when it held that it had jurisdiction to consider the environmental effects in Canada of the power plant in its assessment of the public convenience and necessity.

2nd Issue -- Whether the Board applied the wrong test to the determination of the issue of public convenience and necessity

29 Essentially SE2 submits that the Board applied a test of indispensable necessity to the determination of the question of whether the IPL "is and will be required by the present and future public convenience and necessity". In other words, it is alleged that the Board applied to SE2's application for a certificate a more stringent test than the one warranted at law.

30 In support of its contention, SE2 refers us to the following three very short excerpts of views expressed by the Board, excerpts that it should be pointed out, must be understood in their context:

> a) Nonetheless, on the evidence provided, the Board is of the view that while these benefits could exist, there are no existing significant reliability or market issues in the SE2 market region to make the capture of these potential benefits imperative; (Reasons, page 42)
> b) In the Board's view, the Power Plant is one of many smaller independent power producers vying to enter the market and that the Power Plant would not have an appreciable effect on whether demand is met; (Reasons, page 41)
> c) The Board is of the view that the benefits of the IPL and Power Plant, even if they were all realized, would not be substantial benefits to Canadians. (Reasons, page 96)
>
> (Emphasis added.)

31 It is in the underlined words that SE2 sees the creation by the Board of a new necessity test, one that is overly stringent and that, in SE2's submission, will prevent small independent producers from ever entering the market and contributing to the development of energy programs to satisfy the

growing demand.

32 With respect, SE2 misapprehends and misconstrues what the Board is asserting and doing. It is obvious, when these underlined words are placed in their proper context, that the Board is not creating a new public convenience and necessity test or altering the test contained in the NEB Act.

33 What the Board is doing is simply determining under subsection 58.16(2) of the NEB Act the considerations that are relevant in determining whether a certificate should be issued and, as required under the NEB Act, it is assigning weight to these considerations. The Board is engaged in a balancing of the benefits and burdens resulting from the IPL and the Power Plant with a view to determining whether the public convenience and necessity test is met.

34 In the end, after having considered and weighed the various relevant factors, the Board concluded that, "on balance, the burdens of the IPL outweigh the benefits" and that it was "unable to come to the conclusion that the IPL is in the Canadian public interest and is and will be required for the present and future public convenience and necessity" (Reasons of the Board, p. 97). There was evidence to support that conclusion and, contrary to SE2's allegations, we are satisfied that the Board applied the proper test in reaching it.

3rd Issue -- Arbitrariness and discrimination

35 SE2 alleges that the Board erred in law when it stated that the only apparent limit on the exercise of its discretion in identifying relevant factors is good faith (Canadian National Railway v. Canada Steamship Lines, [1945] 3 D.L.R. 417). We agree that the discretion of the Board in this regard may be subject to review on grounds other than a lack of good faith, including a failure to take into account a consideration that it has identified as relevant. However, it bears repeating that the choice of relevant factors is for the Board alone, and the question of the choice of relevant factors is a decision upon which the Court will give the Board considerable deference.

36 It is common ground that the Board will have made a fatal error of law or jurisdiction if its decision is arbitrary or discriminatory. We agree.

37 The submissions of SE2 on the issue of arbitrariness are lengthy and detailed. We do not propose to deal with them in the same detail. We did, however, review very closely the portions of the Board's decision criticized by SE2 and the related evidence presented on all sides. That review revealed no irreconcilable inconsistencies in the Board's findings of fact or its conclusions. On the contrary, a fair reading of the Board's reasons discloses that the Board carefully and thoughtfully weighed and balanced a large number of factors it considered relevant, many of which favoured SE2, and many of which did not. We can find no indication that the Board was arbitrary in any respect.

38 Part of SE2's argument on arbitrariness was based on its assertion that the Board made certain statements for which there was no foundation in the evidence. Much of that argument focussed on

the Board's statement of its understanding of the United States Federal Energy Regulatory Commission ("FERC") policy of open access and reciprocity (Reasons, page 41). We do not accept the argument of SE2 that the Board's appreciation of that issue was flawed by a lack of evidence or an error of law. The Board's expertise in such matters entitled it to express its understanding of the U.S. FERC policy without the intervention of this Court.

39 SE2 argues that the Board discriminated against it by applying different or novel standards to SE2's application. The record discloses no basis for that argument. On the contrary, the Board's approach seems to us to be based on well established principles, including those derived from the Board's own jurisprudence, applied to the unique facts of this case.

4th Issue -- NAFTA

40 Finally, SE2 argues that the Board's decision is fatally flawed because the Board failed to meet its obligation under section 120.1 of the NEB Act to "give effect to NAFTA". The Board considered NAFTA in the only two contexts in which it was raised, once in relation to its decision on the environmental effects motion, and once in the main decision in the context of a submission by SE2 that it was not open to the Board to use section 58.16 to protect Canadian energy producers from competition from U.S. producers. It appears to us that the Board agreed that its mandate did not permit it to protect any particular producer from competition.

41 SE2 does not suggest that it or any other party made any submission regarding NAFTA that was disregarded by the Board. The kind of NAFTA analysis that SE2 now suggests that the Board should have undertaken was never suggested to the Board itself. It is difficult to justify intervening in a decision on the basis that the Board failed to deal with something that was not raised in the course of a 30-day hearing, following years of pre-hearing procedures.

42 Given the specific submissions made to the Board in relation to NAFTA, and the Board's treatment of the issues to which those submissions were directed, we are unable to find any foundation for SE2's argument that the Board failed to give effect to NAFTA as required by section 120.1 of the NEB Act. Nor are we persuaded that there is any aspect of the Board's decision that offends any principle or objective of NAFTA. In that regard, we do not read NAFTA as compelling the Board to exercise its authority under section 58.16 to permit a U.S. energy producer to construct an IPL in Canada that the Board considers not to be justified by the statutory test of public convenience and necessity.

CONCLUSION

43 For these reasons, the appeal will be dismissed with costs to the respondents, except the NEB, which did not ask for costs.

LÉTOURNEAU J.A.
NOËL J.A.

SHARLOW J.A.

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Des Raj Sharma *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Municipality of Metropolitan Toronto *Respondent*

INDEXED AS: R. *v.* SHARMA

File No.: 22332.

1992: April 28; 1993: February 25.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal law — Municipal by-laws — Validity — Municipal by-law scheme purporting to license street vending — Licences for sidewalk use available only to owners or occupiers of abutting property — Whether distinction between street vendors and owner/occupant vendors authorized by legislation — Municipality of Metropolitan Toronto By-laws 97-80, 211-74 — City of Toronto By-law 618-80 — Municipal Act, R.S.O. 1990, c. M.45, s. 310.

Criminal law — Wilfully obstructing peace officer — Street vendor disobeying peace officer's order to remove wares from sidewalk — Peace officer seeking to enforce municipal by-law later found to be ultra vires — Whether conviction for obstructing a peace officer can stand — Criminal Code, R.S.C., 1985, c. C-46, s. 129.

Appellant, a flower vendor in Toronto, was charged with exposing goods for sale on the street without a licence contrary to s. 11 of Metro By-law 211-74. Through By-law 97-80, Metro delegated to the city of Toronto the authority to license the use of sidewalks. Pursuant to this delegated authority, Toronto By-law 618-80 allows an owner or occupant of abutting land to

* Stevenson J. took no part in the judgment.

Des Raj Sharma *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Municipalité de la communauté urbaine de Toronto *Intimée*

RÉPERTORIÉ: R. *c.* SHARMA

Nº du greffe: 22332.

1992: 28 avril; 1993: 25 février.

Présents: Les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, Stevenson* et Iacobucci.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit municipal — Règlements municipaux — Validité — Régime de réglementation municipale ayant pour objet d'assujettir la vente dans les rues à la délivrance d'un permis — Seuls les propriétaires ou les occupants d'un bien-fonds attenant peuvent obtenir l'autorisation d'utiliser les trottoirs — La distinction entre les vendeurs ambulants et les vendeurs propriétaires-occupants est-elle autorisée par la loi? — Règlements 97-80 et 211-74 de la municipalité de la communauté urbaine de Toronto — Règlement 618-80 de la ville de Toronto — Loi sur les municipalités, L.R.O. 1990, ch. M.45, art. 310.

Droit criminel — Entrave volontaire au travail d'un agent de la paix — Défaut d'un vendeur ambulant d'obtempérer à l'ordre d'un agent de la paix d'enlever ses marchandises du trottoir — L'agent de la paix essayait d'appliquer un règlement municipal qui a été jugé ultra vires par la suite — La déclaration de culpabilité d'entrave au travail d'un agent de la paix peut-elle tenir? — Code criminel, L.R.C. (1985), ch. C-46, art. 129.

L'appelant, qui travaillait comme vendeur de fleurs à Toronto, a été accusé d'avoir étalé des marchandises en vente dans la rue en contravention de l'art. 11 du règlement 211-74 de la Communauté urbaine. Au moyen de son règlement 97-80, la Communauté urbaine a délégué à la ville de Toronto le pouvoir d'assujettir l'utilisation des trottoirs à la délivrance d'un permis. Conformément

* Le juge Stevenson n'a pas pris part au jugement.

apply for a licence to use the sidewalk. Since appellant does not own or occupy abutting land he could not apply for a licence. He was also charged with obstructing a peace officer contrary to s. 129 of the *Criminal Code* after he failed to obey the officer's instruction to pack up his display and move on. He was convicted of both offences. The District Court upheld the convictions. The Court of Appeal, in a majority judgment, dismissed the appellant's further appeal on both charges. It concluded that the regulatory distinction between street vendors and store vendors did not detract from the scheme's validity because regulatory schemes, by their very nature, are not intended to permit all persons to participate in the regulated activity. On the criminal charge, it found that the police officer had both common law and statutory authority to enforce the by-law, and that the existence of other avenues of relief did not erode this authority.

Held: The appeal should be allowed. The appellant's convictions on the by-law and criminal charges should be set aside and acquittals entered instead.

The power to pass municipal by-laws does not entail that of enacting discriminatory provisions unless the enabling legislation authorizes such discriminatory treatment. Discrimination in the municipal law sense is no more permissible between than within classes. The general reasonableness or rationality of the distinction is not at issue: discrimination can only occur where the enabling legislation specifically so provides or where the discrimination is a necessary incident to exercising the power delegated by the province. Here, the distinctions between free-standing street vendors and owner/occupant vendors contained in Metro By-law 97-80 and City of Toronto By-law 618-80 are not authorized by the *Municipal Act* and these by-laws are accordingly *ultra vires* the municipalities. For the reasons given in *R. v. Greenbaum*, s. 11 of Metro By-law 211-74 is also *ultra vires* the municipality.

In charging the appellant with obstructing a peace officer, the officer in question was attempting to enforce

à ce pouvoir délégué, le règlement 618-80 de la ville de Toronto permet au propriétaire ou à l'occupant d'un bien-fonds attenant de solliciter un permis pour l'utilisation du trottoir. N'étant ni propriétaire ni occupant d'un bien-fonds attenant, l'appelant ne pouvait pas solliciter un permis. Il a également été accusé d'entrave au travail d'un agent de la paix en contravention de l'art. 129 du *Code criminel* pour refus d'obtempérer à l'ordre, donné par l'agent, de remballer ses marchandises et de circuler. Il a été reconnu coupable des deux infractions. La Cour de district a maintenu les déclarations de culpabilité. La Cour d'appel a, dans un arrêt majoritaire, rejeté un autre appel interjeté par l'appelant à l'égard des deux accusations. Elle a conclu que la distinction faite dans le règlement entre les vendeurs ambulants et les commerçants ne portait pas atteinte à la validité du régime puisque les régimes de réglementation, de par leur nature même, n'ont pas pour objet de permettre à toutes les personnes de participer à l'activité réglementée. En ce qui concerne l'accusation criminelle, elle a statué que le policier avait le pouvoir, tant en vertu de la common law qu'en vertu de la loi, d'appliquer le règlement, et que l'existence d'autres possibilités de recours n'avait pas pour effet de miner ce pouvoir.

Arrêt: Le pourvoi est accueilli. Les déclarations de culpabilité de l'appelant prononcées relativement à l'accusation portée en vertu du règlement et à l'accusation criminelle sont annulées et remplacées par des verdicts d'acquittement.

Le pouvoir d'adopter des règlements municipaux n'emporte pas celui d'édicter des dispositions discriminatoires à moins que la loi habilitante ne permette un tel traitement discriminatoire. La discrimination au sens du droit municipal n'est pas plus permise entre des catégories qu'au sein de catégories. Le caractère raisonnable ou rationnel général de la distinction n'est pas en cause: il ne saurait y avoir de discrimination que si la loi habilitante le prévoit précisément ou si la discrimination est nécessairement accessoire à l'exercice du pouvoir délégué par la province. En l'espèce, les distinctions entre les vendeurs ambulants indépendants et les vendeurs propriétaires-occupants, prévues dans le règlement 97-80 de la Communauté urbaine et le règlement 618-80 de la ville de Toronto, ne sont pas autorisées par la *Loi sur les municipalités* et ces règlements excèdent donc les pouvoirs des municipalités. Pour les raisons données dans l'arrêt *R. c. Greenbaum*, l'art. 11 du règlement 211-74 de la Communauté urbaine excède également les pouvoirs de la municipalité.

En accusant l'appelant d'avoir entravé le travail d'un agent de la paix, l'agent en question essayait d'appliquer

s. 11 of Metro By-law 211-74. Since that provision has been held to be *ultra vires* the municipality, the appellant's conviction for obstructing a peace officer cannot stand. Further, even if s. 11 of Metro By-law 211-74 were valid, the power to arrest in order to enforce the by-law cannot be inferred in the face of clear language in the *Municipal Act* and the *Provincial Offences Act* setting out more moderate means of dealing with repeated infractions. The officer had no authority, either at common law or under statute, to arrest the appellant for failing to comply with an order to desist from conduct prohibited by the by-law and could not circumvent the lack of an arrest power by charging him with obstruction.

l'art. 11 du règlement 211-74 de la Communauté urbaine. Comme il a été jugé que cette disposition excède les pouvoirs de la municipalité, la déclaration de culpabilité de l'appelant pour entrave au travail d'un agent de la paix ne saurait tenir. En outre, même si l'art. 11 du règlement 211-74 de la Communauté urbaine était valide, le pouvoir d'arrestation en vue d'appliquer le règlement ne saurait être déduit du texte clair de la *Loi sur les municipalités* et de la *Loi sur les infractions provinciales*, qui prévoit des moyens plus modérés de traiter les infractions répétées. L'agent n'avait pas le pouvoir, en common law ou en vertu de la loi, d'arrêter l'appelant pour refus d'obtempérer à l'ordre de mettre fin au comportement interdit par le règlement, et il ne pouvait pas contourner l'absence de pouvoir d'arrestation en l'accusant d'entrave.

Cases Cited

Applied: *R. v. Greenbaum*, [1993] 1 S.C.R. 674; **distinguished:** *R. v. Biron*, [1976] 2 S.C.R. 56; **referred to:** *R. v. Varga* (1979), 51 C.C.C. (2d) 558; *Montréal (City of) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368; *Johanson v. The King* (1947), 3 C.R. 508.

Jurisprudence

Arrêt appliqué: *R. c. Greenbaum*, [1993] 1 R.C.S. 674; **distinction d'avec l'arrêt:** *R. c. Biron*, [1976] 2 R.C.S. 56; **arrêts mentionnés:** *R. c. Varga* (1979), 51 C.C.C. (2d) 558; *Montréal (Ville de) c. Arcade Amusements Inc.*, [1985] 1 R.C.S. 368; *Johanson c. The King* (1947), 3 C.R. 508.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 15(1).
City of Toronto By-law 618-80, s. 1(1).
Criminal Code, R.S.C. 1970, c. C-34, s. 118.
Criminal Code, R.S.C., 1985, c. C-46, ss. 129, 495.
Municipal Act, R.S.O. 1980, c. 302, ss. 210, paras. 66, 134; 310; 315, para. 1; 326.
Municipal Act, R.S.O. 1990, c. M.45, ss. 210, paras. 73, 140; 310; 314(1), para. 1; 327.
Municipality of Metropolitan Toronto Act, R.S.O. 1990, c. M.62 [formerly R.S.O. 1980, c. 314], s. 90.
Municipality of Metropolitan Toronto By-law 97-80, s. 1(1), Schedule "A".
Municipality of Metropolitan Toronto By-law 211-74, ss. 11, 11a, Schedule "A".
Police Act, R.S.O. 1980, c. 381, s. 57 [rep. 1990, c. 10, s. 148(1)].
Provincial Offences Act, R.S.O. 1980, c. 400, ss. 3, 23.
Provincial Offences Act, R.S.O. 1990, c. P.33, ss. 3, 23.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 15(1).
Code criminel, S.R.C. 1970, ch. C-34, art. 118.
Code criminel, L.R.C. (1985), ch. C-46, art. 129, 495.
Loi sur la municipalité de la communauté urbaine de Toronto, L.R.O. 1990, ch. M.62 [auparavant L.R.O. 1980, ch. 314], art. 90.
Loi sur la police, L.R.O. 1980, ch. 381, art. 57 [abr. 1990, ch. 10, art. 148(1)].
Loi sur les infractions provinciales, L.R.O. 1980, ch. 400, art. 3, 23.
Loi sur les infractions provinciales, L.R.O. 1990, ch. P.33, art. 3, 23.
Loi sur les municipalités, L.R.O. 1980, ch. 302, art. 210, disp. 66, 134; 310; 315, disp. 1; 326.
Loi sur les municipalités, L.R.O. 1990, ch. M.45, art. 210, disp. 73, 140; 310; 314(1), disp. 1; 327.
Règlement 97-80 de la municipalité de la communauté urbaine de Toronto, art. 1(1), annexe «A».
Règlement 211-74 de la municipalité de la communauté urbaine de Toronto, art. 11, 11a, annexe «A».
Règlement 618-80 de la ville de Toronto, art. 1(1).

Authors Cited

Makuch, Stanley M. *Canadian Municipal and Planning Law*. Toronto: Carswell, 1983.

Rogers, Ian MacF. *The Law of Canadian Municipal Corporations*, vol. 1, 2nd ed. Toronto: Carswell, 1971.

APPEAL from a judgment of the Ontario Court of Appeal (1991), 44 O.A.C. 355, 77 D.L.R. (4th) 334, 62 C.C.C. (3d) 147, 3 C.R. (4th) 195, 3 M.P.L.R. (2d) 1, affirming a decision of Lang Dist. Ct. J. (1989), 7 W.C.B. (2d) 430, affirming appellant's conviction of violating a municipal by-law and a decision of Crossland Dist. Ct. J. affirming his conviction of obstructing a police officer. Appeal allowed.

Alan D. Gold, for the appellant.

Milan Rupic, for the respondent Her Majesty The Queen.

George Monteith and *Robert Avinoam*, for the respondent the Municipality of Metropolitan Toronto.

The judgment of the Court was delivered by

IACOBUCCI J.—This appeal raises two issues. The first is the validity of municipal by-laws which purport to license street vending under which the appellant was charged (the by-law charge). The second is whether the appellant should have been convicted on a charge of wilfully disobeying the instructions of a police officer when the police officer sought to enforce a municipal by-law, later found to be *ultra vires*, by ordering the appellant to desist from conduct prohibited by the by-law (the criminal charge).

I. Facts

The facts are basically quite simple. On March 24, 1988, the appellant, Des Raj Sharma, was

Doctrine citée

Makuch, Stanley M. *Canadian Municipal and Planning Law*. Toronto: Carswell, 1983.

Rogers, Ian MacF. *The Law of Canadian Municipal Corporations*, vol. 1, 2nd ed. Toronto: Carswell, 1971.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1991), 44 O.A.C. 355, 77 D.L.R. (4th) 334, 62 C.C.C. (3d) 147, 3 C.R. (4th) 195, 3 M.P.L.R. (2d) 1, qui a confirmé la décision du juge Lang de la Cour de district (1989), 7 W.C.B. (2d) 430, de confirmer la déclaration de culpabilité de l'appelant relativement à la violation d'un règlement municipal et la décision du juge Crossland de la Cour de district de maintenir sa déclaration de culpabilité d'entrave au travail d'un agent de police. Pourvoi accueilli.

Alan D. Gold, pour l'appelant.

Milan Rupic, pour l'intimée Sa Majesté la Reine.

George Monteith et *Robert Avinoam*, pour l'intimée la municipalité de la communauté urbaine de Toronto.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI—Le présent pourvoi soulève deux questions. La première concerne la validité de règlements municipaux qui ont pour objet d'assujettir la vente dans les rues à l'obtention d'un permis et en vertu desquels l'appelant a été accusé (l'accusation portée en vertu du règlement). La seconde question est de savoir si l'appelant aurait dû être reconnu coupable d'avoir désobéi volontairement aux ordres d'un agent de police qui cherchait à appliquer un règlement municipal, jugé plus tard *ultra vires*, en ordonnant à l'appelant de cesser une activité interdite par le règlement (l'accusation criminelle).

I. Les faits

Les faits sont fondamentalement assez simples. Le 24 mars 1988, l'appelant, Des Raj Sharma, était

employed as a flower vendor in the city of Toronto, Ontario. He was displaying his wares on Yonge Street near Dundas Street when he was approached by Constable Coulis of the Metropolitan Toronto Police. Constable Coulis informed the appellant that exposing goods for sale on the street without a licence violated s. 11 of Municipality of Metropolitan Toronto By-law 211-74. The appellant was issued a Provincial Offences ticket and instructed to pack up his display and move on. Constable Coulis allowed the appellant a brief grace period to check with his employer or lawyer if he was uncertain about moving, but told him that if he was still there when the officer returned, he would face criminal charges of obstructing the police.

The appellant contacted his employer and was told that he was not to move. The appellant was still operating on the street upon Constable Coulis's return. Accordingly, the appellant was charged with obstructing a peace officer contrary to s. 129 of the *Criminal Code*, R.S.C., 1985, c. C-46 (formerly s. 118). He was convicted of both offences under the by-law charge and the criminal charge in Provincial Court. His appeals to District Court were dismissed. A further appeal on both charges to the Ontario Court of Appeal, heard in conjunction with an appeal in *R. v. Greenbaum* (reasons in which are being released concurrently herewith), was also dismissed, Arbour J.A. dissenting: (1991), 44 O.A.C. 355, 77 D.L.R. (4th) 334, 62 C.C.C. (3d) 147, 3 C.R. (4th) 195, 3 M.P.L.R. (2d) 1. The matter comes to this Court by way of leave, [1991] 1 S.C.R. xiv.

II. Relevant Statutory Authority

The Municipality of Metropolitan Toronto ("Metro") is a municipal corporation governed by the provisions of the *Municipality of Metropolitan Toronto Act*, R.S.O. 1990, c. M.62. Within Metro, there are a number of area municipalities, one of which is the city of Toronto. Metro's powers are exercised by its council by enacting by-laws. Two

employé comme vendeur de fleurs à Toronto (Ontario). Il étalait ses marchandises dans la rue Yonge près de la rue Dundas lorsqu'il a été abordé par l'agent Coulis de la police de la communauté urbaine de Toronto. L'agent Coulis a informé l'appelant que l'étalage de marchandises en vente dans la rue sans permis allait à l'encontre de l'art. 11 du règlement 211-74 de la municipalité de la communauté urbaine de Toronto. L'appelant a reçu une contravention pour avoir commis une infraction provinciale, et s'est vu intimer l'ordre de remballer ses marchandises et de circuler. L'agent Coulis a accordé à l'appelant un court délai de grâce pour consulter son employeur ou un avocat s'il hésitait à partir, mais il lui a dit que s'il était encore là lorsqu'il reviendrait, il ferait face à des accusations criminelles d'entrave au travail d'un policier.

L'appelant a communiqué avec son employeur qui lui a dit de rester là. L'appelant s'adonnait encore à ses activités dans la rue lorsque l'agent Coulis est revenu. L'appelant a donc été accusé d'entrave au travail d'un agent de la paix en contravention de l'art. 129 du *Code criminel*, L.R.C. (1985), ch. C-46 (auparavant l'art. 118). Il a été reconnu coupable, en Cour provinciale, des deux infractions contenues dans l'accusation portée en vertu du règlement et dans l'accusation criminelle. Les appels qu'il a interjetés en Cour de district ont été rejetés. Il y a également eu rejet d'un autre appel interjeté à l'égard des deux accusations devant la Cour d'appel de l'Ontario et entendu en même temps que l'appel *R. c. Greenbaum* (dont les motifs sont déposés en même temps que ceux-ci), le juge Arbour étant dissidente: (1991), 44 O.A.C. 355, 77 D.L.R. (4th) 334, 62 C.C.C. (3d) 147, 3 C.R. (4th) 195, 3 M.P.L.R. (2d) 1. L'affaire est soumise à notre Cour avec l'autorisation de cette dernière, [1991] 1 R.C.S. xiv.

II. Les dispositions législatives pertinentes

La municipalité de la communauté urbaine de Toronto («Communauté urbaine») est régie par les dispositions de la *Loi sur la municipalité de la communauté urbaine de Toronto*, L.R.O. 1990, ch. M.62. La Communauté urbaine est composée d'un certain nombre de municipalités de secteur, dont l'une est la ville de Toronto. Les pouvoirs de

of these by-laws purport to confer upon area municipalities the power to license street vendors: Metro By-laws 211-74 and 97-80. Sections 11 and 11a of Metro By-law 211-74 provide:

11. No person shall, without lawful authority, place or expose goods, wares or merchandise or articles of any kind upon any metropolitan road allowance or hang or put up any goods, wares or merchandise, or other articles outside of any building so that the same shall project over any portion of a metropolitan road allowance.

11a (1) The council of each of the area municipalities set out in Schedule "A" to this By-Law is hereby empowered to lease or license the use of sidewalks and untravelled portions of Metropolitan roads within those portions of such area municipality in which land may be used for commercial or industrial purposes, to the owners or occupants of adjoining property for such purposes as the said council may by lease or license permit, and for such consideration and upon such terms and conditions as may be agreed. [Section 11a was added through Metro By-law 115-77.]

Schedule "A": the Borough of East York, the Borough of Etobicoke, the Borough of North York, the Borough of Scarborough, and the Borough of York

Section 11a(1) permits scheduled area municipalities to grant licences to the owners or occupiers of property which abuts Metropolitan roads. The city of Toronto was removed from Schedule "A" in March of 1978, with the result that s. 11a had no application to the city of Toronto at the time the appellant was charged.

However, through Metro By-law 97-80, Metro delegated to scheduled area municipalities the authority to lease or license the use of sidewalks and untravelled portions of Metropolitan roads.

la Communauté urbaine sont exercés par son conseil au moyen de l'adoption de règlements. Deux de ces règlements ont pour objet de conférer aux municipalités de secteur le pouvoir de délivrer un permis aux vendeurs ambulants: les règlements 211-74 et 97-80 de la Communauté urbaine. Les articles 11 et 11a du règlement 211-74 de la Communauté urbaine prévoient:

[TRADUCTION] **11.** Nul ne doit, sans autorisation légitime, placer ou étaler des marchandises ou articles de quelque sorte que ce soit sur les routes de la Communauté urbaine, ni accrocher des marchandises ou autres articles à l'extérieur des bâtisses de façon à surplomber quelque section d'une route de la Communauté urbaine.

11a (1) Le conseil de chacune des municipalités de secteur, énumérées à l'annexe «A» du présent règlement, est par les présentes habilité à louer, pour une contrepartie ou aux conditions convenues, les trottoirs et les sections non utilisées des routes de la Communauté urbaine dans les zones de la municipalité de secteur où les biens-fonds peuvent être utilisés à des fins commerciales ou industrielles, aux propriétaires ou aux occupants des terrains attenants aux fins que ledit conseil peut autoriser par bail ou permis, ou à assujettir leur utilisation à la délivrance d'un permis. [L'article 11a a été ajouté au moyen du règlement 115-77 de la Communauté urbaine.]

Annexe «A»: la municipalité d'East York, la municipalité d'Etobicoke, la municipalité de North York, la municipalité de Scarborough et la municipalité de York

Le paragraphe 11a(1) permet aux municipalités de secteur mentionnées dans l'annexe de délivrer des permis aux propriétaires ou aux occupants des biens-fonds attenants aux routes de la Communauté urbaine. La ville de Toronto a été rayée de l'annexe «A» en mars 1978, de sorte que l'art. 11a ne s'appliquait pas à la ville de Toronto à l'époque où l'accusation a été portée contre l'appelant.

Toutefois, au moyen de son règlement 97-80, la Communauté urbaine a délégué aux municipalités de secteur mentionnées dans l'annexe le pouvoir de louer les trottoirs et les sections non utilisées des routes de la Communauté urbaine ou d'assujettir leur utilisation à la délivrance d'un permis. La ville de Toronto a été incluse dans l'annexe «A» de

The city of Toronto was included in Schedule "A" to this by-law. Metro By-law 97-80 provides:

1. (1) Notwithstanding the provisions of By-law No. 211-74, as amended, the Council of each of the area municipalities set out in Schedule "A" to this By-law is hereby empowered to lease or license the use of sidewalks and untravelled portions of Metropolitan roads within those portions of such area municipality in which land may be used for commercial or industrial purposes to the owners in possession or the occupants of adjoining properties for the purposes of:

(a) display of merchandise;

(b) operation of boulevard cafes;

(c) installation of bicycle stands;

(d) holding of sidewalk sales.

Schedule "A": the city of Toronto, the city of North York

The city of Toronto exercised its delegated power by enacting By-law 618-80. Section 1(1) of that By-law reads as follows:

1. (1) An owner or occupant of land used for commercial or industrial purposes which abuts on the sidewalk or untravelled portion of a Metropolitan road within the City of Toronto may apply to the Commissioner of Public Works and the Environment to lease or license the use of such sidewalk and untravelled portion of the Metropolitan road within the City of Toronto for the purposes of:

(a) display of merchandise;

(b) operation of boulevard cafes;

(c) installation of bicycle stands;

(d) holding of sidewalk sales.

The effect of By-law 618-80 is that only vendors who own or occupy abutting property can apply for licences to sell on the street.

The Court of Appeal held that the statutory basis for s. 11 of Metro By-law 211-74 was to be found in ss. 314(1), para. 1 and 210, para. 140 of the

ce règlement. Le règlement 97-80 de la Communauté urbaine prévoit:

[TRADUCTION] **1.** (1) Nonobstant les dispositions du règlement nº 211-74 et ses modifications, le conseil de chacune des municipalités de secteur mentionnées dans l'annexe «A» du présent règlement est, par les présentes, habilité à louer les trottoirs et les sections non utilisées des routes de la Communauté urbaine dans les zones de la municipalité de secteur où les biens-fonds peuvent être utilisés à des fins commerciales ou industrielles, aux propriétaires ou aux occupants des terrains attenants, ou à assujettir leur utilisation à la délivrance d'un permis aux fins:

a) d'étaler des marchandises;

b) d'exploiter des cafés terrasses;

c) d'installer des supports à bicyclettes;

d) de tenir des ventes sur le trottoir.

Annexe «A»: la ville de Toronto, la ville de North York

La ville de Toronto a exercé son pouvoir délégué en adoptant le règlement 618-80. Le paragraphe 1(1) de ce règlement est ainsi rédigé:

[TRADUCTION] 1. (1) Le propriétaire ou l'occupant d'un bien-fonds utilisé à des fins commerciales ou industrielles qui est attenant au trottoir ou à la section non utilisée d'une route de la Communauté urbaine, sis dans la ville de Toronto, peut s'adresser au commissaire des travaux publics et de l'environnement pour louer ce trottoir et la section non utilisée de la route de la Communauté urbaine, sis dans la ville de Toronto, ou obtenir un permis autorisant son utilisation aux fins:

a) d'étaler des marchandises;

b) d'exploiter des cafés terrasses;

c) d'installer des supports à bicyclettes;

d) de tenir des ventes sur le trottoir.

Le règlement 618-80 a pour effet que seuls les vendeurs qui possèdent ou occupent un bien-fonds attenant peuvent solliciter un permis pour vendre dans la rue.

La Cour d'appel a statué que le fondement légal de l'art. 11 du règlement 211-74 de la Communauté urbaine se trouvait dans la disposition 1 du

Municipal Act, R.S.O. 1990, c. M.45 (formerly ss. 315, para. 1 and 210, para. 134):

314.—(1) The councils of all municipalities may pass by-laws:

1. For prohibiting or regulating the obstructing, encumbering, injuring or fouling of highways or bridges.

210. By-laws may be passed by the councils of local municipalities:

. . .

140. For prohibiting and abating public nuisances.

This appeal also raises the issue of the applicability of s. 310 of the *Municipal Act*, which states:

310. By-laws may be passed by the council of every local municipality,

(a) for leasing or licensing the use of untravelled portions of highways under the jurisdiction of the council, except highways that are extensions or connecting links of the King's Highway, to the owners or occupants of adjoining property for such consideration and upon such terms and conditions as may be agreed;

(b) for regulating and controlling the use, including the use for parking purposes, of untravelled portions of highways under the jurisdiction of the council that are not extensions or connecting links of the King's Highway, which are leased or in respect of which a licence is granted under clause (a).

The appellant was also charged with the following *Criminal Code* offence:

Criminal Code, R.S.C., 1985, c. C-46:

129. Every one who

(*a*) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer,

. . .

par. 314(1) et la disposition 140 de l'art. 210 de la *Loi sur les municipalités*, L.R.O. 1990, ch. M.45 (auparavant la disposition 1 de l'art. 315 et la disposition 134 de l'art. 210):

314 (1) Le conseil d'une municipalité peut adopter des règlements municipaux:

1. Pour interdire ou pour réglementer l'obstruction, l'encombrement, l'endommagement et l'encrassement des voies publiques et des ponts.

210 Les conseils des municipalités locales peuvent adopter des règlements municipaux:

. . .

140. Pour interdire et supprimer les nuisances publiques.

Le présent pourvoi soulève également la question de l'applicabilité de l'art. 310 de la *Loi sur les municipalités*, qui prévoit:

310 Les conseils des municipalités locales peuvent adopter des règlements municipaux:

a) pour louer, aux conditions convenues, les sections non utilisées des voies publiques qui relèvent de la compétence du conseil aux propriétaires ou occupants des terrains contigus à ces sections ou assujettir leur utilisation à la délivrance d'un permis, exception faite des prolongements de la route principale ou des voies de jonction à celle-ci;

b) pour réglementer et contrôler l'affectation, y compris celle aux fins de stationnement, des sections non utilisées des voies publiques qui ont été louées ou pour l'utilisation desquelles un permis a été délivré en vertu de l'alinéa a) et qui font partie des voies publiques relevant de la compétence du conseil et qui ne sont ni des prolongements de la route principale ni des voies de jonction de celle-ci.

L'appelant a également été accusé de l'infraction suivante au *Code criminel*:

Code criminel, L.R.C. (1985), ch. C-46:

129. Quiconque, selon le cas:

a) volontairement entrave un fonctionnaire public ou un agent de la paix dans l'exécution de ses fonctions ou toute personne prêtant légalement main-forte à un tel fonctionnaire ou agent, ou lui résiste en pareil cas;

. . .

is guilty of

(*d*) an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(*e*) an offence punishable on summary conviction.

Other relevant legislation includes the following:

Municipal Act, s. 327 (formerly s. 326):

327. Where any by-law of a municipality or of a local board thereof, passed under the authority of this or any other general or special Act, is contravened and a conviction entered, in addition to any other remedy and to any penalty imposed by the by-law, the court in which the conviction has been entered, and any court of competent jurisdiction thereafter, may make an order prohibiting the continuation or repetition of the offence by the person convicted.

Police Act, R.S.O. 1980, c. 381, s. 57 [rep. 1990, c. 10, s. 148(1)]:

57. The members of police forces appointed under Part II, except assistants and civilian employees, are charged with the duty of preserving the peace, preventing robberies and other crimes and offences, including offences against the by-laws of the municipality, and apprehending offenders, and commencing proceedings before the proper tribunal, and prosecuting and aiding in the prosecuting of offenders, and have generally all the powers and privileges and are liable to all the duties and responsibilities that belong to constables.

Provincial Offences Act, R.S.O. 1990, c. P.33 (formerly R.S.O. 1980, c. 400):

3.—(1) In addition to the procedure set out in Part III for commencing a proceeding by laying an information, a proceeding in respect of an offence may be commenced by filing a certificate of offence alleging the offence in the office of the court.

(2) A provincial offences officer who believes that one or more persons have committed an offence may issue, by completing and signing, a certificate of offence certifying that an offence has been committed and,

(a) an offence notice indicating the set fine for the offence; or

(b) a summons,

est coupable:

d) soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans;

e) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

Parmi les autres dispositions législatives pertinentes, mentionnons:

Loi sur les municipalités, art. 327 (auparavant l'art. 326):

327 En plus des recours et des sanctions prévus dans le règlement municipal adopté par la municipalité ou un de ses conseils locaux en vertu de la présente loi ou d'une autre loi générale ou spéciale, le tribunal qui déclare un contrevenant coupable, et tout tribunal compétent peut par la suite rendre une ordonnance lui interdisant de continuer à enfreindre le règlement municipal ou de l'enfreindre à nouveau.

Loi sur la police, L.R.O. 1980, ch. 381, art. 57 [abr. 1990, ch. 10, par. 148(1)]:

[TRADUCTION] **57.** Les membres de corps policiers nommés en vertu de la partie II, à l'exception des adjoints et des employés civils, ont le devoir de veiller à l'ordre public, de prévenir les vols qualifiés et autres crimes et infractions, dont les infractions aux règlements municipaux, d'appréhender les criminels, d'engager des procédures devant le tribunal compétent, de poursuivre et d'aider à poursuivre les contrevenants, et ils possèdent généralement tous les pouvoirs et privilèges des constables et en assument toutes les fonctions et responsabilités.

Loi sur les infractions provinciales, L.R.O. 1990, ch. P.33 (auparavant L.R.O. 1980, ch. 400):

3 (1) Une instance relative à une infraction, en plus de pouvoir être introduite au moyen du dépôt d'une dénonciation, comme le prévoit la partie III, peut être introduite au moyen du dépôt d'un procès-verbal d'infraction à l'égard de l'infraction reprochée au greffe du tribunal.

(2) L'agent des infractions provinciales qui croit qu'une ou plusieurs personnes ont commis une infraction peut délivrer un procès-verbal d'infraction, dressé et signé par lui, attestant qu'une infraction a été commise et:

a) soit un avis d'infraction indiquant l'amende fixée à l'égard de l'infraction;

b) soit une assignation,

in the form prescribed under section 13.

23.—(1) Any person who, on reasonable and probable grounds, believes that one or more persons have committed an offence, may lay an information in the prescribed form and under oath before a justice alleging the offence and the justice shall receive the information.

Criminal Code, s. 495:

495. (1) A peace officer may arrest without warrant

(*a*) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;

(*b*) a person whom he finds committing a criminal offence;

rédigés selon la formule prescrite aux termes de l'article 13.

23 (1) Quiconque croit, en se fondant sur des motifs raisonnables et probables, qu'une ou plusieurs personnes ont commis une infraction peut déposer sous serment devant un juge une dénonciation rédigée selon la formule prescrite, exposant l'infraction reprochée. Le juge reçoit la dénonciation.

Code criminel, art. 495:

495. (1) Un agent de la paix peut arrêter sans mandat:

a) une personne qui a commis un acte criminel ou qui, d'après ce qu'il croit pour des motifs raisonnables, a commis ou est sur le point de commettre un acte criminel;

b) une personne qu'il trouve en train de commettre une infraction criminelle;

III. Judgments in the Courts Below

1. *Provincial Offences Court* (By-law Charge)

Draper Prov. Ct. J. dealt with two challenges raised by the defence to the validity of the by-law scheme. The appellant submitted that Metro did not have jurisdiction to control the sidewalks adjacent to Metro roads, because, based on the wording of the *Municipality of Metropolitan Toronto Act*, R.S.O. 1990, c. M.62 (formerly R.S.O. 1980, c. 314), the sidewalk running along Yonge Street was not a Metropolitan road. Judge Draper found that Yonge Street had been legally designated a Metropolitan road in accordance with the *Municipality of Metropolitan Toronto Act*. After considering case law and pertinent legislation, he concluded that the term "road" as used in the *Municipality of Metropolitan Toronto Act*, was equivalent to the term "road allowance" used in the by-law in question. The term "road allowance" was held to include the sidewalks in the Metro

III. Les juridictions inférieures

1. *La Cour des infractions provinciales* (l'accusation portée en vertu du règlement)

Le juge Draper de la Cour provinciale a examiné deux contestations soulevées par la défense quant à la validité du régime de réglementation. L'appelant a soutenu que la Communauté urbaine n'avait pas le pouvoir de contrôler l'usage des trottoirs adjacents aux routes de la Communauté urbaine, parce que, selon le texte de la *Loi sur la municipalité de la communauté urbaine de Toronto*, L.R.O. 1990, ch. M.62 (auparavant L.R.O. 1980, ch. 314), le trottoir longeant la rue Yonge n'était pas une route de la Communauté urbaine. Le juge Draper a statué que la rue Yonge avait été légalement désignée comme étant une route de la Communauté urbaine conformément à la *Loi sur la municipalité de la communauté urbaine de Toronto*. Après avoir examiné la jurisprudence et les lois pertinentes, il a conclu que le mot «route» («*road*») utilisé dans la *Loi sur la municipalité de la communauté urbaine de Toronto*, était l'équivalent du mot «route» («*road allowance*») utilisé dans le règlement en question. Le mot «route» («*road allowance*») a été considéré

road system, including Yonge Street where the by-law offence took place.

The appellant also alleged that s. 11a of Metro By-law 211-74 violated s. 15(1) of the *Canadian Charter of Rights and Freedoms*. The appellant contended that street vendors were subject to discrimination under the licensing regime because, unlike owners and occupiers of adjoining property, they were not eligible for leases or licences to expose goods for sale. Judge Draper noted that the municipality had an essential duty to preserve pedestrian access to sidewalks. He observed that s. 11 of Metro By-law 211-74 was authorized by s. 210 of the *Municipal Act* and that the licensing regime provided Metro with the means to restrict commercial use of sidewalks in order to meet this primary obligation. He concluded that the by-law did not single out the appellant for discriminatory treatment and was, therefore, not in violation of s. 15 of the *Charter*. The appellant was convicted under s. 11 of Metro By-law 211-74, fined $2,000, and ordered not to sell flowers on a specified portion of Yonge Street for the two years of his probation.

2. *Provincial Court (Criminal Division)* (Criminal Charge)

In dealing with the criminal charge, Paris Prov. Ct. J. found that the appellant had been provided with notice that he risked criminal sanction if he remained on the sidewalk in contravention of the constable's order to move on. The fact that the appellant had remained on the advice of his employer was not in itself a defence but was a matter to be considered on sentencing. The appellant was convicted but granted a conditional discharge with one year's probation.

comme comprenant les trottoirs du système routier de la Communauté urbaine, y compris la rue Yonge où est survenue l'infraction au règlement.

L'appelant a également allégué que l'art. 11a du règlement 211-74 de la Communauté urbaine violait le par. 15(1) de la *Charte canadienne des droits et libertés*. Il a prétendu que les vendeurs ambulants étaient victimes de discrimination sous le régime de permis parce que, contrairement aux propriétaires et aux occupants des terrains adjacents, ils n'étaient pas admissibles à des baux ou à des permis pour étaler des marchandises en vente. Le juge Draper a noté que la municipalité avait l'obligation essentielle de préserver l'accès des piétons aux trottoirs. Il a fait remarquer que l'art. 11 du règlement 211-74 de la Communauté urbaine était autorisé par l'art. 210 de la *Loi sur les municipalités* et que le régime de permis fournissait à la Communauté urbaine le moyen de restreindre l'utilisation commerciale des trottoirs de manière à s'acquitter de sa responsabilité première. Il a conclu que le règlement ne soumettait pas l'appelant à un traitement discriminatoire et qu'il ne contrevenait donc pas à l'art. 15 de la *Charte*. L'appelant a été reconnu coupable en vertu de l'art. 11 du règlement 211-74 de la Communauté urbaine, a été condamné à une amende de 2 000 $ et s'est vu enjoindre de ne plus vendre de fleurs dans une section précise de la rue Yonge pendant ses deux années de probation.

2. *La Cour provinciale (Division criminelle)* (l'accusation criminelle)

En examinant l'accusation criminelle, le juge Paris de la Cour provinciale a conclu que l'appelant avait été avisé qu'il risquait une sanction criminelle s'il n'obtempérait pas à l'ordre de circuler du policier et restait sur le trottoir. Le fait que l'appelant soit resté là sur les conseils de son employeur ne constituait pas en soi un moyen de défense mais était une question à prendre en considération au moment de la détermination de la sentence. L'appelant a été reconnu coupable mais il s'est vu accorder une libération conditionnelle assortie d'une année de probation.

3. *District Court of Ontario* (1989), 7 W.C.B. (2d) 430 (By-law Charge)

On appeal from the by-law infraction conviction, Lang Dist. Ct. J. found that Metro By-law 211-74 was *intra vires* the regulatory power of Metro under ss. 210, para. 73, 210, para. 140, and 314(1), para. 1 (formerly ss. 210, para. 66, 210, para. 134, and 315, para. 1) of the *Municipal Act*. While declining to apply the similarly situated analysis employed by the trial judge, she went on to reject the appellant's s. 15 *Charter* argument. She noted that any discrimination suffered by the appellant was not founded upon an enumerated ground under s. 15(1). She also found that no evidence had been adduced in support of the contention that street vendors formed a class of persons subject to economic disadvantage such that they might be characterized as an analogous group under s. 15. She dismissed the appellant's appeal from his conviction under the by-law.

3. *La Cour de district de l'Ontario* (1989), 7 W.C.B. (2d) 430 (l'accusation portée en vertu du règlement)

En appel de la déclaration de culpabilité pour l'infraction au règlement, le juge Lang de la Cour de district a statué que le règlement 211-74 de la Communauté urbaine relevait du pouvoir de réglementation de la Communauté urbaine en vertu des art. 210, disp. 73, et 210, disp. 140, ainsi que du par. 314(1), disp. 1 (auparavant les art. 210, disp. 66, 210, disp. 134, et 315, disp. 1), de la *Loi sur les municipalités*. Tout en refusant d'appliquer l'analyse fondée sur une situation semblable effectuée par le juge du procès, elle a ensuite rejeté l'argument de l'appelant fondé sur l'art. 15 de la *Charte*. Elle a noté que toute discrimination subie par l'appelant n'était pas fondée sur un motif énuméré au par. 15(1). Elle a également constaté qu'aucun élément de preuve n'avait été produit à l'appui de la prétention que les vendeurs ambulants formaient une catégorie de personnes si défavorisées sur le plan économique qu'ils pouvaient être considérés comme un groupe analogue en vertu de l'art. 15. Elle a rejeté l'appel interjeté par l'appelant contre sa déclaration de culpabilité aux termes du règlement.

4. *District Court of Ontario* (Criminal Charge)

In dismissing the appeal from the obstruction charge, Crossland Dist. Ct. J. determined that Constable Coulis had been acting in the execution of his duty as set out in s. 57 of the *Police Act* in enforcing the by-law and in attempting to prevent a continued breach of the by-law. He held that recharging the appellant with by-law infractions would have been to no avail and that the officer had no means of preventing further breaches other than to lay the obstruction charge.

4. *La Cour de district de l'Ontario* (l'accusation criminelle)

En rejetant l'appel interjeté à l'égard de l'accusation d'entrave, le juge Crossland de la Cour de district a décidé que l'agent de police Coulis avait agi dans l'exercice de ses fonctions énoncées à l'art. 57 de la *Loi sur la police*, en appliquant le règlement et en essayant d'empêcher que l'on continue de l'enfreindre. Il a jugé que le fait d'accuser de nouveau l'appelant d'infractions au règlement n'aurait servi à rien et que l'agent ne disposait d'aucun autre moyen d'empêcher d'autres violations si ce n'était de porter une accusation d'entrave à son travail.

5. *Ontario Court of Appeal* (1991), 62 C.C.C. (3d) 147

The appellant's appeals on both charges were heard together at the Ontario Court of Appeal. An

5. *La Cour d'appel de l'Ontario* (1991), 62 C.C.C. (3d) 147

Les appels interjetés par l'appelant à l'égard des deux accusations ont été entendus en même temps

appeal in *R. v. Greenbaum*, which also dealt with the validity of the impugned by-law scheme, was heard separately by the Court of Appeal, which issued one set of reasons for all three appeals.

On behalf of the majority, Osborne J.A. began by pointing out that the lower courts had erred in failing to note that the city of Toronto was not one of the scheduled municipalities referred to in s. 11a of Metro By-law 211-74. However, he found that error had little significance because the combined effect of Metro By-laws 211-74 and 97-80, and City of Toronto By-law 618-80, was to include the city of Toronto in the scheme. Both the majority and the dissent found that these by-laws had been validly enacted under ss. 210, para. 140 and 314(1), para. 1 (formerly ss. 210, para. 134, and 315, para. 1) of the *Municipal Act* and that the *Charter* arguments were without merit.

Before the Court of Appeal, the appellant argued that the licensing scheme was discriminatory in the municipal law or administrative law sense because it impermissibly distinguished between street vendors and owners or occupants of property adjoining the street. Osborne J.A. considered the distinction in the context of the nuisance addressed. He found that Metro had a legitimate interest in keeping its roads and sidewalks unobstructed and that the broad purpose of Metro By-law 211-74 was to prohibit and regulate that interest. As for the distinction between street vendors and store vendors, he found that any distinction in treatment was not discriminatory because the two were different classes of vendors (at pp. 156-57):

In my opinion, there are significant differences between street vendors, such as the appellants, and vendors who own or occupy abutting commercial property; owner/occupant vendors may, by licence issued on occasion,

à la Cour d'appel de l'Ontario. L'appel *R. c. Greenbaum*, qui portait également sur la validité du régime de réglementation contesté, a été entendu séparément par la Cour d'appel qui a formulé une seule série de motifs pour les trois appels.

Le juge Osborne a commencé par souligner, au nom de la majorité, que les juridictions inférieures avaient commis une erreur en ne faisant pas remarquer que la ville de Toronto n'était pas l'une des municipalités mentionnées dans l'annexe et visées par l'art. 11a du règlement 211-74 de la Communauté urbaine. Toutefois, il a statué que cette erreur avait peu d'importance puisque les règlements 211-74 et 97-80 de la Communauté urbaine et le règlement 618-80 de la ville de Toronto avaient pour effet conjugué d'inclure la ville de Toronto dans le régime. Les juges formant la majorité et le juge dissident ont conclu que ces règlements avaient été adoptés validement en vertu de l'art. 210, disp. 140, et du par. 314(1), disp. 1, (auparavant les art. 210, disp. 134, et 315, disp. 1), de la *Loi sur les municipalités*, et que les arguments fondés sur la *Charte* n'étaient pas justifiés.

Devant la Cour d'appel, l'appelant a soutenu que le régime de permis était discriminatoire au sens du droit municipal ou du droit administratif parce qu'il établissait une distinction inacceptable entre les vendeurs ambulants et les propriétaires ou occupants de terrains adjacents à la rue. Le juge Osborne a examiné la distinction dans le contexte de la nuisance en cause. Il a conclu que la Communauté urbaine avait un intérêt légitime à garder dégagés ses routes et ses trottoirs et que le règlement 211-74 de la Communauté urbaine visait en général à établir des interdictions et à réglementer cet intérêt. Quant à la distinction entre les vendeurs ambulants et les commerçants, il a conclu que toute distinction dans le traitement n'était pas discriminatoire parce que les deux constituaient des catégories différentes de vendeurs (aux pp. 156 et 157):

[TRADUCTION] À mon avis, il y a des différences importantes entre des vendeurs ambulants, tels que les appelants, et des vendeurs qui possèdent ou occupent un fonds de commerce attenant; les vendeurs propriétaires-

under the provisions of By-law 618-80, display their goods and wares on the sidewalk and hold sidewalk sales, within defined areas. They generally seek short term specific uses of an abutting sidewalk. They are required to pay business property and utility taxes. Street vendors are not. Owners and occupants of abutting properties are required to clear sidewalks of ice and snow. Street vendors have no such obligation. I think that it is entirely reasonable to draw a distinction between store vendors and street vendors such as the appellants. They are not members of the same class.

Osborne J.A. distinguished both *R. v. Varga* (1979), 51 C.C.C. (2d) 558 (Ont. C.A.), and *Montréal (City of) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368, from the present case because in those cases the municipalities had impermissibly discriminated within a class specified by the provincial legislature. He concluded that the regulatory distinction between street vendors and store vendors did not detract from the scheme's validity because regulatory schemes, by their very nature, are not intended to permit all persons to participate in the regulated activity.

On the criminal charge, Osborne J.A. found that the police officer had both common law and statutory authority to enforce the by-law, founded upon the decision of this Court in *Johanson v. The King* (1947), 3 C.R. 508, and s. 57 of the *Police Act*. He rejected the contention that the obstruction charge amounted to double jeopardy for the same act and that the prevention of a repetition or continuation of the appellant's breach of Metro By-law 211-74 should have been achieved by resort to the offences and penalties contained within the by-law itself, or by resort to injunctive relief as contemplated by s. 327 (formerly s. 326) of the *Municipal Act*. He held that the existence of other avenues of relief did not erode the officer's authority to seek to enforce the by-law.

occupants peuvent, grâce à un permis délivré à l'occasion, en vertu des dispositions du règlement 618-80, étaler leurs marchandises sur le trottoir et y tenir des ventes, dans des secteurs déterminés. En général, ils cherchent à faire un usage précis et à court terme d'un trottoir attenant. Ils sont tenus de payer des taxes d'affaires et des taxes pour les services publics. Les vendeurs ambulants n'y sont pas tenus. Les propriétaires et les occupants des biens-fonds attenants sont tenus d'enlever la neige et la glace des trottoirs. Les vendeurs ambulants n'ont pas d'obligations de ce genre. Je crois qu'il est tout à fait raisonnable d'établir une distinction entre les commerçants et des vendeurs ambulants comme les appelants. Ils ne font pas partie de la même catégorie.

Le juge Osborne a distingué les deux arrêts *R. c. Varga* (1979), 51 C.C.C. (2d) 558 (C.A. Ont.), et *Montréal (Ville de) c. Arcade Amusements Inc.*, [1985] 1 R.C.S. 368, d'avec la présente affaire parce que, dans ces affaires, les municipalités avaient établi une distinction inacceptable au sein d'une catégorie mentionnée par la législature provinciale. Il a conclu que la distinction faite dans le règlement entre les vendeurs ambulants et les commerçants ne portait pas atteinte à la validité du régime puisque les régimes de réglementation, de par leur nature même, n'ont pas pour objet de permettre à toutes les personnes de participer à l'activité réglementée.

En ce qui concerne l'accusation criminelle, le juge Osborne a statué que le policier avait le pouvoir, tant en vertu de la common law qu'en vertu de la loi, d'appliquer le règlement, compte tenu de l'arrêt de notre Cour *Johanson c. The King* (1947), 3 C.R. 508, et de l'art. 57 de la *Loi sur la police*. Il a rejeté la prétention que l'accusation d'entrave équivalait à une double incrimination pour le même acte et qu'on aurait dû empêcher l'appelant de continuer d'enfreindre ou d'enfreindre de nouveau le règlement 211-74 de la Communauté urbaine, en recourant aux infractions et aux peines prévues dans le règlement lui-même, ou à l'injonction envisagée par l'art. 327 (auparavant l'art. 326) de la *Loi sur les municipalités*. Il a estimé que l'existence d'autres possibilités de recours n'avait pas pour effet de miner le pouvoir de l'agent d'essayer d'appliquer le règlement.

In her dissent, Arbour J.A. disagreed with the majority's conclusion that Metro By-law 97-80 and City of Toronto By-law 618-80 were not discriminatory. Arbour J.A. held that, even if the distinction between free-standing street vendors and owners/occupiers of abutting property was reasonable, this was not conclusive of the by-laws' validity. She stated that it is a well-established rule of administrative law that the power to enact by-laws does not include the power to enact discriminatory by-laws unless the enabling legislation provided for the discrimination directly or by necessary implication. She defined discrimination in the administrative law sense as the drawing of a distinction by a subordinate authority that is not authorized by the enabling legislation, relying upon the decision of this Court in *Montréal (City of) v. Arcade Amusements Inc.*, *supra*. In her view, the issue to be addressed was not whether the distinction in the by-laws was reasonable given the context of the nuisance involved, but whether the distinction is authorized. She noted that what has been called the "neutral rule of discrimination" has often been used to strike down seemingly innocuous municipal legislation. She referred to the holding of this Court in *Montréal (City of) v. Arcade Amusements Inc.*, *supra*, as follows (at pp. 164-65):

> . . . distinctions . . . are often perfectly reasonable in the narrow sense that they are wise, rational or judicious; none the less, they must also be reasonable in the legal sense that their wisdom is reserved to the sovereign, rather than the subordinate, legislator.

Applying the doctrine to the case before her, Arbour J.A. found at p. 168 that:

> . . . none of the provisions of the *Municipal Act* authorize, directly or by necessary implication, the distinction drawn in the by-laws between two classes of street vendors. The power to regulate the obstruction or incumbrance of highways does not provide authority for municipalities to discriminate between classes of persons who would be permitted to encumber the roads.

Dans sa dissidence, le juge Arbour s'est dite en désaccord avec la conclusion des juges formant la majorité, selon laquelle le règlement 97-80 de la Communauté urbaine et le règlement 618-80 de la ville de Toronto n'étaient pas discriminatoires. Le juge Arbour a statué que, même si la distinction, entre les vendeurs ambulants indépendants et les propriétaires-occupants de biens-fonds attenants était raisonnable, cela n'était pas concluant quant à la validité des règlements. Elle a déclaré qu'en droit administratif il est bien établi que le pouvoir d'adopter des règlements ne comporte pas celui d'en adopter des discriminatoires à moins que le texte législatif habilitant ne prescrive la discrimination directement ou par déduction nécessaire. Se fondant sur l'arrêt de notre Cour *Montréal (Ville de) c. Arcade Amusements Inc.*, précité, le juge Arbour a défini la discrimination au sens du droit administratif comme étant l'établissement, par une autorité subordonnée, d'une distinction non autorisée par le texte législatif habilitant. À son avis, il s'agissait de déterminer non pas si la distinction prévue dans les règlements était raisonnable dans le contexte de la nuisance en cause, mais si la distinction est permise. Elle a noté que ce qu'on a appelé le «critère neutre de discrimination» a souvent été utilisé pour annuler des règlements municipaux apparemment inoffensifs. Elle s'est ainsi reportée à la conclusion de notre Cour dans l'arrêt *Montréal (Ville de) c. Arcade Amusements Inc.*, précité (aux pp. 164 et 165):

> [TRADUCTION] . . . les distinctions [. . .] sont souvent tout à fait raisonnables au sens strict selon lequel elles sont sages, rationnelles ou judicieuses; néanmoins, elles doivent également être raisonnables au sens juridique selon lequel leur sagesse est réservée au législateur souverain plutôt que subordonné.

Appliquant cette théorie à l'affaire dont elle était saisie, le juge Arbour a statué, à la p. 168, que:

> [TRADUCTION] . . . aucune disposition de la *Loi sur les municipalités* ne permet, directement ou par déduction nécessaire, la distinction établie dans les règlements entre deux catégories de vendeurs ambulants. Le pouvoir de réglementer l'obstruction ou l'encombrement des voies publiques ne confère pas aux municipalités le pouvoir d'établir une distinction entre des catégories de personnes qui seraient autorisées à encombrer les routes.

Arbour J.A. concluded that s. 11 of Metro By-law 211-74, Metro By-law 97-80 and City of Toronto By-law 618-80 created a discriminatory licensing scheme which could only be corrected by striking down the prohibition contained in s. 11 of Metro By-law 211-74 as well as Metro By-law 97-80 and City of Toronto By-law 618-80. Arbour J.A. therefore held that s. 11 of Metro By-law 211-74, Metro By-law 97-80 and City of Toronto By-law 618-80 were *ultra vires* the powers conferred on Metro and the city of Toronto by the *Municipal Act* and would have ordered that they be quashed.

Le juge Arbour a conclu que l'art. 11 du règlement 211-74 de la Communauté urbaine, le règlement 97-80 de la Communauté urbaine et le règlement 618-80 de la ville de Toronto ont créé un régime de permis discriminatoire qui ne pourrait être rectifié que par l'abolition de l'interdiction prévue à l'art. 11 du règlement 211-74 de la Communauté urbaine, ainsi que du règlement 97-80 de la Communauté urbaine et du règlement 618-80 de la ville de Toronto. Le juge Arbour a donc statué que l'art. 11 du règlement 211-74 de la Communauté urbaine, le règlement 97-80 de la Communauté urbaine et le règlement 618-80 de la ville de Toronto excédaient les pouvoirs conférés à la Communauté urbaine et à la ville de Toronto par la *Loi sur les municipalités*, et elle aurait ordonné leur annulation.

Arbour J.A. also reached a different conclusion with respect to the appellant's conviction under the *Criminal Code*. Given the invalidity of the by-law which the appellant was alleged to have breached, she held that the conviction itself could not stand. She went on to state, however, that the charge of obstruction should fail even if the by-law had survived scrutiny. In the absence of a specific statutory direction or binding judicial authority asserting that the peaceful repetition or continuation of an infraction against the by-law in question could be brought to an end under the threat of a criminal sanction, the use of the criminal charge of obstruction could not be justified (at pp. 169-70):

Le juge Arbour a également abouti à une conclusion différente en ce qui concerne la déclaration de culpabilité de l'appelant en vertu du *Code criminel*. Vu l'invalidité du règlement auquel l'appelant aurait contrevenu, elle a estimé que la déclaration de culpabilité elle-même ne pouvait pas tenir. Elle a déclaré ensuite, cependant, que l'accusation d'entrave devrait tomber même si le règlement avait survécu à un examen rigoureux. En l'absence d'une directive législative précise ou d'un précédent voulant qu'il serait possible de mettre fin à la répétition ou à la continuation paisible d'une infraction au règlement en question, par la menace d'une sanction criminelle, le recours à l'accusation criminelle d'entrave ne saurait être justifié (aux pp. 169 et 170):

The specific powers of enforcement of provincial statutes and regulations as well as municipal by-laws are contained in the *Provincial Offences Act*, R.S.O 1980, c. 400. When Constable Coulis found the appellant apparently infringing s. 11 of By-law 211-74, he was empowered, by virtue of ss. 3 and 23 of the *Provincial Offences Act*, to issue a certificate of offence, together with an offence notice or a summons, or to lay an information before a justice of the peace, who may then have issued a summons.

[TRADUCTION] Les pouvoirs précis d'application des lois et règlements provinciaux ainsi que des règlements municipaux sont prévus dans la *Loi sur les infractions provinciales*, L.R.O. 1980, ch. 400. Lorsque l'agent de police Coulis a conclu que l'appelant contrevenait apparemment à l'art. 11 du règlement 211-74, il avait le pouvoir, en vertu des art. 3 et 23 de la *Loi sur les infractions provinciales*, de délivrer un procès-verbal d'infraction en même temps qu'un avis d'infraction ou une assignation, ou de déposer une dénonciation auprès d'un juge de paix, qui aurait pu alors délivrer une assignation.

She continued (at p. 170):

Elle a poursuivi (à la p. 170):

There are no provisions, either in By-law 211-74 or in the *Provincial Offences Act*, empowering the police to

[TRADUCTION] Il n'y a aucune disposition, ni dans le règlement 211-74 ni dans la *Loi sur les infractions pro-*

arrest without a warrant nor to obtain an arrest warrant for that offence. . . .

In my view, the deliberate legislative choice not to permit arrest for this kind of municipal offence cannot be circumvented by a police officer ordering the accused to desist from the conduct constituting infringement of the by-law, thereby exposing the accused to liability for the *Criminal Code* offence of obstruction and thus triggering the arrest powers contained in s. 495 of the *Code*. . . .

Arbour J.A. (at pp. 170-71) held that such broad powers of arrest to enforce municipal by-laws could not be found in s. 57 of the *Police Act*:

The general duties contained in s. 57 of the *Police Act* are clearly subject to the specific statutory power given to the police to direct them as to how to discharge these general duties. For instance, the general duty to apprehend offenders cannot be relied upon to expand on the statutorily limited powers of arrest without a warrant; the general duty to prevent crime cannot expand the statutory authority of the police to search, seize or wiretap. In the same way, the general duty to enforce municipal by-laws must be read subject to the limited enforcement powers contained in the by-laws themselves, in the *Provincial Offences Act* or in any other relevant legislation, as well as in the common law powers incidental to them, such as the power to search as an incident to a valid arrest.

Here the legislature has not seen fit to provide for a mechanism by which the conduct prohibited by s. 11 of the by-law can be immediately brought to a halt. A police officer may invite a person to desist. He or she may issue a new summons if the offence is being repeated. However, the continuation of such conduct, absent circumstances amounting to a breach of the peace or interfering with the authority of the police officer to issue the summons, cannot amount to obstruction, in my opinion, even after the alleged offender has been warned to stop his activities.

vinciales, qui habilite la police à arrêter quelqu'un sans mandat ou à obtenir un mandat d'arrestation pour cette infraction. . .

À mon avis, un policier ne peut éluder le choix délibéré du législateur de ne pas permettre l'arrestation pour ce genre d'infraction municipale, en ordonnant à l'accusé de mettre fin au comportement qui constitue un manquement au règlement et, de ce fait, exposer l'accusé à la responsabilité de l'infraction d'entrave prévue au *Code criminel* et déclencher ainsi l'exercice des pouvoirs d'arrestation prévus à l'art. 495 du *Code*. . .

Le juge Arbour a conclu (aux pp. 170 et 171) que l'on ne pouvait trouver, à l'art. 57 de la *Loi sur la police*, des pouvoirs d'arrestation aussi larges pour l'application de règlements municipaux:

[TRADUCTION] Les fonctions générales prévues à l'art. 57 de la *Loi sur la police* sont clairement assujetties au pouvoir précis que la Loi confère aux policiers pour les guider dans la façon de s'acquitter de ces fonctions générales. Par exemple, on ne peut pas invoquer la responsabilité générale d'appréhender les contrevenants pour expliquer les pouvoirs d'arrestation sans mandat limités que confère la Loi; la responsabilité générale de prévenir le crime ne saurait élargir le pouvoir que la Loi confère aux policiers d'effectuer des fouilles, des perquisitions et des saisies ou de faire de l'écoute électronique. De même, la responsabilité générale d'appliquer les règlements municipaux doit être interprétée sous réserve des pouvoirs limités d'application contenues dans les règlements eux-mêmes, dans la *Loi sur les infractions provinciales* ou dans toute autre loi pertinente, ainsi que dans les pouvoirs de common law qui leur sont accessoires, comme le pouvoir d'effectuer une fouille ou une perquisition accessoirement à une arrestation valide.

En l'espèce, la législature ne semble pas avoir jugé bon de prévoir un mécanisme permettant de mettre fin immédiatement au comportement interdit par l'art. 11 du règlement. Un policier peut inviter une personne à cesser ses activités. Il peut délivrer une nouvelle assignation si l'infraction est répétée. Toutefois, le fait de continuer d'agir ainsi, en l'absence de circonstances équivalant à troubler la paix publique ou à contrecarrer le pouvoir du policier de délivrer l'assignation, ne peut, selon moi, équivaloir à une entrave, même après que le prétendu contrevenant a été averti de cesser ses activités.

The legislature has addressed the problem of repetition or continuation of infractions to municipal by-laws in s. 326 of the *Municipal Act*, which provides that:

326. Where any by-law of a municipality or of a local board thereof, passed under the authority of this or any other general or special Act, is contravened and a conviction entered, in addition to any other remedy and to any penalty imposed by the by-law, the court in which the conviction has been entered, and any court of competent jurisdiction thereafter, may make an order prohibiting the continuation or repetition of the offence by the person convicted.

Arbour J.A rejected the argument of the respondents that *Johanson v. The King*, *supra*, provides common law authority for an arrest. She distinguished that case on the basis that the by-law under which Johanson and Daniluk had been convicted contained a specific requirement of "obedience to police officers". She took the view that subsequent decisions of this Court and others did not grant as expansive an interpretation of the ratio of *Johanson v. The King* as that for which the respondents contended. She would have set aside the conviction and entered an acquittal.

IV. Analysis

1. *The By-law Charge*

I agree with Arbour J.A. that this case is governed by the decision of this Court in *Montréal (City of) v. Arcade Amusements Inc.*, *supra*, with respect to the discrimination in the by-law scheme. In that case, the Court held that the power to pass municipal by-laws does not entail that of enacting discriminatory provisions (*i.e.*, of drawing a distinction) unless in effect the enabling legislation authorizes such discriminatory treatment. See also Rogers, *The Law of Canadian Municipal Corporations* (2nd ed. 1971), at pp. 406.3-406.4:

It is a fundamental principle of municipal law that by-laws must affect equally all those who come within the ambit of the enabling enactment. Municipal legislation

La législature a abordé le problème de la répétition ou de la continuation d'infractions aux règlements municipaux à l'art. 326 de la *Loi sur les municipalités*, qui prévoit que:

326. En plus des recours et des sanctions prévus dans le règlement municipal adopté par la municipalité ou un de ses conseils locaux en vertu de la présente loi ou d'une autre loi générale ou spéciale, le tribunal qui déclare un contrevenant coupable, et tout tribunal compétent peut par la suite rendre une ordonnance lui interdisant de continuer à enfreindre le règlement municipal ou de l'enfreindre à nouveau.

Le juge Arbour a rejeté l'argument des intimés selon lequel l'arrêt *Johanson c. The King*, précité, prévoit un pouvoir d'arrestation fondé sur la common law. Elle a établi une distinction d'avec cette affaire en affirmant que le règlement en vertu duquel Johanson et Daniluk avaient été reconnus coupables prescrivait précisément l'[TRADUCTION] «obéissance aux policiers». Elle a adopté l'opinion selon laquelle les décisions ultérieures de notre Cour et d'autres tribunaux ne donnaient pas une interprétation aussi large du raisonnement suivi dans l'arrêt *Johanson c. The King* que celle préconisée par les intimés. Elle aurait annulé la déclaration de culpabilité et inscrit un verdict d'acquittement.

IV. Analyse

1. *L'accusation portée en vertu du règlement*

Je conviens avec le juge Arbour que la présente affaire est régie par l'arrêt de notre Cour *Montréal (Ville de) c. Arcade Amusements Inc.*, précité, en ce qui concerne la discrimination dans le régime de réglementation. Dans cet arrêt, la Cour a statué que le pouvoir d'adopter des règlements municipaux n'emportait pas celui d'édicter des dispositions discriminatoires (c.-à-d. d'établir une distinction) à moins que la loi habilitante ne permette effectivement un tel traitement discriminatoire. Voir également Rogers, *The Law of Canadian Municipal Corporations* (2e éd. 1971), aux pp. 406.3 et 406.4:

[TRADUCTION] C'est un principe fondamental en droit municipal que les règlements doivent toucher également tous ceux qui sont visés par le texte habilitant. Le règle-

must be impartial in its operation and must not discriminate so as to show favouritism to one or more classes of citizens. Any by-law violating this principle so that all the inhabitants are not placed in the same position regarding matters affected by it is illegal.

The general principle does not apply where the enabling statute clearly specifies that certain persons or things may be excepted from its operation or expressly authorizes some form of discrimination.

The rule against discriminatory by-laws is an outgrowth of the principle that, as statutory bodies, municipalities "may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation" (Makuch, *Canadian Municipal and Planning Law* (1983), at p. 115).

The Court of Appeal found that free-standing street vendors and owners/occupiers of property abutting sidewalks are in different classes and could reasonably be treated differently in the licensing scheme. However, in *Montréal (City of) v. Arcade Amusements Inc.*, *supra*, this Court recognized that discrimination in the municipal law sense was no more permissible between than within classes (at pp. 405-6). Further, the general reasonableness or rationality of the distinction is not at issue: discrimination can only occur where the enabling legislation specifically so provides or where the discrimination is a necessary incident to exercising the power delegated by the province (*Montréal (City of) v. Arcade Amusements Inc.*, *supra*, at pp. 404-6). Sections 210, para. 73, 210, para. 140 and 314(1), para. 1 of the *Municipal Act*, do not, in my view, authorize any discriminatory treatment, between free-standing street vendors and those owning or occupying abutting property,

ment municipal doit être impartial dans son application et ne doit pas faire de distinction de manière à montrer un certain favoritisme envers une ou plusieurs catégories de citoyens. Tout règlement qui viole ce principe de telle sorte que les citoyens ne se trouvent pas tous dans la même situation en ce qui concerne les questions qu'il touche est illégal.

Ce principe général ne s'applique pas lorsque la loi habilitante précise clairement que certaines personnes ou choses peuvent être soustraites à son application ou permet expressément une certaine forme de discrimination.

La règle interdisant les règlements discriminatoires est une excroissance du principe selon lequel, en tant qu'organismes créés par la loi, les municipalités [TRADUCTION] «peuvent exercer seulement les pouvoirs qui leur sont conférés expressément par la loi, les pouvoirs qui découlent nécessairement ou vraiment du pouvoir explicite conféré dans la loi, et les pouvoirs indispensables qui sont essentiels et non pas seulement commodes pour réaliser les fins de l'organisme» (Makuch, *Canadian Municipal and Planning Law* (1983), à la p. 115).

La Cour d'appel a jugé que les vendeurs ambulants indépendants et les propriétaires-occupants de biens-fonds attenants aux trottoirs font partie de catégories différentes et pouvaient raisonnablement être traités différemment dans le régime de permis. Toutefois, dans l'arrêt *Montréal (Ville de) c. Arcade Amusements Inc.*, précité, notre Cour a reconnu que la discrimination au sens du droit municipal n'était pas plus permise entre des catégories qu'au sein de catégories (aux pp. 405 et 406). En outre, le caractère raisonnable ou rationnel général de la distinction n'est pas en cause: il ne saurait y avoir de discrimination que si la loi habilitante le prévoit précisément ou si la discrimination est nécessairement accessoire à l'exercice du pouvoir délégué par la province (*Montréal (Ville de) c. Arcade Amusements Inc.*, précité, aux pp. 404 à 406). Les articles 210, disp. 73, et 210, disp. 140, et le par. 314(1), disp. 1, de la *Loi sur les municipalités*, ne permettent, à mon avis, aucun traitement discriminatoire entre les vendeurs ambulants indépendants et les vendeurs qui possè-

in Metro By-law 97-80 and City of Toronto By-law 618-80.

Before this Court, the respondent argued that the discrimination in Metro By-law 97-80 and City of Toronto By-law 618-80 might find express authorization in s. 310(a) of the *Municipal Act*. For ease of reference, s. 310 is reproduced again:

310. By-laws may be passed by the council of every local municipality,

(a) for leasing or licensing the use of untravelled portions of highways under the jurisdiction of the council, except highways that are extensions or connecting links of the King's Highway, to the owners or occupants of adjoining property for such consideration and upon such terms and conditions as may be agreed;

(b) for regulating and controlling the use, including the use for parking purposes, of untravelled portions of highways under the jurisdiction of the council that are not extensions or connecting links of the King's Highway, which are leased or in respect of which a licence is granted under clause (a).

The respondent argued that the phrase "untravelled portions of highways" includes the sidewalks adjacent to highways. If sidewalks are "untravelled portions of highways," the respondent argues that s. 310(a) does authorize a distinction between owners or occupants of adjoining property and other persons. Through application of the *expressio unius est exclusio alterius* rule, the reference to owners or occupants in the provision implies that a by-law may be passed excluding all other persons from the leasing and licensing scheme.

I do not agree with the respondent's submissions on this point. While the *Municipal Act* does not define "untravelled portions of highways", s. 310(b) suggests that the phrase refers to untravelled portions of the part of the highway reserved for vehicular traffic, rather than the sidewalk, inasdent ou occupent un bien-fonds attenant, dans le règlement 97-80 de la Communauté urbaine et le règlement 618-80 de la ville de Toronto.

Devant notre Cour, l'intimée a soutenu que la discrimination établie dans le règlement 97-80 de la Communauté urbaine et le règlement 618-80 de la ville de Toronto pourrait être autorisée expressément à l'al. 310a) de la *Loi sur les municipalités*. Pour en faciliter la consultation, nous reproduisons de nouveau l'art. 310:

310 Les conseils des municipalités locales peuvent adopter des règlements municipaux:

a) pour louer, aux conditions convenues, les sections non utilisées des voies publiques qui relèvent de la compétence du conseil aux propriétaires ou occupants des terrains contigus à ces sections ou assujettir leur utilisation à la délivrance d'un permis, exception faite des prolongements de la route principale ou des voies de jonction à celle-ci;

b) pour réglementer et contrôler l'affectation, y compris celle aux fins de stationnement, des sections non utilisées des voies publiques qui ont été louées ou pour l'utilisation desquelles un permis a été délivré en vertu de l'alinéa a) et qui font parties des voies publiques relevant de la compétence du conseil et qui ne sont ni des prolongements de la route principale ni des voies de jonction de celle-ci.

L'intimée a fait valoir que l'expression «sections non utilisées des voies publiques» comprend les trottoirs contigus aux voies publiques. L'intimée soutient que si les trottoirs sont des «sections non utilisées des voies publiques», l'al. 310a) permet effectivement l'établissement d'une distinction entre les propriétaires ou occupants des terrains contigus et les autres personnes. Grâce à l'application de la règle *expressio unius est exclusio alterius*, la mention des propriétaires ou occupants dans la disposition implique qu'il est possible d'adopter un règlement excluant toutes les autres personnes du régime de baux et de permis.

Je ne suis pas d'accord avec les arguments de l'intimée sur ce point. Bien que la *Loi sur les municipalités* ne définisse pas l'expression «sections non utilisées des voies publiques», l'al. 310b) laisse entendre qu'elle renvoie aux sections non utilisées de la partie de la voie publique réservée à

much as it permits usage of such untravelled portions for parking purposes. This conclusion is supported by s. 90 of the *Municipality of Metropolitan Toronto Act*, which empowers Metro to delegate to area municipalities the power to license use of "sidewalks and untravelled portions of Metropolitan roads" (emphasis added). The by-law provisions themselves indicate that there is a distinction between "untravelled portions of highways" and sidewalks. Metro By-law 97-80, which delegates to the city of Toronto the authority to enact a licensing scheme, provides as follows:

1. (1) Notwithstanding the provisions of By-law No. 211-74, as amended, the Council of each of the area municipalities set out in Schedule "A" to this By-law is hereby empowered to lease or license the use of sidewalks and untravelled portions of Metropolitan roads within those portions of such area municipality in which land may be used for commercial or industrial purposes to the owners in possession or the occupants of adjoining properties for [enumerated purposes]. [Emphasis added.]

City of Toronto By-law 618-80 contains similar language. There would have been no need to refer to sidewalks in these provisions if sidewalks were included in "untravelled portions" of roads or highways.

I conclude, therefore, that s. 310 of the *Municipal Act* does not expressly authorize a distinction between free-standing street vendors and owner/occupant vendors. The distinctions contained in Metro By-law 97-80 and City of Toronto By-law 618-80 are therefore not authorized by the *Municipal Act* and those by-laws are accordingly *ultra vires* the municipalities.

For the reasons given by the Court in *R. v. Greenbaum*, [1993] 1 S.C.R. 674, released concurrently with the reasons in the case at bar, I am also

la circulation automobile, plutôt qu'aux trottoirs, dans la mesure où elle permet l'utilisation de ces sections inutilisées à des fins de stationnement. Cette conclusion est étayée par l'art. 90 de la *Loi sur la municipalité de la communauté urbaine de Toronto* qui habilite la Communauté urbaine à déléguer aux municipalités de secteur le pouvoir d'assujettir à la délivrance d'un permis l'utilisation «des trottoirs et des parties inutilisées des routes de la communauté urbaine» (je souligne). Les dispositions mêmes du règlement indiquent qu'il existe une distinction entre les «sections non utilisées des voies publiques» et les trottoirs. Le règlement 97-80 de la Communauté urbaine, qui délègue à la ville de Toronto le pouvoir d'adopter un régime de permis, prévoit ce qui suit:

[TRADUCTION] **1.** (1) Nonobstant les dispositions du règlement nº 211-74 et ses modifications, le conseil de chacune des municipalités de secteur mentionnées dans l'annexe «A» du présent règlement est, par les présentes, habilité à louer les trottoirs et les sections non utilisées des routes de la Communauté urbaine dans les zones de la municipalité de secteur où les biens-fonds peuvent être utilisés à des fins commerciales ou industrielles, aux propriétaires ou aux occupants des terrains attenants, ou à assujettir leur utilisation à la délivrance d'un permis aux [fins énumérées]. [Je souligne.]

Le règlement 618-80 de la ville de Toronto a une formulation semblable. Il n'aurait pas été nécessaire de mentionner les trottoirs dans ces dispositions si les trottoirs avaient été compris dans les «sections non utilisées» des routes ou des voies publiques.

En conséquence, je conclus que l'art. 310 de la *Loi sur les municipalités* ne permet pas expressément d'établir une distinction entre les vendeurs ambulants indépendants et les vendeurs propriétaires-occupants. Les distinctions prévues dans le règlement 97-80 de la Communauté urbaine et le règlement 618-80 de la ville de Toronto ne sont donc pas autorisées par la *Loi sur les municipalités* et ces règlements excèdent donc les pouvoirs des municipalités.

Pour les raisons données par notre Cour dans l'arrêt *R. c. Greenbaum*, [1993] 1 R.C.S. 674, rendu en même temps que les présents motifs, je

of the view that s. 11 of Metro By-law 211-74 is *ultra vires* the municipality. Therefore I need not address the question whether or not Arbour J.A. was correct when she held that "the illegal discrimination contained in the licensing system can only be corrected by striking down the prohibition contained in s. 11 of By-law 211-74" (p. 169). In other words, I need not decide whether s. 11 of Metro By-law 211-74 is severable from the by-laws impugned herein. I would therefore order that the appellant's conviction on the by-law charge be set aside and that an acquittal be entered instead.

2. *The Criminal Charge*

I also agree with Arbour J.A. that the appellant's conviction for obstructing a peace officer in the execution of his duty to enforce municipal by-laws must also be set aside and an acquittal entered. In charging the appellant with obstructing a peace officer, Constable Coulis was attempting to enforce s. 11 of Metro By-law 211-74. However, s. 11 of Metro By-law 211-74 has been held by this Court in *R. v. Greenbaum* to be *ultra vires* the municipality. As a result, the conviction of the appellant for obstructing a peace officer cannot stand.

The respondent, the Attorney General for Ontario, argued that this issue was governed by the decision of this Court in *R. v. Biron*, [1976] 2 S.C.R. 56. In that case, the accused was convicted of resisting arrest on a charge of creating a disturbance, even though he was acquitted on the disturbance charge itself. In his defence, the accused submitted that the arrest itself was unlawful since he had not in fact been committing an offence at the time. A majority of this Court rejected that argument. Martland J. stated, at p. 75:

The power of arrest . . . has to be exercised promptly, yet, strictly speaking, it is impossible to say that an

suis également d'avis que l'art. 11 du règlement 211-74 de la Communauté urbaine excède les pouvoirs de la municipalité. Par conséquent, il n'est pas nécessaire que je me demande si le juge Arbour avait raison en statuant que [TRADUCTION] «la discrimination illégale prévue dans le régime de permis ne saurait être rectifiée que par l'abolition de l'interdiction prévue à l'art. 11 du règlement 211-74» (p. 169). En d'autres termes, je n'ai pas à décider si l'art. 11 du règlement 211-74 de la Communauté urbaine peut être dissocié des règlements attaqués en l'espèce. Je suis donc d'avis d'ordonner l'annulation de la déclaration de culpabilité de l'appelant relativement à l'accusation portée en vertu du règlement, et son remplacement par un verdict d'acquittement.

2. *L'accusation criminelle*

Je conviens également avec le juge Arbour que la déclaration de culpabilité de l'appelant pour entrave à un agent de la paix dans l'accomplissement de sa tâche d'appliquer les règlements municipaux doit aussi être annulée et qu'un verdict d'acquittement doit être inscrit. En accusant l'appelant d'avoir entravé le travail d'un agent de la paix, l'agent Coulis essayait d'appliquer l'art. 11 du règlement 211-74 de la Communauté urbaine. Toutefois, dans l'arrêt *R. c. Greenbaum*, notre Cour a jugé que cet article excède les pouvoirs de la municipalité. Par conséquent, la déclaration de culpabilité de l'appelant pour entrave au travail d'un agent de la paix ne saurait tenir.

L'intimée, représentée par le procureur général de l'Ontario, a soutenu que cette question était régie par l'arrêt de notre Cour *R. c. Biron*, [1976] 2 R.C.S. 56. Dans cette affaire, l'accusé a été reconnu coupable d'avoir résisté à son arrestation relativement à une accusation d'avoir troublé la paix, même s'il a été acquitté relativement à l'accusation elle-même d'avoir troublé la paix. Dans sa défense, l'accusé a soutenu que l'arrestation elle-même était illégale puisqu'en fait il n'avait pas commis d'infraction à l'époque. Notre Cour à la majorité a rejeté cet argument. Le juge Martland a dit, à la p. 75:

Le pouvoir d'arrestation [. . .] doit être exercé promptement, bien que, strictement parlant, il soit impossible de

offence is committed until the party arrested has been found guilty by the courts. If this is the way in which this provision [now s. 495 of the *Criminal Code*] is to be construed, no peace officer can ever decide, when making an arrest without a warrant, that the person arrested is "committing a criminal offence". In my opinion . . . the power to arrest without a warrant is given where the peace officer himself finds a situation in which a person is apparently committing an offence.

The decision in *R. v. Biron*, *supra*, did not concern the power of arrest without a warrant where police officers believe themselves to be enforcing legislation which is later found *ultra vires*. *Biron* deals with apparent perpetration of an offence, not apparent offences, and as such it cannot be relied upon to confer on police the power to charge someone with obstruction where there is an apparent violation of a law which itself is invalid.

In my view, Arbour J.A. was correct in holding that, even if s. 11 of Metro By-law 211-74 were valid, the police cannot circumvent the lack of an arrest power for a violation of the by-law by ordering someone to desist from the violation and then charging them with obstruction. The power to arrest in order to enforce the by-law cannot be inferred in the face of clear language in the *Municipal Act* and the *Provincial Offences Act* setting out more moderate means of dealing with repeated infractions. The officer had no authority, either at common law or under statute, to arrest the appellant for failing to comply with an order to desist from conduct prohibited by the by-law. The power to arrest without a warrant for disobeying an order to desist from conduct prohibited by s. 11 of Metro By-law 211-74 cannot be founded upon the language of Metro By-law 211-74, nor on ss. 3 and 23 of the *Provincial Offences Act*, nor on s. 57 of the *Police Act*. *Johanson v. The King*, *supra*, has no application in the absence of a statutory duty of obedience to police officers. The police constable in this case indeed had an obligation to enforce the by-law. The legislature defined the enforcement power as ticketing the offender, and the appellant did not obstruct the constable in the performance of this duty. The power of arrest cannot be derived

dire si une infraction a été commise tant que la personne arrêtée n'a pas été déclarée coupable par les tribunaux. Si cette disposition [maintenant l'art. 495 du *Code criminel*] doit être interprétée de cette façon, un agent de la paix ne pourrait jamais décider, lorsqu'il arrête une personne sans mandat, que la personne arrêtée est «en train de commettre une infraction criminelle». À mon avis, [. . .] le pouvoir d'arrêter sans mandat est accordé lorsque l'agent de la paix constate lui-même une situation où une personne est apparemment en train de commettre une infraction.

L'arrêt *R. c. Biron*, précité, ne portait pas sur le pouvoir d'arrêter sans mandat lorsque des agents de police s'estiment en train d'appliquer une loi qui est, par la suite, jugée *ultra vires*. L'arrêt *Biron* traite de la perpétration apparente d'une infraction, non d'infractions apparentes, ce qui fait qu'on ne saurait l'invoquer pour conférer à la police le pouvoir de porter contre quelqu'un une accusation d'entrave lorsqu'il y a violation apparente d'une loi qui est elle-même invalide.

À mon avis, le juge Arbour a eu raison de conclure que, même si l'art. 11 du règlement 211-74 de la Communauté urbaine était valide, la police ne peut pas contourner l'absence de pouvoir d'arrestation pour la violation du règlement, en ordonnant à quelqu'un de cesser de commettre la violation, pour ensuite l'accuser d'entrave. Le pouvoir d'arrestation en vue d'appliquer le règlement ne saurait être déduit du texte clair de la *Loi sur les municipalités* et de la *Loi sur les infractions provinciales*, qui prévoit des moyens plus modérés de traiter les infractions répétées. L'agent n'avait pas le pouvoir, en common law ou en vertu de la loi, d'arrêter l'appelant pour refus d'obtempérer à l'ordre de mettre fin au comportement interdit par le règlement. Le pouvoir d'arrestation sans mandat pour désobéissance à l'ordre de mettre fin à un comportement interdit par l'art. 11 du règlement 211-74 de la Communauté urbaine ne saurait reposer sur le texte du règlement 211-74 de la Communauté urbaine, pas plus que sur les art. 3 et 23 de la *Loi sur les infractions provinciales* ou sur l'art. 57 de la *Loi sur la police*. L'arrêt *Johanson c. The King*, précité, ne s'applique pas en l'absence d'une obligation légale d'obéir aux agents de police. En l'espèce, l'agent de police était effectivement tenu d'appliquer le règlement. La législature a défini le

as a matter of common law from the officer's duty to enforce the by-law given the legislature's definition of what such enforcement entails. The words of Arbour J.A., at p. 170, are apt:

> In my view, the deliberate legislative choice not to permit arrest for this kind of municipal offence cannot be circumvented by a police officer ordering the accused to desist from the conduct constituting infringement of the by-law, thereby exposing the accused to liability for the *Criminal Code* offence of obstruction and thus triggering the arrest powers contained in s. 495 of the *Code*. . . .

V. Disposition

For the foregoing reasons, I would allow the appeal, and I would order that the appellant's convictions both on the by-law charge and on the criminal charge be set aside and acquittals entered instead.

Appeal allowed.

Solicitors for the appellant: Gold & Fuerst, Toronto.

Solicitor for the respondent Her Majesty The Queen: The Attorney General for Ontario, Toronto.

Solicitor for the respondent the Municipality of Metropolitan Toronto: H. W. O. Doyle, Toronto.

pouvoir d'application de la loi comme consistant à donner des contraventions aux contrevenants, et l'appelant n'a pas gêné l'agent de police dans l'exercice de cette fonction. Le pouvoir d'arrestation ne saurait, sur le plan de la common law, découler de la responsabilité de l'agent d'appliquer le règlement, vu la définition que la législature donne de ce que comporte une telle application de la loi. Les propos que tient le juge Arbour, à la p. 170, sont pertinents:

> [TRADUCTION] À mon avis, un policier ne peut éluder le choix délibéré du législateur de ne pas permettre l'arrestation pour ce genre d'infraction municipale, en ordonnant à l'accusé de mettre fin au comportement qui constitue un manquement au règlement et, de ce fait, exposer l'accusé à la responsabilité de l'infraction d'entrave prévue au *Code criminel* et déclencher ainsi l'exercice des pouvoirs d'arrestation prévus à l'art. 495 du *Code*. . .

V. Dispositif

Pour les motifs qui précèdent, je suis d'avis d'accueillir le pourvoi et d'ordonner l'annulation des déclarations de culpabilité de l'appelant prononcées relativement à l'accusation portée en vertu du règlement et à l'accusation criminelle, ainsi que leur remplacement par des verdicts d'acquittement.

Pourvoi accueilli.

Procureurs de l'appelant: Gold & Fuerst, Toronto.

Procureur de l'intimée Sa Majesté la Reine: Le procureur général de l'Ontario, Toronto.

Procureur de l'intimée la municipalité de la communauté urbaine de Toronto: H. W. O. Doyle, Toronto.